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Court of Appeals No. 70810-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

New Cingular Wireless PCS LLC,

Plaintiff-Respondent,

vs.

City of Bothell, et al.,

Defendants-Petitioners.

BRIEF OF PLAINTIFF-RESPONDENT

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I. INTRODUCTION

Federal and state laws prohibit taxation of Internet access. New Cingular Wireless PCS LLC inadvertently remitted utility tax payments to the City of Bothell that included taxes on Internet access. To recover these improper taxes, New Cingular filed a tax refund claim with Bothell. Bothell processed the claim in bad faith by waiting 17 months then summarily denying the claim in violation of its own code, along with eleven other cities. Facing a hostile administrative process in Bothell, New Cingular filed suit in superior court, which was allowed under the concurrent original jurisdiction doctrine that was, at that time, established by the Supreme Court. When Bothell filed a motion for partial summary judgment, the trial court ruled that filing the administrative claim with Bothell had tolled the statute of limitations. This Court should affirm the trial court's ruling because the record demonstrates New Cingular satisfied the predicates for equitable tolling and justice demands its application in this case.

II. STATEMENT OF THE ISSUE

Did the trial court properly exercise its equitable powers in finding that the statute of limitations had been equitably tolled upon New Cingular's filing of a tax refund claim with Bothell, where the filing promptly and fairly appraised Bothell of New Cingular's claim and satisfied the purpose of the statute of limitations?

III. STATEMENT OF THE CASE

A. As a Cellular Telephone Business, New Cingular Collected Bothell's Telephone Utility Tax from Its Customers and Remitted the Tax to Bothell.

Bothell, like many taxing jurisdictions, imposes a utility tax on telephone businesses, including New Cingular. CP 41, 196. As permitted by law, New Cingular passes the utility tax through to its customers on their monthly bills by collecting a utility fee from its customers and remitting it to the taxing jurisdictions. *See* CP 21. During the period at issue, New Cingular inadvertently collected and remitted a tax not only on telephone services, but also on Internet access. CP 273-74. State and federal laws prohibit taxation of Internet access. 47 U.S.C. § 151 (1998), as amended; RCW 35.21.717.

B. The Advent of "Smart Phones" Caused New Cingular to Evolve into a Cellular Telephone Business That Offered Internet Access Services.

AT&T Mobility ("**ATTM**") and its affiliates, including New Cingular, began as cellular telephone companies that did not offer Internet access services. CP 273. Before the iPhone, New Cingular mainly provided services through basic "clam shell" style cellular phones. *Id.* The introduction of the iPhone in June 2007 significantly increased sales of wireless Internet access services. *Id.* The iPhone and other so called "smart phones" enhanced and simplified customers' ability to access the Internet. *Id.*

The tax payments at issue relate to ATTM's complex billing systems. ATTM sells Internet access data services plans for smart phones, other wireless devices, laptop connectivity data plans, and also sells such services on a pay-per-use basis (collectively, "**Internet Access Services**"). *Id.* Internet Access Services are sold under different names and in numerous formats that vary depending on the plan the customer desires and the type(s) of device(s) the customer will use. CP 242. Customers pay either a flat monthly charge or a varying charge

based on actual use. CP 242-43. Some plans bundle Internet Access Services with other services (e.g., text messaging), while others provide Internet Access Services for a separately stated charge. CP 273.

C. New Cingular Discovered That It Collected Taxes on Internet Access Services After Its Customers Filed Class Action Lawsuits Across the Country.

In February 2010, customers in Washington and around the country sued ATTM and its affiliates, including New Cingular, to recover taxes collected and remitted on Internet access, including utility taxes collected and remitted to Bothell. *See* CP 72-81. The United States Judicial Panel on Multidistrict Litigation consolidated the class action lawsuits into one proceeding before the United States District Court for the Northern District of Illinois. *In re AT & T Mobility Wireless Data Servs. Sales Tax Litig.*, 789 F. Supp. 2d 935, 939 (N.D. Ill. 2011) (the "**Federal Lawsuit**").

In response to the Federal Lawsuit, ATTM conducted lengthy and thorough evaluations of its billing codes for Internet Access Services in early 2010. CP 243. ATTM first determined whether its customers were charged for Internet Access Services

by reviewing the various codes used in the billing plans. CP 243. Once the codes were identified as Internet Access Services, ATTM parsed customer billing records to determine which customers purchased services under those codes. *Id.* ATTM engaged PricewaterhouseCoopers ("**PwC**") to review and test the data analysis. *Id.* During the testing, PwC identified additional combinations of codes that constituted Internet Access Services on which taxes had been charged, collected, and remitted. *Id.*

Through this process, ATTM determined that, as new services had evolved to meet the needs of iPhone and other smart-phone customers, taxes had inadvertently been collected from ATTM's customers on unbundled Internet Access Services and remitted to taxing jurisdictions, including Bothell. CP 273-74. In August 2010, ATTM's systems were reprogrammed so no unbundled Internet Access Services would be taxed. CP 274.

The parties to the Federal Lawsuit eventually reached a settlement, which was reviewed and approved by the court. *AT & T*, 789 F. Supp. 2d at 939. As part of the settlement, ATTM agreed to seek refunds from the taxing jurisdictions that

received the taxes on Internet access, and return the refunded taxes to the class members (the "**Settlement Class**"). *Id.* at 940-41. ATTM agreed to pay the significant costs involved in seeking the refunds and notifying the class. *Id.* at 941. New Cingular assigned its right to any amounts refunded to the Settlement Class. *Id.* at 943. When taxing jurisdictions in Washington issue a tax refund or credit, New Cingular deposits the refunded or credited money directly into escrow accounts for the benefit of the Washington plaintiffs in the Settlement Class (the "**Washington Settlement Class**"). *See Id.* at 940.

D. New Cingular Submitted a Detailed Refund Request to Bothell in Accordance with the Court-Approved Class Action Settlement.

Having evaluated and reprogrammed its billing system to prevent future billing of taxes on unbundled Internet Access Services, ATTM set to work filing refund claims with the taxing jurisdictions pursuant to the class action settlement. CP 244. On or about November 1, 2010, New Cingular filed a refund claim with Bothell and other taxing jurisdictions in Washington and throughout the United States. CP 243-44, 247-64.

To submit a thoroughly supported claim, New Cingular submitted the information required by the Washington Administrative Code provision for tax refunds. *See* CP 244, 247-64; WAC 458-20-229. The Bothell Municipal Code ("**BMC**") lacks specific form requirements for a tax refund application. *See* BMC 5.08.210. New Cingular's refund claim included the taxpayer's name and tax identification number, the amount of the claim, the tax type and taxable period, the basis for the claim, and the signature of the taxpayer or its representative. CP 248. Additionally, the refund claim included a detailed statement in support of the claim that summarized the legal and factual bases for the overpayment and refund request. CP 249-56.

In addition to these items, the refund claim included detailed spreadsheets showing (1) customer-level information, including each individual customer's amount of taxes on Internet Access Services paid to Bothell for the period from November 1, 2005 through September 7, 2010, and (2) the aggregate amount of taxes attributable to Internet Access Services paid to Bothell over the same period. CP 244.

New Cingular continued to analyze the data and subsequently supplemented and reduced the refund claim by letter dated June 15, 2012. CP 269-71. The letter identified certain adjustments to the refund amount, which reduced the total refund claim by less than five percent. CP 245, 269-71. New Cingular sent similar letters to other taxing jurisdictions in Washington and across the country. CP 245.

New Cingular sent a follow-up letter to Bothell in January of 2012, requesting a status update regarding Bothell's processing of the refund claim. CP 290-91. As identified in the letter, New Cingular understood that processing the refund claim could take time and effort. CP 291. In fact, New Cingular had assisted other Washington cities in processing refund claims and had dedicated staff to answer technical questions and provide additional information upon request. CP 244. However, as of January 2012, New Cingular had not received any kind of response from Bothell. *Id.*

E. In a Joint Letter, Bothell and Eleven Other Cities Summarily Denied the Refund Claim.

Despite the representation in Bothell's municipal code that a request for refund shall "promptly" be considered,

BMC 5.08.210, and despite New Cingular's follow-up letter in January of 2012, Bothell did not contact New Cingular until 17 months after the submittal of the refund claim. CP 69, 276.

On April 16, 2012, the refund claim was denied pursuant to a letter (the "**Denial Letter**") sent by an attorney to New Cingular on behalf of Bothell and 11 other cities, identified collectively in the letter as the "Consortium Cities." CP 266. The Denial Letter denied the refund claim on behalf of each of the 12 Consortium Cities in a mere one-and-one-half pages. CP 266-67. The Denial Letter did not identify any Bothell-specific, nor any Consortium City-specific, reason for denial. Instead, it summarily stated that the refund requests for each of the Consortium Cities were denied. *Id.*

One of the stated reasons for denial was insufficient information. *Id.* It is undisputed that Bothell did not request additional information from New Cingular at any time prior to Bothell's denial of the refund claim. CP 276. In fact, no Bothell representative requested additional information, identified any insufficiencies, or otherwise contacted New Cingular in relation to the refund claim until the Denial Letter was sent. *Id.*

The Denial Letter did not outline the procedures for, much less identify the opportunity to, appeal any of the 12 denials. Of course, given the summary nature of the Denial Letter, there was nothing of substance to appeal.

F. New Cingular Filed Suit in Superior Court.

On April 25, 2012, less than 10 days after receipt of the Denial Letter, New Cingular filed its complaint seeking, among other things, a declaration of its rights to a refund and restitution of the unjustly retained taxes. CP 106-24. In addition to Bothell, New Cingular named as defendants other Washington cities that had not issued a refund.[1]

At the time of filing, Washington law did not require New Cingular to exhaust administrative remedies before filing suit in Superior Court because of the concurrent original jurisdiction doctrine. The doctrine recognized that superior courts have original jurisdiction in cases involving the "legality of any tax,

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[1] On March 14, 2013, the trial court granted various defendants' motion for misjoinder and ordered all defendant cities dropped from the lawsuit, except Bothell as the first-named defendant. New Cingular argued that the court should have denied the motion, and that, if granted, the claims against the defendants should have been severed rather than dismissed. Upon reconsideration, the court affirmed its prior order. The order dropping the parties remains subject to appeal upon entry of a final order in this case.

impost, assessment, toll or municipal fine." Const. art. IV, § 6; RCW 2.08.010. Because the trial court shared original jurisdiction with Bothell over the tax refund claim, the trial court did not operate in an appellate capacity, and administrative exhaustion requirements did not apply. *Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353, 371, 166 P.3d 667 (2007), *disagreed with by Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013) (hereinafter "***CMS***"); *Chaney v. Fetterly*, 100 Wn. App. 140, 145, 995 P.2d 1284 (2000), *disagreed with by CMS*, 178 Wn.2d 635. Both parties and the trial court acknowledged that the state of the law at the time did not obligate New Cingular to exhaust administrative remedies. RP 10, 12, 17-18, 22, 37; CP 65, 234, 297.

G. New Cingular Prevailed on Bothell's Motion for Partial Summary Judgment.

On July 5, 2013, Bothell brought a motion for partial summary judgment regarding the statute of limitations. CP 46-67. New Cingular argued the statute of limitations should be equitably tolled from the date it filed its tax refund claim with Bothell. *See* CP 211-240. Judge Ramsdell agreed with New

Cingular and ruled in its favor. CP 326-27. Bothell filed a motion for discretionary review, and New Cingular agreed that interlocutory appeal of the equitable tolling issue should be allowed. This Court granted discretionary review on October 28, 2013.

H. The Supreme Court Clarified the Rule that Allowed Plaintiffs to File Tax Refund Claims in Superior Court Without Exhausting Administrative Remedies.

While the parties prepared for this appeal, the Washington Supreme Court decided *CMS*, 178 Wn.2d 635. In holding that the taxpayer was not obligated to exhaust administrative remedies because the city never directly responded to the refund claim, the Court distinguished the procedural nature of exhaustion from jurisdictional requirements:

> The exhaustion doctrine has no bearing on the jurisdiction of the court in terms of the constitutional power of the court to hear a case.... A superior court's original jurisdiction over a claim does not relieve it of its responsibility to consider whether exhaustion should apply to the particular claim before the court.

Id. at 648. The Court acknowledged the *Qwest* decision suggested exhaustion is not required if a superior court has

original jurisdiction, which was "potentially confusing." *Id.* at 645. *CMS* did not address equitable tolling.

IV. ARGUMENT

A. Standard of Review.

When reviewing an order for summary judgment, the appellate court engages in the same inquiry as the trial court. Summary judgment should be affirmed if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo. The court may sustain the trial court's judgment upon any theory established in the pleadings and supported by proof. *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994) (omitting internal citations).

Bothell's assertion that it is entitled to favorable reasonable inferences is baseless. Both cases Bothell cites in support of its assertion state that the court must draw all reasonable inferences in favor of the nonmoving party. *Burris v. Gen. Ins. Co. of Am.*, 16 Wn. App. 73, 76, 553 P.2d 125 (1976);

Jacobsen v. State, 89 Wn.2d 104, 108-10, 569 P.2d 1152 (1977). Bothell moved for partial summary judgment, and it is not entitled to favorable inferences on appeal simply because it lost. *See McNabb v. Dep't of Corr.*, 163 Wn.2d 393, 395-96, 180 P.3d 1257 (2008) (acknowledging "facts and reasonable inferences are considered in the light most favorable to the nonmoving party" when the trial court sua sponte enters an order of summary judgment in favor of the nonmoving party).

B. Trial Courts Possess Authority to Sua Sponte Grant Motions for Summary Judgment in the Nonmoving Party's Favor.

Trial courts are empowered to sua sponte grant summary judgment to a nonmoving party. *Kassbaum v. Steppenwolf Prods., Inc.*, 236 F.3d 487, 494 (9th Cir. 2000); *see also Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 507, 919 P.2d 62 (1996) (affirming a trial court's summary judgment order in favor of the nonmoving party that was granted sua sponte upon a motion for partial summary judgment).

Bothell had an adequate opportunity to defend itself. Bothell submitted more than 150 pages in support of its motion, and its counsel vigorously argued for Bothell's interests at the

summary judgment hearing. CP 49-210. The trial court acted within its discretion by carefully evaluating the motion, supporting evidence, and the law, and finding New Cingular was entitled to judgment as a matter of law. RP 42-45.

C. The Filing of New Cingular's Tax Refund Application Should Equitably Toll the Statute of Limitations for Each of Its Claims.

The trial court properly exercised its broad equitable powers in concluding that the statute of limitations had been tolled. New Cingular was entitled to equitable tolling because it proved each of the elements as a matter of law. Despite Bothell's attempts to limit equity's reach, justice demands tolling under the facts of this case because New Cingular diligently asserted its rights and will be denied its remedy without equitable tolling.

1. The trial court properly used its broad discretion to craft an equitable remedy.

Equitable powers of remedy must be broad and flexible. *State v. Ralph Williams' NW Chrysler*, 82 Wn.2d 265, 278-79, 10 P.2d 233 (1973). Courts have considerable inherent discretion when applying equitable remedies. *Rupert v. Gunter*, 31 Wn. App. 27, 30, 640 P.2d 36 (1982). This flexible standard

allows courts to "meet new situations that demand equitable intervention, and to accord all the relief necessary to correct particular injustices." *Holland v. Florida*, 560 U.S. 631, 650, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010).

The Washington State Supreme Court has invoked an equitable analysis to allow a claim that would have otherwise been barred by the statute of limitations because the plaintiff pursued an administrative remedy in reliance on representations made by the city. *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 733 P.2d 182 (1987). There, a property developer filed five building permit applications with the city to develop an industrial park on land the city was in the process of rezoning from "light industrial" to "agricultural." *Id.* at 625-28. The city informed the plaintiff via letter that the permit applications were deemed abandoned, but city officials later assured the plaintiff that it could proceed under the permits. *Id.* at 629. After the city rezoned the property to agricultural use, the plaintiff filed an application to change the zoning back to light industrial use. *Id.* The city council denied the rezone request, and the plaintiff did not appeal that decision

within 30 days as provided by the city code. *Id.* at 629, 631. The plaintiff filed suit after subsequent negotiations with the city failed. *Id.* at 629.

The Court rejected the city's argument that the statute of limitations barred relief from the zoning change because the plaintiff had a good faith belief based on representations made by the city that it had a vested right to develop the industrial park. *Id.*. The plaintiff pursued administrative relief in reliance on the city's representations, and terminated its attempts to work with the city after the city issued its final denial. *Id.* at 632. Without expressly conducting an equitable tolling analysis, the Court found the plaintiff did not lose its right to obtain relief "simply because it took more than 30 days to seek some accommodation from the City." *Id.*.

As in *Valley View*, this case demonstrates why courts' equitable powers must be flexible to allow relief for diligent parties. New Cingular had a good faith belief based on Bothell's representations that it had a right to a refund of overpaid taxes. *See* BMC 5.08.110 (obligating the city to issue refunds of overpaid taxes). Based on that representation, New Cingular

pursued redress by filing an administrative refund claim. CP 244. New Cingular filed suit only after Bothell manifested that it would not fairly process the claim. *Valley View* demonstrates how courts should exercise their broad equitable discretion to relax statute of limitation requirements, even without conducting an equitable tolling analysis. Like *Valley View*, this case presents a new situation where the plaintiff is entitled to equitable relief.

2. New Cingular's tax refund application satisfies all elements of equitable tolling.

The Supreme Court "allows equitable tolling when justice requires." *Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (omitting internal citations). Case law establishes that among the predicates for equitable tolling in Washington are bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Id.* Equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations. *Id.*

New Cingular established each of these elements, and is entitled to equitable tolling as a matter of law. Justice requires equitable tolling here, because, without it, New Cingular and the Washington Settlement Class will not obtain the relief to which they are entitled. Bothell was put on full notice of the possibility for litigation when New Cingular filed its refund claim, and has not lost the ability to defend itself in any way. The Court should apply its broad and flexible equitable powers to toll the statute of limitations, or Bothell will be rewarded for its bad faith, and New Cingular will be penalized for filing an administrative refund application instead of immediately filing suit.

a. Bothell acted in bad faith by failing to reasonably process New Cingular's tax refund application.

The facts before the Court show that Bothell acted in bad faith in processing the tax refund claim. Bothell's bad faith is manifested not only by its delay in processing the claim, but also by its failure to describe how the detailed claim that New Cingular submitted was supposedly insufficient, its failure to ask for more information, and its lack of contact with New

Cingular in any way prior to Bothell's summary, generic denial. Bothell attempted to extend and exploit its cursory review of the claim to set up its argument that less damages fall within the statute of limitations that it claims was ticking all the while.

New Cingular submitted a detailed refund claim explaining the legal and factual bases for why the tax payments remitted to Bothell were excessive. New Cingular submitted, and Bothell received, a DVD with both customer-level and aggregate data that proved the amount of overpayment. CP 44, 244. New Cingular understood it could take some time to process the claim and verify the accuracy of the submitted data, which is why it waited a year before requesting a status update. CP 291. Further, New Cingular offered Bothell the help of staff dedicated to assist with the tax refund claims. CP 279. Bothell disregarded the specific information and resources New Cingular offered, and instead submitted a generic and perfunctory denial along with 11 other cities. CP 266-67.

Bothell alleged the tax refund claim lacked sufficient information, and this groundless assertion alone shows Bothell's bad faith. Nowhere in the denial nor in any subsequent

communication, pleading, or exhibit, has Bothell provided any indication of what information it purportedly lacked to verify New Cingular's refund claim. Bothell cannot argue that New Cingular's application was facially inadequate, because Bothell does not require a specific form for tax refund applications. *See* BMC 5.08.110, .210. Bothell cannot argue that New Cingular's application was substantively inadequate, because New Cingular submitted all the information Washington State requires for tax refunds. *See* CP 244, 247-64; WAC 458-20-229. Bothell cannot argue that it could not verify the claim, because New Cingular offered, and Bothell ignored, staff assistance to interpret the submitted data. CP 279. Bothell simply invented reasons to deny the claim.

Bothell's stonewalling directly affected New Cingular's alleged delay in filing suit, which Bothell would like to assert to its own advantage through its statute of limitations argument. Bothell's argument that it was not advantaged by delaying its response ignores the then-applicability of *Qwest* and the concurrent original jurisdiction doctrine. Both parties believed the rule in *Qwest* made Bothell's administrative procedure an

unnecessary precondition to filing suit in court. RP 10, 12, 17-18, 22, 37; CP 65, 234, 297. Bothell apparently believed it had a significant advantage in delaying because each passing day reduced the amount of damages it would pay if New Cingular filed suit (by placing tax payments remitted earlier than three years outside the statute of limitations). Bothell revealed its motive to delay when it asserted in its Denial Letter that submitting the tax refund application did not toll the statute of limitations. *See* CP 266. Bothell showed bad faith by stonewalling the processing of the claim, failing to interpret and apply the data, and explicitly seeking to take advantage of its unreasonable delay.

b. Bothell provided false assurances by failing to comply with its own code.

Bothell's Municipal Code provided false assurances in two ways: first, by providing that Bothell would "promptly" process the claim, BMC 5.08.210, and, second, by representing any overpayment in taxes "shall be refunded" to the taxpayer. BMC 5.08.110. New Cingular relied on both representations when it pursued its administrative claim. Waiting 17 months to

respond is not prompt, and Bothell has flouted its obligation to repay the funds it wrongfully possesses.

BMC 5.08.210 mandates that the city treasurer "shall promptly consider" tax refund applications, but Bothell waited nearly 17 months to respond to New Cingular's claim. CP 276. Seventeen months to consider a claim is far from prompt. When New Cingular requested a status update on the refund claim, it requested some indication that Bothell was processing the claim, and not a final determination. CP 291. Seventeen months could be a reasonable amount of time to analyze the submitted data and verify an amount owed, but Bothell did not use those 17 months for accounting and record verification. *See* CP 276. Instead, Bothell used that time to stonewall.

Bothell's denial of the refund claim violates the BMC in a second way that constitutes a false assurance. BMC 5.08.110 contains mandatory language that removes discretion from the city treasurer: once the treasurer determines a taxpayer overpaid a utility tax, the overpayment "shall be refunded." Bothell has not disputed the amount owed, but instead relies on various other purported defenses.

New Cingular relied on the false assurances in the BMC when it pursued the administrative remedy instead of filing suit directly in court. New Cingular sought to avail itself of the prompt, less costly administrative remedies Bothell offered, and only filed suit after it became apparent Bothell would not consider the refund claim in good faith. Public policy encourages taxpayers to file claims with cities to avoid litigation. That public policy would be thwarted if the statute of limitations continues to run, and the claim is correspondingly diminished while it remains pending with a city.

c. New Cingular diligently pursued and monitored its refund claim.

New Cingular has diligently asserted its right to a tax refund since it became aware of the overpayment. New Cingular filed an administrative claim within the statute of limitations, and monitored the claim while it was processed. After Bothell's generic Denial Letter, New Cingular filed a declaratory judgment action, which is a course of action the Supreme Court has recognized as diligent. *Millay*, 135 Wn.2d at 207. Diligence did not require exhausting Bothell's administrative remedies

because those procedures were optional, and New Cingular pursued another viable means of asserting its rights.

(1) New Cingular timely asserted its rights.

Courts have not yet developed a precise standard for when a party seeking equitable tolling acts diligently, but the cases Bothell cites describe a lack of diligence *after* plaintiffs received denial letters from the government and failed to file suit for several years. The plaintiff in *Kingery* received her worker's compensation widow's benefit denial letter in 1983, but she did not file suit until 1993. *Kingery v. Dep't of Labor & Indus. of the State of Wash.*, 132 Wn.2d 162, 167-68, 937 P.2d 565 (1997). The plaintiff in *Graham Neighborhood* was notified in 2005 that its land use application would be cancelled one year from the date of the letter, but did not seek approval of the application until 2009. *Graham Neighborhood Ass'n v. F.G. Assocs.*, 162 Wn. App. 98, 104, 252 P.3d 898 (2011).

Unlike the plaintiffs in *Kingery* and *Graham Neighborhood*, New Cingular diligently pursued its claim by seeking redress through the administrative process and then filing suit promptly after Bothell sent its summary denial. After

New Cingular discovered the tax overpayments, it comprehensively reviewed its complicated coding system, changed that system, hired an auditor to verify that work, filed tax refund claims across the country, allowed the taxing jurisdictions time to process the claims, made staff available to assist with the refund claims, and sought a status update from cities that had not yet responded. CP 243-44. Bothell sent its perfunctory denial on April 16, 2012, CP 266, and New Cingular filed suit on April 25, 2012. CP 106-24. New Cingular exercised diligence by pursuing an administrative remedy within the statute of limitations, and filing suit less than 10 days after Bothell's denial.

(2) Filing a declaratory judgment action is a diligent assertion of rights.

Diligence has been recognized when a plaintiff resolves a confusing situation by filing a declaratory judgment action. In *Millay*, the defendant sent the plaintiff a grossly exaggerated statement of the sum required to redeem the plaintiff's interest in certain real property. 135 Wn.2d at 197. The Court found the defendant caused confusion and uncertainty, because the plaintiff either had to pay the exaggerated amount or risk losing

his right of redemption. *Id.* at 207. The Court recognized filing a declaratory judgment action may have been a diligent action in the face of such confusion, and remanded for additional fact finding. *Id.*

Here, New Cingular faced a similar confusing situation following Bothell's denial, placing this case far from one of garden variety neglect where equitable tolling would not apply. New Cingular potentially could have pursued administrative remedies that were demonstratively slow and apparently futile, it could have sought a writ of mandamus to receive a final determination directly from the city treasurer, or it could have filed suit in court. New Cingular did not sleep on its rights, but instead sought to resolve the confusing situation by filing a declaratory judgment action—an approach the Supreme Court has recognized as diligent. *Id.*

(3) Diligence does not require exhaustion of administrative remedies.

Bothell incorrectly argues that New Cingular failed to act diligently by not pursuing a conference with the city treasurer. BMC 5.08.210 indicates that a conference with the treasurer is an optional procedure, because the taxpayer "may" apply for a

conference, and a conference is not necessary to receive a refund. Plaintiffs are not required to exhaust optional administrative procedures. *See Smoke v. City of Seattle*, 132 Wn.2d 214, 227-28, 937 P.2d 186 (1997). Furthermore, BMC 5.08.240 allows the treasurer or her duly authorized agent to initiate a hearing "in order to ascertain whether a return should be made," which suggests Bothell itself displayed a lack of diligence if it required a conference to process the claim and yet never initiated a hearing.

Bothell is similarly incorrect when it argues New Cingular should have appealed to the city council. Bothell's argument again ignores the applicability of *Qwest* and Bothell's admissions that an administrative appeal was (at the time) unnecessary to obtain relief. RP 10, 12, 17-18, 22, 37; CP 65, 297. By filing suit in court, New Cingular utilized a remedy that both parties recognized was a viable procedure. *Id.* It would be impractical and wasteful for New Cingular to simultaneously pursue all existing mechanisms of relief, which is precisely why the initial filing of the refund claim should equitably toll the statute of limitations. Moreover, exhaustion

was not required under the circumstances of this case. *See infra* at 37 to 43.

d. Equitable tolling here effectuates the policies of Bothell's tax refund code provision.

Overpaid taxes constitute a debt owed to the taxpayer, and the taxing jurisdiction has no equitable right to the taxes paid in excess of the amount properly due. *Bryam v. Thurston Cnty.*, 141 Wn. 28, 38-40, 251 P. 103 (1926), *modified*, 141 Wn. 28, 252 P. 943 (1927). Bothell's municipal code, BMC 5.08.110, reflects this policy. It represents to its taxpayers that Bothell will only retain taxes it is properly owed. Equitable tolling furthers this policy, because it allows New Cingular and the Washington Settlement Class to regain possession of the taxes that Bothell has no equitable right to retain.

e. Equitable tolling here effectuates the purposes underlying the statute of limitations.

Statutes of limitations serve to protect defendants from stale claims and to promote justice by "preventing surprises through the revival of stale claims that have been allowed to slumber while evidence has been lost, memories have faded, and

witnesses have disappeared." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965).

Equitable tolling in this case effectuates each of those purposes. Bothell has had full notice of New Cingular's claims since the filing of the refund claim in November 2010. It does not and cannot claim that evidence has been lost, memories have faded, or witnesses have disappeared since the claim was filed. Bothell was fully able to gather and preserve evidence as soon as New Cingular filed its refund claim.

Bothell argues it would be prejudiced by equitable tolling because New Cingular could recover more of the payments Bothell unjustly possesses, but an increased damages award is not the type of prejudice statutes of limitations protect against. *See Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) (describing prejudice in terms of unavailable evidence that prevents an adequate defense). Bothell cannot allege its defense is stymied by the application of equitable tolling.

f. Sophistication does not preclude equitable relief.

The test for applying equitable tolling is whether justice demands it and tolling is consistent with the relevant statutes, not whether the party is unsophisticated. *Millay*, 135 Wn.2d at 206. Adopting Bothell's interpretation of the equitable tolling doctrine would limit its applicability to the insane and the illiterate (Br. of Appellant at 21-24, 38-40), but equity's reach is not so limited. A lack of sophistication can create the need for equitable relief, but sophisticated plaintiffs are not categorically ineligible for equitable relief. *See Capital Tracing, Inc. v. United States*, 63 F.3d 859, 863 (9th Cir. 1995) (statute of limitations equitably tolled for a bail bond company); *Millay*, 135 Wn.2d at 207-08 (allowing equitable tolling for property developers).

When deciding whether to grant an equitable remedy, "courts often 'balance the equities' between the parties, taking into consideration the relief sought by the plaintiff and the hardship imposed on the defendant." *Douchette*, 117 Wn.2d at 812. Bothell has not demonstrated any hardship. New Cingular and the Washington Class members, however, will not receive adequate relief if the Court declines to exercise its broad

equitable powers and toll the statute of limitations from the date New Cingular filed the refund claim. Balancing the equities between the parties militates in favor of equitably tolling the statute of limitations.

3. Bothell omits key facts to stretch the impact of recent Supreme Court cases.

Bothell incorrectly asserts that two recent Washington Supreme Court cases, *CMS* and *Highighi*, control this case. *CMS* does not address equitable tolling, but rather stands for the impropriety of using the administrative process to evade court rulings. *Highighi* is limited to the Personal Restraint Petition context, and explicitly states that equitable tolling should be allowed in situations where the plaintiff would otherwise be denied its remedy.

a. CMS does not address or control equitable tolling.

Bothell argues that *CMS* controls this case, but *CMS* stands for the proposition that the administrative process cannot revive claims after a court rules those claims are stale. Bothell never once mentions that the *CMS* trial court ruled the

claims were stale, which was the key fact for the statute of limitations analysis in *CMS*. 178 Wn.2d at 651-52.

There, the taxpayer, CMS, pursued administrative remedies specifically to overcome an adverse court ruling. CMS initially filed a tax refund claim that Lakewood never directly responded to. *Id.* at 639. Instead, Lakewood sent CMS a demand for tax payment for a time-frame other than that mentioned in the refund claim. *Id.* CMS responded to Lakewood's demand by filing suit in superior court. *Id.* The court ruled on a motion for partial summary judgment that the three year statute of limitations barred a portion of CMS' claim. *Id.* at 640. To recover the taxes paid during the time-barred period, CMS filed a second suit against Lakewood that sought a writ of mandamus to force the city to respond to its initial tax refund claim. *Id.*

The Court disapproved of that tactic because CMS attempted to evade the trial court's ruling. *Id.* at 651. CMS "sought mandamus only *after* the trial court informed it that its recovery in superior court was constrained by the three year statute of limitations." *Id.* (emphasis added). CMS' express purpose for seeking mandamus was to reach beyond the statute

of limitations. *Id.* at 652. As Chief Justice Madsen phrased it during oral argument, CMS tried to get what it wanted in the first place, but through the back door.[2]

The Court issued a narrow holding: "Under the circumstances of this case, we hold that CMS cannot choose first to pursue recovery through the courts, and then attempt to bypass the statute of limitations that necessarily applies as a result of that choice by seeking relief through the administrative process." *Id.* at 652. The Court repeatedly limited its holding to "the circumstances of this case." *Id.* *CMS* merely held the administrative process could not be used to bypass a court's statute of limitations ruling. There is no such issue in the case at bar, where, unlike *CMS*, there has been no ruling that New Cingular's claims are stale. Instead, New Cingular has asserted the doctrine of equitable tolling, and the trial court agreed the doctrine applies.

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[2] Wash. State Supreme Court oral argument, *Cost Mgmt. Servs., Inc. v. City of Lakewood,* No. 87964–8 (May 16, 2013), at 38 min., 50 sec., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org.

b. Highighi does not apply to civil cases.

Bothell also overstates the precedential value of *In re Highighi*, 178 Wn.2d 435, 309 P.3d 459 (2013), by omitting that it was decided in the Personal Restraint Petition ("**PRP**") context.

Highighi was convicted using evidence obtained through an out-of-state warrant that was not properly domesticated. *Id.* at 438. The trial court relied on the inevitable discovery doctrine to deny his motion to suppress the out-of-state evidence. *Id.* at 439. After the Court of Appeals affirmed his convictions, and the mandate terminating review was issued, the Supreme Court struck down the inevitable discovery doctrine. *Id.* at 440 (referencing *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009)). Highighi timely filed a PRP, and his appointed counsel subsequently filed an amended PRP to include an ineffective assistance of counsel claim. *Id.* at 441. The Court of Appeals found the ineffective assistance of counsel claim was time-barred because the amended PRP was filed beyond the one-year limit for PRPs and equitable tolling did not apply. *Id.*

The Supreme Court agreed and found equitable tolling did not apply because of the unusual PRP context. The Court distinguished the PRP context from "normal" situations:

> Moreover, the general framework governing PRPs shows that equitable tolling has a more limited role *than exists in other contexts*, which makes it necessary to adhere to a stricter standard. *In a "normal" situation, equitable tolling might be the only way in which a party is not deprived of his or her remedy.*

Id. at 448 (quotation in original, emphasis added). The Court declined to extend equitable tolling in the PRP context because of the general rules and policies governing PRPs, the finality of criminal judgments as a precondition to federal habeas corpus relief, and Highighi's ability to toll the statute of limitations by relying on newly discovered evidence, double jeopardy violations, and the actual innocence doctrine. *Id.*

None of those concerns exist with New Cingular's refund claim. Instead, this is the kind of "normal" situation where New Cingular and the Washington Settlement Class will be deprived of their remedy without equitable tolling.

4. Justice requires equitable tolling of New Cingular's claims.

In *Douchette*, the Court established seven factors to weigh when applying the doctrine of equitable tolling. 117 Wn.2d at 811. These factors are not elements, but serve as considerations to assist the court's evaluation. The most relevant factors here are the plaintiff's diligence in pursuing its rights, absence of prejudice to the defendant, and the plaintiff's reliance on false assurances on the part of the defendant. *Id.*

Applying these factors to the present case demonstrates that justice requires equitable tolling. As discussed above, New Cingular was diligent in pursuing its rights, Bothell's defense is not prejudiced, and the Bothell Municipal Code provided false assurances to New Cingular.

Justice further requires equitable tolling because New Cingular could not, and was not required to, exhaust administrative remedies, so it had no other means to preserve the initial tolling date. If the Court disagrees because of the holding in *CMS*, then the Court should find that under the unique circumstances of this case, the confusion caused by *CMS*

provides another basis to equitably toll the statute of limitations.

a. Exhaustion does not apply to the Denial Letter.

Bothell now argues that completing the administrative process would have tolled the original filing date, so justice does not require the application of equitable tolling. Bothell's argument is odd in light of the assertion in its Denial Letter that "[t]he letter received on November 3, 2010 did not toll the statute of limitations." CP 266. Bothell's current argument requires that its administrative appeal process was available and mandatory to New Cingular. *CMS* held that courts must determine whether exhaustion applies, not that available administrative processes are always mandatory. 178 Wn.2d at 648. Exhaustion is not always required simply because administrative procedures exist. *Smoke*, 132 Wn.2d at 224-25.

Here, New Cingular could not administratively appeal Bothell's denial because, while the Bothell City Council would have appellate jurisdiction over a denial issued by its treasurer, the city council lacked jurisdiction over its attorney's Denial Letter. *See* BMC 5.08.220. Furthermore, exhaustion was not

required because Bothell failed to comply with its own code by having its attorney issue a tax refund determination instead of its treasurer. Taken as a whole, considerations of fairness and practicality in this case outweigh the policies underlying the doctrine of exhaustion.

(1) The Bothell City Council lacked jurisdiction to review the Denial Letter.

An administrative order is not appealable unless an agency has jurisdiction over the claim. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868, 947 P.2d 1208 (1997). In *Mount Vernon*, the Supreme Court excused the failure to appeal the city council's approval of a commercial planned unit development to the Growth Management Hearings Board because "the approval granted by the city council falls outside the scope of review granted to the Board." *Id. See also State v. Tacoma-Pierce Cnty. Multiple Listing Serv.*, 95 Wn.2d 280, 284, 622 P.2d 1190 (1980) (exhaustion of potential remedies through the Department of Licensing or Real Estate Commission for Consumer Protection Act violations not required because neither agency had jurisdiction over those claims).

Here, Bothell's attorney issued the denial, CP 266, and BMC 5.08.220 provides the city council with jurisdiction over tax refund determinations made by the treasurer only. That limitation was intentional. BMC 5.08.240, which immediately follows the tax refund appeal provisions in the BMC, specifically allows "[t]he city treasurer or his duly authorized agent" to conduct an investigation related to a tax refund. BMC 5.08.210, however, empowers the *treasurer alone* to issue refund claim decisions, and BMC 5.08.220 allows review only for "the decision of the *treasurer*.... " (emphasis added). If the code empowered the city council to review the attorney's denial, then BMC 5.08.220 would likely state "the decision of the treasurer or his duly authorized agent," is appealable, but it does not. BMC 5.08.220 consequently does not provide the city council with appellate jurisdiction over the city's attorney's tax refund claim decisions. No city entity had appellate jurisdiction over the Denial Letter, so New Cingular's only available redress was filing suit in court.

(2) Bothell's denial was not a final, appealable order because it failed to comply with Bothell's Municipal Code.

Exhaustion is not required unless the reviewing entity has issued a final, appealable order. *Valley View*, 107 Wn.2d at 635. Doubts as to finality are resolved in favor of the taxpayer. *Id.* at 634.

A city cannot issue a final, appealable order when the city fails to comply with its code. *WCHS v. Lynnwood*, 120 Wn. App. 668, 86 P.3d 1169, *review denied* 152 Wn.2d 1034 (2004). In *WCHS*, the plaintiff sued for declaratory judgment after the city denied both the plaintiff's building permit and business license. *Id.* at 673-74. The plaintiff did not administratively appeal the city's denials. In finding for the plaintiff, the court rejected the city's argument that the denial letters should have been appealed administratively because the court found the letters were not final orders. *Id.* at 679-80. Neither letter complied with the city code provisions governing who should receive notice of decisions, and the provision requiring disclosure of the right to appeal. *Id.* The court found

the non-complying nature of the letters could not give rise to exhaustion. *Id.*

Bothell failed to comply with its code requirements by having its attorney, instead of its treasurer, deny New Cingular's claim. BMC 5.08.210 empowers the treasurer alone with the authority to review and "grant or deny" tax refund applications. As described above, Bothell's attorney is not authorized to issue tax refund claims, and that limitation was intentional. The denial letter also failed to disclose the right to appeal or available appeal procedures.[3] Bothell's failure to comply with BMC 5.08.210 precludes the finding of a final, appealable order and an exhaustion requirement.

(3) Fairness and practicality outweigh requiring exhaustion.

Courts do not require exhaustion when considerations of fairness and practicality outweigh the policies underlying the doctrine of exhaustion. *Prisk v. City of Poulsbo*, 46 Wn. App. 793,

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[3] Bothell's failure to clearly communicate the right to an appeal, failure to provide clear instructions regarding information necessary to substantiate a refund claim, and failure to communicate how long the city takes to process claims runs counter to the state's public policy that the rights of taxpayers are best implemented when they are provided with "accurate tax information, instructions, forms, administrative policies, and procedure to assist taxpayers...." RCW 82.32A.005(2).

798, 732 P.2d 1013 (1987) (finding fairness and practicality outweighed exhaustion where the plaintiff's only avenue of appeal for assessment of fees was to the city council, which previously imposed the same fees upon the plaintiff). Exhaustion is unfair and impractical where "the questions raised are purely legal and beyond the authority and expertise of an administrative agency to resolve, and it appears that further administrative proceedings would be ineffective or useless." *Schreiber v. Riemcke*, 11 Wn. App. 873, 875, 526 P.2d 904 (1974) (citing *Hillsborough v. Cromwell*, 326 U.S. 620, 625, 66 S. Ct. 445, 90 L. Ed. 358 (1946)).

The issues here are purely legal and exceed the expertise of the treasurer and city council. Bothell asserted several legal defenses in its denial, including lack of standing, the grandfather clause of the Internet Tax Freedom Act, the voluntary payment doctrine, and the statute of limitations. CP 266-67. Each of Bothell's defenses raises complicated legal issues. The Bothell treasurer demonstrated the legal issues were beyond her expertise by consulting with an attorney in her cursory review of the claim. CP 276. Appealing to the city

council would also be "ineffective or useless" given the complicated legal nature of the arguments, and Bothell's tactic of delaying action.

Without an appealable order, New Cingular could not exhaust administrative remedies. Exhaustion should also be excused because fairness, practicality, and a futile appeal obviate the exhaustion requirement. Without the ability to access fair administrative procedures, justice requires equitable tolling here.

b. The narrow circumstances of this case justify equitable tolling.

The issue before the court is narrow: whether the voluntary pursuit of administrative proceedings prior to filing a lawsuit can equitably toll the statute of limitations in the court action. Courts around the country recognize that equitable tolling constitutes prudent public policy in that context. *See Am. Marine Corp. v. Sholin*, 295 P.3d 924, 927 (Alaska 2013); *Weidow v. Uninsured Emp'rs Fund*, 359 Mont. 77, 83, 246 P.3d 704 (2010); *Enron Oil & Gas Co. v. Freudenthal*, 861 P.2d 1090, 1094 (Wyo. 1993).

For example, in *McDonald v. Antelope Valley Cmty. Coll. Dist.*, 45 Cal. 4th 88, 97, 194 P.3d 1026 (2008), Sylvia Brown filed an administrative discrimination complaint against her employer when she could have filed a lawsuit instead. While internal appeal proceedings were pending, Brown filed a lawsuit against her employer after the statute of limitations for her claim had run. *Id.* at 98. The Court of Appeal found Brown's administrative claim equitably tolled the statute of limitations. *Id.* at 99.

The California Supreme Court explained equitable tolling applies "when an injured person has several legal remedies, and reasonably and in good faith, pursues one." *Id.* at 100 (internal citations omitted). Application of equitable tolling in such circumstances "serves the need for harmony and the avoidance of chaos in the administration of justice" because it allows the parties to pursue informal remedies without the need to seek redress in two different forums. *Id.* It does not compromise the defendants' interests "in being promptly appraised of claims against them in order that they may gather and preserve

evidence" because the defendant receives notice through the "filing of the first proceeding that gives rise to tolling." *Id.*

The elements of equitable tolling in this instance are (1) timely notice to the defendant, (2) lack of prejudice to the defendant, and (3) good faith conduct on the part of the plaintiff. *Id.* at 102. The Court could adopt these elements to apply Washington's equitable tolling law to the circumstances of this case. These elements establish when it is just for the voluntary pursuit of administrative proceedings to equitably toll the statute of limitations.

This case satisfies these three elements, in addition to the predicates required under Washington law, because Bothell received timely notice of the claim when New Cingular filed its tax refund application in November 2010, Bothell's defense is not prejudiced by equitable tolling, and New Cingular acted in good faith in pursuing its claim. "Failing to afford plaintiffs equitable tolling in these circumstances would both create procedural traps for the unwary and encourage duplicative filings, with attendant burdens on plaintiffs, defendants, and the court system." *Id.*

This Court should adopt the sound reasoning of *McDonald* to conclude that New Cingular's tax refund claim tolled the statute of limitations. Applying equitable tolling in these circumstances aligns incentives, because cities have no incentive to delay processing claims, and taxpayers have no incentive to immediately initiate litigation. Furthermore, equitable tolling here promotes harmony and efficiency in the administration of justice, because it allows the parties to pursue informal remedies without the need to seek redress in two different forums at the same time. *Id.* at 100.

CMS further narrows the reach of equitable tolling. *CMS* clarified *Qwest* by limiting the concurrent original jurisdiction doctrine. *CMS*, 178 Wn.2d at 648. Administrative exhaustion will now apply in most cases, but might not when cities fail to respond to claims, cities lack clear administrative review procedures, or cities fail to comply with their procedures. In those situations, as here, plaintiffs should not be penalized for pursuing administrative remedies in good faith.

c. *Equitable tolling is available when courts cause confusion.*

Equitable tolling is available to plaintiffs that face a confusing procedural quandary and select a viable, but ultimately incorrect, course of action. *Millay*, 135 Wn.2d at 207 (filing a declaratory judgment action could equitably toll statute of limitations). Courts recognize that court actions that cause confusion justify equitably tolling the statute of limitations. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151, 104 S. Ct. 1723 (1984) (*citing Carlile v. South Routt Sch. Dist.* RE 3-J, 652 F.2d 981 (10th Cir. 1981)).

Washington courts have not declared a test for when court-caused confusion justifies equitable tolling, but federal law is instructive. *See Douchette*, 117 Wn.2d at 811. The Ninth Circuit found a plaintiff was entitled to equitable tolling when (1) there was confusing authority regarding procedural requirements, (2) the courts issued an intervening decision, (3) the intervening decision required a procedure for which the limitations period had expired when the decision was issued, and (4) the absence of prejudice to the defendant. *Capital Tracing*, 63 F.3d at 860-63.

All four elements are present here. The Supreme Court has already stated the rule in *Qwest* was confusing, as it blurred procedural elements with jurisdictional requirements. *CMS*, 178 Wn.2d at 645-48. *CMS* was decided after the trial court granted partial summary judgment and shortly before this Court granted review. If the Court requires New Cingular to file a new administrative claim before the Court will exercise jurisdiction, then the entire refund claim would fall outside the statute of limitations. Finally, Bothell has not and cannot assert equitable tolling prejudices its defense in any way.

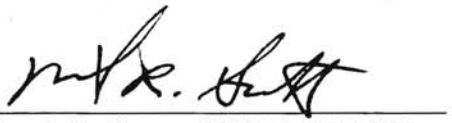
V. CONCLUSION

The Court has significant equitable powers and should exercise them here to find the statute of limitations was tolled upon the filing of the tax refund application. New Cingular established that the predicates for equitable tolling were satisfied by Bothell's bad faith processing of the claim, the false assurances caused by the disjunction between Bothell's Municipal Code and the city's actual conduct, and New Cingular's diligence in asserting its rights administratively and in court. Equitable tolling is appropriate here because it

effectuates the purposes of the tax refund statute and the statute of limitations. Given the narrow circumstances of this case, this Court should affirm the trial court because justice demands that New Cingular and the Washington Settlement Class should have access to relief.

RESPECTFULLY SUBMITTED this 20th day of February, 2014.

HILLIS CLARK MARTIN & PETERSON, P.S.

By: 

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

DATED this 20th day of February, 2014, at Seattle, Washington.

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