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69838-9

NO. 69838-9-I

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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GIFFORD INDUSTRIES, INC.,

Appellant,

v.

CHRISTIN TREUER d/b/a BRANCHFLOWER PROPERTIES, INC.,

Respondent.

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**RESPONDENT'S BRIEF**

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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## **I. INTRODUCTION**

Appellant Gifford Industries, Inc. (“Gifford”) asks the Court to relieve it of the terms of its lease with Branchflower Properties, Inc. (“Branchflower”). But the two parties are equally sophisticated, and Gifford therefore presumably had the power and opportunity to negotiate the terms of the contract. As such, the Court should reject Gifford’s attempt to paint itself as an innocent and powerless party, and affirm the trial court’s ruling upholding the terms of the lease agreement. The lease states that Branchflower will not be liable for damage to Gifford’s personal property, but Gifford brought a lawsuit against Branchflower for just such damages. The lawsuit was properly dismissed upon Branchflower’s motion for summary judgment. The Court should affirm.

## **II. RESTATEMENT OF ISSUES**

1. Should this Court affirm the trial court’s ruling giving meaning to the first sentence of paragraph 17, since the lease was negotiated between two sophisticated parties?
2. Should this Court affirm summary judgment in favor of the landlord where the lease clearly states that the landlord will not be liable for damage to tenant’s personal property, the tenant exercised its right to other remedies by withholding rent, and the tenant nevertheless brought a lawsuit seeking the precise damage excluded by the lease?

3. Should this Court grant attorney fees on appeal to Respondent Branchflower under RAP 18.1 where the contract between the parties allows for attorney fees?

### III. STATEMENT OF THE CASE

In March 2002, two corporations entered into a lease agreement for warehouse space on Shilshole Avenue in Seattle, Washington. CP 24. Gifford Industries, Inc. (“Gifford”) is a corporation involved in the construction and installation of specialty flooring at athletic facilities. CP 2. Branchflower Properties, Inc. (“Branchflower”) owned the warehouse space on Shilshole Avenue and agreed to lease the space to Gifford for storage. CP 11, 19.

As part of the lease agreement, Branchflower agreed to maintain the roof, exterior walls, and foundation. CP 25. Gifford was responsible for maintenance of all other parts of the premises. *Id.* Paragraph 7 of the lease provides:

**REPAIRS AND MAINTENANCE:** . . . Except for the roof, exterior walls and foundation, which are the responsibility of the Landlord, Tenant shall make such repairs as necessary to maintain the premises in as good condition as they are now, reasonable use and wear and damage by fire and other casualty excepted.

*Id.*

The lease agreement also stated in simple, clear, and concise language that if the tenant sustained any property damage, Branchflower was exempt from liability for that damage. CP 26. The first sentence of paragraph 17 of the lease, “Accidents and Liability,” provides the following: “Landlord or its agent shall not be liable for any injury or damage to persons or property sustained by Tenant or other, in and about the Premises.” *Id.* The same paragraph also addresses a different issue, indemnification, with the following clause: “Tenant agrees to defend and hold Landlord and its agents harmless from any claim, action and/or judgment for damages to property or injury to persons suffered or alleged to be suffered on the Premises by any person, firm or corporation unless caused by Landlord’s negligence.” *Id.*

On September 8, 2009, Gifford sent Branchflower a letter stating, in part:

We came in after the long Labor Day weekend and please note the roof is leaking very badly . . . . Please note we didn’t have any damage to any of our merchandise. . . . So, if you could have your maintenance personnel repair the roof so it doesn’t leak, we will be greatly appreciative.

CP 67. In response, Branchflower installed a sump pump sometime between September 8 and November 9, 2009. CP 96. Branchflower also sought bids from roofing companies in December 2009, *see* CP 107, and undertook to repair the roof in January 2010. CP 101-05.

On January 13, 2010, Gifford sent a letter to Branchflower alleging “serious damage to material and equipment . . . due to roof leaks.” CP 69. Gifford claimed in the January 13 letter that “the damage gets worse, more extensive day by day.” *Id.* On January 27, 2010, Gifford sent another letter to Branchflower demanding that Branchflower forward the letter to its insurance adjuster. CP 71. Gifford claimed that it “has sustained severe and substantial damage to materials, mostly wood products and power products, as well as office furniture, miscellaneous items, and some tools.” *Id.* Gifford had removed some of the tools but had not otherwise vacated the property.<sup>1</sup> *Id.*

Indeed, despite the apparently extensive and continuing damage to its personal property, Gifford remained in the property until at least August 2010.<sup>2</sup> *See* CP 74. On August 16, 2010, it sent another letter to Branchflower in which it stated that it “is not paying anymore rent on the premises.” *Id.* It is unclear from the record when Gifford last paid rent on

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<sup>1</sup> Gifford’s answer to Branchflower’s counterclaims below implies that Gifford abandoned the property in September 2009. Supp. CP 139 ¶ 10. But the correspondence from Gifford to Branchflower regarding the leak indicates that Gifford remained in the property well beyond September 2009. Indeed, while Gifford’s first letter to Branchflower states that Gifford suffered no damage, subsequent correspondence claims that Gifford suffered extensive damage to its property, showing that Gifford had not abandoned the property. CP 67, 69, 71.

<sup>2</sup> Branchflower’s counterclaim below alleged that Gifford actually remained in the property until approximately October 2011, with its last rent payment in September 2009. Supp. CP 136 ¶ 10.

the property.<sup>3</sup> *See id.* Gifford stated that, “[b]ased upon [Branchflower’s] neglect, i.e. opening up the roof of our warehouse and not protecting our goods . . . , you have virtually destroyed every item in this warehouse.” *Id.* The letter claims that Gifford “offered to remove everything from this warehouse under the auspices of your insurance company . . . in order to vacate this warehouse in a timely manner.” *Id.*

On August 4, 2010, Gifford brought a lawsuit against Branchflower for breach of contract. CP 2. Gifford alleged that Branchflower “breached its contract by making modifications . . . to the building in such a way as to allow water or other materials to enter the building.” CP 3, 20. Gifford claimed that the water “ruined much of [Gifford’s] inventory and destroyed some of [Gifford’s] equipment.” CP 20. Gifford further claimed that it “took immediate steps to protect what was left of its’ (sic) inventory, stock and equipment”<sup>4</sup> and “immediately notified Defendant of the damages and . . . asked Defendant to take immediate steps to prevent the damages from continuing.” *Id.*

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<sup>3</sup> As stated above, Branchflower alleged in its counterclaims below that Gifford had not paid rent since September 2009. Supp. CP 136 ¶ 10. Gifford did not deny this allegation in its answer to Branchflower’s counterclaims. Supp. CP 139-40.

<sup>4</sup> It is unclear from the record what immediate steps Gifford took to protect its personal property.

Branchflower moved for summary judgment on July 7, 2011. CP 10-16. The trial court granted summary judgment to Branchflower based on the exculpatory clause in paragraph 17, in which Gifford agreed that Branchflower would not be liable for damages to Gifford's personal property. CP 130-31. Gifford appealed the trial court's decision.

#### **IV. ARGUMENT**

##### **A. Summary Judgment Was Appropriate**

This Court reviews a ruling for summary judgment de novo, engaging in the same inquiry as the trial court. *In re Estate of Black*, 153 Wn.2d 152, 160, 102 P.3d 796 (2004). Summary judgment is appropriate where, as here, there are no genuine issues as to any material fact and therefore the moving party is entitled to judgment as a matter of law. CR 56. Branchflower moved for summary judgment based on the first sentence of paragraph 17 of the lease, which is an exculpatory clause that states unequivocally that Branchflower is not responsible for any damage to Gifford's personal property. CP 14-15. For purposes of summary judgment, the relevant facts were not in dispute. CP 11. The trial court properly granted summary judgment to Branchflower based on the valid exculpatory clause, and this Court should affirm that ruling.

**B. Agreement Between Two Sophisticated Parties**

The parties to this lease were both sophisticated commercial entities. As such, the Court should enforce the lease as written. “[P]arties to a commercial lease have discretion in allocating duties and responsibilities through contract.” 6A WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 130.00 (6th ed.). “When the bargaining position of the parties is not unequal and ‘the distribution of risks entail[s] no elements of injustice,’ the courts will, as a general rule, leave the parties in the positions that they bargained for.” *Id.* (quoting *Gabl v. Alaska Loan & Inv. Co.*, 6 Wn. App. 880, 884, 496 P.2d 548 (1972)).

Gifford claims that the trial court improperly applied *Gabl* when it ruled that the first sentence of paragraph 17 eliminated Branchflower’s liability for damage to Gifford’s personal property. App.’s Br. at 31-35. But Gifford incorrectly focuses on the factual distinctions between *Gabl* and the instant case. Rather, the trial court felt bound by *Gabl* because *Gabl* explicitly states that where “the respective bargaining positions of the parties to the lease were not unequal and the distribution of the risks entailed no elements of injustice, . . . the leases will be enforced as the parties contemplated.” *Gabl*, 6 Wn. App. at 884; CP 130-31. The *Gabl* court properly recognized that, in such a case, “[t]o shift liability from the commercial tenant to the landlord without regard to the other provisions of

the lease could cause, rather than cure, inequity.” *Gabl*, 6 Wn. App. at 884.

As in *Gabl*, the parties to the lease here were both sophisticated commercial entities. The trial court properly enforced the lease as the parties negotiated it, and felt bound by the *Gabl* court’s holding that shifting liability where the parties have decided to allocate it in a particular way could “cause, rather than cure, inequity.” CP 130 (quoting *Gabl*, 6 Wn. App. at 884). This Court should hold the same, and enforce the lease as the two sophisticated commercial parties explicitly intended.

**C. Contract Provisions Clear and Harmonious**

In interpreting a contract, Washington courts give the utmost importance to the parties’ intent and consider the contract as a whole. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 829, 214 P.3d 189 (2009); *King v. Rice*, 146 Wn. App. 662, 670, 191 P.3d 946 (2008). The language of the contract is interpreted as written, giving each term its “ordinary, usual, and popular meaning.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005). Courts interpret contracts so as to give effect to each provision and harmonize any contract terms that seem to conflict. *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 849, 158 P.3d 1265 (2007).

**1. Gifford inserts language not present in paragraph 17 to arrive at its conclusion that the clause is susceptible to two different meanings.**

Gifford claims that “the introductory sentence [of paragraph 17] is itself susceptible to two different meanings.” App.’s Br. at 26. But in order to derive a second meaning, Gifford adds language not present in paragraph 17 of the lease. This is improper.

Gifford claims that “the rules of construction for exculpatory clauses in Washington do not permit reading additional exculpatory terms into the contract, as required for Respondent’s intended meaning.” App.’s Br. at 27. But this is exactly what Gifford is attempting to do. Rather than reading the exculpatory clause as written, Gifford suggests that the “more reasonable meaning is: [except where damages are caused by breach of other provisions of this contract or the Landlord’s own negligence] ‘Landlord or its agent shall not be liable for an injury or damage to persons or property sustained by Tenant or others, in and about the Premises.’” App.’s Br. at 26-27.

Instead, the Court should read the exculpatory clause as written. The clause explicitly states that Branchflower will not be liable “for an injury or damage to persons or property sustained by [Gifford].” CP 26. It does not exempt damage caused by Branchflower’s negligence from the

exclusion. The Court must read the clause as written and enforce the lease terms as the parties intended. *Hearst Communications*, 154 Wn.2d at 504.

**2. Gifford’s interpretation—not the trial court’s—renders a clause of the contract “meaningless.”**

Gifford asks the Court to consider the first sentence of paragraph 17 as “the warm up.” App.’s Br. at 28. But the rules of construction require that all of the terms of a contract be given meaning. *Nishikawa*, 138 Wn. App. at 849. Indeed, Gifford states in its brief: “Contracts are to be read so that each promise is given meaning. ‘Each portion of an agreement should be construed to avoid ineffectiveness.’” App.’s Br. at 22 (quoting *McIntyre v. Plywood Co.*, 24 Wn. App. 120, 127, 600 P.2d 619 (1979)).

Gifford also claims that the second portion of paragraph 17 is entitled to “greater weight” because it is more specific “as opposed to the general introductory language in the first sentence.” App.’s Br. at 29. But Gifford fails to explain how the second portion of paragraph 17—the indemnification agreement—is the more specific portion of the paragraph and the first portion the more general. Indeed, the two separate clauses are equally specific. This is particularly clear when considered in contrast to the two clauses discussed in *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004), cited by Gifford in support of its “general

versus specific” argument. App.’s Br. at 23 (citing 153 Wn.2d 331, 354-55, 103 P.3d 773 (2004)). In *Adler*, the more general provision stated that “Washington law, to the extent permitted, shall govern all substantive aspects of the dispute.” *Adler*, 153 Wn.2d at 354-55 (internal quotation marks omitted). The more specific provision in *Adler* stated that the “parties shall bear their own respective costs and attorney[] fees.” *Id.* at 355.

Unlike the clauses in *Adler*, the second clause of paragraph 17 is no more specific than the first. *Adler* is therefore inapposite, and Gifford’s argument that the first clause should be considered a “warm up” must fail.

#### **D. Exculpatory Clause Must Be Enforced**

##### **1. Gifford fails to discern the two clauses within paragraph 17; one an exculpatory clause, and one an indemnification agreement.**

The first clause of paragraph 17 is clearly an exculpatory clause and is separate and distinct from the second sentence, the indemnification clause.

**An exculpatory clause** purports to deny an injured party the right to recover damages from the person negligently causing the injury. **An indemnification clause** attempts to shift responsibility for the payment of damages to someone other than the negligent party . . . .

*Scott v. Pac. West Mtn. Resort*, 119 Wn.2d 484, 491, 834 P.2d 6 (1992)

(emphasis added). Here, the first sentence states that Branchflower “shall

not be liable for any injury or damage to persons or property sustained by [Gifford] or other, in and about the Premises.” CP 26. This sentence “purports to deny an injured party the right to recover damages from the person negligently causing the injury.” *Scott*, 119 Wn.2d at 491.

The second sentence states that Gifford “agrees to defend and hold [Branchflower] and its agents harmless from any claim, action, and/or judgment for damages to property or injury . . . unless caused by [Branchflower’s] negligence.” CP 26. This sentence “attempts to shift responsibility for the payment of damages to someone other than the negligent party.” *Scott*, 119 Wn.2d at 491. In other words, if a *third party* sues Branchflower for injury or damages related to the leased property, Gifford must defend and hold Branchflower harmless unless the damages are caused by Branchflower’s negligence. CP 26. The exception for negligence is attached to the indemnification clause only, and no similar exception is attached to the exculpatory clause. *Id.* The clauses are compatible because they address different issues.

**2. The exculpatory clause at issue here must be upheld as none of the three exceptions to enforce such clauses are applicable.**

“Washington courts generally accept, ‘subject to certain exceptions, [that] parties may contract that one shall not be liable for his or her own negligence to another.’” *Hanks v. Grace*, 167 Wn. App. 542,

548, 273 P.3d 1029 (2012) (quoting *Wagenblast v. Odessa Sch. Dist. No. 05-157-166J*, 110 Wn.2d 845, 848, 758 P.2d 968 (1988)). “[T]he general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy, or (2) the negligent act falls greatly below the standard established by law for protection of others, or (3) they are inconspicuous.” *Vodapest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996). Gifford does not claim that the first clause of paragraph 17 violates public policy, nor does it claim that Branchflower’s “negligent act falls greatly below the standard established by law for protection of others.”<sup>5</sup> *Id.* It appears, therefore, that Gifford is claiming that the exculpatory clause is inconspicuous. *Id.*

The rule in determining whether an exculpatory clause is inconspicuous is that courts “will not uphold an exculpatory agreement if ‘the releasing language is so inconspicuous that reasonable persons could reach different conclusions as to whether the document was unwittingly signed.’” *Stokes v. Bally’s Pacwest, Inc.*, 113 Wn. App. 442, 54 P.3d 161 (2002) (quoting *Chauvlier v. Booth Creek Ski Holdings, Inc.*, 109 Wn.

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<sup>5</sup> In response to the trial court’s finding that “Plaintiff made no allegation of negligence, gross negligence or willful misconduct,” Gifford claims in its brief that its pleadings below “allege all of the elements of negligence.” App.’s Br. at 30. But Gifford does not claim that Branchflower acted with gross negligence, nor did it raise gross negligence below; therefore, this exception to the enforceability of exculpatory clauses does not apply.

App. 334, 341, 35 P.3d 383 (2001)). This is because in Washington, parties to a contract have a right “expressly to agree in advance that the defendant is under no obligation of care for the benefit of the plaintiff, and shall not be liable for the consequences of conduct which would otherwise be negligent.” *Chauvlier*, 109 Wn. App. at 339 (internal quotation marks omitted).

Here, paragraph 17 begins with the exculpatory clause, which in clear language states “Landlord or its agents shall not be liable . . . .” CP 26. The language is clear and unambiguous—and conspicuous—that Branchflower “shall not be liable for an injury or damage to persons or property sustained by [Gifford].” *Id.* Gifford cannot claim that it “unwittingly” signed the document, particularly given its equal footing with Branchflower as two commercial parties to a mutually-agreeable contract. Gifford provides no reason why this exculpatory clause should not be enforced as written and negotiated between the parties. The exculpatory clause does not fall under any of the three exceptions, and must therefore be enforced. *Vodapest*, 128 Wn.2d at 848.

**E. Duty to Repair is Intact, But Lease Limits Remedies**

Branchflower does not dispute that the lease imposed “an affirmative contractual duty to repair and maintain the roof and exterior walls.” App.’s Br. at 34. Gifford wrongly assumes that limiting the

available remedies necessarily eliminates the duty itself, claiming that the trial court's application of *Gabl* "reads the Respondents' contractual duty to maintain and repair [the roof] out of the lease." App.'s Br. at 6. The trial court did not strike Branchflower's duty to repair the roof. Rather, the trial court read one specific remedy out of the contract because the parties had written the contract as such, and ruled that Branchflower did not have a duty to reimburse Gifford for damage to personal property.

Simply because remedies are not outlined in the lease agreement itself does not mean no remedies exist. Gifford was entitled to common law remedies for breach of lease and breach of contract, and the exculpatory clause removing Branchflower's liability for damage to personal property does not remove these remedies. For example, a tenant has a right to terminate a lease or seek other remedies when a landlord causes the tenant to be constructively evicted. 17 WASH. PRAC., REAL ESTATE § 6.32 (2d ed.). Constructive eviction occurs "if the landlord has made the premises untenable, this is tantamount to an actual ouster; it 'constructively' evicts the tenant." *Id.* "With commercial leases, the Washington courts have been quite ready to find constructive evictions in cases in which the landlord seriously interfered with the tenant's conduct of business on the premises." *Id.*

Indeed, Gifford cited to just such a constructive eviction case in its response to Branchflower's motion for summary judgment below.<sup>6</sup> CP 52-53. In that case, the landlord apparently attempted to repair a leak, and finally the tenant moved out of the premises. The landlord brought a suit against the tenant for breach of the lease contract, and "[t]he trial court ruled for the tenant because the premises had been made untenable for the purposes for which they were used." CP 53. The tenant in the case cited by Gifford correctly vacated the property on the theory of constructive eviction. This was his remedy, a remedy equally available to Gifford.<sup>7</sup>

The Restatement of Property explains a tenant's remedies in the event the landlord breaches an obligation:

Except to the extent the parties to a lease validly agree otherwise, there is a breach of the landlord's obligations if, after the tenant's entry . . . a change in the condition of the leased property caused by the landlord's conduct or failure to fulfill an obligation to repair . . . makes the leased property unsuitable for the use contemplated by the parties and the landlord does not correct the situation within a

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<sup>6</sup> Gifford did not provide a citation for this Massachusetts case in its opposition brief. CP 52-53.

<sup>7</sup> In a declaration in support of its opposition to summary judgment, Gifford claims that "it would have cost a fortune to move the materials." CP 57. But Gifford could have sought a declaratory judgment prior to moving its materials if it was unsure that it had given Branchflower sufficient time, or if it wanted confirmation that it had been constructively evicted. *See* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 10.1, cmt. d.

reasonable time after being requested by the tenant to do so.

RESTATEMENT (SECOND) OF PROPERTY, LANDLORD & TENANT § 5.4 (1977). In such a case of constructive eviction, a tenant has several options, such as to terminate the lease; to repair the damage itself and seek reimbursement from the landlord; or to withhold rent. *See id.*<sup>8</sup> In fact, Gifford did avail itself of one of these remedies when it chose to stop paying rent in August 2010.<sup>9</sup> CP 74.

Gifford's argument that the trial court's ruling eliminated Gifford's remedies from the lease is incorrect, particularly given Gifford's use of one of the remedies available to it. The four corners of a contract need not include a list of all available remedies. Simply because the parties here chose to limit the remedies available to the tenant does not mean the contract eliminated the landlord's duties, and the Court must uphold the parties' contract as written and negotiated. *Hanks*, 167 Wn. App. at 548; *Wagenblast*, 110 Wn.2d at 848.

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<sup>8</sup> If the tenant terminates the lease, the tenant is entitled to fair market value of the lease on the date of termination and reasonable relocation costs. RESTATEMENT (SECOND) OF PROPERTY § 10.2. If the tenant does not terminate the lease, the tenant is entitled to "reasonable additional costs of substituted premises incurred by the tenant." *Id.* If the tenant remedies the default itself, it is entitled to "reasonable costs incurred." *Id.* Finally, the tenant is entitled to reasonable expenditures made before the default, "loss of anticipated business profits . . . which resulted from the landlord's default," and interest. *Id.*

<sup>9</sup> Branchflower's counterclaims below allege that Gifford actually stopped paying rent as early as September 2009. Supp. CP 136 ¶ 10.

**F. Branchflower Is Entitled to Attorney Fees on Appeal**

Finally, Branchflower requests attorney fees on appeal under RAP 18.1. A contract that provides for attorney fees at trial also supports such an award on appeal. *Atlas Supply, Inc. v. Realm, Inc.*, 170 Wn. App. 234, 241, 287 P.3d 606 (2012). Here, the lease contains a provision stating that “the losing party [to a legal action] agrees to pay all reasonable costs and attorney[] fees in connection therewith.” CP 27. Because the Court should affirm in favor of Branchflower, Branchflower is entitled to its attorney fees on appeal.

**V. CONCLUSION**

For the foregoing reasons, Branchflower asks the Court to uphold the contract as written by the parties. Branchflower and Gifford negotiated the terms of the commercial lease to include an exculpatory clause stating that Branchflower would not be liable to Gifford for damage to personal property. Gifford’s lawsuit asked for precisely the type of damages excluded by the lease, loss of materials and other personal property. The trial court properly dismissed the suit on Branchflower’s motion for summary judgment based on the exculpatory clause, and this Court should affirm and award Branchflower its attorney fees associated with this appeal.

RESPECTFULLY SUBMITTED this 26th day of July, 2013.

BETTS, PATTERSON & MINES, P.S.

By:   
Steven Goldstein, WSBA #11042  
Bridget T. Schuster, WSBA #41081  
Attorneys for Respondent

**CERTIFICATE OF SERVICE**

I, Laraine Green, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on July 26, 2013, I caused to be served upon counsel of record at the addresses and in the manner described below, the following documents:

- **Respondent’s Brief; and**
- **Certificate of Service.**

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

DATED this 26th day of July, 2013.

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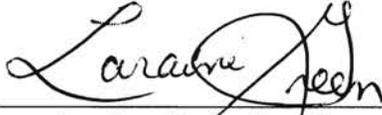
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A handwritten signature in cursive script that reads "Laraine Green". The signature is written in black ink and is positioned above a horizontal line.

Laraine Green, Legal  
Assistant to Steven Goldstein