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NO. 71638-7-1

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

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HELEN KATHLINE SULLIVAN,

Appellant,

v.

SAFEWAY, INC.,

Respondent.

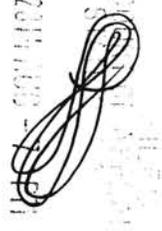
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**RESPONDENT'S BRIEF**

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### III. STATEMENT OF ISSUES

1. Whether the trial court properly granted Safeway's summary judgment motion where Safeway did not cause a spill on the floor?

2. Whether the trial court properly granted Safeway's summary judgment motion where Plaintiff's accident occurred approximately 30 seconds after Safeway received notice that a customer had spilled liquid on the floor?

3. Whether the trial court properly granted Safeway's summary judgment motion where within one minute of learning of the spill Safeway warned customers and employees twice about the spill over the intercom, called for a clean-up, and had an employee heading towards the spill with clean-up materials in hand?

4. Whether the trial court properly granted Safeway's summary judgment motion where there was no evidence that liquid soap on the floor in the area of the store where Plaintiff's accident occurred was continuous or foreseeably inherent in the nature of Safeway's business?

5. Whether the trial court properly granted Safeway's summary judgment motion where Safeway conducted periodic

inspections of the area where Plaintiff's accident occurred much more frequently than required by the foreseeability of risk?

#### IV. STATEMENT OF THE CASE

This is a personal injury action arising out of Plaintiff Helen Kathline Sullivan's slip and fall at a Safeway store in Everett on April 9, 2012. Plaintiff slipped on some liquid soap. Plaintiff's deposition at 16-19, CP 50-51. Safeway did not spill the soap. Declaration of Chloe Thompson at page 1, CP 29; Declaration of Gwynn Graika at page 2, CP 32; Deposition of Plaintiff at page 36, CP 56. It is undisputed another customer spilled the soap. Declaration of Chloe Thompson at page 1, CP 29; Declaration of Gwynn Graika at page 2, CP 32.

The evidence also showed Safeway responded promptly and appropriately to the spill. Safeway's security video showed the customer who spilled the soap reporting the spill to Safeway employee, Chloe Thompson. Declaration of Gwynn Graika at page 2, CP 32. Ms. Thompson went immediately to the store intercom to warn customers and employees about the location of the spill and to call for a clean-up of the spill. Declaration Gwynn Graika at pages 1-2, CP 31-32; Declaration of Chloe Thompson at page 1, CP 29. Five seconds after the customer finished telling Ms.

Thompson about the spill, Plaintiff can be seen on the security video walking towards the aisle where the spill occurred. Graika Declaration at page 2, CP 32 and Exhibit 1 to Graika Declaration. While Ms. Thompson was calling over the store intercom to warn about the spill that had occurred on Aisle 9, and to ask for a clean-up, Plaintiff was about to enter the aisle. Graika Declaration at page 2, CP 32. The security video then showed Plaintiff heading down the aisle where the spill occurred, less than 30 seconds after Ms. Thompson learned about the spill from the customer who spilled the soap. See Graika Declaration at page 2, CP 32 and Exhibit 1. The video then showed Cindy Ward, another Safeway employee, heading towards Aisle 9 with clean-up equipment to clean the spill. See Graika Declaration at page 2, CP 32 and Exhibit 1. Only one minute elapsed from the time that the customer told Ms. Thompson about the spill and the time that Ms. Ward headed towards the aisle to clean it up. See Graika Declaration at CP 31 and Exhibit 1. During that one minute, Safeway warned customers twice over the intercom about the spill and where it was located. Thompson deposition at 1-2, CP 29-30.

On February 21, 2014, the Snohomish County Superior Court granted Safeway's summary judgment motion. CP 5-6. Plaintiff then brought this appeal. CP 1-4.

V. ARGUMENT

A. Standard of Review.

An Appellate court reviewing a grant of summary judgment engages in the same inquiry as the trial court. *Little v. Countrywood Homes* 132 Wn. App. 777, 779, 133 P.3d 944 (2006). Summary judgment should be granted when, after viewing the pleadings, depositions, admissions and affidavits and all reasonable inferences that may be drawn there from in the light most favorable to the non-moving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. *Olympic Fish Products v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). When a motion for summary judgment is supported by evidentiary matter, the adverse party may not rest on mere allegations in the pleadings but must set forth specific admissible facts showing there is a genuine issue for trial. *LePlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975).

A defendant in a civil action is entitled to summary judgment when the defendant shows there is an absence of evidence supporting an element essential to plaintiff's claim. *Carlyle v. Safeway Stores, Inc.*, 78 Wn. App. 272 896 P.2d 750 (1995), review denied, 128 Wn.2d 1004 (1995); *Las v. Yellow Front Stores*, 66 Wn.App. 196, 831 P.2d 744 (1992). The defendant may support a motion for summary judgment by merely challenging the sufficiency of plaintiff's evidence as to any material issue. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 770 P.2d 182 (1989).

B. Safeway was entitled to judgment as a matter of law because Plaintiff failed to set forth any evidence that Safeway was negligent, or that Safeway's negligence proximately caused her accident or injuries.

In order to recover against Safeway, Plaintiff had the burden of proving, among other things, that Safeway either caused an unreasonable risk at the store or had actual or constructive notice of the unreasonable risk or unsafe condition and failed to use ordinary care to protect against the risk. *Ingersoll v. Debartolo, Inc.*, 123 Wn.2d 649, 869 P.2d 1014 (1994). *Carlyle v. Safeway Stores, Inc.*, *supra*. In the *Ingersoll* case, the Supreme Court reiterated this well-established principle as follows:

As to the law, we start with the basic and well-established principle that for a possessor of land to be liable to a business invitee for an unsafe condition of the land, the possessor must have actual or constructive notice of the unsafe condition. *Smith v. Manning's, Inc.*, 13 Wn.2d 573, 126 P.2d 44 (1942). Constructive notice arises where the condition "has existed for such time as would have afforded [the proprietor] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger." *Smith*, at 580. The plaintiff must establish that the defendant had, or should have had, knowledge of the dangerous condition in time to remedy the situation before the injury or to warn the plaintiff of the danger. *Brant v. Market Basket Stores, Inc.*, 72 Wn.2d 446, 451-52, 433 P.2d 863 (1967).

*Ingersoll v. Debartolo, Inc.*, *supra* at 652. In *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991), the Supreme Court similarly held:

If a customer had knocked over merchandise in the aisle and the next customer had immediately tripped over that merchandise, certainly the store owner should not be responsible without being placed on notice of the hazard.

*Wiltse v. Albertson's, Inc.*, *supra* at 461-62. The purpose of requiring a possessor of land to be on notice of a risk is to allow the possessor to have the opportunity, in exercising reasonable care, to then protect

against the danger. This purpose is evident from the elements that Plaintiff must prove in order to establish negligence:

The common law allows a property owner to be put on notice of an unsafe condition prior to attaching liability. He must be negligent. Restatement (Second) of Torts § 343 (1965) reads as follows:

Dangerous Conditions Known to or Discoverable by Possessor. A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect against the danger.

*Wiltse v. Albertson's, Inc., supra* at 457.

Applying this law to the facts in the case at bar, Plaintiff did not meet her burden of setting forth admissible evidence to prove that Safeway either caused an unsafe condition on the floor or had actual or constructive knowledge of an unsafe condition on the floor and failed to use ordinary care to protect against that danger. First,

it is undisputed Safeway did not cause the liquid soap to spill on the floor. A customer spilled the soap on the floor. See Declaration of Graika at page 2, CP 32; Declaration of Thompson at page 1, CP 29. Plaintiff confirmed in her deposition testimony that she had no evidence a Safeway employee caused the spill on the floor.

Plaintiff testified:

Q And you don't have any personal knowledge of how the soap got onto the floor?

A No.

Q You don't know whether a customer had just caused it to be on the floor?

A No.

Q You don't have any evidence that a Safeway employee caused it to be on the floor, do you?

A No.

Plaintiff deposition at 35-36, CP 55-56.

Second, Plaintiff did not prove that Safeway had actual or constructive knowledge of an unsafe condition on the floor and failed to use ordinary care to protect against that danger. Constructive notice arises where the condition has existed for such time as would have afforded the proprietor sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger. *Ingersoll v. DeBartolo, Inc., supra*. Plaintiff cannot establish constructive notice

in this case because she has no idea how long the soap had been on the floor. Plaintiff testified:

Q And you don't know how long the soap had been on the floor?

A No.

Q For all you know, it could have just gotten on the floor before you fell?

A Correct.

Dep. Helen Kathline Sullivan, 36:6-11. Consequently, Plaintiff cannot show the soap was on the floor for such time as would have afforded Safeway sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of Aisle 9 and to have removed the danger.<sup>1</sup>

Finally, there was no evidence that Safeway failed to exercise reasonable care to protect against the danger once it did have actual notice of the spill. In fact, Plaintiff does not argue that

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<sup>1</sup> Plaintiff argues that since the video does not show the spill occurring, it is unknown how much time elapsed from the time of the spill until the time the customer reported it to Safeway. Plaintiff's argument does not alter the appropriateness of the trial court's summary judgment order. Plaintiff has the burden of proof regarding constructive notice. It was Plaintiff's burden to show how long the spill had been on the floor, and that the length of time was sufficient, in the exercise of ordinary care, for Safeway to discover the spill and clean it up. Plaintiff failed to meet her burden of showing how long the spill was on the floor. Her argument that the spill was on the floor for up to half an hour or more is sheer speculation. Neither did Plaintiff meet her burden of proving that Safeway failed to inspect the aisle in question with the frequency required by the risk. In light of the long history of Aisle 9 being a safe aisle, free of foreign objects on the floor, there is no evidence that ordinary care would have required Safeway to inspect Aisle 9 more frequently than the 3-4 times per hour that it did inspect. See Supplemental Declaration of Gwynn Graika, CP 7-8.

Safeway failed to use ordinary care in responding to the spill. Plaintiff admits that Safeway responded promptly and appropriately. It was undisputed that when the customer who spilled the soap on the floor reported the spill to Chloe Thompson, Ms. Thompson immediately announced the spill over the store intercom to warn customers and employees, and called for a clean-up on the aisle where the spill had occurred. See Declaration of Graika, CP 31-32; Declaration of Thompson, CP 29-30. In fact, Ms. Thompson warned customers and employees twice over the store intercom. See Declaration of Thompson, CP 29-30. It is also undisputed that only one minute after Safeway learned of the spill, Cindy Ward, a Safeway employee, was headed towards the spill with clean-up materials. See Exhibit 1 attached to Declaration of Graika at CP 31-32. In short, the undisputed facts showed that within one minute of learning of the spill Safeway warned customers and employees twice about the spill over the intercom, called for a clean-up, and had an employee heading towards the spill with clean-up materials in hand. Under the circumstances, no reasonable person could conclude that Safeway failed to use ordinary care. Safeway was entitled to judgment as a law. See, e.g., *Wiltse, supra*; *Carlyle, supra*.

C. The *Pimentel* exception did not apply because Plaintiff failed to set forth evidence demonstrating that liquid soap on the floor in the area where her accident occurred was continuous or foreseeably inherent in the nature of Safeway's business.

Plaintiff claims she did not have to prove that Safeway had constructive notice of the unreasonable risk and failed to respond appropriately, based upon a limited exception expressed in *Pimentel v. Roundup Company*, 100 Wn.2d 39, 666 P.2d 888 (1983). The Court should reject Plaintiff's contention because *Pimentel* does not apply to the case at bar.

Since *Pimentel*, Washington courts have made it clear that *Pimentel* provides a very limited exception to the general rule that plaintiff must prove the storeowner had actual or constructive notice of a dangerous condition before liability will be imposed. Not all areas of a self service store fall within the *Pimentel* exception. Similarly, not all causes of an accident fall within the *Pimentel* exception. In *Wiltse v. Albertson's Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991), the Supreme Court refused to apply the *Pimentel* exception, and emphasized the very limited nature of the exception. The court held:

The Pimentel rule does not apply to all self-service operations, but only if the particular self-service operation of the defendant is such that it is reasonably foreseeable that unsafe conditions in the self-service area might be created.

*Wiltse v. Albertson's, Inc.*, *supra* at 456. Contrary to Plaintiff's argument, the *Pimentel* rule does not apply simply because one can imagine that a store's products might be spilled or dropped onto the floor. The *Wiltse* court further emphasized the need to determine what the specific unsafe condition was in order to determine whether that specific condition was continuous or foreseeably inherent in the nature of the business. The *Wiltse* court held:

Because *Pimentel* is a limited rule for self-service operations, not a per se rule, the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation. . . . If a customer had knocked over merchandise in the aisle and the next customer had immediately tripped over that merchandise, certainly the store owner should not be responsible without being placed on notice of the hazard.

(Emphasis added) *Wiltse v. Albertson's, Inc.*, *supra* at 461-62.

With respect to the specific unsafe condition, Washington courts have also pointed out that the actual cause and location of

the hazard are critical in determining whether the unreasonably dangerous condition was continuous or reasonably foreseeable.

The *Wiltse* court held:

Pimentel realized that certain departments of a store, such as the produce department, were areas where hazards were apparent and therefore the owner was placed on notice by the activity. Hence, the actual cause of the hazard is relevant in establishing whether the unreasonably dangerous condition was continuous or reasonably foreseeable because of the specific self-service operation. Because Pimentel is a limited rule for self-service operations, not a per se rule, the rule should be limited to specific unsafe conditions that are continuous or foreseeably inherent in the nature of the business or mode of operation.

*Wiltse v. Albertson's, Inc.*, *supra* at 461. Thus, in order for *Pimentel* to apply, Plaintiff had to demonstrate that liquid soap on the floor in the area where she fell at the Safeway store was continuous or foreseeably inherent in the nature of Safeway's business.

Similarly, in *Arment v. K-Mart Corp.*, 79 Wn.App. 694, 902 P.2d 1254 (1995), the court affirmed summary judgment in favor of defendant and emphasized the same narrow application of the *Pimentel* exception. The court held:

The fact that a business is a self-service operation is insufficient, standing alone, to bring a claim for negligence within the *Pimentel* exception. *Wiltse v. Albertson's, Inc.*, 116 Wn.2d 452, 805 P.2d 793 (1991). The *Pimentel* exception is a narrow one, limited to specific unsafe conditions in specific areas that are inherent in the nature of self-service operations. *Wiltse*, 116 Wn.2d at 461. In order to fall within the *Pimentel* exception, therefore, a plaintiff must show that the nature of the particular self-service operation is such that it creates reasonably foreseeable unsafe conditions in the self-service area of the business. *Wiltse*, 116 Wn.2d at 456. While certain departments of a store, such as a produce department, are "areas where hazards were apparent and therefore the owner [is] placed on notice by the activity," *Wiltse*, 116 Wn.2d at 461, it does not follow that specific unsafe conditions associated with a self-service business are reasonably foreseeable in all areas of the business. On the contrary, to invoke the *Pimentel* exception, a plaintiff must present some evidence that the unsafe condition in the particular location of the accident was reasonably foreseeable. *Carlyle v. Safeway Stores, Inc.*, 78 Wn.App. 272, 896 P.2d 750 (1995).

(Emphasis added) *Arment, supra* at 698.

In short, Washington courts have indicated the *Pimentel* exception is very limited. Where plaintiff can show evidence that a particular product gets on the floor in a particular area of the store

with such frequency that it can be fairly characterized as continuous, then it is fair and appropriate to apply the *Pimentel* exception and deem the store to be on notice that products of that nature will get onto the floor in that particular area. However, when plaintiff does not produce evidence of that frequency of problems with specific products in a particular area of the store, *Pimentel* does not apply and plaintiff must prove that the store had actual or constructive notice of the hazard and an opportunity to clean it up before liability will be imposed.

Plaintiff failed to demonstrate that liquid soap on the floor in the area of the store where her accident occurred was continuous or foreseeably inherent in the nature of Safeway's business. On the contrary, the evidence showed the area of Plaintiff's accident was an extremely safe part of the store. There was no evidence of any other slip and fall accidents in the area where Plaintiff's accident happened. Neither was there evidence of any other incident where liquid soap got on the floor in the area where Plaintiff's accident occurred. Ms. Graika testified she could not remember any other slip and fall accidents on Aisle 9 other than Plaintiff's, during her 8-year tenure as manager of the store. Supplemental Declaration of Graika, CP 7. Neither could

Ms. Graika remember any other instance of liquid soap or any other items spilling on Aisle 9 during her tenure as manager. Supplemental deposition of Graika, CP 7. With no evidence of any prior occasion where liquid soap got onto the floor in the area where Plaintiff's accident occurred, it cannot be said that liquid soap on the floor in that area was a problem that was continuous or foreseeably inherent in the nature of Safeway's business. Plaintiff's argument that *Pimentel* should apply in the case at bar where there was no evidence of liquid soap ever spilling on the floor in that area before would make *Pimentel* a per se rule rather than a limited rule for self-service operations, contrary to the express holdings of Washington courts. See, e.g., *Wiltse, supra* at 461-62; *Arment, supra* at 698.

In *Carlyle v. Safeway Store, Inc.*, 78 Wn.App. 272, 896 P.2d 750 (1995), the Court of Appeals also held the *Pimentel* exception was not applicable where the evidence on summary judgment showed employees found 1 dropped or spilled item in the store per 8-9 hour shift. *Carlyle, supra* at 278. The Court held:

These facts do not raise an issue that unsafe conditions are reasonably foreseeable in the area where Ms. Carlyle fell.

*Carlyle, supra* at 278. Similarly, the facts in the case at bar do not raise an issue that unsafe conditions were reasonably foreseeable in the area where Ms. Sullivan fell. *Pimentel* does not apply to the case at bar.

D. Safeway was entitled to Summary Judgment because Plaintiff did not meet her burden of proof under *Pimentel* in any event.

Even if the *Pimentel* case did apply to the case at bar, Plaintiff did not set forth evidence required by *Pimentel* in order to demonstrate liability against Safeway. In *Wiltse v. Albertson's, Inc., supra*, the Supreme Court held:

We emphasize that this exception [*Pimentel*] did not impose strict liability or even shift the burden to the defendant to disprove negligence. Rather, where the operation of a business is such that unreasonably dangerous conditions are continuous or reasonably foreseeable, it is unnecessary to prove the length of time that the dangerous condition had existed. The plaintiff can establish liability by showing that the operator of the premises had failed to conduct periodic inspections with the frequency required by the foreseeability of risk. *Pimentel*, 100 Wn.2d at 49.

(Emphasis added) *Wiltse v. Albertson's, Inc., supra* at 461. Plaintiff did not set forth evidence that Safeway failed to conduct periodic inspections with the frequency required by the foreseeability of risk. On the contrary, the evidence was undisputed that Safeway conducted periodic inspections much more frequently than required by the foreseeability of risk. The risk of liquid soap spilling onto the floor in the area where Plaintiff's accident occurred was extremely low, *i.e.*, no evidence of any prior problems. Supplemental Declaration of Graika, CP 7. The evidence also showed Safeway had inspected the area of Plaintiff's accident multiple times on the date of her accident before the accident occurred. See Supplemental Declaration of Graika, CP 8. Consequently, Plaintiff did not demonstrate the requirement of *Pimentel* that Safeway failed to conduct periodic inspections with the frequency required by the foreseeability of risk. As a matter of law, Safeway was entitled to judgment. *Wiltse v. Albertson's, Inc., supra; Arment v. K-Mart Corp., supra.*<sup>2</sup>

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<sup>2</sup> Plaintiff relies upon *Morton v. Lee*, 75 Wn.2d 393, 450 P.2d 957 (1969), which involved an apricot that had been on the ground at least 5 minutes before Plaintiff stepped on it. *Morton* is no longer good law with respect to these issues. In *Coleman v. Ernst Home Center, Inc.*, 70 Wn.App. 213, 853 P.2d 473 (1993), the Court of Appeals held:

However, we find that *Morton* governed the narrow exception to establishing

VI. CONCLUSION

There were no genuine issues of material fact with respect to Safeway's motion. It was undisputed Safeway did not cause the spill of liquid soap on the floor. Plaintiff did not demonstrate constructive notice because there was no proof regarding how long the soap was on the floor and no proof the soap was on the floor for such time as would have afforded Safeway sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the aisle and to have removed the soap. The *Pimentel* exception of proving notice does not apply in the case at bar. Finally, there is no evidence Safeway failed to exercise reasonable care, or any evidence that a failure to use ordinary care proximately caused

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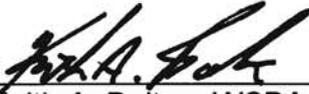
actual or constructive notice before our Supreme Court adopted the *Pimentel* exception. The issue of the adequacy of the housekeeping procedures in Morton was for the jury simply because there were apricots in a bin right at the store entrance, which foreseeably would be dropped right where the offending apricot was dropped. Thus, Morton was actually a foreseeability case. No one could seriously argue that the store had a duty to inspect the entryway in Morton every 4 ½ minutes, or even every 5 minutes. *Pimentel* was the end result of the Morton-type situation, and *Pimentel* now governs self-service departments like the one in Morton. Morton has little additional utility today and is inapposite to the notice issues in this case.

*Coleman v. Ernst Home Center, Inc.*, *supra* at 222.

Plaintiff's accident. Safeway respectfully requests the Court affirm the trial court's summary judgment order.

Respectfully submitted this 6<sup>th</sup> day of August, 2014.

BOLTON & CAREY

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COURT OF APPEALS  
STATE OF WASHINGTON  
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COURT OF APPEALS, DIVISION I,  
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HELEN KATHLINE SULLIVAN,

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v.

SAFEWAY, INC.,

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**DECLARATION OF SERVICE**

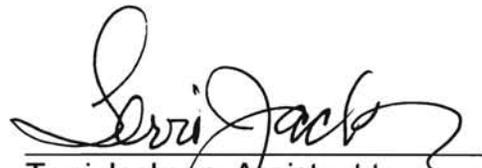
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The undersigned, Terri L. Jackson, hereby certifies that on August 6, 2014, she served by way of email, and on August 7, 2014, by way of ABC Legal Messengers she caused to be filed with the State of Washington, Court of Appeals, Division I, and served upon attorney for Appellant, the *Respondent's Brief*, together with this *Declaration of Service*, addressed as follows:

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DATED this 6<sup>th</sup> day of August, 2014, at Seattle,  
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