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COURT OF APPEALS DIV. #1
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No. 37865-5-II

**DIVISION II OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

**YAKIMA POLICE PATROLMEN'S)
ASSOCIATION,)
)
Appellant,)
)
v.)
)
CITY OF YAKIMA,)
)
Respondent.)**

FILED
COURT OF APPEALS
STATE OF WASHINGTON
APR 23 2009
BY [Signature]

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Commission Decision is riddled with errors. The City's attempt to prop up the Decision with its excuses for the Commission's mistakes fails.

The Decision cannot be sustained, as the City would ask, by asserting to "apparent" findings that were *never* actually made. The Commission made "leaps in logic" at the heart of the case. The City criticizes the Association for the selective use of fact; yet it is the City, with all due respect, which is distorting the record, a tactic which, unfortunately, allowed its appeal to succeed before an inattentive Commission.

Unlike the Hearing Examiner, who grasped the distinctions between the two pending unfair labor practice cases, the Commission erroneously conflated the two matters. Its lack of attention to the record that the Examiner had developed caused it to leap to conclusions that cannot be sustained by a rigorous, logical review of the record.

The Commission overlooked and never properly applied the substantial factor test required by its own case law and the case law of this State's courts. The Commission never addressed a squarely presented "interference" charge on the merits. The Commission never made clear credibility findings and never gave due regard to the

Examiner's findings. Either singly or in combination, these errors require reversal.

II. LEGAL ARGUMENT

A. **Intervening Events Affect Potential Remedies but do Not Render this Case Moot.**

Since the parties filed their opening briefs to this Court, tragic events have intervened in a way that might ultimately affect the remedies that the Association could pursue but does not render the case moot. Tragically, weeks ago Mike Rummel succumbed to his on-going fight with depression and took his own life.¹

The Association's request for an extension of time for this reply brief was partially motivated by the need of time for the Association to assess what to do with this pending appeal. The Association decided not to file a Petition for Review on the related Division III case² concerning the arbitration reinstatement order because of the futility of the reinstatement sought in the arbitration process. It has, however, decided to pursue this matter.

There are some differences between the two cases that explain this different approach and also explains why this case is not moot. The

¹ See <http://www.yakima-herald.com/stories/2009/02/01/troubled-former-officer-commits-suicide>.

² *Yakima v. Yakima Police Patrolman's Association*, 148 Wn.App. 186, 199 P.2d 484 (2009).

available reinstatement remedy the Association sought is obviously futile but the Association has determined the labor discrimination issues involving the Police Chief are too important to ignore. The Association's claims that the Chief unlawfully discriminated and interfered with the union continue to remain viable. Furthermore, the Chief's continued potential for participation in acts of serious workplace discrimination lead the Association to conclude that this matter definitely should not be treated as moot, despite the tragic end of Mike Rummel's life.

B. This Court Owes PERC No Special Deference on Matters of General Law or Administrative Law which are at the Heart of this Case.

The City argues that this Court owes PERC some type of deference to its labor law "expertise."³ This argument overlooks two central points.

First, the issues at the heart of this case involve the interpretation and application of issues of *general and administrative law* — whether the Commissioner properly applied the "substantial factor" discrimination standard adopted by this State's Courts and whether the Commission complied with the Administrative Procedures Act (APA). There is nothing in PERC's previous adoption of application of the substantial factor tests that should lead this court to believe that it is any

more difficult or complex to apply here than any other type of statutory discrimination claim. Even more clear is that whatever supposed expertise PERC has, it has no special expertise in the APA that would supplant the review role of the courts.

Courts have previously rejected the claim that simply because PERC has jurisdiction over labor law matters, it has some special immunity from court review on questions of law.⁴ The second problem with the City's argument is that the Commission exhibited little expertise to which to defer. Any issue that might involve some expertise in defining the law — whether there was unlawful “interference” — was not addressed on the merits by the Commission. As to the discrimination charge, PERC made the more elemental of errors and *never* demonstrated an understanding that application of the test would require it to make clear and specific findings as to the Police Chief's statements and state of mind.

The City's perfunctory effort⁵ to distinguish this Court's decision in *PERC v. City of Vancouver* fails. The City's argument that in that case PERC was overturned because it had failed to consider “the totality of the circumstances” ignores the fact that *this is precisely the error made by*

³ City Brief at 19.

⁴ See *Graham v. Northshore School District*, 99 Wn. 2d 232, 662 P.2d 38 (1983).

the Commission here. As addressed in the Association's opening brief and addressed again below, the errors caused here largely stem from the Commission's failure to grasp the entirety of the record that the Examiner had mastered and its leap to unsupportable conclusions based upon a misapprehended set of "facts."

Nothing in PERC's jurisdiction or demonstrated expertise in this case warrants restricting this Court's review authority. The City cannot prevail on this case simply by asserting that special and complex labor law issues lurk below the surface. A blanket claim of administrative "expertise" cannot immunize an administrative action from effective review. The Commission's errors involve fundamental issues of due process squarely within this Court's authority to remedy.

C. The City Cannot Rescue PERC from its Failure to Address all Necessary Issues by Suggesting there are "Apparent" Findings which were Never Expressly Made.

Rather than conceding error that the Commission failed to make express finding on necessary issues, the City attempts to prop up the decision by claim that "apparent" findings were made.⁶ Critical to this case is the question: "What did the Chief say and what was he thinking when he said it?" The Commission addressed neither. As close as it

⁵ See City Brief at 38, n. 17.

⁶ See City Brief at 29.

came, it explained that the Chief made statements of “frustration.” Without finding what those statements were or how they affected his attitude toward the Association and its members, it is simply *not possible* to conclude whether or not his discharge action was motivated by anti-union animus. The Examiner’s decision was premised on a conclusion that the Chief had directly linked the Chief’s refusal to retain Rummel with the previous unfair labor practice complaint. This is much more than a mere statement of “frustration” — it would be a statement of intent to retaliate.

It is even more of a reach for the City to argue here, as it does, that the Commission “apparently” found its witness credible. The Commission *never* indicated anything of the sort. For all this record shows, it may well be that the Commission believed they were profusely lying yet excused it as a recognition of their general right to be “frustrated.” Only leaps in logic can take the City where it wants to go.

What the City overlooks is the issue squarely argued by the Association in its opening Brief — *that the APA requires specific findings as to witness credibility and also requires the Commission to provide due regard to the Examiner.*⁷ Here the Commission has done

⁷ See Association’s Opening Brief at 34-35.

neither. Filling gaps in the record with “apparent” findings does nothing to bring this record into APA compliance.

The City argues, and the Superior Court agreed, that the absence of a finding indicates that the party with the burden of proof simply failed to meet that burden. Yet the APA does not allow administrative agencies to engage in a cavalier dismissal of claims, especially after specific findings have been made by the hearing officer who had first hand observation of the witnesses.

Further, there is absolutely no basis from this record, even if one were permitted to exercise some leaps in logic, to believe the City witnesses were credible. The Chief’s testimony borders on the incoherent and seems, even in the light most favorable to the City, to only allow a conclusion that at least, at some point, the Chief brought up the earlier Unfair Labor Practice Complaint in a quid pro quo context reference Mike Rummel’s tenure. However one views his convoluted excuse-making, “credible” would not be it. Nor would such a quid pro quo negotiation be lawful.

And an even larger leap involves the City’s claim that the Commission found the Seeley testimony credible. The City has always had one major hurdle with Seeley’s testimony — in order to find that he told the truth at the hearing, *one would have to conclude (by his own*

admission) that he had lied multiple times before. Given the obvious evasiveness he exhibited at the hearing — which included his discussion of his career aspirations and desire not to be giving any sworn testimony — the best conclusion one might reach on this record is that Examiner and Commissioner extended him some type of courtesy by withholding a label on his frankly embarrassing testimony. As any experienced trial lawyer knows, it is awfully hard to stake a defense on a claim that we are to believe the witness who says that he is telling the truth about being a liar when he told his story the first time. If the City really believes its case hinges on a finding of Seeley's credibility, it is in deep trouble, not to mention that a remand would still be needed.

Recognizing that the “apparent” findings made by the Commission might not hold up, it alternative argues that the absence of a finding indicates that the party with the burden of proof simply failed to meet that burden. Yet the APA does not allow administrative agencies to engage in a cavalier dismissal of claims, especially after specific findings have been made by the hearing officer who had first hand observation of the witnesses. Clearly *some* statements were made in the May 19 meeting. Without a specific elaboration on the Commission's statement that the Chief uttered statements of “frustration,” it is not possible to conclude whether there is any logical nexus between the Commission's apparent

and ill-defined findings of fact and its ultimate conclusions of law. Given that all the City can put forward now is some type of guess, this alone demonstrates that the Commission's decision should be reversed.

D. The Commission's Inattention to Detail and Leaps in Logic Lead it to Unsupportable Conclusions.

A careful examination of the decisions by the Examiner and the Commission together with a consideration of the applicable law reveals that the Commission's analysis unravels upon any kind of reasoned scrutiny. With all due respect to the Commission, it appears that they engaged in a too cursory review of the record and, in their haste, conflated two different situations into one. The Examiner, on the other hand, had carefully tracked the evidence as it was presented and was not fooled by the City's claim that it was appropriate to bring up the earlier ULP in the context of Rummel's tenure.

A fair examination of the record shows how the Examiner got it right. In August 2004, the Chief had a situation involving Officer Brian Dahl. He addressed it by directing that Dahl submit to random testing. The parties' labor agreement did not permit random testing. The collective bargaining statute requires that parties negotiate all wages, hours and

working conditions before they are changed.⁸ Under applicable PERC law,⁹ had the Association not objected to this imposition of random testing, it would have become a new “condition of employment” in the workplace and would have permitted the Chief to have imposed random testing on *any* of its members with or without a compelling basis.

After this change, the Association continued to offer to discuss random testing with the Chief issues as well as issues it also had with the pre-existing policy. But the Chief kept stalling on requests to meet. That led to the Association filing its ULP in February 2005. Immediately after that Complaint was filed, the Association had a discussion with the Chief and stated a continued desire to work this issue out.¹⁰ The Chief, in his own mind, took this as some promise that the Association would simply drop the ULP without a proper resolution of the issues. The Association denied that it would *ever* unconditionally drop the complaint and, given the labor law context in which the issue arose, the Chief’s beliefs to the contrary simply reflect his capacity to hear what he wants to hear.

This discussion did not involve or concern the Rummel situation.

In close temporal proximity but in *separate discussions*, the Association

⁸ See RCW 41.56.140(4); *Pasco Police Officers Association v. City of Pasco*, 132 Wn.2nd 450, 938 P. 827 (1997).

⁹ See, e.g., *City of Burlington*, Decision 5840 (PECB, 1977).

¹⁰ Transcript at 67.

and the City had resolved issues surrounding Rummel.¹¹ Rummel had renewed alcohol abuse issues and the City was understandably concerned about returning him to duty without appropriate alcohol monitoring. The Association agreed that under *the specific situation in his case*, random testing designed to promote and guarantee his sobriety was appropriate.¹² The Association offered return to work conditions, as they had done in the past, which required Rummel to submit to random testing with the key proviso that this be nonprecedental.¹³ Through these informal discussions, *the parties arrived at an agreement which permitted Rummel to return to work.*¹⁴

Resolution of the earlier ULP as a precondition to Rummel's return was *utterly unnecessary given the parties agreement*. The Association's objection to the Dahl situation was that the Chief had without negotiations unilaterally imposed random testing without any condition that it be nonprecedental. As such, the Association had very valid concerns that the order to Brian Dahl created a new and unacceptable working condition.

¹¹ Transcript at 35-41; Exhibit 4.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

The Chief, though, very persistently *wanted* this to be an established working condition *for all officers*. His frustration that he was not having his way on this issue is what led to his angry outburst in May.

The Examiner understood all this. He understood that there was no immediate impediment in the Association's pending ULP complaint to the reinstatement of Rummel and that the Chief was simply retaliating because he had not gotten something he dearly wanted from the union. As the Examiner found, the City too had previously accepted (apparently when the Chief mistakenly thought that the union would unconditionally drop the earlier ULP) *that there was no need to tie the two issues together*:

The employer offered to reinstate Rummel on March 17, 2005 subject to alcohol testing. The employer inquired repeatedly about the union's proposal to allow Rummel to return to work. The union acquiesced on April 4, 2005, to such a proposal, but did not agree to a department-wide drug testing program or to withdraw the first unfair labor practice complaint.¹⁵

From this premise, the Examiner quite appropriately concluded that the City always understood that minor workplace violations were not grounds for invoking the "last chance agreement."¹⁶ Furthermore, the Examiner clearly grasped the *separate* nature of the two matters:

The Examiner cannot construe Granato's comments merely as an expression of frustration over the lack of a means to

¹⁵ Decision 9451-A at 9.

¹⁶ *Id.*

reinstate Rummel, *because the union had proposed to submit Rummel to random alcohol testing, which would have foreclosed a second unfair labor practice complaint.* In cross-examination, Granato indicated he was disappointed that the union had not fulfill (sic) its promise to withdraw the first complaint. In that context, Granato's May 27 comments conveyed his frustration over the lack of a wider drug testing program.¹⁷

Based on this evidence, the Examiner found it necessary to conclude that the Association's refusal to abandon the earlier ULP "substantially motivated" the Chiefs decision to discharge Rummel.

The Commission came to an opposite conclusion but based on a misunderstanding of the record the Examiner had developed. The Commission erroneously stated that the parties had "disagreed" as about the procedure to apply to Rummel.¹⁸ *Nothing could be further from the truth.* The parties had quickly agreed to the concept of random testing in Rummel's situation and the only delay in the formal agreement was the drafting of the appropriate legal language to identify the nonprecedental nature of the agreement. Rummel's immediate return to work was simply held up by this necessary drafting work and an intervening hand injury.

The Commission discounted the Chief's statement of "frustration" about the failure to drop the earlier ULP but offered no explanation as to why it *ever* would have been appropriate to bring that issue up in the

¹⁷ *Id.* at 12-13. (Emphasis supplied.)

context of Rummel's retention given that the parties had *already agreed* to separate those two issues. The Commission's failure to grasp the totality of the record, led it to fail to comprehend that the only reason the Chief brought up the ULP was, as the union officers had testified, to directly respond to what most irked him — *the union's refusal to drop it challenged his much cherished random testing program*. The Commission's apparent misapprehension of the fact that there was no remaining connection between the two issues led it to reach a logically insupportable conclusion.

E. An Employer is not Excused from its Discriminatory Actions by Asserting Some Employee Misconduct.

The City argues: "Washington labor law precedent makes clear that it is not an unfair labor law practice to take disciplinary action or discharge an employee where that employee has engaged in misconduct."¹⁹ The City's argument distorts that case precedent and entirely misses the point. The City's argument also rests on a distortion of the Association's argument.

The Association does not claim that an employee who commits misconduct has some type of "get out of jail free card" entitling him or her to assert after the fact that because there was some evidence of

¹⁸ Decision 9451-B at 6.

employer discriminatory thinking, they are immunized from discipline. But the City also needs to recognize that, likewise, an employer does not have a “get out of jail free card” immunizing *it* from discriminatory action simply by asserting after the fact that there was some *employee* misconduct. Neither of these claims would find support in the law.

On this issue there are these two extremes and the law lies in the middle. One view, that the City offers up as a *caricature* of the Association argument is that an employee can commit serious misconduct and then go find some evidence that the employer had ill-intent and invoke that evidence to set aside the discipline *even when the state of mind had nothing to do with the discharge*. The other extreme, which the City does seem to be advocating here, is that if it can point to some misconduct no matter how minor, that misconduct excuses the fact that the discharge was motivated in substantial part by the unlawful animus. The courts of this state have rejected these views in favor of a reasoned approach between those two extremes.

As indicated in the Association’s opening brief,²⁰ the Supreme Court adopted the “substantial factor” test in the face of competing arguments for the “any degree” standard and the “but for” standard. It

¹⁹ City Brief at 23.

²⁰ See Association’s Brief at 27-28.

concluded that the public policy of the state did not allow an employer to immunize itself by asserting that while it might have discriminated, it could get away with it by saying that it would have taken the same action anyway. The “but for” test not only failed to square with public policy, it also created difficult burden of proof issues for plaintiffs who had demonstrably been the subject of some discrimination. It was rightly and clearly rejected by the Supreme Court.

Likewise the Supreme Court rejected the “any factor” test. The court indicated that the factor had to have played a role in the decision. The bottom line is that where there is, as here, a mixed motive, an employer *cannot trump its responsibilities to avoid discrimination by finger pointing at the employee.*

The accusations against Rummel, especially as to the second charge, involved a *minor* issue supported by *weak* evidence. The City distorts the record in its reach to excuse the Commission’s errors especially when it cites the last chance agreement and Captain Copeland’s supposed “independent” opinion. The entire point the Association made as to the last chance agreement — which the Examiner squarely adopted — was that it was never intended to be used for minor infractions. The Examiner reasonably found that the City’s utter lack of any assertion to the contrary when the first infraction arose corroborated

the Association's claim. The City's simplistic argument that the second infraction arose after the first²¹ states the obvious but distorts what the issue was all about. The Chief's invocation of the last chance agreement was *pure* pretext and the Examiner so found.

Instead of acknowledging that the Commissioner erred with the labeled Captain Copeland's recommendation as "independent" the City seeks to redefine the term "independent." The City does not and cannot deny that the Chief advised Copeland of his view *before* Copeland offered his own. The City now would have us believe Copeland's view was "independent" because Copeland did not disagree with the Chief.²² The Association never disputed in the acrimonious climate created by Granato that Copeland did not dare disagree with what the Chief said he wanted. But in that context, Copeland's recommendation is hardly "independent" and the Commission erred by assuming to the contrary.

F. The Police Chief's Anti-union Animus is not Peripheral to this Union Discrimination Case.

The City claims that the abundant evidence the Chief was locked in a major ongoing battle with Association was "objectionable" evidence²³ and that all this was peripheral to the issue involving Officer Mike Rummel. This argument simply seems to be an extension of the

²¹ City Brief at 34.

City's earlier argument that all that matters is whether some employee's misconduct occurred and that anti-union animus — no matter how prevalent — then becomes irrelevant.

The Chief's attitude to the Association is *not* peripheral given the allegations. The evidence is that he was locked in major war with the Association and exhibited heightened emotions over the dispute. The Examiner so found, noting that the issues boiled over into a local media controversy on random drug testing.²⁴ Given the facts, the Examiner could not conclude that Granato was cool and detached about the labor disputes.

The Chief's emotions are at the center of this case. The City's efforts to paint his animosity toward the union as peripheral is misplaced and belies the fact that *the central issue is whether the Chief retaliated as an exercise of his emotions.* Necessarily this case involves his state of mind. The City's efforts to ignore state of mind evidence must be rejected. The Commission's failure to make complete findings in a discrimination case on state of mind evidence requires reversal.

²² City Brief at 21.

²³ City Brief at 27.

²⁴ Decision 9451-A. The Examiner also cited Granato's hostility to union Grievances. Id. at 7-8.

G. The City's Claim that PERC can Ignore the Squarely Pled Interference Charge is Baseless.

The City cannot and does not deny that the Association presented a charge concerning interference. The City cannot and does not deny that the Commission failed to address those charges. The Commission's refusal to address the issue does not constitute addressing it. In defense of this oversight the City brings a three-prong attack, all misplaced.

First, the City argues the Commission never made any findings concerning the Chief's threats at the May 27 meeting. *But that is precisely the point of the Association's argument.* It is the lack of findings as to what the Chief said that is fatal to the Commission's decision. The Commission did find that the Chief made statements of "frustration" and there is little reason to believe that this did not encompass threats. Yet the Commission leaves us all in the lurch to wonder *what* it was thinking.

Second, the City claims that the Commission is entitled to overlook the Interference charge because it dismissed the Discrimination charge. No amount of argument about PERC's supposed "expertise" will ever prop up this argument. Interference and Discrimination are *separate* prongs of the Collective Bargaining Statute and were *both* pled by the

Association. *They are alternative claims.* Under the APA, the Association has a right to have *both* issues decided.

The best way to grasp the role of an “interference” charge in a labor retaliation complaint, would be to analogize the charge to a “lesser included” charge in a criminal case. Here, where the Examiner found the discrimination complaint valid, he had no reason to reach the alternative “lesser” interference charge; it becomes subsumed into the discrimination finding in what PERC labels a “derivative” interference finding. As a result, there was contrary to the City’s claim, simply no reason for the Association to “appeal” the Examiner’s failure to address the separate issues as his finding on the “greater” charge obviated the need for a finding on the “lesser” charge.

But why PERC failed to revisit the interference issue in light of its dismissal of the discrimination issue is, at best, puzzling. The only cases cited by either the Commission or the City on this issue, shed no light on its failure to act. All the cited cases involve situations where the fact-finding precluded a conclusion that either violation had occurred. Here, on the other hand, it seems uncontested that the Chief made some (albeit not well specified) statements of “frustration” that would seemingly meet

the test of interference. Even the Superior Court found that the interjection of the earlier ULP was “unfortunate.”²⁵

The City cites to the Commission’s footnote in which it indicates that since it did not find discrimination, it can ignore the interference charge. The Commission has no such discretion and is disregarding its own case law. Discrimination and interference have separate elements. Frequently PERC has found proof of discrimination lacking yet has sustained lesser allegations of interference. PERC’s conclusions to the contrary are puzzling at best and arbitrary at worst in the sense its conclusion is directly at odds with its own case precedent.²⁶ True, PERC has dismissed the dual charges *where a common necessary factual element was found unproven.*²⁷ But to categorically apply the dismissal of one charge to the dismissal of others would involve an utter absence of logic.

Third, the City claims the Associations did not properly present this issue to the Commission on appeal. This is flatly incorrect. The Examiner had found a “derivative” interference violation as PERC routinely does where a discrimination charge is sustained. In that

²⁵ CP 110, §4.

²⁶ *City of Omak*, Decision 5579-B (PECB, 1998); *City of Mill Creek*, Decision 5699 (PECB 1996).

context, there was nothing to “appeal” because he had found for the Association on its interference charge. It become an issue only later when no discrimination was found by the Commission. At that point it was incumbent on the Commission to then turn its attention to the alternative interference accusation.

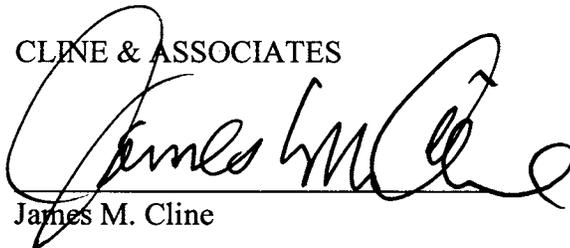
A dismissive and conclusory footnote does not comply with the APA. The Commission note expressly refused to consider the merits of the Association’s claim: “Therefore, we need not address whether any of the facts alleged constitute interference.”²⁸ The Commission erred by not addressing the interference charge on the merits.

III. CONCLUSION

For the foregoing reasons, the Commission’s Decision should be reversed.

RESPECTFULLY SUBMITTED this ^{23rd} ~~17th~~ day of ^{April} ~~March~~ 2009,
at Seattle, Washington.

CLINE & ASSOCIATES



James M. Cline

²⁷ See, e.g., *City of Seattle*, Decision 9439-A (2006) (both interference and discrimination charges dismissed when complainant could not prove she was engaged in protected activity).

²⁸ Commission Decision at footnote 2.

DECLARATION OF SERVICE

I, Debora G. Pettersen, Legal Assistant at Cline & Associates,
declare under penalty of perjury of the laws of the State of Washington
that the following is true and correct:

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On April 23, 2009, I caused to be filed with the Clerk of Court
and served the foregoing Appellant's Reply Brief in the foregoing
referenced matter in the following manner to the entities below listed.

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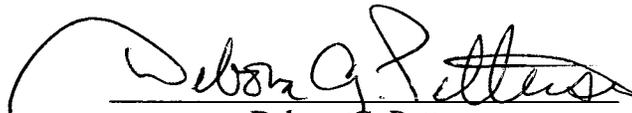
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SIGNED AND DATED this 23rd day of April, 2009 at Seattle,
Washington.


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