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A. ASSIGNMENTS OF ERROR

Assignments of Error

Joinder: Nguyen joins in and incorporates by reference all assignments of error and legal issues identified in co-petitioners' brief. The only additional errors and issues argued separately by Nguyen are as follows:

Error 1: The trial court erred in denying Nguyen's motion for directed verdict at the close of plaintiffs' case because the plaintiffs failed to prove Nguyen's liability as a matter of law.

Error 2: The trial court erred in refusing to instruct the jury on the qualified community interest privilege as requested.

Error 3: The trial court erred in denying defendants' motions for directed verdict or for new trial as the damage awards were clearly due to passion and prejudice, were grossly excessive and shock the conscience.

Issues Pertaining to Assignments of Error

Joinder: Nguyen joins in and incorporates by reference all assignments of error and legal issues identified in co-petitioners' brief.

The only additional errors and issues argued separately by Nguyen are as follows:

Issue 1: Whether the plaintiffs failed to prove Nguyen's actual malice by clear and convincing evidence as required in a public figure defamation case?

Issue 2: Whether the trial court erred in refusing to instruct the jury on the community interest privilege when the statements at issue were published in Vietnamese by the Committee Against the Communist Vietnamese Flag (CAVCF) and intended to warn and inform Vietnamese refugees who share a common interest in the public display of Communist flags, symbols and propaganda in their community?

Issue 3: Whether the trial court erred in denying defendants' motions for directed verdict or for new trial because the jury's damage awards had no support in the evidence and were so grossly excessive as to shock the conscience?

B. STATEMENT OF THE CASE

This appeal arises from claims of defamation involving members of the local Vietnamese refugee community. Plaintiffs Duc Tan ("Tan") and the Vietnamese Community of Thurston County ("VCTC") brought suit against defendants Nguyen and the co-appellants for their role in the publication of an article written in Vietnamese and posted on the internet by the Committee Against Vietnam Communist Flag (CAVCF). Prior to

trial, the court ruled that the plaintiffs were public figures as a matter of law. CP 31:17.

After trial in Thurston County, the jury returned verdicts in favor of plaintiffs and against all of the defendants in the amount of \$210,000.00, as well as an additional \$100,000.00 awarded severally against defendant Normal Le. CP 146 – 155. Mr. Nguyen hereby joins and incorporates by reference the statement of the case presented in co-appellants' brief filed on February 11, 2010. The present brief will focus on those additional facts and legal arguments specific to Mr. Nguyen.¹

1. **Nguyen's Background.**

Defendant Phiet Nguyen was born in North Vietnam in 1944. RP VII, 1277. He fled south after the Communists took over the north in 1954. RP VII, 1279-1280. Mr. Nguyen served as an assistant commander for a South Vietnamese infantry division in 1968 and 1969. RP VII, 1281. He was specially trained as a translator at Lackland Air Force Base in the U.S. in 1971. RP VII, 1282. Mr. Nguyen returned to Vietnam and taught English to air cadets in Saigon from 1971 to 1973. RP VII, 1283. He also served as chief of a Vietnamese village near Saigon with a population of

¹ Although Phiet X. Nguyen and his wife Vinh T. Nguyen were both named as defendants, judgment was not entered against Mrs. Nguyen. Therefore, all references within this brief apply only to Mr. Nguyen.

69,000 from 1973 until the fall of Saigon on April 30, 1975. RP VII, 1284.

After the fall of Saigon, Mr. Nguyen was captured and imprisoned in a Communist labor or “reeducation” camp for six years. RP VII, 1286. Dr. Norman Le was imprisoned in a similar camp for almost ten years. RP VII, 1376. The conditions in these camps were brutal. The prisoners were kept on starvation diets. RP VII, 1286. At Mr. Nguyen’s camp, the prisoners’ duties included clearing minefields with hoes and shovels.. RP VII, 1288.

After Mr. Nguyen was released from prison, he lived under the watchful eye of the local police and had to report regularly. RP VII, 1290-1291. He was required to do menial labor, RP VII, 1290; and he was not permitted to travel without permission. RP VII, 1290-1291.

Mr. Nguyen finally escaped from Vietnam in 1983. RP VII, 1291-1293. He first worked as a translator for a United Nations commission in 1983. RP VII, 1292. He assisted in processing immigration papers for Vietnamese refugees seeking to relocate to the U.S. RP VII, 1292-1293. Mr. Nguyen was trained to detect and note any person with ties to the Communist party. RP VII, 1293.

Mr. Nguyen moved to the state of Washington in 1984. RP VII, 1295-1296. He became a U.S. citizen in 1988. RP VII, 1297. He has

worked as a senior computer analyst for the state of Washington for more than twenty years. RP VII, 1276.

2. Nguyen's Opposition to Communism.

Mr. Nguyen believes in freedom and democracy. He is against communism. Based on his knowledge, training and experience, Mr. Nguyen believes that communism is an amoral, unjust system that destroyed his country. Mr. Nguyen had to flee communism twice; first when Ho Chi Minh and the Communists took over the north in 1957 and again after they took over the south after the fall of Saigon in 1975.

Mr. Nguyen belongs to an organization that opposes the public display of Communist flags or symbols in his community, the Committee Against the Vietnamese Communist Flag ("CAVCF"). RP VII, 1300. This political view is neither irrational nor unusual given Mr. Nguyen's background, training and experience. The plaintiffs' own expert, Dr. Miriam Bevi Lam explained that many Vietnamese refugees who see Communist flags or symbols experience deep pain and anguish. RP III, 509. She equated planting a Communist flag in a Vietnamese refugee community to planting a Nazi swastika in "an American Jewish community," or posting a photo of Osama Bin Laden to celebrate 9/11, or to destroying the Statue of Liberty. RP III, 509-510, 539.

3. The Lakefair Apron.

Since 1995, some of the defendants, the plaintiffs and other members of the Vietnamese refugee community in Thurston County have clashed over various political issues. These issues include: appropriate name changes for community organizations, RP IV, 634, 636, RP VII, 1392-1393, RP VII 1210, RP VIII 1385; whether to accept money from Communist sources, RP IV, 663, RP VII 1398; objections to the playing of the Communist Vietnamese national anthem, RP III, 412-414; and the best way to object to the display of the flag of Communist Vietnam.

As noted, Defendants are members of Committee Against the Vietnamese Communist Flag (“CAVCF”). RP VII, 1300-1301. Mr. Nguyen and his co-appellants who oppose the public display of Communist flags and symbols were shocked to learn that a Communist flag disguised as a “Santa apron” was worn by a cook at the VCTC food booth at Lakefair in Olympia, Washington in 2003. The apron was discovered by the VCTC’s own employee, Dai Pham, in July, 2003. RP II 362-365, 374-375. Pham reported the apron as suspicious as soon as he found it. He thought the apron had been placed there by bad people. RP II, 364-365. Pham based his conclusion on exposure to Communist symbols during his fifteen years of service in the south Vietnamese Air

Force. RP II, 364-365. Plaintiff Tan nonetheless told Pham that the figure on the apron was just a design and not to worry about it. RP II, 374-375. Many witnesses later testified that they believed the apron was disguised as a symbol of the Communist flag. RP VI, 1085; RP VII, 1309; RP VII, 1379-1380. They were dismayed that Communist symbols were so brazenly displayed at a VCTC food booth at Lakefair, the biggest annual community event in the county, especially when the VCTC was an organization that presumed to speak for the Vietnamese community. RP V, 941.

4. The Public Notice.

As soon as Mr. Nguyen saw the apron, he feared communism was following him to Thurston County. RP VII, 1309. Mr. Nguyen felt that if the Communist symbol was not challenged, it would simply proliferate within the community. RP VII, 1309. He and others felt it was their right and duty to warn and inform the refugee community of the presence of the Hanoi Communist regime in Thurston County. RP VII, 1309-1310, RP VIII, 1454. The plaintiffs declined to meet with the CAVCF to explain their position and failed to attend a related press conference. RP VII, 1319. The CAVCF therefore published its interpretation of the Lakefair apron and related political events in a Public Notice, admitted as exhibit #8.

The plaintiffs' main complaint with the Public Notice is the accusation that plaintiffs "intentionally displayed the Communist flag." RP V, 990. There is no dispute, however, that Plaintiff Tan was the principal of a school that used facilities displaying the Communist flag, RP V, 819, 836, 838, or that the Lakefair apron was found at his food booth.

C. SUMMARY OF ARGUMENTS

1) Nguyen Joins in Co-Appellants' Arguments.

Nguyen *joins* in all of the legal arguments presented on behalf of the co-appellants, Norman Le, Dat Ho, Tanh Nhan Tranh and Nga Pham. This includes all arguments based on state or federal constitutional law and the trial court's erroneous evidentiary rulings including but not limited to the outrageous admission of a phony death threat "to prove damages," the admission of an unauthenticated hearsay webpage to prove the provenance of the Lakefair apron, and the exclusion of expert testimony from a trained U.S. Special Forces operative because he was white.

2) Plaintiffs Never Proved Nguyen's Malice as Required in Public Figure Defamation Case.

The court ruled before trial that the Plaintiffs were public figures. As argued in the brief of co-appellants, this means that the plaintiffs had to

prove by clear and convincing evidence that the allegedly defamatory statements were made by Nguyen with “actual malice”.

Nguyen’s subjective interpretation of political events and symbols was never rationally assailed or impeached during the trial. Plaintiffs never proved by clear and convincing evidence that Nguyen *did not* truly believe what the CAVCF said in its Public Notice, or that he made the statements recklessly. Consequently, Nguyen was immune from defamation liability as a matter of law and the trial court’s refusal to grant his motion for a directed verdict at the close of plaintiffs’ case was a manifest abuses of discretion.

3) **The Court Erred by Refusing to Instruct the Jury on the Community Interest Privilege.**

The trial court’s refusal to instruct the jury on the “community interest” privilege was a manifest abuse of discretion and a clear error of law. The statements at issue were published in Vietnamese by the Committee Against Display of Communist Flag (CACVF). The Public Announcement was intended to inform and warn community members with shared concern over any public display of Communist flags or symbols. This is a classic set of facts requiring the community interest privilege instruction and the court’s refusal to give it deprived Nguyen of his right to a fair trial.

4) **The Damage Awards in this Case Should Have Been Vacated by the Court as Requested in Nguyen's Post Trial Motions as They had no Evidentiary Basis and Were so Grossly Excessive as to Shock the Conscience.**

The damage awards in this case had no support in the evidence. They clearly resulted from passion and prejudice and are so grossly excessive as to shock the conscience.

These public figure plaintiffs had not one cent of economic damage. They had no proof of any general damage other than perhaps hurt feelings or pride. If the plaintiffs lack the character or mettle to participate in rough and tumble politics, they should stay out.

The court poisoned the case by admitting a phony death threat that plaintiff Tan may have even fabricated and mailed to himself. The plaintiffs took maximum unfair advantage by arguing that the jury should punish the defendants and award money for harm that never occurred.

In these circumstances, the court should have granted Nguyen's post trial motions to vacate the verdicts. The court's refusal to grant these motions was a manifest abuse of discretion.

D. ARGUMENTS

1) **The Court's Refusal to Grant Defendants' Motion for Directed Verdict and Judgment Notwithstanding the Verdict Were Manifest Abuses of Discretion Because the Public Figure Plaintiffs Failed to Prove Defendants' Malice by Clear and Convincing Evidence as a Matter of Law.**

Nguyen joins and incorporates by reference his co-appellants' arguments that the Public Notice contained no actionable, defamatory factual assertions that proximately caused damages as a matter of law.

The additional argument presented here is that there was no clear and convincing proof that Nguyen lied or said anything he did not subjectively believe to be true. Consequently, the trial court's refusal to grant the motion for directed verdict at the close of plaintiffs' case was a manifest abuse of discretion.

A public figure plaintiff alleging defamation is required to prove by clear and convincing evidence that the defendant knew his statements were false or made in reckless disregard of the truth. This is one of the highest hurdles in civil law to overcome and for good reason. Its crucial to guarantee the right to free speech under the state and federal constitutions. The right of free speech distinguishes a democratic from a Communist country. People have the legal right to wear Nazi uniforms and swastikas and march down the street in Skokie, Illinois. *Nationalist Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). But other people have an equal right to voice their objection, contempt, or ridicule.

The statements in the Public Notice cannot be proved false and therefore cannot constitute actionable defamation as a matter of law. *See* Co-appellants' Brief, pp 45-47. But even if the statements are *presumed* false for purposes of discussion, the plaintiffs must still lose this case because they never even came close to proving that Nguyen did not personally believe what he said to be true.

Nguyen's thoughts and impressions were perfectly reasonable given his background, knowledge and experience and the relevant facts and circumstances. But whether they were *objectively reasonable* makes no difference under public figure defamation law. Nguyen has no liability for forming and expressing his own political beliefs even if they are objectively unreasonable. *See* Co-appellant Brief, pp. 38 – 40.

The trial court ruled in this case that it takes an expert to know whether the Lakefair apron has Communist symbols. RP VII, 1260-1261. Who qualifies as such an expert is unclear. A psychological warfare specialist trained by the United States to identify communist propaganda while serving in Vietnam was barred from testifying regarding the Lakefair apron because he was *not Vietnamese* and therefore knew *too little*. RP VII, 1262, CP 62, 224-225.

The court seemed comfortable, however, with the qualifications of the plaintiffs' expert, Dr. Miriam Bevi Lam. Dr. Bevi Lam was born in

Vietnam but had not been imprisoned in a Communist labor camp like Phiet Nguyen and Dr. Norman Le. She had never been arrested and hauled away in handcuffs in front of her children by the Communist secret police like Dr. Le. RP VII, 1374-1375. Dr. Lam was never forced by Communists to clear minefields with a hoe and shovel. She never saw dead bodies floating down the river with Communist stars pinned to their chests or had Vietcong threaten to rip her tongue out like Dat Ho. RP VI, 1129-1130. Dr. Bevi Lam did not grow up in a village rocketed nightly by Communists like Thanh Nhan Tran. RP VI, 1072.

Dr. Lam is a university professor who has read about such things in books. She has interviewed people and given lectures. Perhaps Dr. Lam's most interesting qualification, however, is her current service on the board of VAALA, in Los Angeles, California. In 2009, the VAALA sponsored a show in Little Saigon featuring a picture of a young Vietnamese girl wearing a red tank top with a gold Communist star sitting next to a cell phone and a statue of Ho Chi Minh. RP III, 517-519. Dr. Bevi Lam knew that displaying the picture had the potential to spark controversy in the local Vietnamese community, RP III, 514; and she did not think it was a good idea. RP III, 517-518. But Dr. Bevi Lam also felt that the VAALA had the right to display whatever it wanted and ultimately supported its decision to display the picture. RP III, 517. The

local community reacted more negatively than expected. Dr. Bevi Lam attributed this to local politicians bowing to political pressure. RP III, 520.

Dr. Lam had a very different spin, however, on a similar incident involving a video store owner who displayed a Communist flag in his window in San Jose, California in the 1990s. The store owner was threatened and spat upon by angry protesters. In this situation, Dr. Lam opined that the store owner “*got what he deserved.*” PR III, 497, 512. Apparently, the photograph of a girl wearing a Communist star next to a cell phone and Ho Chi Minh is okay because that is art or political expression but hanging the Communist flag in a store window is not.

The problem with this whole discussion is that it has no place in a court of law in this country. The plaintiffs had the legal right to schedule their cultural events to coincide with the Communist revolution or the fall of Saigon, to play the opening of the Communist national anthem, to display the Communist flag at their school, and to take money from Communist sources. But Mr. Nguyen had the right to interpret, criticize or condemn such actions as he saw fit. Nguyen and all the other appellants had the legal right to question the credibility and motives of the public figure plaintiffs and to challenge, criticize or condemn their actions

and ideologies. They had no legal duty to get permission or to remain silent.

2) **The Court's Refusal to Instruct the Jury on the Community Purpose Privilege was a Clear Error of Law and a Manifest Abuse of Discretion.**

The Public Notice at issue in this case was published in Vietnamese by the Committee Against the Vietnamese Communist Flag (CAVCF). It was intended solely to inform Vietnamese refugees with a shared interest in Communist flags, symbols or propaganda that is displayed in their community. As defendant Le explained, "we have to make announcements to alarm our community and to get them to speak up for their sides, too." RP VIII, 1454. In light of multiple events that had occurred Mr. Nguyen wanted "to raise awareness of the Vietnamese community so they have a high alert from things that might happen." RP VII, 1331. This was a set of facts and circumstances warranting the special jury instruction on community privilege proffered by defendants. The court's refusal to give the instruction was a manifest abuse of discretion.

Defamatory remarks may be privileged and not actionable if the publisher can show a common interest furthered between the speaker and

the third-party recipient². The rationale is that the third person is reasonably entitled to know the information. *Haueter v. Cowles Publ'g Co.*, 61 Wn. App. 572 (1991); *Herron v. Tribune Publishing Co.*, 108 Wn.2d 162 (1987); *Restatement (2d) of Torts* §611. Specifically, Washington law provides that a qualified privilege arises when:

... the circumstances are such as to lead any one of several persons having a common interest in a particular subject matter, correctly or reasonably to believe that facts exist which another sharing such common interest is entitled to know.” A legitimate business interest between the publisher and the recipient qualifies as a ‘common interest.’”

Ward v. Painters' Local Union No. 300, 41 Wn.2d 859, 865, 252 P.2d 253 (1953) (emphasis supplied); *Caruso v. Local 690*, 107 Wn.2d 524 (1957); *see also Restatement (2d) of Torts* § 596.

The plaintiffs argued in their opposition to defendants' Motion for JNOV or New Trial that the request for this instruction was based on the “xenophobic racist” theory that the Vietnamese refugee community shared a common interest in issue regarding Communist ideology and

² A plaintiff can establish abuse of the qualified privilege if the defendant (i) knows the matter to be false or acts in reckless disregard as to its true or falsity, (ii) does not act for the purpose of protecting the interest that is the reason for the existence of the privilege, (iii) knowingly publishes the matter to a person to whom its publication is not otherwise privileged, (iv) does not reasonably believe the matter could be necessary to accomplish the purpose for which the privilege is given, or (v) publishes unprivileged as well as privileged matters. *Moe v. Wise*, 97 Wn. App. 950 (1999).

propaganda This argument makes no sense, however, because every witness who testified during the trial acknowledged that all Vietnamese refugees have a legitimate interest in Communist ideology and propaganda that pops up in their community.

Furthermore, the plaintiffs' argument is directly contrary to their central thesis that whether the Public Notice is defamatory must be determined solely by reference to a discrete and insular minority with unique and special sensitivities. If anything is *xenophobic racism*, its plaintiffs' companion argument that Robert Cavanaugh is unqualified to interpret the Lakefair apron because he is white. CP 224-225.

3) **The Court's Refusal to Vacate the Jury's Verdicts Was a Manifest Abuse of Discretion Because the Damage Awards Were Clearly the Result of Passion and Prejudice and So Grossly Excessive As to Shock the Conscience.**

CR 59(a)(5) authorizes a new trial when the damages awarded are "so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice."

The law that governs review of damage awards may be summarized as follows:

An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived as the result of passion or

prejudice . . . Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable . . . The issue thus becomes whether the size of the award for pain and suffering in and of itself shocks the conscience of the court. Stated otherwise, were the damages flagrantly outrageous and extravagant? *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246 (1992); *Bingaman v. Grays Harbor Community Hospital*, 103 Wn.2d 831 (1985).

As in any other legal case, the plaintiffs here had to prove not only that defamatory statements were published with actual malice, but that such statements proximately caused damage; i.e. that the plaintiffs' damages would not have occurred but for the actions of the defendants. *Mark v. Seattle Times*, 96 Wn.2d 473, 476 (1981), *cert. denied*, 457 U.S. 1124 (1982).

Plaintiff Duc Tan claimed no loss of job, no loss of income, no loss of business opportunities, no effect on his employment or career, no physical symptoms of anxiety or stress supported by medical testimony, no psychological treatment or counseling, no effect on his marriage (the plaintiff's wife did not even bother to testify), and no effect on his friends and social activities. Plaintiff Tan conceded that his family and friends did not believe the allegation that he was a Communist. RP V, 949-950. His entire claim for "emotional distress" was based on a letter that

Plaintiff himself admitted was a hoax, and that he could not prove was sent by any of the defendants. RP V, 962.

VCTC's damage claim had no credibility either. The VCTC was not lawfully operating as a corporate entity for several years prior to trial. The VCTC admitted it had no corporate resolutions, no minutes and no proof of any financial loss. RP IV, 678-684. The VCTC had no proof of any damage to its reputation or anything else sufficient to support any damage award in this case.

The jury verdicts in this case are inexorably tainted by the trial court's outrageous admission of the phony death threat over the defendants' ER 402 and ER 403 objections described in co-appellants' Brief at pages 59-63. Unfairly prejudicial evidence causes jurors to make emotional rather than rational decisions. *Hoglund v. Raymark Industries, Inc.*, 50 Wn. App. 360 (1987). "Evidence is unfairly prejudicial when "it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action (which) may cause a jury to base its decision on something other than the established propositions in the case". J. Weinstein & M Berger, WEINSTEIN'S EVIDENCE, Sec. 403(3) at 19-22 (1982).

In closing argument, plaintiffs' counsel recounted the testimony of his expert, Dr. M. Bevi Lam, regarding two incidents in California where

Vietnamese refugees had protested displays of the Communist flag. Plaintiffs' counsel described the protests as "extreme reactions" involving violence and "bombings." RP IX, 1595. He then exclaimed that "(w)e know that (plaintiff) Tan actually received a death threat letter (which) is the type of incendiary, explosive information that they are putting out to the intended readers." RP IX, 1595.

The argument was grossly improper because it implied causal connections the plaintiffs knew did not exist, presumed the bona fides of a letter fraudulent on its face, urged the jury to punish the defendants for creating risk of harm that never occurred and was based on false analogies and distorted facts. As the trial court had opened the door by ruling the phony death threat was "relevant to damages," however, there was nothing Mr. Nguyen and his co-defendants could do but sit back and watch their constitutional right to a fair trial go up in smoke.

E. CONCLUSION

Mr. Nguyen had every legal and moral right to express his thoughts and feelings regarding Communist flags, symbols and propaganda. He had the same right to challenge, criticize or condemn the credibility and credentials of public figures and their political motives and actions while purporting to represent the Vietnamese refugee community. Public figures have no business filing lawsuits over hurt feelings in such

circumstances. If they lack the fortitude and character to withstand challenge and criticism, they should not involve themselves in the rough and tumble world of politics.

The plaintiffs proved no damage and they manipulated the trial with phony evidence and arguments designed to whip up the passion and prejudice of the jury. For all of these reasons, Mr. Nguyen joins in his co-appellants' request for the outright dismissal of the case, or alternatively, an order vacating the judgments and ordering a new trial.

RESPECTFULLY SUBMITTED this 17TH day of February, 2010.

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NO. 39447-2-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

BY 
DEPUTY

Thurston County Superior Court Cause No. 04-2-00424-9

NORMAN LE, and PHU LE, husband and wife; TUAN A. VU and
HUYNH T. VU, husband and wife; PHIET X. NGUYEN and VINH T.
NGUYEN, husband and wife; DAT T. HO and "JANE DOE" HO,
husband and wife; NGA T. PHAM and TRI DUONG, wife and husband;
and NHAN T. TRAN and MAN M. VO, wife and husband

Defendants/Appellants,

v.

DUC TAN, a single man; and VIETNAMESE COMMUNITY
OF THURSTON COUNTY, a Washington Corporation,

Plaintiffs/Respondents.

CERTIFICATE OF SERVICE

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 17th day of February, 2010, she served or caused to be served a copy of the Brief of Appellants Phiet and Vinh Nguyen on the parties listed below by the method(s) indicated:

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

Dated at Tacoma, Washington this 17th day of February, 2010.



 CHRISTINE DOBBINS