

NO. 42845-8-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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**SHELCON CONSTRUCTION GROUP, LLC, a Washington  
Corporation,**

**Respondent,**

**vs.**

**SCOTT HAYMOND & JANE DOE HAYMOND, husband and wife;  
A-3 VENTURE, LLC, a Washington limited liability company; A-4  
VENTURE, an unknown entity type, A-1111 VENTURE, LLC, a  
Washington limited liability company, 14224 PIONEER LIVING  
TRUST, & ANCHOR MUTUAL SAVINGS BANK,**

**Appellants.**

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**SUPERIOR COURT FOR PIERCE COUNTY**

**HONORABLE FREDERICK W. FLEMING**

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**BRIEF OF APPELLANTS  
SCOTT HAYMOND & A-1111 VENTURE, LLC**

---

ALLAN L. OVERLAND WSBA #2648  
Attorneys for Appellants Scott  
Haymond & A-1111 Venture, LLC

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STATE OF WASHINGTON  
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## I. TABLE OF AUTHORITIES

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## I - INTRODUCTION

Shelcon Construction Group LLC ("Shelcon") filed this lawsuit to foreclose on a \$309,369.58 mechanics lien that it recorded in 2009 against real property at 14224 Pioneer Way East (referred to as "the Farm"). Shelcon, a site development contractor, was hired by the property owner, defendant A-1111 Venture LLC ("A-4") and the LLC owner Haymond. Shelcon sued A-4 and Haymond for payment for earthwork and infrastructure development on the Farm property and to foreclose on its lien.

Appellants Scott M. Haymond and A-1111 Venture, LLC appeal only as two provisions of the Judgment and Decree of Foreclosure entered by the trial court October 28, 2011, i.e. prejudgment interest of \$167,480.60 computed at 18% and the amount of attorneys fees awarded to Plaintiff.

The priority of Plaintiff's lien as to Defendant Anchor Bank is not part of this appeal.

The Decree of Foreclosure provides 18% prejudgment interest as well as providing that the judgment shall bear interest at 18% per annum.

## II – ASSIGNMENTS OF ERROR

1. Haymond and A-1111 Venture assign error to the trial court's ruling that the prejudgment interest of 18% and the judgment entered October 28, 2011 shall bear interest at 18% per annum.

Findings of Fact and Conclusions of Law entered October 28, 2011 provide in Paragraph 4 of Conclusions as follows:

"Shelcon is entitled to interest at the rate of eighteen per cent per annum on the principal amount owing."

Copy attached as Appendix A.

2. Finding of Fact No. 26. The only mention of 18% interest in the Findings of Fact is No. 26 which recites that Shelcon sent a letter to Haymond September 8, 2008 setting out additional terms as to payment including a provision stating:

"Any overdue payment shall accrue interest for the benefit of contractor from the due date until actual payment date at the per annum rate of eighteen per cent (per annum)."

Haymond refused to sign the letter and refused to sign any memoranda agreeing to 18% per cent interest on any amounts due.

The said finding of fact implies that the letter was signed or approved in writing in some manner by Haymond.

3. Finding of Fact No. 30 declared that the September 8, 2008 letter as a written memorialization was executed by the conduct of the parties and called for substituted performance with regard to payment of interest and attorneys fees but did not call for any revisions to the scope of the work.

4. Conclusion of Law No. 4 states simply that Shelcon is entitled to interest at the rate of eighteen per cent per annum on the principal amount owing. No evidence of any written agreement by defendants to pay 18% interest was ever presented.

### **III – ISSUES PRESENTED**

1. Did any defendant ever sign any memoranda of any kind agreeing to the payment to plaintiff of 18% interest?
2. Is a signed memorandum required to enforce interest at more than 12% per annum?
3. Is 18% interest on a judgment supported by law?

### **IV - STATEMENT OF THE CASE**

The lien foreclosure presented substantial questions of priority between plaintiff and Anchor Bank which are not part of this

limited appeal. The trial consisted of a great deal of detailed billing and accounting which are not challenged by appellant. This appeal is about 18% interest.

The officer of plaintiff corporation, Shane Martin testified that he (the corporation) was asking only 12% because he understood "now legally you can get only 12 percent." (Verbatim Report of Proceedings September 9, 2011, Cross examination of Martin, pages 22-24).

Counsel for defendants was attempting to cite the usury statute (RCW 19.52.010) to the court when counsel for plaintiff made a suggestion and stated that the 18% was in writing. It should be noted that at the second trial in this matter against defendant Anchor Bank concerning some of the same issues, the following conclusion of law was presented by counsel for Shelcon and signed by that trial judge, the Honorable Vicki L. Hogan on May 17, 2013, to-wit:

"Conclusion of Law No. 9:

Shelcon is entitled to interest at the rate of twelve percent per annum on the amount of \$262,828.26 accruing from May 1, 2009."

Defendants' position was consistent that no plaintiff's writing was ever signed by any defendant. The report of proceedings of

the hearing before the trial court on Proposed Findings and Conclusions on October 28, 2011, page 11 dealt with appellant's objection to Conclusion of Law No. 4.

## **V - ARGUMENT**

A. The trial court erroneously concluded that the letter from plaintiff to defendant dated September 8, 2008 was a writing required to permit interest in excess of 12% to be charged by plaintiff.

The fact is that neither that letter nor any memoranda of any kind was ever signed by defendant Haymond or any defendant. (RP 21-22 Shane Martin cross examination)

RCW 19.52.010 provides that every forbearance shall bear interest at the rate of twelve per cent per annum where no different rate is agreed to in writing between the parties.

The plaintiff contends that a self-serving unsigned "writing" prepared by plaintiff need not be signed by the party to be charged and that circumstances may suffice for signature.

Finding of Fact No. 30 stated that it was "executed by the conduct of the parties".

This argument simply makes the statute irrelevant and makes it possible for a creditor to simply ignore it completely by

sending a letter or email declaring that usurious interest will be charged.

It is further made clear by the second trial that the complaint and amended complaint unlawfully demanded 18% interest and the conclusion of law awarding 18% interest was in error.

B. Conclusion of Law No. 4 erroneously applies 18 percent interest to the principal owing and also does not state the date for said interest to commence. Conclusion of Law No. 5 and Finding of Fact 33 recited that Shelcon's lien was recorded May 1, 2009. Applying the principal amount due found in Finding of Fact 34, i.e. \$245,151.00 to be due as of filing the lien on May 1, 2009, the time elapsed to the date of judgment October 28, 2011 is three days short of 2-1/2 years. Applying 18% interest to \$245,151.00 for 2-1/2 years is \$110,317.95.

Appellant does not concede that said sum or any amount of interest is due but points out an error in computation by plaintiff.

C. RCW 19.52.030 provides that there is a penalty upon suit or contract for a greater rate of interest than is allowed by statute the the creditor shall only be entitled to the principal less the amount of all accrued and unpaid interest. The

plaintiff officer Shane Martin testified that he had abandoned the 18% part of the lawsuit (RP Cross examination September 19, 2011, page 22) but the plaintiff's official position in Findings, Conclusions and Judgment is a claim of \$167,480.60 for interest of 18% per annum.

D. The judgment entered by the trial court provided that the judgment shall bear interest at 18% per annum. RCW 4.56.110 provides that judgments founded on written contracts . . . shall bear interest at the rate specified. The evidence was clear that no contract was signed by defendant. The work was done by bid with no signature by defendant of any kind on any document or memorandum.

E. Request for Attorneys Fees.

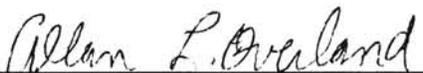
Pursuant to RAP 18.1 the appellant requests reasonable attorney fees for representing the appellant at trial and in this appeal if appellant is the prevailing party herein. RCW 60.040.081 provides that if the lien is clearly excessive and is reduced by the court, the prevailing party may be allowed to recover costs and attorney fees incurred by the attorney in the trial court and Court of Appeals as the court deems reasonable.

## VI - CONCLUSION

The trial court erred in awarding Shelcon 18% interest on any amounts due on its lien. Pursuant to RCW 19.52.030, the principal amount of \$245,151.42 should be reduced by the claimed interest in the sum of \$167,480.60 for a net judgment of \$77,670.82.

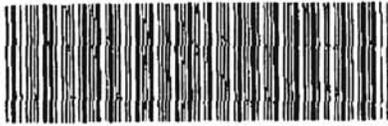
Shelcon's attorneys fees of \$140,432.97 should be reduced by one-third on the grounds that a substantial portion of Shelcon's action to foreclose the lien was for the purpose of establishing priority over the claim of defendant Anchor Bank. Shelcon was awarded even greater attorneys fees in a separate later trial against Anchor Bank involving many of the same facts and arguments in involved in this case.

Respectfully submitted this 24<sup>th</sup> day of December, 2013.

  
Allan L. Overland WSBA #2648  
Attorney for Appellants  
Scott M. Haymond &  
A-1111 Venture, LLC

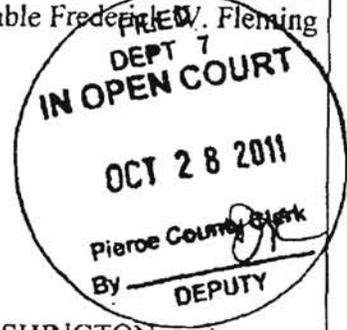
## APPENDIX A

1



09-2-15838-5 37411462 FNFL 11-01-11

October 28, 2011  
Honorable Frederick W. Fleming



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6

7

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

8

SHELCON CONSTRUCTION GROUP, LLC, a )  
Washington limited liability company, )

NO. 09-2-15838-5

10

Plaintiff, )

11

v. )

FINDINGS OF FACT

12

SCOTT M. HAYMOND AND JANE DOE )  
HAYMOND, husband and wife; A-3 VENTURE )  
LLC, a Washington limited liability company; )  
A-4 VENTURE, an unknown entity type; A- )  
1111 VENTURE LLC, a Washington limited )  
liability company; 14224 PIONEER LIVING )  
TRUST; and ANCHOR MUTUAL SAVINGS )  
BANK, )

AND

CONCLUSIONS OF LAW

13

14

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Defendants. )

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**I. PROCEDURAL HISTORY**

19

This matter came on for trial on September 14, 2011 in Department No. 7 of the Pierce  
County Superior, the Honorable Frederick W. Fleming presiding. This matter was originally  
assigned to Department No. 11 of the Pierce County Superior Court, the Honorable John A.  
McCarthy presiding. On 09/13/2011, Judge John A. McCarthy was unavailable to hear this  
matter, which was then reassigned to Department No. 7 of the Pierce County Superior Court,  
the Honorable W. Fleming, presiding.

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1 Plaintiff Shelcon Construction Group, LLC ("Shelcon") appeared for trial and was  
2 represented throughout the trial proceedings by Lawrence B. Linville, WSBA #6401.  
3 Defendants Scott M. Haymond ("Haymond"), A-111 Venture LLC, A-4 Venture, A-1111  
4 Venture LLC, and 1474 Pioneer Living Trust each appeared for trial and were represented  
5 throughout the trial proceedings by Allan L. Overland, WSBA #2648.

6 All claims against Defendant Anchor Mutual Savings Bank were dismissed with  
7 prejudice through an order granting partial summary judgment entered by the Honorable John  
8 McCarthy on November 19, 2010. After the case was called for trial by the remaining parties, a  
9 Stipulation and Order for Vacation of Judgment and New Trial was entered by the Honorable  
10 John McCarthy on October 19, 2011 ("Stipulated Vacation Order"). A copy of the Stipulated  
11 Vacation Order is attached hereto as Exhibit A.  
12

13 The trial proceedings concluded on September 22, 2011. The Court has evaluated  
14 both the credibility of the witnesses and the witnesses' testimony. The Court has received  
15 and weighed all evidence which was admitted. The Court NOW AND THEREFORE  
16 enters the following FINDINGS OF FACT and CONCLUSIONS OF LAW.  
17

## 18 II. FINDINGS OF FACT

19 1. At all times relevant, Shelcon was a general contractor, duly registered with  
20 the Washington State Department of Labor & Industries, Contractor Registration No.  
21 SHELCCG 97420.  
22

23 2. At all times relevant, Scott M. Haymond was an unmarried man engaged in  
24 the business of real estate development.  
25

1           3.     A-111 Venture, LLC is a Washington limited liability company which was  
2 formed on 4/20/2005. Scott Haymond is the registered agent and sole governing person of  
3 A-111 Venture, LLC.

4           4.     A-1111 Venture LLC is a Washington limited liability company, which was  
5 formed on 4/20/2005. Scott M. Haymond is the registered agent and sole governing person  
6 of A-1111 Venture, LLC.

7           5.     A-4 Venture, LLC is not a legal entity and is simply the same limited  
8 liability company as A-1111 Venture, LLC. A-4 Venture, LLC is used by some persons as  
9 a shorthand reference for A-1111 Venture, LLC.

10           6.     The property which is the subject of Shelcon's lien and this foreclosure  
11 action is situated at 14224 Pioneer Way East, Puyallup, Washington (hereinafter, "subject  
12 property").

13           7.     Defendant 14224 Pioneer Living Trust is the owner of the subject property.

14           8.     Anchor Bank is the beneficiary under a Commercial Construction Deed of  
15 Trust recorded against the subject property on 8/22/2008. The deed of trust secures a loan  
16 for \$3,900,000.00 to A-1111 Venture, LLC with regard to construction financing for  
17 development of the subject property.

18           9.     On or about 1/17/2006, Haymond and Shelcon agreed that Haymond would  
19 pay Shelcon the amount of \$732,941.92 to perform a certain scope of work on the subject  
20 property according to certain specifications, estimates and terms that were written on a 2  
21 page document dated 1/17/2006.

22           10.    The agreement between Haymond and Shelcon was for Haymond's business  
23 purpose of preparing the subject property for construction of a commercial building.  
24  
25

1           11.    At the time of entering the agreement on 1/17/2006 and at all times  
2 subsequent, Haymond acted as the undisclosed agent for A-1111 Venture, LLC, the  
3 principal.

4           12.    At no time did Haymond disclose to Shelcon that Haymond was acting as an  
5 agent for A-1111 Venture, LLC, nor did Haymond disclose to Shelcon that Haymond was  
6 acting solely as an agent for a principal.

7           13.    Shelcon commenced work at the subject property on 7/05/2006 pursuant to  
8 a set of drawings prepared by Apex Engineering dated 5/22/2006.

9           14.    On 08/15/2006, Shelcon and Haymond further agreed upon certain changes  
10 in the scope of work and the contract amount was changed to \$717,193.12.

11           15.    During the course of Shelcon's work, Haymond authorized and directed  
12 Shelcon to perform extra work in the amount of \$211,352.90.

13           16.    During the course of Shelcon's work, Haymond deleted certain work from  
14 Shelcon's scope of work in the amount of \$111,265.60.

15           17.    To date, Haymond has paid Shelcon the sum of \$572,129.00 for work  
16 performed on the subject property.

17           18.    On 6/20/2008, Shelcon recorded a mechanic's lien against the subject  
18 property due to nonpayment by Haymond.

19           19.    On 7/06/2008, Shelcon released said lien as an accommodation to Haymond  
20 so that Haymond could obtain refinancing of the project through Anchor Bank.

21           20.    At no time did Anchor Bank ever communicate directly with Shelcon nor at  
22 any time did Shelcon ever communicate directly with Anchor Bank.  
23  
24  
25

1           21.     Neither Haymond nor Anchor Bank ever requested Shelcon to waive or  
2 otherwise compromise Shelcon's right to subsequently record a lien for work performed  
3 either before or after the date said lien release was recorded by Shelcon.

4           22.     Shelcon had previous experience with lenders' requests for subordination  
5 agreements in situations where Shelcon's lien rights would have been superior to the  
6 lenders' real property security interest (i.e. deed of trust) in the property, and Shelcon had  
7 upon several previous occasions executed such subordination agreements.

8           23.     Anchor Bank did not contact Shelcon, nor did either Haymond or Anchor  
9 Bank request that Shelcon execute a subordination agreement or any document whatsoever  
10 purporting to limit or waive Shelcon's right to subsequently record a lien against the  
11 subject property for unpaid work performed either before or subsequent to 7/16/2008, the  
12 date upon which Shelcon recorded a release of lien against the subject property.

13           24.     On 8/20/2008, Anchor Bank executed a commercial loan to A-1111  
14 Venture, LLC in the amount of \$3,9000,000.00 and recorded a Commercial Construction  
15 Deed of Trust with the Pierce County Recorder's Office, said deed of trust obligating A-  
16 1111 Venture, LLC to, among other things,  
17

18                   "...defend generally the title to the Property against any and all  
19 claims and demands whatsoever."

20           25.     A-1111 Venture, LLC, and Haymond, through their counsel of record, were  
21 present during the course of the trial proceedings and defended against all claims asserted  
22 by Shelcon.

23           26.     On 9/08/2008, Shelcon sent a letter to Haymond together with a written  
24 memorialization which summarized the progress of the work to date by referencing the  
25 5/22/2006 drawings and the 1/17/2006 agreement, mathematically summarizing all

1 adjustments to date in changes in the scope of work resulting in both credits and debits to  
2 Haymond, and further setting out additional terms regarding payment, including a  
3 provision stating:

4 "Any overdue payment shall accrue interest for the benefit of  
5 CONTRACTOR from the due date until actual payment date at the  
6 per annum rate of Eighteen Percent (per annum)."

7 The writing also contained an additional term regarding attorneys' fees as  
8 follows:

9 "CONTRACTOR shall be entitled to recover its actual collection  
10 costs, including attorneys' fees and court costs."

11 27. Shelcon's letter to Haymond dated 9/08/2008: (1) expressly "reserved all lien  
12 rights, including the right to re-file a claim of lien for these and any other amounts that may  
13 become due", (2) requested immediate payment of \$70,200.00, and (3) enclosed a Conditional  
14 Waiver of Lien in the amount of \$70,200.00 subject to receiving payment of \$70,200.00 from  
15 Haymond, again "with the understanding that we retain all lien and other rights regarding  
16 amounts still due and not yet paid".

17 28. Haymond paid Shelcon the requested sum of \$70,200.00 in two checks, one for  
18 \$62,000.00 and one for \$8,200.00.

19 29. Haymond accepted the revisions to scope and price stated in the 9/08/2008  
20 memorialization and Haymond accepted the additional terms and conditions stated therein, one  
21 of which stated that henceforth Haymond would pay Shelcon for all extra work on the basis of  
22 cost plus fifteen percent (15%), which Shelcon did in fact charge Haymond, and Haymond did  
23 in fact pay to Shelcon subsequent to 9/08/2008.  
24  
25

1           30.    The 9/08/2008 written memorialization was executed by the conduct of the  
2 parties and called for substituted performance with regard to payment of interest and attorneys'  
3 fees, but did not call for any revisions to the scope of work.

4           31.    Neither Haymond nor Shelcon intended the 9/08/2008 written memorialization  
5 to be a substituted contract.

6           32.    Shelcon completed its work on 2/12/2009, which was the last day that Shelcon  
7 furnished material and/or equipment and performed labor for improvement of the subject  
8 property.

9           33.    On 5/01/2009, Shelcon recorded a mechanics lien against the subject property.

10           34.    Haymond and A-1111 Venture, LLC owe Shelcon the principal sum of  
11 \$245,151.41 calculated as follows:  
12

13           Contract Amount	\$717,193.12
14           (Credit for work performed by 15           others)	(\$111,265.60)
16           Extra work	\$211,352.90
17           (Payments made)	(\$572,129.00)
18           Principal Balance Owed	\$245,151.42

19           Having entered the foregoing FINDINGS OF FACT, the Court now enters  
20 the following CONCLUSIONS OF LAW.  
21

22  
23                           **III.        CONCLUSIONS OF LAW**

1           1.       Scott M. Haymond and A-1111 Venture, LLC are jointly and severally  
2       liable to Shelcon for payment to Shelcon for Shelcon's work on the subject property in the  
3       principal amount of \$245,151.42.

4           2.       Shelcon met its burden of proving that the initial contract amount was  
5       \$717,193.12, the proper credit for work performed by others was \$111,265.60, the extra  
6       work cost of change orders totaled \$211,352.90, that Haymond's payments to date total  
7       \$572,129.00, and thus Shelcon is entitled to recover the principal amount of \$245,151.42.

8           3.       Shelcon's claim for principal due is for a liquidated amount because  
9       Shelcon's claim is determinable by computation with reference to a fixed standard.

10          4.       Shelcon is entitled to interest at the rate of eighteen percent per annum on  
11       the principal amount owing.

12          5.       Shelcon's lien recorded on 5/01/2009 is a valid lien and complies with the  
13       requirements of RCW Ch. 60.04.

14          6.       Shelcon's lien contains a lawful acknowledgement pursuant to RCW  
15       60.04.091(2).

16          7.       Shelcon's lien was timely recorded pursuant to RCW 60.04.091.

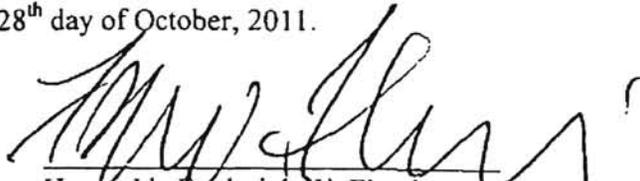
17          8.       The date that Shelcon's lien attached to the subject property was 7/05/2006,  
18       which was Shelcon's first day of work at the subject property.

19          9.       Shelcon commenced suit to foreclose its lien in a timely manner pursuant to  
20       RCW 60.04.141.

21          10.       Pursuant to the Stipulated Vacation attached as Exhibit A hereto, the above  
22       Findings of Fact and Conclusions of Law shall not be binding on Anchor Mutual Savings  
23       Bank. All issues related to Shelcon's claims against Anchor Mutual Savings Bank, to  
24  
25

1 include the respective priorities of Shelcon's lien and Anchor Mutual Savings Bank's  
2 Construction Deed of Trust lien and all defenses, shall be tried in a separate trial.

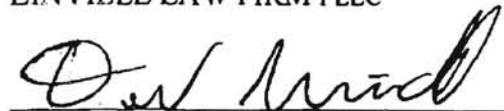
3 SIGNED IN OPEN COURT this 28<sup>th</sup> day of October, 2011.

4   
5  
6 Honorable Frederick W. Fleming  
7 Department No. 7



8 Presented by:

9 LINVILLE LAW FIRM PLLC

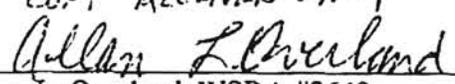
10   
11 Lawrence B. Linville, WSBA #6401  
12 David E. Linville, WSBA #31017  
13 Attorneys for Plaintiff Shelcon Construction Group LLC

14 Approved as to form: Notice of presentation waived

15 GORDON THOMAS HONEYWELL LLP

16  approved per email  
17 Margaret Archer, WSBA #21224  
18 William T. Lynn, WSBA #7887  
19 Christine Sanders, WSBA #40736  
20 Attorneys for Defendant Anchor Mutual Savings Bank

21 Approved as to form: Notice of presentation waived

22 COPY RECEIVED ONLY  
23   
24 Allan L. Overland, WSBA #2648  
25 Attorney for all Defendants except for Anchor Mutual Savings Bank

COURT OF APPEALS, DIVISION II  
OF STATE OF WASHINGTON

SHELCON CONSTRUCTION  
GROUP, LLC, a Washington  
Corporation,

Respondent,

vs.

SCOTT HAYMOND & JANE DOE  
HAYMOND, husband and wife; A-3  
VENTURE, LLC, a Washington limited  
liability company; A-4 VENTURE, an  
unknown entity type, A-1111  
VENTURE, LLC, a Washington limited  
liability company, 14224 PIONEER  
LIVING TRUST, & ANCHOR MUTUAL  
SAVINGS BANK,

Appellants.

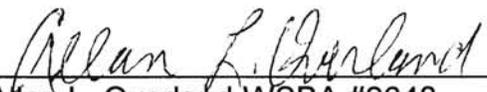
NO. 42845-8

CERTIFICATE OF  
SERVICE

2013 DEC 24 7:11:11  
STATE OF WASHINGTON  
CLERK OF COURT

THIS IS TO CERTIFY that on this 24<sup>th</sup> day of December,  
2013, I did deliver to ABC Legal Services, true and correct copies  
of Appellants Scott Haymond & A-1111 Venture, LLC's Brief by  
sending for delivery to the following:

Lawrence B. Linville and Margaret Archer  
David Linville 1201 Pacific Ave., Suite 2100  
800-5<sup>th</sup> Ave., Suite 3850 Tacoma, WA 98402  
Seattle, WA 98104

  
Allan L. Overland WSBA #2648  
Attorney for Appellants Scott Haymond  
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