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DIVISION II

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STATE OF WASHINGTON

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NO. 43877-1-II

COURT OF APPEALS FOR DIVISION II

STATE OF WASHINGTON

SHAOUL S. HAI
Appellant-Plaintiff,

v.

STL INTERNATIONAL, INC., AND TSA STORES, INC.,
Respondents-Defendants.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
I. Restatement of Argument.....	1
A. The trial court erred by focusing on the statute of limitations.....	2
B. Other potential conflicts may not apply to the facts of our case.....	5
C. Washington cases favor applying our product liability law.	6
D. In the Alternative, Policy Interest Favor Application of Washington Law.....	14
E. TSA Jurisdictional Argument Should Be Denied	16
II. Conclusion.....	18

TABLE OF AUTHORITIES

Washington Cases

<i>Burnside v. Simpson Paper Co.</i> , 123 Wn.2d 93, 100, 864 P.2d 937 (1994)	2, 3, 4, 7
<i>Ellis v. Barto</i> , 82 Wn. App. 454, 918 P.2d 540 (Div. III 1996).....	5
<i>Johnson v. Spider Staging Corp.</i> , 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976).....	7
<i>LaPlante v. State</i> , 85 Wn.2d 154, 158, 531 P.2d 299 (1975)	2
<i>Martin v. Humbert Constr., Inc.</i> , 114 Wn. App. 823, 830, 61 P.3d 1196 (2003).....	14
<i>Mbm Fisheries v. Bollinger Mach. Shop & Shipyard</i> , 60 Wn. App. 414, 418 (Wash. Ct. App. 1991)	19
<i>Raymon v. Robinson</i> , 104 Wn. App. 637 15 P.3d 697 (2001).....	20
<i>Rice v. Dow Chemical Co.</i> 124 Wn.2d 205, 211, 875 P.2d 1213 (1994)..	4, 11, 14, 15
<i>Seizer v. Sessions</i> , 132 Wn.2d 642, 648, 940 P.2d 261 (1997); <i>Burnside</i> , 123 Wn.2d at 100.....	3, 6
<i>Unifund CCR Partners v. Sunde</i> , 163 Wn. App. 473, 260 P.3d 915 (Div. 2 2011).....	4
<i>Williams v. Leone & Keeble</i> , 171 Wn.2d 726, 736 n.6; 254 P.3d 818 (2011).....	9

<i>Zenaida-Garcia v. Recovery Systems Tech., Inc.</i> , 128 Wn. App. 256, 115 P.3d 1017 (2005).....	8
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Statutes

RCW 4.18.020(1)(a)	5
RCW 4.18.020(1)(b).....	5
RCW 4.18.040	5
RCW 4.18.901(1).....	4
RCW 4.28.080(10).....	19
RCW 7.72.010(5).....	9, 12

Rules

RAP 18.9.....	2, 20
RAP 9.6(a)	18

Other Authorities

UNDERSTANDING CONFLICT OF LAWS, Richman, William, 175 (1984).....	3
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I. Restatement of Argument

All parties agree that the issue before the court is a conflicts of law analysis to be reviewed *de novo*. The injured party, Mr. Hai sued the STL International, Inc. (the “product designer”) which designed the product in Washington to recover damages for injuries that he sustained due to a design defect. Mr. Hai also sued TSA Stores, Inc. (the “retailer”) for instituting designing all of its nationwide stores and insufficient company policies at its headquarters in Colorado for the damage those improper designs and insufficient policies caused in conjunction with displaying the defective product that it purchased FOB in Washington. In their response brief, the product designer and the retailer highlight irrelevant facts and ignore binding precedent in an effort to avoid a determination on the merits by imposing foreign law to bar the claim.

Additionally, the retailer asks this Court to dismiss it for lack of personal jurisdiction. While this party raises personal jurisdiction in its legal argument, it does not present any facts. It does not present the facts because it waived the defense three different ways, and the evidence in the record subjects it to personal jurisdiction both generally and specifically. Not only did the retailer contract to purchase the entire line of defective products in Washington, but this party is also licensed to do business in this state because it has thirteen individual stores in this state. This Court

should either refuse to entertain the argument because the retailer affirmatively waived or insufficiently briefed the issue, or find sufficient minimum contacts to support the exercise of personal jurisdiction, and it may entertain sanction under RAP 18.9. Mr. Hai asks this Court to reverse and remand so that the case can be decided on its merits.

A. The trial court erred by focusing on the statute of limitations.

“In a summary judgment motion, the moving party bears the initial burden of showing the absence of a true issue of material fact.” *See LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). In this case the Respondents, as the moving party, needed to show the laws of Washington and Texas conflicted.¹ Summary judgment is only proper if the record demonstrates an absence of an issue of material fact and the moving party is entitled to judgment as a matter of law. As the moving

¹ In *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100, 864 P.2d 937 (1994), our state’s Supreme Court adopted the reasoning of Professor Currie, a conflict of laws scholar. The *Burnside* Court utilized Currie’s principals governing the start of a conflict of laws analysis, stating:

“The law of the forum, as the source of the rule of decision, should normally be displaced only by the interested party’s timely invocation of the foreign law. The interested party invokes foreign law by calling attention to its relevance and its superior claim to be applied, and by informing the court of its tenor. “

Id.

The *Burnside* Court, and other authorities require the moving party to show a conflict of law exists. *See also*, UNDERSTANDING CONFLICT OF LAWS, Richman, William, 175 (1984) (forum law supplies rule of decision as a default, therefore burden is on moving party to show the propriety of applying foreign law).

party below, the Respondents failed to show a true conflict of laws, rather than a false conflict- the laws of the forum state, Washington, should presumptively be applied.

To engage in a choice of law determination, there must first be an actual conflict between the laws or interests of Washington and the laws or interests of another state. Br. of Resp't at 6-7(citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93, 100-101, 864 P.2d 937 (1994)). To be an actual conflict, rather than a false conflict, triggering the conflict of laws analysis the interests of the jurisdictions must be fundamentally incompatible, or the outcome of the case would differ depending on the choice of law. *Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997); *Burnside*, 123 Wn.2d at 100. In cases of false conflict, the law of the forum state presumptively applies. *Burnside*, 123 Wn.2d at 100.

On summary judgment, the moving parties invited the trial court to apply the two-year Texas statute of limitations. The trial court restated the issue at the beginning of the hearing: "And what this comes down to is essentially whether or not Texas law applies because of the two year statute of limitations." VRP 2. In its oral ruling, the court stated the "actual conflict between Texas and Washington law" is the statute of limitations. VRP 28. On appeal, it is the first area of conflict listed by respondents. Br. of Resp't at 7.

Differences in limitation periods of states are not subject to conflict of law methodology. *See* RCW 4.18.901(1); *Rice v. Dow Chemical Co.* 124 Wn.2d 205, 211, 875 P.2d 1213 (1994) *Unifund CCR Partners v. Sunde*, 163 Wn. App. 473, 260 P.3d 915 (Div. 2 2011); *Ellis v. Barto*, 82 Wn. App. 454, 918 P.2d 540 (Div. III 1996). Instead, the court looks to the most significant relationship rule to determine which forum state's law best governs the tort. The respondents invited error, and the trial court erred in determining that there was an actual conflict of interest.

Washington statutory law provides that if a claim is substantively based upon the law of another state, the limitation period of that state applies. RCW 4.18.020(1)(a). If the claim is substantively based on the law of more than one state, the limitation period of one of those states is chosen by applying Washington conflict of law principles. RCW 4.18.020(1)(b).² In this case, plaintiff asserted a claim under Washington's Product Liability Act for a product defectively designed in Washington.³ Respondents imply that a counterclaim for comparative

² Additionally, an exception is made, and Washington's limitation period applies, if the court determines that the other state's limitation period is substantially different from Washington's limitation period and a fair opportunity to sue or defend has not been afforded. RCW 4.18.040. Mr. Hai would like an opportunity to present new evidence at the trial court on the fairness of the opportunity to sue.

³ While respondents argue that supplementary design was conducted outside of the United States, there is no evidence in the record to suggest

fault or that negligence occurring in Texas is a superseding cause of the damage. A defendant seeking a shorter statute of limitations ought not to be able to raise a defense to distort conflict of law analysis for the primary purpose of making relevant a shorter statute of limitations.

B. Other potential conflicts do not apply to the facts of our case.

Respondents also argue that the laws of Texas and Washington conflict in other areas. While the many states and two nations with contacts to this case may have dozens of areas that conflict, Respondents offer no clear analysis that any of the conflicts they raised are material to this case. Respondents did not attempt to explain how the laws conflict in fundamentally incompatible way, or the whether outcome of the case would differ depending on Washington or Texas law. *See Seizer v. Sessions*, 132 Wn.2d 642, 648, 940 P.2d 261 (1997); *Burnside*, 123 Wn.2d at 100. Absent Respondents showing any conflict on how the case would differ, this is simply a false conflict, and therefore, the law of the forum state presumptively applies. *Burnside*, 123 Wn.2d at 100. If an actual conflict is found, the court will find that Washington has a strong policy favoring the use of its own law in step two.

that the decision to exclude the component that would have made the product safe was made anywhere other than Washington.

C. Washington cases favor applying our product liability law.

Mr. Hai properly filed suit in Washington alleging a products liability claim against the product designer for a defective design. When the court has decided analogous cases in the past, it has decided to apply Washington law. In his opening brief, the injured party cited the Supreme Court case of *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580-81, 555 P.2d 997 (1976). Comparing the facts of *Johnson* with the facts of this case, the four factors lean toward applying Washington law:

FACTORS	<i>Johnson</i>	<i>Hai</i>
1) Place of injury	Kansas	Texas
2) Place of conduct	Designed in Wash.	Wash./Colorado
3) Parties are from	Wash. Corp.	Wash./Dela./Color.
4) Relationships centered	Bought in Kansas Injured in Kansas Healthcare in Kansas Died in Kansas	Shipped F.O.B. Wash. Injured in Texas Healthcare in Texas

Similarly, this same analysis was applied in *Zenaida-Garcia v. Recovery Systems Tech., Inc.*, 128 Wn. App. 256, 115 P.3d 1017 (2005). In that case, the injured party lived and worked in Oregon. *Id.* at 258. He was injured and died in Oregon. *Id.* The product was purchased second-hand in Oregon, but the allegation was that the product was defectively designed in Washington. *Id.* at 263. The civil action was brought in

Washington, and the Washington defendant wanted to use Oregon's statute of repose. The appellate court wrote that "the defendant is a Washington corporation engaged in designing and manufacturing [products] in Washington; the cause of action is negligent and unsafe design of the [product]," so "the conduct causing the injury, and the place where the relationship is centered, is Washington." *Id.* at 263. That appellate court considered the Washington Products Liability Act preamble, just as this court is asked to do and the court reaffirmed Washington's "strong policy interests in deterring the design, manufacture and sale of unsafe products," overcame Oregon's interest in protecting manufacturer's from liability. *Id.*

In this case, the injured party seeks to apply two⁴ analogous cases that compel the application of Washington law and not Texas law in this product liability case.

1. The mere fact that the injury occurred in Texas is not the most important point.

Respondents first argue that the most important factor in this analysis is that Mr. Hai was injured in Texas. However, the Washington

⁴ Respondent argues these two cases are distinct as the factors are not balanced, which is a bald argument, and because Mr. Hai was not "using" the product. Under Washington law, a "claimant" is defined by statute as "any person ... that suffers harm." RCW 7.72.010(5). The law does not distinguish "users" from "claimants."

Supreme Court has specifically noted that “the location of the injury is not necessarily determinative.” *Williams v. Leone & Keeble*, 171 Wn.2d 726, 736 n.6; 254 P.3d 818 (2011). Although Mr. Hai was hurt in Texas, the more relevant consideration is where the negligent acts that caused the injury occurred, which in this products liability case is primarily Washington. Thus, because the acts causing the injury occurred outside of Texas, the fact that Mr. Hai was injured in Texas bears little, if any, weight.

2. The negligent conduct causing the injury occurred in Washington, not Texas.

Respondents’ assertion that the injury-causing conduct occurred in Texas is misplaced. In their response brief, Respondents argue primarily from the retailer’s vantage point and largely ignore the negligent design by the product designer in Washington. Appellant does not contest that he was injured on a product in a Texas store, however, this conduct was foreseeable due to acts occurring in Washington and Colorado, and it is the very conduct that makes this particular design defective according to the only expert witness in this case. CP at 159 – 163.

Respondents do not and cannot contest that the product designer primarily designed and conceptualized the product at issue in this case in the state of Washington. CP 126, 129. The product designer also

developed the marketing strategy for the product and issued warnings for its use in Washington. CP 151. These facts alone are sufficient to apply Washington law because Mr. Hai's product liability claim is primarily based upon the product designer's defective design and warnings of the product. It is undisputed that other than the mere circumstance that one of its products was distributed to Texas. The product designer has no other relevant connection to the state of Texas. While Respondents argue that the negligent act must have been in Texas where Mr. Hai was injured, the facts demonstrate that the product designer's negligent acts occurred in Washington long before Mr. Hai was injured, when the product was designed without a built-in locking mechanism. CP at 197; CP at 178.

Inversion tables without built-in locks are inherently more dangerous than tables with built-in locks because it is foreseeable that the lock will not be used and a person will come into inadvertent contact with the product. CP at 162-63. This is exactly how this product injured Mr. Hai.

Notably, Respondents sole response to this claim is the assertion that the alleged design defect did not cause the injury. Specifically, Respondents assert that Texas law should apply because even if there was a built-in lock, a person in Texas would have been responsible for using it. Response Brief at 14. This contention simply assumes without evidence

that even if the product was properly designed, this accident would still have occurred. This assertion should carry no weight because it is conjecture and all facts and inferences are to be construed in Mr. Hai's favor in this action. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994).

Respondents also try to dismiss the defective warnings claim by asserting that it is irrelevant to this case because Mr. Hai was not using the product and was not looking at the product when he was injured. Mr. Hai is a claimant under Washington law. RCW 7.72.010(5). Besides, it has never been asserted that the defective warnings are solely limited to the end-users of the product. Rather, had the product designer included proper warnings for the product, retail level employees would have been properly warned about the extreme risk of harm and taken appropriate precautions to secure the product. Similarly, had proper warnings been utilized on the product itself, Mr. Hai may have avoided the product entirely and thus his injury. Regardless, the fact remains that because the product designer issued defective warnings in Washington, this product was unsecured and the accident occurred.

Ultimately, a key component of this case is the fact that if the product designer had properly designed the product to include a built-in lock and issued proper warnings, then this injury would have been

avoided. As highlighted in Appellant's opening brief, the tortious activity that was the proximate cause of Mr. Hai's severe injuries – the activity sought to be regulated under Washington's product liability laws – occurred in Washington by a Washington corporation. Because all of the product designer's negligence occurred in Washington, the product designer should be held accountable for its actions under Washington's laws.

Respondents also fail to adequately respond to Mr. Hai's assertion that his injury was the product of the retailer's negligence at a corporate-level in Colorado. (Opening Brief at 6.) Specifically, a key element of Mr. Hai's Washington product liability claim against the retailer is that TSA failed to establish proper safety protocols for the product. (Opening Brief at p. 18.) Respondents did not offer any rebuttal to that fact that the retailer knew it was displaying a dangerous product because the product designer provided the retailer with removable locks for its inversion tables and admonished the retailer (in its corporate office in Colorado) to ensure that the lock was installed on the table and to re-lock the table after any product demonstrations. CP 199. Had the retailer taken better precautions, Mr. Hai's injury would not have occurred. Additionally, Respondents do not, and cannot, rebut Mr. Hai's expert witness who opined that the architecture and store design were a substantial factor in

the accident, which was overseen by the retailer's construction department in Colorado. CP at 138. Contrary to Respondents' claims, the retailer admitted that the decision of "general placement, such as the area of the store and the kinds of adjacent products,... was made at corporate headquarters in Colorado," it was made with significant participation from the corporate headquarters or it was made pursuant to a corporate policy written at the Colorado headquarters. CP 143; Br. of Resp. at 13. This conduct is key to Mr. Hai's product and premises liability claims, and it is uncontroverted that the conduct occurred outside of Texas. Instead of addressing these key points, the retailer has tried to narrowly interpret the facts and rely on unsupported suppositions. All facts and inferences are to be construed in Mr. Hai's favor in this summary judgment action, however. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994).

Overall, Respondents attempt to minimize the substantial negligent acts in Washington by arguing that TSA's own negligence did not occur in Washington. However, the Court's analysis should not be limited to one party's contacts, but rather upon the entirety of the contacts from all parties. *See Martin v. Humbert Constr., Inc.*, 114 Wn. App. 823, 830, 61 P.3d 1196 (2003). Ultimately, because STL's negligence occurred solely in Washington and the bulk of TSA's own negligent acts that are the

subject of Mr. Hai's claims occurred primarily outside of Texas, the contacts of Washington, and not Texas, should control.

Finally, Respondents baldly allege that Mr. Hai's own "failure to watch where he was going was a primary cause of his injury." Br. of Resp. at 15. However, there is no evidence in the record that Mr. Hai's actions were the cause of his injuries, much less the primary cause. Rather, the evidence shows that the only reason Mr. Hai was injured was because the product was defectively designed such that it sprang into action upon inadvertent contact. Regardless, this is clearly a fact issue that should be viewed in Mr. Hai's favor. *Rice v. Dow Chemical Co.*, 124 Wn.2d 205, 208, 875 P.2d 1213 (1994). In sum, it is clear that the injury causing conduct occurred primarily in the State of Washington.

3. The domicile, residence, nationality, place of incorporation and place of business of the parties point to Washington.

Respondents argue that this factor should favor Texas because Mr. Hai is a Texas resident and the injury occurred in Texas. Residency in the forum state alone has not been considered a sufficient relation to the action to warrant application of forum law. *Rice, supra* at 216 (citing Restatement (Second) of Conflict of Law § 145 cmt. e (1971) ("The fact ... that one of the parties is domiciled ... in a given state will usually carry little weight of itself.")).

In this case, STL is not only incorporated in Washington, but it is headquartered here, conducts business here, and maintains a registered agent here. CP 129, 151. Similarly, TSA is a Delaware corporation, with a principle place of business in Colorado, that maintains 13 stores in Washington. CP 136-42, 192. When weighed together, because both Respondents are located in and do business in Washington, this factor strongly favors the application of Washington law.

The facts demonstrate that Washington law should have been applied to this product liability case against a Washington corporation that primarily conceptualized and marketed the product from Washington. Accordingly, the trial court erred by applying Texas law and dismissing the injured party's claims.

D. In the Alternative, Policy Interest Favor Application of Washington Law

It is clear that Washington has the most significant contacts with this case, but if the Court finds they are even, Washington law should still apply. In their brief, Respondents again try to reframe this case as a personal injury case arising solely out of Texas and assert that the suit in Washington is mere forum shopping. However, as described in detail above, even though he was hurt in Washington, Mr. Hai's product liability

claims against a Washington corporation actually arose in Washington. Thus, this alleged forum shopping is inapplicable to this analysis.

Regardless, Respondents argue that that the policy behind the Products Liability Act will not be advanced by this suit because it is intended to protect “retail businesses” by “unwarranted exposure to product liability litigation.” Response Brief at 19. However, this argument is misplaced because (1) STL, the product creator, is not a retail business; and (2) it is hardly unfair to hold a Washington company that oversees the design, marketing and manufacturing of the product in question on a national scale liable under Washington law. More importantly, it cannot be contested that Washington has a strong interest in deterring the design, manufacture, and sale of unsafe products within its borders. Thus, the policy considerations asserted by Respondents are inapplicable and Washington’s strong interest should be applied.

Similarly, Respondents do not rebut Appellant’s argument that the application of Texas’ statute of limitations would not further its stated purpose. In fact, as explained in the opening brief, applying the Texas statute of limitations to the facts of this case is contrary to its purpose. Thus, Texas’ interests are not furthered by applying its limitations, especially when compared to Washington’s interest in deterring the design

of unsafe products within its borders. Therefore, Washington law should be applied even if this Court finds the contacts are even.

E. TSA Jurisdictional Argument Should Be Denied

TSA also argues that if this Court determines that Washington law applies, then this Court should find that Washington does not have personal jurisdiction. TSA waived this argument three different ways, and the argument lacks support if considered on its merits.

TSA waived the issue. First, TSA enumerated 17 affirmative defenses in its answer, but it did not assert lack of personal jurisdiction. CP 136. Second, it failed to raise the issue in its first motion under Rule 12, which was denied. CP 163-174. TSA has waived the defense under Civil Rule 12(h)(1) by failing to assert the defense in its answer and its first motion under Rule 12. Third, TSA also ignores the point made in the opening brief, (Br. of Resp't At 7, n. 4). The trial court did not err, so the issue was not appealed.⁵ However, when this issue was raised at the summary judgment hearing, TSA expressly conceded that personal jurisdiction was proper before the Washington court. In answer to the trial court's question of whether it had jurisdiction to rule on the merits applying Texas law on summary judgment, or whether jurisdictional

⁵ TSA failed to designate those clerk's papers pertinent to its issue under RAP 9.6(a).

grounds would let Mr. Hai refile in Texas: “It’s [TSA’s] position that subject matter and personal jurisdiction are proper, and so this court could apply Texas law.” VRP at 32.

If TSA’s jurisdictional arguments are nonetheless considered on the merits, a Washington court would have personal jurisdiction under general or specific jurisdiction. Under Washington law, a state court may exercise either general or specific personal jurisdiction over a nonresident defendant. *Mbm Fisheries v. Bollinger Mach. Shop & Shipyard*, 60 Wn. App. 414, 418 (Wash. Ct. App. 1991). RCW 4.28.080(10) authorizes general jurisdiction over a nonresident defendant *without regard* to whether the cause of action is related to the defendant’s contacts with the forum state. *Id.* Although that provision appears only to address service of process, the Washington Supreme Court has held that it confers general jurisdiction over a nonresident defendant “doing business” in this state, that is, transacting substantial and continuous business of such character as to give rise to a legal obligation. *Id.*

Thus, Washington’s general jurisdiction over TSA is not narrowly limited to the facts of the particular case, but rather to TSA’s overall business in the state. Here, TSA has 13 stores in the State of Washington, it has entered into at least one vendor contract with a Washington corporation (STL) and the company and has substantial and continuing

business in the state of Washington. TSA is subject to this Court's general jurisdiction, regardless of its actions as they apply to the facts of this case. Further, the execution of a contract in Washington coupled with other contacts between the defendant and the state may be sufficient alone to establish personal jurisdiction. *See, e.g., Raymon v. Robinson*, 104 Wn. App. 637 15 P.3d 697 (2001).

This issue is so wholly without merit as to warrant consideration of attorney's fees under RAP 18.9. Washington Courts have personal jurisdiction in this case specifically, and all cases generally, over TSA.

II. Conclusion

Ultimately, this appeal comes down to a determination of which state has the most significant relationship to the occurrence and the parties in this product liability case. It is clear that the totality of contacts in this case demonstrate that this case should be governed by Washington law, Texas law does not have as significant of a relationship. Therefore, this Court should reverse the superior court's decision to grant summary judgment.

Respectfully submitted this 28th day of March, 2013.

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Declaration of Service

I caused a copy of the foregoing Appellant's Reply Brief to be served on the following in the manner indicated below:

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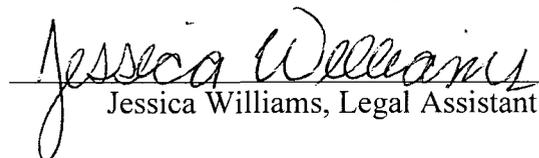
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on today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

SIGNED this 29th day of March, 2013, at Seattle, Washington.


Jessica Williams, Legal Assistant