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Court of Appeals
Division III
State of Washington

No. 318176-III

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

DAVID ABERCROMBIE,

Appellant,

v.

RECONTRUST COMPANY, INC.; LANDSAFE TITLE OF
WASHINGTON, INC.; MORTGAGE ELECTRONIC REGISTRATION
SYSTEMS INC.; COUNTRYWIDE HOME LOANS, INC.; BAC HOME
LOANS SERVICING, LP; and, BANK OF NEW YORK MELLON FKA
THE BANK OF NEW YORK, AS TRUSTEE FOR THE CERTIFICATE
HOLDERS OF CWABS, INC. ASSET-BACKED CERTIFICATES,
SERIES 2006-26

Respondents.

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I. INTRODUCTION

Appellant David Abercrombie seeks through this lawsuit a judgment that requires Respondents to comply with the law when initiating foreclosure proceedings under the Deed of Trust Act (“DOTA”). Respondents urge this Court to ignore recent binding precedent and leave them unrestrained from initiating unlawful foreclosure proceedings in the future. Respondents’ primary arguments are directly at odds with the recent decision of *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 308 P.3d 716 (2013), which held that borrowers may have actionable claims against a trustee under the DOTA, the Washington Consumer Protection Act (“CPA”), and the Fair Debt Collection Practices Act (“FDCPA”) even if no foreclosure sale has yet occurred.

Because the court below can still provide effective relief to prevent Respondents ReconTrust and BNY Mellon from initiating further unlawful foreclosure proceedings, Abercrombie’s claims for injunctive and declaratory relief are not moot. The damages Abercrombie suffered as a result of Respondents’ actions establish both the requisite prejudice under the DOTA as well injury and causation under the CPA. ReconTrust also violated the physical presence requirement of the DOTA by failing to place in Washington any representative who could speak on behalf of the company. Furthermore, because Respondents qualify as debt collectors, Respondents’ arguments that they are exempt under the FDCPA and the

Collection Agency Act (“CAA”) must be rejected. These claims were improperly dismissed below. Finally, contrary to Respondents’ assertions, Abercrombie properly requested attorneys’ fees in his opening brief.

For these reasons and those that follow, the Superior Court’s rulings and judgment should be reversed.

II. ARGUMENT AND AUTHORITY

A. Abercrombie’s Claims for Declaratory and Injunctive Relief Against ReconTrust and BNY Mellon Are Not Moot

The trial court improperly dismissed Abercrombie’s claims for declaratory and injunctive relief against Respondents ReconTrust and BNY Mellon. Respondents assert that there is no longer a justiciable controversy regarding these claims. Respondents are wrong.

A controversy is not moot if a court can still provide effective relief. *City of Moses Lake v. Grant Cnty. Boundary Review Bd.*, 104 Wn. App. 388, 392, 15 P.3d 716 (2001); *Pentagram Corp. v. Seattle*, 28 Wn. App. 219, 223, 622 P.2d 892 (1981). Here, ReconTrust has already issued two unlawful notices of trustee sale on behalf of BNY Mellon, and there is no applicable ruling or other authority to bar ReconTrust from issuing a third. A declaration that ReconTrust was not a valid Trustee in this case, and an injunction prohibiting ReconTrust from acting as a Trustee under any Deed of Trust in Washington, would constitute effective relief by ensuring Abercrombie is not subjected to the same illegal actions in the future.

The 2012 consent decree between ReconTrust and the Attorney General of Washington has no bearing on this issue. *See* CP 734-46. Indeed, Respondents themselves argue that in Washington, consent decrees have no preclusive effect outside the parties to the settlement. *See* Resp. Br. at 13 (citing *Dunning v. Paccarelli*, 63 Wn. App. 232, 242, 818 P.2d 34 (1991)). Thus, because the consent decree fails to ensure that ReconTrust will not again attempt to act as Trustee in this case, claims for declaratory and injunctive relief are not moot.

Respondents' contention that Abercrombie has no claim for injunctive or declaratory relief against BNY Mellon is without merit. ReconTrust initiated foreclosure proceedings in violation of the DOTA on behalf of BNY Mellon. The beneficiary and holder of the loan must authorize a foreclosure; the trustee is not free to unilaterally initiate foreclosure. *See* RCW 61.24.030(7). As the holder of the note and beneficiary of the Deed of Trust, BNY Mellon failed to ensure that foreclosure proceedings under the DOTA were correctly followed. Abercrombie is entitled to declaratory relief that affirms the same, and an injunction to ensure that BNY Mellon complies with the DOTA in the future.

B. Abercrombie Asserted a Valid Claim for Wrongful Initiation of Nonjudicial Foreclosure under the Deed of Trust Act

The landscape of this case was substantially altered by *Walker v. Quality Loan Serv. Corp.*, 176 Wn. App. 294, 313, 308 P.3d 716 (2013),

in which the Washington Court of Appeals held that a borrower may have an actionable claim against a trustee under the DOTA even if no foreclosure sale has yet occurred.¹ Thus, although Respondents never followed through on their intent to foreclose on Abercrombie's home, Abercrombie has an actionable claim for damages caused prior to the potential sale.

Although no foreclosure sale ever occurred, Abercrombie was prejudiced by Respondents failure to comply with the DOTA. Citing the supposed lack of prejudice, Respondents wrongly assert that the viability of Abercrombie's DOTA claim under *Walker* is doubtful. All of the cases cited by Respondents in support of this assertion are inapposite, as they were decided before *Walker* and concern factual scenarios in which the borrower failed to object to the foreclosure procedure prior to the trustee sale. *See Amresco Independence Funding, Inc. v. SPS Properties, LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005) (declining to void the sale because the trustee's error was nonprejudicial); *Koegel v. Prudential Mut. Sav. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988) (same); *Steward v. Good*, 51 Wn. App. 509, 514-15, 754 P.2d 150 (1988) (same).

Walker in fact supports the proposition that a borrower such as

¹ While Respondents correctly note that this holding is the subject of a certified question pending before the Washington State Supreme Court pursuant to *Frias v. Asset Foreclosures Servs., Inc.*, No. C13-760-MJP, 2013 WL 6440205 (W.D. Wash. Sept. 25, 2013), *Walker* is the current authority that controls the issue presently before the Court.

Abercrombie may suffer prejudice as a result of DOTA violations even if a foreclosure sale has not occurred. *See* 176 Wn. App. at 312. Due to Respondents' violations of the DOTA and Abercrombie's subsequent efforts to address the violations, Abercrombie suffered general damages that led to the filing of this lawsuit, including but not limited to investigative expenses. *See generally* CP 001-18; *Walker*, 176 Wn. App. at 312 (holding that such damages were sufficient to establish prejudice as a result of unlawful actions taken in violation of the DTA). Abercrombie is therefore able to establish the requisite prejudice for a viable DOTA claim.

C. ReconTrust Did Not Satisfy the Deed of Trust Act's Physical Presence Requirement

When there is an attempt to foreclose on Washington property, "the trustee must maintain a street address in this state where personal service of process may be made, and the trustee must maintain a physical presence and have telephone service at such address." RCW 61.24.030(6) (emphasis added). When interpreting a statute, courts first look to its plain language. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009). Respondents attempt to explain away the plain language of the statute's "physical presence" clause as a mere

qualification of the “personal service” requirement that precedes it.² The state legislature, however, would not have added a separate “physical presence” clause if all that was required was a street address for personal service. *See Prosser Hill Coal. v. Cnty. of Spokane*, 176 Wn. App. 280, 288, 309 P.3d 1202 (2013) (“A court must give meaning to every word and interpret the statute as written.”). The crux of Respondents’ argument is that the physical presence requirement “prevents a trustee from avoiding personal service by maintaining only a PO Box as its ‘street address.’” Resp. Br. at 18. By definition, however, the requirement of a “street” address already prohibits the use of a PO Box as an address for personal service of process. Thus, Respondents’ argument is meritless, and “physical presence” must require more than merely designating an agent for service of process at a Washington address.

Furthermore, if the purpose of the “physical presence” clause were only to enable service of process, there would be no reason to also require telephone service. The telephone service requirement must be interpreted within the context of the DOTA’s purpose of ensuring that interested parties have an adequate opportunity to prevent wrongful foreclosure. *See Plein v. Lackey*, 149 Wn.2d 214, 225, 67 P.3d 1061 (2003). Physical presence in Washington, including telephone service, is essential to

² The federal district court cases cited by Respondents in support of their interpretation of the “physical presence” requirement are not controlling here, and fail to provide any in depth analysis of the statute’s language and legislative purpose. *See* Resp. Br. at 17.

accomplishing this purpose. Indeed, when Abercrombie dialed the phone number listed on the Notice of Trustee's Sale, he was only able to reach a representative of ReconTrust's agent for service of process, who was unable to speak for ReconTrust or provide any assistance related to the foreclosure process. Abercrombie's experience contravenes the purpose of the DOTA and demonstrates the purpose of the physical presence requirement.

D. Abercrombie Has Asserted a Valid Consumer Protection Act Claim

1. Respondents' Actions Constitute Unfair and Deceptive Acts

The legislature has made clear that the CPA "shall be liberally construed" to fulfill its objective of protecting the public against "unfair, deceptive, and fraudulent acts or practices." RCW 19.86.920. Consistent with the broad and remedial purposes of the CPA, the Court should reject Respondents' attempt to eliminate the ability of borrowers to assert CPA claims.

Respondents wrongly assert Abercrombie is unable to prove an unfair or deceptive act or practice to satisfy the first element of a CPA claim. As recognized by Respondents, in *Bain v. Metro. Mortgage Grp., Inc.*, 175 Wn.2d 83, 117, 285 P.3d 34 (2012), the Washington State Supreme Court agreed that "characterizing MERS as the beneficiary has the capacity to deceive and thus...presumptively the first element [of a claim for violation of the CPA] is met." Whether Abercrombie was in fact

deceived by MERS' designation as the beneficiary is irrelevant; the relevant inquiry is whether such a false and illegal designation has the capacity to deceive. *Bain* unequivocally answers this question in the affirmative.

Walker further demonstrates that Respondents' conduct constitutes unfair or deceptive acts under the CPA. Like Abercrombie, the plaintiff in *Walker* alleged that an improperly appointed trustee (Quality Loan Service Corp.) sent a notice of default to the plaintiff "despite not meeting the requirements of a successor trustee under RCW 61.24.010(2)," which the improper trustee and improper beneficiary (Select) knew or should have known at the time notice was issued. *Walker*, 176 Wn. App. at 318-19. The plaintiff further contended that the defendants' actions "facilitated a deceptive and misleading effort to wrongfully execute and record documents [they] knew or should have known contained false statements related to the Appointment of Successor Trustee and Assignment of Deed of Trust." *Id.* Finally, the plaintiff alleged that the improperly appointed trustee and beneficiary issued a notice of trustee's sale that they knew contained false statements in that no obligation of the plaintiff was ever owed to the purported beneficiary, and as a result, they knew the conduct amounted to wrongful foreclosure and a violation of the FDCPA. *Id.* The court held that such allegations, which are analogous to those asserted by Abercrombie here, were sufficient to establish unfair and deceptive acts

under the CPA. *Id.*

In addition, Abercrombie has established a per se violation of the CPA, thus automatically proving an unfair or deceptive act. A non-judicial foreclosure is fundamentally an attempt to collect on a debt. As set forth below, Respondents' conduct violated the FDCPA. "When a violation of debt collection regulations occurs, it constitutes a per se violation of the CPA ... under state and federal law, reflecting the public policy significance of this industry." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 53, 204 P.3d 885 (2009); *see also Walker*, 176 Wn. App. at 318-19 (citing *Panag* and recognizing a per se violation of the CPA satisfies the unfair and deceptive act requirement). Abercrombie has therefore established that Respondents' conduct constitutes unfair and deceptive acts under the CPA.

2. Abercrombie Established Injury and Causation under the CPA

In *Panag*, the Washington Supreme Court broadly defined CPA injuries in the context of debt collection: "[T]he injury requirement is met upon proof the plaintiffs' property interest or money is diminished because of the unlawful conduct even if the expenses caused by the statutory violations are minimal." 166 Wn.2d at 57 (citing *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). Importantly for debtors, *Panag* upheld injury for investigative expenses and other inconvenience costs caused by deceptive business practices. *Id.* at 62. These expenses

include loss of business profit as a result of time spent away from business responding to deception, *Sign-O-Lite Signs v. Delaurenti Florists*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992); costs of travel, *Panag*, 166 Wn. 2d at 64; and costs and fees paid to attorney to dispel uncertainty regarding deceptive practices, *id.* at 62-63.

As a result of Respondents' unfair and deceptive acts, Abercrombie suffered damages. *See generally*, CP 001-18. Prior to filing this lawsuit to prevent the unlawful foreclosure, Abercrombie obviously had to investigate his claims and confirm that violations had occurred. Related injuries include lost business profit as a result of missed work, as well as travel time. *See Sign-O-Lite Signs*, 64 Wn. App. at 564; *Panag*, 166 Wn. 2d at 64. *Walker* definitively confirms that such damages suffice to establish requisite injury under the CPA. *Walker*, 176 Wn. App. at 320 ("Investigative expenses, taking time off from work, travel expenses, and attorney fees are sufficient to establish injury under the CPA.").

The damages Abercrombie suffered were not caused by Abercrombie's own default. All of the cases cited by Respondents in support of their argument to the contrary are distinguishable, as the damages asserted by the borrowers in those cases related directly to the default rather than the unlawful foreclosure process. *See Massey v. BAC Home Loans Servicing LP*, No. C12-1314JLR, 2013 WL 6825309, at *8 (W.D. Wash. Dec. 23, 2013) (damages related to bankruptcy filing, credit

score, and the loss of equity and down payment); *Wear v. Sierra Pac. Mortgage Co., Inc.*, No. C13-535-MJP, 2013 WL 6008498, at *3 (W.D. Wash. Nov. 12, 2013) (damages related only to pending lawful foreclosure of home); *Babrauskas v. Paramount Equity Mortgage*, No. C13-0494RSL, 2013 WL 5743903, at *4 (W.D. Wash. Oct. 23, 2013) (damages related to plaintiff's credit, cloud on his title, and monetary effect of the threat of lawful foreclosure). Here, the "but for" cause of Abercrombie's damages is Respondents' failure to comply with the DOTA, not Abercrombie's default.

Respondents' argument that Abercrombie did not suffer a CPA injury because he was not confused as to the identity of the holder or the party to deal with to resolve disputes regarding the loan is a red herring. *See Op. Br.* at 25. Abercrombie suffered damages not as a result of confusion regarding the identity of the note holder or loan servicer, but as a result of Respondents' violations of the DOTA and Abercrombie's efforts to address those violations. Furthermore, Abercrombie's damages under the CPA do not include attorneys' fees and costs incurred since filing this lawsuit. His damages relate to investigative actions taken before he filed his Complaint in order to confirm that Respondents violated the DOTA. The investigative actions prompted by the deceptive actions that led to the filing of the lawsuit were instituted to save Abercrombie's home, not sue for a CPA violation.

E. Abercrombie Has Asserted a Valid Claim Under the Fair Debt Collection Practices Act

In his Complaint, Abercrombie asserted a claim under the FDCPA for violations of 15 U.S.C. § 1692 *et seq.* Abercrombie acknowledges that Division I held in *Walker* that foreclosure proceedings do not constitute “debt collection” within the meaning of the FDCPA. The *Walker* court relied upon *Jara v. Aurora Loan Services, LLC*; No. C 11-00419, 2011 WL 6217308, at *4 (N.D. Cal. Dec. 14, 2011), and quoted the district court in *McDonald v. OneWest Bank, FSB*, No. C10-1952RSL, 2012 WL 555147, at *4 n.6 (W.D. Wash. Feb. 21, 2012), where it was stated: “The current trend among district courts in the Ninth Circuit is to find that, at least insofar as defendant confines itself to actions necessary to effectuate a nonjudicial foreclosure, only § 1692f(6) of the DCPA applies.” *Walker*, 176 Wn.2d at 316.

In deciding *Walker*, Division I recognized that our Ninth Circuit has yet to rule on the issue, as did the court in *Jara* in deciding to follow the “trend”. The *Jara* court did note, however, that the underlying reasoning for the “trend” was “not without its critics,” and cited the Fourth Circuit Court of Appeals ruling in *Wilson v. Draper & Goldberg PLLC*, 443 F.3d 373, 376-77 (4th Cir. 2006).

In *Wilson*, the Fourth Circuit thoroughly analyzed the arguments regarding the applicability of the FDCPA to foreclosure proceedings as debt collection activities, and, after considering the proposition that the

FDCPA did not apply to such proceedings, concluded (citing both the Second and Third Circuits):

We disagree. Wilson's "debt" remained a "debt" even after foreclosure proceedings commenced. *See Piper v. Portnoff Law Assocs.*, 396 F.3d 227, 234 (3d Cir. 2005) ("The fact that the [Pennsylvania Municipal Claims and Tax Liens Act] provided a lien to secure the Pipers' debt does not change its character as a debt or turn PLA's communications to the Pipers into something other than an effort to collect that debt."). Furthermore, Defendants' actions surrounding the foreclosure proceeding were attempts to collect that debt. *See Romea v. Heiberger & Assocs.*, 163 F.3d 111, 116 (2d Cir.1998) (concluding that an eviction notice required by statute could also be an attempt to collect a debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 124 (Colo. 1992) ("[A] foreclosure is a method of collecting a debt by acquiring and selling secured property to satisfy a debt.").

Defendants' argument, if accepted, would create an enormous loophole in the Act immunizing any debt from coverage if that debt happened to be secured by a real property interest and foreclosure proceedings were used to collect the debt. We see no reason to make an exception to the Act when the debt collector uses foreclosure instead of other methods. *See Piper*, 396 F.3d at 236 ("We agree with the District Court that if a collector were able to avoid liability under the [Act] simply by choosing to proceed *in rem* rather than *in personam*, it would undermine the purpose of the [Act].")

Wilson, 443 F.3d at 376.

The *Wilson* court went on to note that the correspondence used in the foreclosure process before it “contained a specific request for money to ‘reinstate the above account’”, as does virtually every communication required by the DOTA, making the point that debt collection is an integral component of all foreclosure proceedings. *Id.*

Abercrombie respectfully asks this court to adopt the reasoning of the Second, Third and Fourth Circuits, decline to follow the *Walker* court’s lead, and rule that the all of the provisions of the FDCPA apply to proceedings under the DOTA.

Should this court choose to follow *Walker* in this regard, Abercrombie asks that it at least rule, as did Division I, that when lenders, servicers or trustees participate in nonjudicial foreclosure proceedings they are pursuing debt collection activities under § 1692f(6), which prohibits threats to “take nonjudicial action to dispossess the Plaintiff of his residence without a present right to possession.” *See* 15 U.S.C. § 1692f(6); *Walker*, 176 Wn. App. at 314. Contrary to Respondents’ assertions, Abercrombie never limited his claim to violations of only § 1692e. By pleading violations of 15 U.S.C. § 1692 *et seq.*, the claim necessarily includes § 1692f(6).

Abercrombie’s claims relate specifically to the enforcement of a security interest by Respondents MERS and ReconTrust, and, therefore, these parties may be “debt collectors” within the meaning of § 1692f(6).

Neither MERS nor ReconTrust had a present right to possession of the property through nonjudicial foreclosure because they were not the holders of the underlying debt instrument. Because this was a violation of the DOTA, Respondents also violated § 1692f(6), which expressly prohibits threats to take possession of property through nonjudicial foreclosure without a present right to possession.

F. Abercrombie’s Claim Under the Collection Agency Act Was Improperly Dismissed

The CAA requires both “collection agencies” and “out-of-state collection agencies” to be licensed by the Washington State Department of Licensing (“DOL”). *See* RCW 19.16.110. RCW 19.16.100 defines the two quite differently. Subsection 5 defines “Collection agency” from which, Respondents correctly argue, they are exempted. Subsection 10, however, defines “Out-of-state collection agency” with language that mirrors FDCPA, the applicability of which to respondents is settled law. *See* RCW 19.16.100(10); *Moritz v. Daniel N. Gordon, P.C.*, 895 F.Supp.2d 1097, 1111 (W.D. Wash. 2012) (collection agencies located outside of Washington). This is unquestionably true with respect to ReconTrust, which is not a servicer and never acquired the debt.

A violation of the provisions of the CAA is a per se violation of the CPA, and it is the clear intention of the CAA to bring collection agency and out of state collection agency activities within the coverage of the CPA. *See* RCW 19.16.440 (CAA violations “are declared to be unfair acts

or practices or unfair methods of competition in the conduct of trade or commerce for the purpose of the application of the [CPA].”); *Evergreen Collectors v. Holt*, 60 Wn.App. 151, 155, 803 P.2d 10 (1991) (“It is clear, therefore, that a violation of the provisions of the Collection Agency Act is a per se violation of the Consumer Protection Act.”). There is no dispute that Respondents MERS, ReconTrust, BNY Mellon or BANA were not licensed by DOL as collection agencies. Thus, they violated the CAA when they attempted to collect on a debt through the non-judicial foreclosure process. As set forth above, Abercrombie is able to prove the injury and causation elements of his CPA claim. He has therefore asserted an actionable claim under the CAA.³

Contrary to Respondents’ assertions, MERS, ReconTrust and BNY Mellon acted as “out-of-state collection agencies” when they attempted to foreclose on Abercrombie’s mortgage.

G. Abercrombie Properly Requested Attorneys’ Fees

Respondents’ argument that Abercrombie is not entitled to attorneys’ fees and costs must be rejected. Abercrombie properly requested attorneys’ fees in multiple sections of his opening brief.⁴ *See*

³ Respondents wrongly contend Abercrombie failed to sufficiently address his CAA claim in his opening brief. In *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), cited by Respondents, the appellant merely incorporated his trial briefs by reference. In contrast, Abercrombie succinctly stated his argument in the opening brief, and he now elaborates in reply to Respondents’ responsive arguments.

⁴ By repeatedly addressing his request for attorney’s fees in his opening brief, Abercrombie satisfied the requirements of RAP 18.1(b). In the cases cited by

Op. Br. at 1, 4, 15, 17. RCW 4.84.330 provides that in “any action on a contract” which provides that attorneys' fees and costs “shall be awarded to one of the parties, the prevailing party, whether he or she is the party specified in the contract or lease or not, shall be entitled to reasonable attorneys' fees in addition to costs and necessary disbursements.” Here, the Deed of Trust, at section 26, provides that the lender shall receive an award of “attorney’s fees and costs in any action or proceeding to construe or enforce any term of this Security Instrument.” CP 358. Although Abercrombie was not included as a party entitled to fees under the deed of trust, RCW 4.84.330 provides a right to fees to all parties to the contract. If this Court reverses the trial court’s judgment with respect to any claim, Abercrombie will be entitled to reasonable attorneys’ fees under RCW 4.84.330.

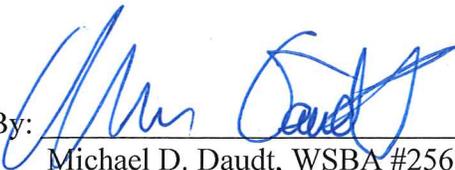
III. CONCLUSION

For the reasons set forth above, Appellant respectfully requests that the Court reverse the Superior Court’s decision below, vacate the Order Granting Defendants’ Renewed Motion for Summary Judgment, award no fees to Respondents on appeal, and award Appellant reasonable attorneys’ fees and costs.

Respondents, the parties merely requested fees in the conclusion of their opening or responsive briefs. See *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 676-67, 303 P.3d 1065 (2013).

RESPECTFULLY SUBMITTED AND DATED this 16th day of
July, 2014.

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CERTIFICATE OF SERVICE

I, Michael D. Daudt, declare and say as follows:

I certify that on July 16, 2014, I caused a true and correct copy of the foregoing to be served on the following via the means indicated:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16th day of July, 2014.



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