

No. 34747-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RONALD TRAVIS ROTH,

Respondent,

v.

HEMPZEN ENTERPRISES, LTD.,
a Washington corporation,

Appellant.

REPLY BRIEF OF APPELLANT

Robert W. Sealby, WSBA #21330
Carlson, McMahon & Sealby, PLLC
37 South Wenatchee Avenue
3rd Floor, Suite F
Wenatchee, WA 98007-2965
(509) 662-6131

Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Appellant
Hempzen Enterprises, Ltd.

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A. INTRODUCTION

The brief submitted by respondent Ronald Roth is remarkable for its obstinate insistence that in the face of Mr. Electric's blatant effort to shake down Hempzen Enterprises Ltd. ("Hempzen") by the filing of a frivolous lien, Hempzen should simply have caved in to such conduct. Roth's position is but further evidence of his violation of the implied covenant to act in good faith with regard to the lease: Roth sought to oust Hempzen from his marijuana grow premises, and he happily used the excuse of the Mr. Electric lien to accomplish that goal.

Roth, like the trial court, seemingly ignores the Legislature's directions in both RCW 59.12.030(4) *and* RCW 59.12.190 to allow a tenant to cure a problem with a lease before a writ of restitution may issue to a landlord. Hempzen removed the lien, met its lease obligation to improve the leasehold, and paid the rent. The trial court erred in issuing a writ of restitution.

B. STATEMENT OF THE CASE

With regard to Roth's restatement of the case, resp't br. at 2-9, it is exceedingly troubling that Roth's restatement is both argument, thinly disguised, in violation of RAP 10.3(a)(5), and distorts the "findings of fact" by the trial court here.

At the outset of Roth's restatement of the facts, he claims that the trial court made findings of fact on Hempzen's breach of the lease and that 10 days to remove any lien would not present "too much of a hardship." Resp't br. at 2. That is a misrepresentation of what occurred below. CP 83-85. *See* Appendix.¹ In fact, the Commissioner made very general findings and specifically *deleted* a finding that "Defendant has failed to resolve its dispute with Mr. Electric of Greater Seattle and obtain a lien release for the premises, and Defendant has failed to vacate the premises." CP 84. *Nowhere* do the Commissioner's actual findings state that no hardship was present for Hempzen in removing the lien. CP 83-85.

Roth references the Clerk's Minutes for the revision proceedings before Judge Nakata. Significantly, Judge Nakata's actual order on revision essentially adopts Commissioner Radillo's findings and conclusions. CP 165. Judge Nakata's order on revision *nowhere* incorporates any oral ruling as part of her written order. CP 164-65.

As Roth and his counsel are well aware, the rule in Washington is that the trial court's written, not oral, ruling controls. *In re Marriage of Raskob*, 183 Wn. App. 503, 512, 334 P.3d 30 (2014); *Mairs v. Dep't of*

¹ The findings and conclusions were entered by Commissioner Ernest Radillo. The trial court, the Honorable Alicia Nakata, denied revision of those findings and conclusions, *except* to note that Mr. Electric released its lien on August 1, 2016. CP 165.

Licensing, 70 Wn. App. 541, 545, 854 P.2d 665 (1993). Simply put, Roth distorts the “findings” he now claims as “verities” on appeal.²

Roth’s representation of the facts here, particularly those relating to his own conduct and Hempzen’s efforts to address the Mr. Electric lien, fail to tell the entire story.³

² If Roth seriously believes that the Clerk’s Minutes represent “findings” of the trial court, he has done this Court no favor in his highly selective excerpting of them. The trial court here was troubled by the integrity of Roth’s actions:

Court noted this case boiled down to whether the Court had the authority to provide equitable relief based on what Hempzen Enterprises has presented which was that they had made substantial improvements to the property, they had done what was needed to meet statutory requirements to become a processing grown incorporation and had incurred huge expenses for that. The Court had not been able to find any authority allowing It to grant equitable relief under those grounds but understood why defendant was making his request and why Commissioner Radillo had some discomfort in making his Findings of Fact & Conclusions of Law. Court noted it was uncomfortable to see hardship on one side....

CP 140.

³ Roth makes an extensive argument about his own “good faith” in seeking to oust Hempzen. Resp’t br. at 17-19. He *concedes* that an implied covenant of good faith is attendant upon all contracts in Washington. *Id.* at 17-18; Br. of Appellant at 11. But his conduct can hardly be considered in good faith when:

- he insisted on the July 22 show cause hearing before Commissioner Radillo *knowing* that Hempzen had a signed July 15 CR 2A agreement, resolving the Mr. Electric lien. CP 39-40, 77-82;
- he made a baseless claim for damages to the property, CP 6, at the same time he claimed that the only basis for a writ of restitution was the Mr. Electric lien. CP 5;
- he contended at the July 22 hearing that the alterations/improvements provision in the lease was violated. CP 89;
- he made the baseless argument at the revision hearing that Hempzen “trashed” the premises. CP 107.

For example, Roth does not deny that he tried to claim damages against Hempzen, CP 6, notwithstanding the *extensive* improvements to his property made by Hempzen during the entirety of the leasehold. Nor does he deny he made unsupported false allegations to the trial court that Hempzen “trashed” the property. CP 107.⁴

Nowhere does Roth deny that during the entire period of the lease, Hempzen has paid him all the rent to which he was due and spent thousands on the security improvements to the property (that he is entitled to retain when the lease to Hempzen concludes), as it was obligated to do under the lease. CP 40, 93-94.

Finally, Roth’s discussion of Hempzen’s interactions with Mr. Electric, Hempzen’s communications with him, and his “time line” are all exercises in what can only be described as revisionist history.

Roth’s description of Hempzen’s dispute with Mr. Electric tries to cast blame on Hempzen. Resp’t br. at 3-4. Roth has *no answer* to the fact that Mr. Electric misrepresented its actual experience in the installation of

These actions fail to demonstrate “good faith” on Roth’s part. They support Hempzen’s contention that Roth simply wanted to oust Hempzen, and retain all the valuable improvements it made to the leasehold.

⁴ Roth presented this information to the Court at the revision hearing. CP 106-12. Hempzen’s Scott Sotebeer replied to this baseless assertion at length. CP 114-38. It was this evidence presented at the revision hearing that the trial court refused to consider. CP 165. That court only struck the Sotebeer submission, however.

security equipment, or that it did not properly perform work it contracted with Hempzen to perform. Br. of Appellant at 3.

Although Roth implies in his brief at 3-4 that there were no efforts by Hempzen to resolve the lien, that is *false*. As Sotebeer testified: “During the course of this dispute between Hempzen and Mr. Electric, Hempzen’s King County legal counsel, continued to communicate with Mr. Electric’s counsel in an effort to resolve the dispute.” CP 38. Moreover, the trial court had evidence of *extensive* communications in the summer and fall of 2015 to remedy the problem. CP 34-37.

Finally, as will be noted *infra*, the final settlement of the Mr. Electric lien did not occur on August 1, as Roth claims. Resp’t br. at 9. It occurred on July 15. CP 75.⁵

C. ARGUMENT

(1) The Trial Court Erred in Denying Hempzen a Meaningful Opportunity to Cure Any Lease Issue

Roth does not deny that a tenant has a statutory right to cure under RCW 59.12.030(4) *and* RCW 59.12.190. Resp’t br. at 10-17. However, he attempts to ignore the implications of the trial court’s failure to address

⁵ Roth quibbles about when the cashier’s check to settle the lien was provided to Mr. Electric. Resp’t br. at 7. Regardless of when the cashier’s check was actually delivered, Hempzen and Mr. Electric had *resolved the lien* before the July 22 hearing before Commissioner Radillo.

cure under the latter statute because Hempzen did not incant a specific reference to .190 in seeking cure. But Hempzen sought cure *just as that statute envisioned*. This Court should reject Roth's hypertechnical argument that ignores the cure Hempzen actually sought below.

(a) RCW 59.12.030(4)

Roth claims in his brief at 10-15 that Hempzen failed to establish a basis for cure under RCW 59.12.030(4). In so doing, he misrepresents Hempzen's argument as to why the statute applied. Br. of Appellant at 11-13. Hempzen has not argued, and is not arguing now that there is "some indefinite 'equitable' period beyond the ten-day cure period in RCW 59.12.030(4)." Resp't br. at 11-12. Hempzen has only asked what Washington law already provides: a strict construction of its statutory opportunity to cure, a *jurisdictional* requirement under RCW 59.12.⁶

To support his bad faith position on cure, Roth tortures the facts, claiming alternatively that Hempzen did not actually settle with Mr. Electric until August 1, 2016, and that the Mr. Electric lien could not have been bogus, or Hempzen would not have paid \$10,000 to resolve it. Neither contention is legitimate.

⁶ This is necessary because the 10-day cure period is unrealistic and offers illicit lien claimants the opportunity to extort settlements of bogus lien claims against tenants facing the risk of ouster by an aggressive landlord's invocation of a writ of restitution. See Br. of Appellant at 12-13.

First, contrary to Roth's assertion in his brief at 12-13, Hempzen settled with Mr. Electric before the show cause hearing on July 22 before Commissioner Radillo. An enforceable CR 2A agreement was executed on July 15. CP 75-76, 98. *See* Appendix. Roth *ignores* this fact.⁷ In fulfillment of that agreement funds were delivered and a lien release occurred on July 27. CP 99-100. The lien lawsuit was dismissed on August 1. CP 136-38.

Simply put, the July 15 CR 2A agreement resolved the lien issue, but Roth was bound and determined to oust Hempzen and he *insisted* on the July 22 show cause hearing anyway, a hearing where he claimed Hempzen violated other lease provisions. Br. of Appellant at 5. More critically, even if August 1 is the date upon which the Mr. Electric lien is deemed to be fully removed, that is well within the 30 days after entry of the Commissioner's judgment, CP 86-88, given to a tenant by RCW 59.12.190 in which to effectuate cure. Roth *knew* the lien was removed by

⁷ Hempzen's counsel's statement at the July 22 hearing that they were waiting on Mr. Electric's counsel to execute the agreement, CP 89, only meant the execution of the settlement documentation in fulfillment of the already-executed, enforceable CR 2A agreement. CP 75-76.

the time of the revision hearing. CP 90-100, 165.⁸ Judge Nakata made an addition to the findings to that effect.⁹

Second, Roth attempts to cast aspersions on Hempzen's statement that it endeavored to resolve the Mr. Electric lien as soon as possible, br. of appellant at 12, by pointing to the fact that no answer was immediately filed. Resp't br. at 13. Defense counsel often do not immediately file answers to complaints, but that does not mean that Hempzen was not trying to remove the Mr. Electric lien. The Sotebeer and Sealby declarations more than clearly document that fact. CP 30-82, 92-100, 114-38.¹⁰

Finally, Roth's assertion that the Mr. Electric lien must not have been bogus as Hempzen claims because it paid money to resolve it is disingenuous. His insistence on seeking a writ of restitution because the lien existed afforded Mr. Electric exactly the leverage its provision of fundamentally flawed security-related services did not entitle it otherwise

⁸ Thus, Roth's assertion that the removal of the lien after the Commissioner's entry of judgment is a "nullity," resp't br. at 13 n.1, is wrong, as it is yet another example of his effort to read cure under RCW 59.12.190 out of the law.

⁹ The court found: "The Lien on the subject property was released by Mr. Electric on August 1, 2016." CP 165.

¹⁰ Roth's reference to evidence appropriately before the Commissioner is particularly disingenuous. Resp't br. at 13 n.1. The Sotebeer and Sealby declarations were made necessary by Roth's own unjustified claim that Hempzen "trashed" his premises and how rebut his baseless claim that Hempzen did little to resolve the Mr. Electric lien.

to claim. In fact, Roth *forced* Hempzen to pay Mr. Electric if it wanted to stay on the premises.¹¹

In sum, the trial court erred in granting a writ of restitution to Roth on July 22 when Hempzen had settled the Mr. Electric lien on July 15.

(b) RCW 59.12.190

Roth's only answer to the authority set forth in Hempzen's opening brief at 9-11, 13-14 on cure under RCW 59.12.190 is to assert that Hempzen did not properly invoke the statute and to argue, despite the mandate that *strict compliance* with that statute is necessary before a writ of restitution may issue, the trial court had discretion to ignore Hempzen's request for cure. Roth is wrong.

First, the cases cited by Roth in his brief at 15 are cases in which a party did not seek the particular relief *at all* in the trial court and then asked the appellate court to provide such relief. That is not what occurred here. In fact, Roth's counsel *admitted* below that it was Hempzen's position before the trial court that cure extended beyond RCW 59.12.030(4)'s 10-day period. CP 104.

The statute mandates the form by which cure under RCW 59.12.190 must be sought. The statute states that cure must be allowed "where application for such relief is made within thirty days after the

¹¹ Hempzen paid \$10,250 on a \$13,504.20 lien. CP 20, 98.

forfeiture is declared by the judgment of the court, as provided in this chapter.” It must be “made upon petition, setting forth the facts upon which relief is sought...” The landlord must have notice. The request for cure cannot be granted “except on condition that full payment of rent due, or full performance of conditions of covenants” occur. RCW 59.12.190. Hempzen’s motion for revision to Judge Nakata satisfied *all* of these statutory procedural requirements. Hempzen was current in its rent payments to Roth, CP 93-94, and the Mr. Electric lien was removed. CP 165.

The trial court apparently labored under the misconception, however, that Hempzen’s only avenue for cure was RCW 59.12.030(4) and its 10-day requirement, in no small part because that was the focus of Roth’s counsel at the July 22 hearing. CP 140-41. Roth consistently asserted that only RCW 59.12.030(4) governed cure. CP 103 (RCW 59.12.030(4) only avenue of cure for tenant). The trial court failed to understand that cure was more broadly available to Hempzen. Hempzen acted fully in accordance with RCW 59.12.190 when it filed its motion for revision, supported by the supplemental Sotebeer and Sealby declarations, within 30 days of the Commissioner’s ruling. It affirmatively demonstrated that the Mr. Electric lien issue was resolved. Rather than

accepting this cure, the trial court struck the supplemental declarations, and denied revision. The trial court erred in doing so.

Second, Roth misreads the statutory language in RCW 59.12.190 as allowing the trial court to exercise discretion in its application. It cites no cases applying RCW 59.12.190 to support that position. In fact, there is authority providing that the language in RCW 59.12.190 is *not* discretionary. In *Canyon Lumber Co. v. Sexton*, 93 Wash. 620, 626, 161 Pac. 841 (1916), our Supreme Court rejected that reading:

Again, it is said that the statute is not obligatory in its terms; that it uses the term ‘may’ instead of ‘must,’ and it thus permissive and not directory. But the statute confers a right, and prescribes the time within which the right may be exercised. To say that the right ‘may’ be exercised within the prescribed time is to preclude the idea that it may be exercised at some later time.

Roth also ignores the statutory context. It has *no answer* to the case authority that *mandates* compliance with cure statutes as a precondition to the issuance of a writ of restitution. Indeed, as noted in Hempzen’s opening brief at 10, compliance with RCW 59.12.030 is *jurisdictional*. It is no different for RCW 59.12.190. Even if there is any ambiguity as to whether RCW 59.12.190 is jurisdictional, any ambiguity is strictly construed in a tenant’s favor. *Kitsap Cty. Consol. Housing Auth. v. Henry-Levingston*, 196 Wn. App. 688, 698, 385 P.3d 188 (2016).

Finally, even if the statutory language is discretionary, Roth offers no legitimate reason why the trial court at the revision hearing should not have allowed cure. Roth falls back on his false refrain that Hempzen “misrepresented” the status of the Mr. Electric lien. His argument is entirely *frivolous* at the time of the revision hearing when the trial court modified the commissioner’s findings to state that the lien was gone. CP 165. *Nothing* justified the trial court’s refusal to allow cure, other than its error of law.

(2) The Trial Court Erred in Denying Hempzen an RCW 59.12.100 Bond to Stay the Issuance of the Writ

The trial court erred in failing to allow Hempzen a bond under RCW 59.12.100. Roth contends that Hempzen suffered no harm in this regard because it stayed in possession of the premises by virtue of a bond on appeal under RCW 59.12.200. Roth’s position is disingenuous, and smacks again of his bad faith in this case.

As set forth in Hempzen’s opening brief at 14-16, RCW 59.12.100 allows a tenant to remain in possession of the premises by posting a bond “within three days after the service of writ of restitution.” The statute is *mandatory* in affording a tenant the right to such a bond. The court must set the bond amount. Hempzen complied with the statute. CP 151-63. Roth opposed any bond consistently below. CP 141, 168.

While an appeal bond was ultimately available to Hempzen under RCW 59.12.200, it should not have been forced to the delay and expense of the unnecessary bond proceedings below. It was entitled to a RCW 59.12.100 bond, and, but for Roth's bad faith objection to it, the trial court should have granted it.

(3) Hempzen Is Entitled to Its Fees on Appeal

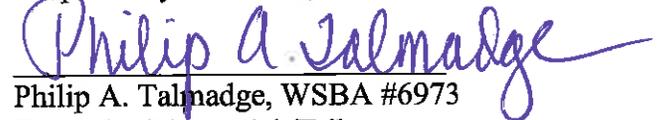
As noted in Hempzen's opening brief at 16-17, it is entitled to its fees at trial and on appeal if it prevails on appeal. Roth does not deny that this would be true. Resp't br. at 22-23.

D. CONCLUSION

Nothing offered in Roth's brief should dissuade this Court from vacating the writ of restitution entered by the trial court and the fee awards to Roth. It should remand case to the trial court for an award of fees to Hempzen. Costs on appeal, including reasonable attorney fees, should be awarded to Hempzen.

DATED this 5th day of May, 2017.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Robert W. Sealby, WSBA #21330
Carlson, McMahon & Sealby, PLLC
37 South Wenatchee Avenue
3rd Floor, Suite F
Wenatchee, WA 98007-2965
(509) 662-6131

Attorneys for Appellant
Hempzen Enterprises, Ltd.

APPENDIX

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CHELAN COUNTY CLERK

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF CHELAN**

RONALD TRAVIS ROTH,

Plaintiff,

NO. 16-2-00579-3

v.

HEMPZEN ENTERPRISES, LTD. a
Washington corporation,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Defendants.

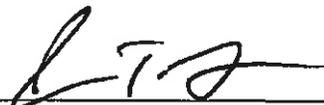
THIS MATTER having come on regularly for hearing before the Court on this 22nd day of July, 2016. Defendant having previously been ordered to appear on the same date and show cause why a Writ of Restitution should not be issued restoring to Plaintiff possession of the property described in the Complaint for Unlawful Detainer at 91 Grade Creek Road, Manson, WA 98831; Plaintiff appearing through his attorney, Jeffrey T. Fehr, and Defendants appearing through its attorney, Robert W. Sealby, and the Court having examined the parties and witnesses present, considered the evidence and being fully advised in the premises, now makes the following:

Findings of Fact

1. Defendant was at all times material hereto doing business in Chelan County, Washington.
2. Plaintiff has and still does rent to Defendant the premises located at 91 Grade Creek Road, Manson, WA 98831.
3. Defendant is in possession of the premises. Plaintiffs are entitled to possession of the premises.

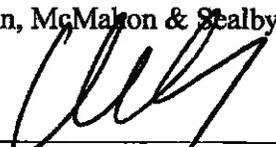
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Presented By:
Fehr Law Office, PLLC



Jeffrey T. Fehr, WSBA#32741
Attorney for Plaintiff

Approved for entry:
Notice of Presentation waived:

Carlson, McMahon & Sealby, PLLC


Robert W. Sealby, WSBA#21330
Attorney for Defendant

From: Dennis Perkins <dperklaw@seanet.com>
Date: Fri, Jul 15, 2016 at 1:55 PM
Subject: RE: Mr. Electric v. Sotebeer
To: Synthia Melton <synthia@dimensionlaw.com>
Cc: Larry Ross <lross@mrelectricgreaterseattle.com>

Synthia,

This e-mail will serve as our CR 2A settlement agreement, upon your return e-mail confirmation. The terms of settlement are as follows:

1. Scott Sotebeer/Hempzen Ltd. shall pay Mr. Electric of Greater Seattle the sum of \$10,250.00 by cashier's check no later than July 25, 2016.
2. Immediately upon clearance of your client's check, Mr. Electric will forward to your office an executed full Release of its Claim of Lien against 91 Grade Creek Road, Manson, WA.
3. Mr. Electric, Scott Sotebeer and Hempzen, Ltd. will execute a Mutual release in the form attached to this e-mail.
4. The pending lawsuit will be dismissed with prejudice, with each party to bear their own costs and attorneys fees.

I have attached a form of Stipulation and Order of Dismissal, for your approval.

Dennis Perkins

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MUTUAL RELEASE
OF CLAIMS

In consideration of payment by M. Scott Sotebeer/Hempzen Enterprises, LTD. to Ergenix, Inc., d/b/a Mr. Electric of Greater Seattle in the sum of \$10,250.00, receipt of which is hereby acknowledged, the undersigned do hereby mutually release and renounce, each against the other, and their members, stockholders, principals, agents, present and former employees, heirs, spouses, successors, predecessors, assigns, attorneys, and representatives, all claims, liens, assertion of rights, causes of action or suits of any kind or nature, including without limitation those for breaches of contract, breaches of warranty, negligence, personal injury, property damage, economic or consequential damages, whether known or unknown, which may presently be in existence or which may hereafter occur, arising out of or in connection with the supplying of materials and equipment or performance of labor by Ergenix, Inc. in connection with the installation of security systems at 91 Grade Creek Road, Manson, WA.

ERGENIX, INC., d/b/a MR. ELECTRIC OF
GREATER SEATTLE

By: _____
Larry Ross, President

M. SCOTT SOTEBEER, Individually

HEMPZEN ENTERPRISES, LTD.

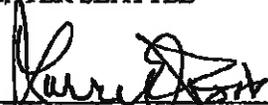

M. Scott Sotebeer

By: 
Its: _____

MUTUAL RELEASE
OF CLAIMS

In consideration of payment by M. Scott Sotebeer/Hempzen Enterprises, LTD. to Ergenix, Inc., d/b/a Mr. Electric of Greater Seattle in the sum of \$10,250.00, receipt of which is hereby acknowledged, the undersigned do hereby mutually release and renounce, each against the other, and their members, stockholders, principals, agents, present and former employees, heirs, spouses, successors, predecessors, assigns, attorneys, and representatives, all claims, liens, assertion of rights, causes of action or suits of any kind or nature, including without limitation those for breaches of contract, breaches of warranty, negligence, personal injury, property damage, economic or consequential damages, whether known or unknown, which may presently be in existence or which may hereafter occur, arising out of or in connection with the supplying of materials and equipment or performance of labor by Ergenix, Inc. in connection with the installation of security systems at 91 Grade Creek Road, Manson, WA.

ERGENIX, INC., d/b/a MR. ELECTRIC OF
GREATER SEATTLE

By: 
Larry Ross, President

M. SCOTT SOTEBEER, Individually


M. Scott Sotebeer

HEMPZEN ENTERPRISES, LTD.

By: 
Its: CEO

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the Reply Brief of Appellant in Court of Appeals, Division III Cause No. 34747-8-III to the following parties:

Robert W. Sealby Carlson, McMahon & Sealby, PLLC 37 South Wenatchee Avenue 3rd Floor, Suite F Post Office Box 2965 Wenatchee, WA 98007-2965	Ian C. Cairns Howard M. Goodfriend Smith Goodfriend, P.S. 1619 Eighth Avenue North Seattle, WA 98109
--	--

Jeffrey T. Fehr
Fehr Law Office, PLLC
PO Box 1606
Chelan, WA 98116

Original E-filed with:
Court of Appeals, Division III
Clerk's Office
500 N. Cedar Street
Spokane, WA 99201

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

DATED: May 5, 2017, at Seattle, Washington.



John Paul Parikh, Legal Assistant
Talmadge/Fitzpatrick/Tribe

TALMADGE/FITZPATRICK/TRIBE

May 05, 2017 - 3:25 PM

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