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Court of Appeals
Division III
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CASE No. 35806-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN RE: THE TIMES

2OVER PUBLISHING, LLC, Appellant

v.

TOUCHET VALLEY PUBLISHING, LLC, Respondent

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. Introduction..... 4

II. Assignments of Error 5

III. Issues Pertaining to Assignments of Error..... 5

IV. Statement of the Case..... 6

V. Summary of Argument 7

VI. Argument 9

VI.1. Issue No. 1. LLCs must be represented by an attorney. 9

VI.2. Issue No. 2.1. The Times can have only one place of publication.
..... 10

VI.3. Issue 2.2. The Times’s place of publication is Walla Walla
County..... 16

VII. Conclusion 21

TABLE OF AUTHORITIES

Cases Washington

Daily Journal of Commerce, Inc. v. Daily Journal Corp., 86 Wn. App. 324, 936 P.2d 1179 (Div. 1 1997)..... 12, 17

Dutch Village Mall v. Pelletti, 162 Wn. App. 531, 256 P.3d 1251 (Div. 1 2011) 9

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)..... 9, 13, 15, 17

Cases Other

City of Plainfield v. Courier News, 72 N.J. 171, 369 A.2d 513 (N.J. 1976) 10, 15, 20

Express Pub., Inc. v. City of Ketchum, 114 Idaho 114, 753 P.2d 1260 (Idaho 1988)..... 13, 17, 20

Hunterdon Cty. Democrat, Inc. v. Recorder Pub. Co. of Bernardsville, 117 N.J. Super. 552, 285 A.2d 258, (N.J. 1971)..... 10, 19, 20

Okla. Journal Publ’g Co. v. City of Okla. City, 620 P.2d 452 (Okla. 1979) 20

Rose v. Fall River Five Cents Sav. Bank, 165 Mass. 273, 43 N.E. 93 (Mass. 1896) 17

Statutes

RCW § 36.72.075 13

RCW § 65.16.020 8, 10, 11, 12

RCW § 65.16.030 12

RCW § 65.16.050 13

Other Authorities

85 A.L.R.4th 581 (Originally published in 1991) (West 2018)..... 14, 18

United States Postal Serv. Domestic Mail Manual 207 (updated Mar. 5,
2018) 10, 11

United States Postal Serv. Handbook DM-204 (May 2016)..... 11

United States Postal Serv., 707 Domestic Mail Manual § 4.1 10

I. INTRODUCTION

The Times, formerly known as The Waitsburg Times, is and has been since 1941, approved as a legal newspaper for Walla Walla County. In 2011, The Times was approved by the Columbia County Superior Court as a legal newspaper for Columbia County. The Times’s, a newspaper owned by Respondent, known office of publication, its original entry post office where it maintains its periodical permit and pays postage, and its headquarters are all located in Waitsburg, Walla Walla County, Washington.

The Dayton Chronicle, owned by Appellant, is also a legal newspaper for Columbia County. In the fall of 2017, Appellant petitioned Columbia County Superior Court to revoke The Times's approval as a legal newspaper for Columbia County because it is not published in Columbia County as required by statute and is therefore ineligible. The court defined "published," as used in the legal newspaper statute, as synonymous with being made available to the public and because The Times is available in Columbia County, it denied the petition.

II. ASSIGNMENTS OF ERROR

No. 1 Permitting a limited liability company's sole non-attorney member to appear on behalf of the company is legal error.

No. 2 The court's decision to deny revocation and maintain The Times's approval as a legal newspaper when it is published in Walla Walla County is legal error.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

No. 1

1.1. May a limited liability company be represented by a non-attorney member even where that member is its sole member?

No. 2

2.1. For purposes of RCW § 65.16 *et seq*, may a legal newspaper be published in more than one county when it (1) publishes only one edition, (2) holds only one periodical permit, and (3) the periodical permit allows the newspaper to have only one known office of publication and one original entry post office?

2.2. For purposes of RCW § 65.16 *et seq*, is should a legal newspaper's place of publication be determined by the location of its known office of publication and original entry post office where it maintains its periodical permit privileges?

IV. STATEMENT OF THE CASE

The facts are undisputed. The Petition's averments are not denied. No response to the Petition was filed. Ken Graham, Respondents sole owner whom is not an attorney, filed a letter in which he states "[t]he facts presented in the petition currently in front of the court to justify revocation of The Times' [sic] approval as a legal newspaper were as true in July 2011 as they are today: [sic]." CP 14.

The Waitsburg Times was approved as a legal newspaper in and for Walla Walla County by the Superior Court in and for Walla Walla in 1941. CP 8. The Waitsburg Times changed its name to The Times on June 14th, 1955. CP 9. The Times has continually served as a legal newspaper in Walla

Walla since it was approved. CP 2: ¶3.1.

The Times's place of publication is Walla Walla County. CP 2: ¶3.1; CP 3: ¶3.8. The Times's periodical permit, its known office of publication, its headquarters, and the original entry post office where it first enters the mails are all located in Waitsburg, Washington in Walla Walla County. CP 3: ¶3.5-3.6. The Times identifies Waitsburg, Washington as its one and only known office of publication in its masthead printed in each edition and its ownership statement printed once a year. CP 2-3.

In 2011, The Times petitioned the Columbia County Superior Court for approval as a legal newspaper pursuant to RCW § 65.16 *et seq.* CP 2: ¶3.2. The petition was unopposed and an order approving The Times was entered on July 14, 2011. *Id.* Petitioner filed a petition to terminate The Times' approval in 2017 because it is not published in Columbia County and the trial court denied the petition. CP 38. This appeal followed.

V. SUMMARY OF ARGUMENT

The Times is not qualified to serve as a legal newspaper in and for Columbia County because its one and only place of publication, for purposes of the legal newspaper statute, is Walla Walla County. Under the legal newspaper statutes, a newspaper can be circulated in many counties, but it can only be published in one.

The statute reveals the legislature's intent to restrict a legal newspaper's place of publication to only one county. To be approved as a legal newspaper, a newspaper:

- 1) shall have been published regularly, at least once a week, in the English language, as a newspaper of general circulation, in *the city or town where the same is published* at the time of application for approval, for at least six months prior to the date of such application;
- 2) shall be compiled either in whole or in part in an office maintained at *the place of publication*;
- 3) shall contain news of general interest as contrasted with news of interest primarily to an organization, group or class;
- 4) shall have a policy to print all statutorily required legal notices;
- 5) and shall hold a periodical class mailing permit:

RCW § 65.16.020. A newspaper can only be approved as a legal newspaper “by order of the superior court of *the county* in which such newspaper is published.” RCW § 65.16.040 (emphasis added).

The Times' is published in Walla Walla County; it reports its known office of publication to the public and the United States Postal Service (“USPS”) as located in Waitsburg, Walla Walla County, Washington, it first enters the mail through its original entry post office which is also in Waitsburg, and that is where its headquarters are located. The Times is not

published in Columbia County and because it is not published in Columbia County it is not qualified to serve as a legal newspaper for Columbia County. The trial court's decision should be reversed and The Times' approval should be revoked.

The central issue is the interpretation of the term "published" as used by statute, the standard of review is de novo. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

VI. ARGUMENT

VI.1. Issue No. 1. *LLCs must be represented by an attorney.*

Respondent, Touchet Valley Publishing, LLC's, sole owner may not represent it in court because he not an attorney.

As a matter of law, a limited liability company ("LLC") must be represented by a licensed attorney at law in a court proceeding. *Dutch Village Mall v. Pelletti*, 162 Wn. App. 531, 539, 256 P.3d 1251 (Div. 1 2011). Respondent is an LLC and was represented by its sole-member, Ken Graham, who is not an attorney. RP 7:2-:5; CP 18.

It is unclear to what extent the trial court considered Mr. Graham's oral argument or papers submitted, but any such consideration was error. The Petition should be considered unopposed and all allegations asserted in the petition admitted.

VI.2. Issue No. 2.1. *The Times can have only one place of publication.*

The Times cannot have more than one place of publication because its periodical permit restricts it to only one Known Office of Publication at the place where its original entry post office is located.

A Washington legal newspaper is required to hold a “periodical class mailing permit” to qualify as a legal newspaper. RCW § 65.16.020. By imposing that requirement in the statute, the USPS rules governing periodical permit holders are incorporated by reference into the statute. *See Hunterdon Cty. Democrat, Inc. v. Recorder Pub. Co. of Bernardsville*, 117 N.J. Super. 552, 285 A.2d 258, 266-67 (N.J. 1971) (discussing the requirements for a newspaper to be second-class mail, which is now as periodicals); *see also City of Plainfield v. Courier News*, 72 N.J. 171, 369 A.2d 513, 521 (N.J. 1976) (noting that the second-class mailing permit laws lend support to the court’s conclusion a newspaper can only be published in one place).¹

A periodical permit holder must publish an identification statement in each edition, often in a “masthead,” United States Postal Serv. Domestic Mail Manual 207 § 4.11(updated Mar. 5, 2018) [hereinafter DMM 207]², and the identification statement must clearly identify the

¹ “On July 1, 1996, Second-Class Mail was renamed ‘Periodicals.’” United States Postal Serv., 707 Domestic Mail Manual § 4.1 (updated 5-5-14) available at <https://pe.usps.com/archive/PDF/DMMArchive20140505/707.pdf>

² “An identification statement, in an easily read type, must be included in all copies of publications authorized Periodicals mailing privileges and in all copies mailed pending

permit holder's known office of publication, United States Postal Serv. DMM 207 § 4.11.5. The known office of publication is required to be in the same locality as its original entry Post Office. DMM 207 § 4.5.1; United States Postal Serv. Handbook DM-204 § 1-2.3 (May 2016) [hereinafter DM 204].³ Failure to comply with the permit's requirements can result in permit revocation. DMM 207 § 5.4.⁴ Without a permit, the newspaper would no longer qualify as a legal newspaper. RCW § 65.16.020.

The Times' publishes this information in its masthead and also publishes this information in its annually required United States Postal Service Statement of Ownership, Management and Circulation. CP 3: ¶3.4. In its October 12, 2017 edition The Times printed that statement and clearly identified its known office of publication as 139 Main St., Waitsburg, Washington which is in Walla Walla County. CP 6. According to its periodical permit requirements, The Times' original entry

approval of Periodicals mailing privileges." *Id.* (available at <https://pe.usps.com/cpim/ftp/manuals/dmm300/207.pdf>).

³ "You must maintain a known office of publication at the location where the original entry Post Office™ for Periodicals mailing privileges is authorized. The known office of publication is a public office where normal business of the publication is conducted during normal posted business hours. You must keep circulation records of the publication at the office or make them available upon request at that office for review by Postal Service personnel." *Id.* (available at <https://about.usps.com/handbooks/dm204.pdf>).

⁴ "4.5.1 Location The publisher of a Periodicals publication must maintain a known office of publication at the location where the original entry for Periodicals mailing privileges is authorized." *Id.*

post office must also be located where its known office is located, in Waitsburg, Washington. The Times' place of publication is Walla Walla County for purposes of RCW § 65.16 *et seq.*, not Columbia County.

Washington's legal newspaper statute requires a legal newspaper to have one place of publication.

The legislature's deliberate and consistent use of singular determiners as to *the* place of publication unambiguously shows its intent to restrict a legal newspaper to having only one place of publication for purposes of determining eligibility. Where a newspaper is "published," as that term is used in this statute, is a distinctly different concept than where a newspaper is "circulated." See *Daily Journal of Commerce, Inc. v. Daily Journal Corp.*, 86 Wn. App. 324, 329, 936 P.2d 1179 (Div. 1 1997) (describing the difference between the "general interest" requirement, concerning the newspaper's content, and the "general circulation" requirement, concerning its market penetration).

1. RCW § 65.16.020 provides ". . . in *the* city or town where *the* [newspaper] is published . . . in an office maintained at *the* place of publication. . ." *Id.* (emphasis added).
2. RCW § 65.16.030 provides ". . . the affidavit of publication shall state that the newspaper has been approved as a legal newspaper by order of the superior court of *the* county in which it is published." *Id.* (emphasis added).
3. RCW § 65.16.040 provides ". . . shall be a newspaper which has been approved as a legal newspaper by order of the superior court of *the county* in which such newspaper is published." *Id.* (emphasis added).

4. RCW § 65.16.050 provides “by delivering a copy of such notice . . . by mailing a copy of such notice addressed to the publisher at *the place of publication* alleged in the petition for approval.” *Id.* (emphasis added).

The legislature did not say in the “cities,” “towns,” “counties,” or “places of publication.” The legislature chose one place of publication, in one county, its intent to restrict a legal newspaper to having one place of publication is apparent from this choice of language.

A related statute, RCW § 36.72.075, requiring each county to annually approve a legal newspaper as the official county newspaper also shows the legislature’s intent to limit a legal newspapers place of publication to a single county:

If there be no legal newspaper **published in the county**, the county legislative authority shall let the contract to a legal newspaper **published in an adjacent county** and **having general circulation in the county**.

Id. (emphasis added). The legislature distinguishes the places of circulation from the place of publication. *Express Pub., Inc. v. City of Ketchum*, 114 Idaho 114, 753 P.2d 1260, 1262 (Idaho 1988) (agreeing that place of publication is not synonymous with place of circulation when used in a statute that uses the two terms to mean something different). If a legal newspaper can be circulated in a county that it is not published in, the place of circulation cannot be synonymous with place of publication. *J.P.*, 149 Wn.2d at 450.

Washington courts have not yet had occasion to determine if the legislature did intend to limit a legal newspaper's place of publication to a single county or not. American Law Reports maintains an article titled "Application of requirement that newspaper be locally published for official notice publication" which delves into a multijurisdictional analysis of how to determine a place of publication under statutes also requiring a newspaper to be published in and circulated in a particular locality, similar to Washington's legal newspaper statute. 85 A.L.R.4th 581 (Originally published in 1991) (West 2018). Summarizing its findings, the report states:

Under governmental enactments requiring both publication and circulation in the locality, one or more cases have supported the view that the place of publication is: [1] the place where the newspaper is first issued or printed; [2] the place where the newspaper is first put into circulation; [3] the place where the newspaper is first distributed to the public; and [4] the principal office of the newspaper.

Id. § 2 (internal citations omitted). Notably, none of the four approaches taken by other jurisdictions supports the contention that a newspaper may have multiple places of publication. Neither the A.L.R. nor I have been able to find any jurisdiction interpreting a statute analogous to RCW § 65.16 *et seq.* permitting a newspaper to have more than one place of publication.

One New Jersey decision did touch on the issue, it stated "we find it impossible to agree with the position (at least under ordinary circumstances) that a newspaper can have more than one place of publication" and

expressly disapproved of that idea on the facts. *City of Plainfield*, 369 A.2d at 518 (interpreting statute requiring publication and circulation in the locality). That court did hypothesize about a potential situation as to how a newspaper may possibly qualify as being published in more than one place: “[a] paper of national circulation, with editorial offices on both east and west coasts at which different ‘editions’ were prepared and issued to subscribers, might well qualify [as being published in multiple locations].” *Id.* at 521. With total reported average circulation of 1,400, The Times is not such a nationally circulated publication with editorial office on both coasts. CP 6.

Washington’s statute should not be interpreted differently. The legislature’s consistent use of singular language combined required maintenance of a periodical permit shows the legislature’s intent to limit a newspaper’s place of publication to a singular county for purposes of approval as a legal newspaper for that county. To interpret it otherwise would be to create ambiguity in an otherwise unambiguous statute. The legislature chose to unambiguously limit its language to the singular form and that language should be given its effect. *J.P.*, 149 Wn.2d at 450.

The trial court's approval of the Lewiston Morning Tribune as a legal newspaper for Asotin County is not precedent for the proposition that a legal newspaper for a county does not have to be published within that county.

The trial court attached an order finding the Lewiston Morning Tribune to be “published in Clarkston, Asotin County, Washington” and approving it as a legal newspaper in and for Asotin County. CP 39-40. That order is not instructive on the issue presented today. It may well be the case that the Lewiston Morning Tribune did have a second-class mailing permit maintained in Clarkston, Washington at the time it applied for approval and it could very well still hold a periodical permit there as well. That answer does not appear in the record here. If it meets all the requirements for approval as a legal newspaper for Asotin County, as the order states, it should be approved as a legal newspaper. The contention in our case is The Times isn't qualified to be a legal newspaper for Columbia County because it is not published in Columbia County, Washington.

VI.3. Issue 2.2. *The Times's place of publication is Walla Walla County.*

Should The Times's place of publication for purposes of the legal newspaper statute be Waitsburg, Washington when, pursuant to its periodical permit requirements, it tells the USPS and the public its place of publication is Waitsburg, Washington.

The trial court defined the term “published” as being “synonymous with the act of being made available to the public.” CP 37. The statutes treat these two things as different and distinct concepts, *Express Pub., Inc.*, 753

P.2d at 1262, “general circulation” has to do with the degree in which the newspaper is made available to the public, not a factor to determine its place of publication. *See Daily Journal of Commerce, Inc.*, 86 Wn. App. at 329 (Div. 1 1997) (describing difference between general interest and general circulation concepts).

The term “published” has many meanings depending upon the context in which it is used. *See Rose v. Fall River Five Cents Sav. Bank*, 165 Mass. 273, 43 N.E. 93, 94 (Mass. 1896) (United States Supreme Court Justice Holmes, then writing for the state supreme court, noting that “publish” as used by statute requiring publication in a locality is not given the same meaning as it would for purposes of libel). In our case, the term “published” must be interpreted within the context of Washington’s legal newspaper statutes. To define “published” as synonymous with “being made available to the public” would render the requirement of general circulation superfluous and conflict with the singular place of publication limitation. *J.P.*, 149 Wn.2d at 450 (no portion of statute should be rendered meaningless or superfluous).

In the absence of controlling Washington authority, how then shall a newspaper’s place of publication be determined? The A.L.R. reduced other jurisdictions’ approaches to determining a newspapers place of publication to four categories:

1. the place where the newspaper is first issued or printed;
2. the place where the newspaper is first put into circulation;
3. the place where the newspaper is first distributed to the public; and
4. the principal office of the newspaper.

85 A.L.R.4th 581 § 2. I would posit a 5th approach, a newspaper's place of publication, for purposes of the legal newspaper which requires the newspaper to hold a periodical permit, should correspond with the place of the newspaper's known office of publication and original entry post office where it first enters the mails. This approach, while making the place of publication readily ascertainable, would also be consistent with the four approaches identified by the ALR.

In *Hunterdon*, the court discussed at length this intersection between the second-class mailing (*i.e.* periodical) permit requirements⁵ and the qualifications of a legal newspaper:

There seems to be a distinct correlation between that portion of N.J.S.A. 35:1-2.2 requiring publication in the municipality where the publication office is situate and the one dealing with the entry of the newspaper as second-class mail matter. . . . Since the federal postal laws, as well as the pertinent regulations, employ the term 'office of publication,' there is a reasonable inference that the legislative intent at the time of the 1941 amendment was to attribute to the words 'publication office' the meaning given

⁵ Second-class permits are now called periodical permits. *Supra*, n.1.

to the comparable words ‘office of publication’ in the federal postal laws and regulations.

According to these laws and regulations, there must be a known office of publication, one where the business of the publication is transacted during usual business hours. There is a significant recognition that offices for the transaction of business may be maintained at more than one place, although second-class mailings are accepted only at the post office where original or additional mail privileges have been authorized. . . .

Hunterdon, 285 A.2d at 568.

The [Review’s] masthead continued to read ‘Whitehouse Station,’ and the statement of ownership, management and circulation filed with the post office identified the location of the ‘known office of publication’ as Whitehouse Station, even though Clinton was named as the headquarters or general business offices. The Whitehouse Station office continued to be staffed, regular business hours were maintained, news and sports items were received there, advertising was solicited and accepted, and circulation was attended to. . . .

The court concludes, therefore, that where, as here, a newspaper concededly eligible to publish official advertising of a municipality, and having a publication office in that municipality, changes ownership and transfers some of the editorial, advertising and business operations elsewhere, but retains and staffs the original office for the transaction of business, and ***no change is made with respect to the entry of the newspaper as second-class mail matter in the local post office***, the original office does not lose its status as the publication office of the newspaper within the meaning of N.J.S.A. 35:1-2.2.

Id. at 569-70.

Similarly, Washington’s statute requires a legal newspaper to maintain a periodical permit and the periodical permit requires the

newspaper to clearly identify one known office of publication maintained at the place where its original entry post office is located. DM-204 §1-2.3. “A newspaper must be considered published in one readily ascertainable location.” *Express Pub., Inc.*, 753 P.2d at 1262 (quoting *Okla. Journal Publ’g Co. v. City of Okla. City*, 620 P.2d 452, 455 (Okla. 1979)). The readily ascertainable place of publication for purposes of approval as a legal newspaper should coincide with the newspaper’s known office of publication regularly printed in its identification statement. *See Hunterdon*, 285 A.2d at 266-67; *see City of Plainfield*, 369 A.2d at 521 (noting that the second-class mailing permit laws lend support to the court’s conclusion a newspaper can only be published in one place).

The Times masthead and ownership statement identify Waitsburg, Washington in Walla Walla County as the location of its known office of publication. CP 6. The Times publishes that identification statement in each issue and its annual ownership statement and tells its subscribers that Waitsburg is its place of publication. CP 2: ¶3.3. The Times’s headquarters are in Waitsburg, CP 3: ¶3.5, it first enters into the mail in Waitsburg, CP 3: ¶3.6, and its known office of publication is in Waitsburg, CP 3: ¶3.5; The Times’s place of publication for purposes of RCW § 65.16 *et seq.* should coincide and also be Waitsburg, Walla Walla County, Washington. a

VII. CONCLUSION

The legislative intent to limit a legal newspaper to one place of publication, not circulation, for purposes of the statute governing legal newspapers is unambiguous. The legislature chose to restrict a legal newspaper to one readily ascertainable place of publication, its intent clearly appearing by its choice of singular language like “*place* of publication,” RCW § 65.16.020, and “*the* county in which such newspaper *is* published,” RCW § 65.16.030; RCW § 65.16.040, and its choice to require legal newspapers to maintain a periodical permit. The Times cannot simultaneously be published in Walla Walla County and published in Columbia County according to the meaning of published as used in the context of the legal newspaper statutes. There can be only one place of publication.

Regardless of which approach followed to determine where The Times’s place of publication is, be it one of the four approaches used by other jurisdictions or relying upon the known office of publication, they all lead to the conclusion that The Times’s readily ascertainable place of publication is Waitsburg, Washington in Walla Walla County, not Columbia County.

The Times's known office of publication is in Waitsburg, Washington in Walla Walla County, CP 6, it first enters the mail through its original entry post office in Waitsburg, CP 3: ¶3.6, its known office of publication is in Waitsburg, CP 3: ¶3.5, its headquarters is in Waitsburg, *id.*, and it tells the world it is published in Waitsburg. CP 6.

The Times order of approval for Columbia County should be revoked because The Times is not published in Columbia County as that term is meant for purposes of the legal newspaper statutes. The trial court's decision to deny Respondent's petition for revocation should be reversed.

Respectfully submitted this 2nd day of April, 2018.



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IN RE: THE TIMES

Petitioner:
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And Respondent:
TOUCHET VALLEY PUBLISHING, LLC

COA No. 35806-2

CERTIFICATE OF SERVICE

RE: Brief of Appellant

CERTIFICATE OF SERVICE

I certify that I served true and correct copies of the foregoing Brief of Appellant on the following parties and in the manner indicated below on the 2nd day of April, 2018:

Touchet Valley Publishing, LLC
DBA The Times
139 Main St.
Waitsburg, WA 99361
ken@waitsburgtimes.com

- Certified U.S. Mail, return receipt requested
 Standard First-Class Mail
 Electronic Mail
 Fax Transmission
 Personal Service

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

1
2 Signed this 2nd day of April, 2018 in Columbia County, Washington.

3 

4 _____
5 Matthew R. Johnson, WSBA # 47821
6 Attorney for Plaintiff
7 Gravis Law, PLLC
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9 Dayton, Washington 99328
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