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NO. 35951-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

(Walla Walla County Superior Court Number 16-2-00845-4)

WA-HOLDINGS-01, LLC, a Washington limited liability company,

Respondent

v.

SNAKE RIVER STILLS, LLC, a Washington limited liability company,
d/b/a/ WALLA WALLA WEEDERY,

Petitioner

BRIEF OF RESPONDENT

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I. INTRODUCTION

This is the third appeal by Appellant, Snake River Stills ("Snake River") in this unlawful detainer case.[1] Snake River has repeatedly used the appellate process as an instrument of delay. Now that the superior court has entered judgment in favor of respondent WA Holdings-01 LLC ("WA-Holdings") for the fees WA-Holdings incurred in responding to Snake River's delaying tactics, Snake River requests this Court grant it relief from the judgment.

At the time this case was filed, Snake River was substantially in arrears of the lease payments due WA-Holdings under its commercial lease. Shortly before trial, the parties entered into a Settlement Agreement which authorized the entry of a Stipulation and Order dated May 30, 2016, (the "Stipulation and Order") that required Snake River to vacate the leased premises by July 31, 2017. CP 215-218. In the event, Snake River did not vacate the premises, the Stipulated Order authorized WA-Holdings to obtain an *ex-parte* order authorizing a writ of restitution. *Id.*

Snake River moved to stay the entry of the writ of restitution, CP 221-230, but the motion was denied. When Snake River did not vacate the premises as agreed on July 31, 2017, the superior court entered an Order

[1] See CP 513-517, Court of Appeals, Div. III, Case No. 35504-7-III and CP 677-681, Court of Appeals, Div. III, Case No. 35583-7-III.

authorizing the entry of a writ of restitution. CP 503-504. Snake River appealed the order authorizing the entry of said writ. CP 513-517. Execution of the writ of restitution was stayed pending appeal by an Order Denying Snake River's Motion for Reconsideration and Amending Supersedeas Amount (the "Supersedeas Order"). CP 621-623.

Snake River voluntary vacated the premises on October 6, 2017. Snake River's appeal of the order authorizing the Writ of Restitution was dismissed as untimely. Its later appeal was dismissed as moot. Following the dismissal of Snake River's second appeal, WA-Holdings moved for judgment on the supersedeas amount on deposit with the court registry. CP 738-746. The trial court awarded WA-Holdings double damages pursuant to Unlawful Detainer Statute, RCW 59.12.010 *et seq.*, for the period Snake River occupied the premises from August 1, 2017 through October 6, 2017, the date Snake River finally vacated the premises, and awarded WA-Holdings a judgment for its reasonable costs and attorney fees. CP 869-872. Snake River appeals the award of double damages and reasonable attorney fees. CP 910-920.

II. RESPONDENT'S STATEMENT OF ISSUES

1. Did the superior court abuse its discretion in deciding WA-Holdings' motion for judgment on the supersedeas bond based on the

Stipulation and Order, which in a prior appeal by Snake River, this court ruled was a final order in the unlawful detainer proceeding.

2. Did the superior court properly awarded double damages for the period of time that Snake River occupied the premises after the Writ of Restitution had been stayed pending appeal.

3. Did the trial court properly exercise its discretion in awarding WA-Holdings its reasonable attorney fees as the prevailing party pursuant to the terms of the underlying lease and Stipulated Order.

III. STATEMENT OF THE CASE

A. The Unlawful Detainer Case

Snake River entered in a commercial lease with WA-Holdings on August 1, 2015 for retail space in Walla Walla, Washington, on which Snake River subsequently opened and operated a marijuana dispensary. On December 15, 2016, WA-Holdings commenced an unlawful detainer action in the Walla Walla Superior Court against Snake River alleging Snake River had failed to pay its monthly rent of $25,000 since August 1, 2015. CP 1-19. The complaint sought judgement for the unpaid rent, double damages under the unlawful detainer statute, a writ of restitution and attorney fees. *Id.* Trial in the matter was set for June 6, 2017. Shortly before the trial date, the parties agreed to settle their claims in the unlawful detainer action as well as claims asserted in a related lawsuit pending in the Pierce County

Superior Court that involved both WA-Holdings and Snake River, as well as other parties (the "Pierce County Case").[2] Pursuant to the terms of the Settlement Agreement, the Walla Walla Superior Court entered the Stipulation and Order on May 30, 2017, which resolved all issues in the unlawful detainer case relating to Snake River's right to possession. CP 215-218.

The Stipulation and Order required that "[Snake River] and all other occupants shall vacate and surrender the commercial property described in the Complaint on or before 11:59 PM on July 31, 2017." *Id.* The Stipulation and Order further provided that if Snake River did not vacate the premises by July 31, 2017, WA-Holdings was entitled to present an *ex-parte* order, without notice to Snake River, authorizing the immediate issuance of a Writ of Restitution. *Id.*

On June 30, 2017, Snake River announced on its website that it was moving to a new location in Walla Walla, CP 572, 586-587, and later that month placed a banner on the property indicating it would be moving, CP 572, 589. Shortly before July 31, 2017, Snake River learned that it would not be able to obtain the requisite permits for its new premises in time. *See* Appellant's Opening Brief at 8.

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[2] None of the other parties were parties in the Walla Walla unlawful detainer action.

On July 24, 2017, desperate to avoid eviction from the premises, Snake River served WA-Holdings a motion to Stay Entry of the Writ of Restitution and noted it for the hearing on August 1, 2017. CP 221-230. In its motion, Snake River claimed that WA-Holdings was required to dismiss certain defendants in the Pierce County Case, who were not parties to the Settlement Agreement, against whom WA-Holdings had asserted separate and independent claims, and who, in turn, had asserted counterclaims against WA-Holdings. *Id.* In response, Respondent maintained that the settlement agreement did not require the dismissal of certain parties in Pierce County Action, and even if it did, a condition precedent to Respondent's obligation to dismiss was full payment of the settlement amount Snake River agreed to pay, which had not been paid, and which was not due until November 30, 2017.[3] Also on July 25, 2018, Snake River filed a separate Motion to Rescind or Enforce Settlement Agreement, CP 241-269, which it noted for hearing on August 28, 2017.

None of the arguments in Snake River's motion addressed the right of possession but rather dealt with ancillary issues related to the Pierce

[3] The Settlement Agreement, provides in Section 12 that WA-Holdings was not required to dismiss the lawsuit until its "receipt of the Settlement Payment. CP 572, 583. The Settlement Payment was $1,700,000 to be paid in three installments, the last being $300,000 due by November 30, 2017, CP 581-582, and which had not been paid. Snake River now concedes that the Agreement did not require WA-Holdings to dismiss the Pierce County Case until "receipt of the Settlement Payment." Appellant's Opening Brief at 6.

County Case. It was WA-Holdings' position that the arguments Snake River advanced in its motion to stay were manufactured for the sole purpose to delay the inevitable eviction and to buy Snake River more time to obtain the requisite permits for its new location. The Snake River moving papers failed to inform the trial court of its inability to secure the necessary permits. When questioned by the court at the hearing on August 1, 2017, counsel for Snake River admitted for the first time that Snake River had not vacated the WA-Holdings' premises because it had been unable to timely secure the permits for the new premises. WA-Holdings argued that the showing made by Snake River failed to satisfy the legal standard for a stay.

At the conclusion of the hearing, the court denied Snake River's motion for a stay and entered an Order Authorizing the Issuance of a Writ of Restitution (the "Restitution Order") pursuant to the terms of the Stipulation and Order. CP 503-504. Snake River filed its Notice of Appeal/Discretionary Review of the superior court's Restitution Order and its denial of Snake River's request to stay or enjoin enforcement of the Stipulation and Order. CP. 513-517.

Following the issuance of the Writ of Restitution, Snake River requested the superior court establish a supersedeas amount. On August 11, 2017, the trial court entered the Supersedeas Order. CP 621-623. The Supersedeas Order permitted Snake River to retain possession of the

premises provided it (i) post a bond of $100,000, (ii) pay rent to plaintiff in the amount of $25,000 (the monthly rent under the lease) and all utilities for the leased premises during the pendency of the appeal, (iii) pay an additional $25,000 per month to the clerk of the court to be held as additional security, all by August 18, 2017. *Id.* It further provided that if Snake River failed to timely make the $25,000 rent and security payments, the stay would be automatically lifted and the sheriff could execute the Writ of Restitution. *Id.* Snake River posted the $100,000 bond and made the two $25,000 payments by August 18, 2017 as required by the Supersedeas Order.[4]

Snake River's Motion to Rescind or Enforce Settlement Agreement, CP 241-269, which it had filed on July 25, 2017, came on for hearing on August 28, 2108. In its oral ruling, the superior court indicated that Snake River's motion was a collateral attack on an order that had never been vacated, that it lacked jurisdiction under the unlawful detainer statute to grant declaratory relief as to the merits of the settlement agreement and that it did not have jurisdiction over the other defendants in the Pierce County Case. CP 703-705. The court entered an order denying the motion without

[4] *See* Declaration of Michael M. Feinberg in Support of Respondent's Motion to Dismiss Based on Mootness at 2, filed November 21, 2017. Court of Appeals, Div. III, Case No. 35583-7-III.

prejudice. CP 675-676. Snake River filed an appeal of the order. CP. 677-681.

Snake River timely made the $25,000 month rent payment required by the Supersedeas order for September 2017. Snake River, however, did not pay the rent due on October 1, 2017. Instead, on October 6, 2017, Snake River advised WA-Holdings that it had vacated the premises. Since October 6, 2107, Snake River has been operating its business at its new location.[5]

B. The First Appeal

On September 5, 2017, Snake River filed its motion for discretionary review.[6] WA-Holdings responded to the motion contending that the Snake River motion was untimely because the May 30, 2017 Stipulation and Order was the final unlawful detainer order in the case, and the deadline for filing an appeal had long since expired. On October 24, 2018, this Court ruled that the "August 1 writ of restitution merely executed the [Stipulation and Order] on unlawful detainer; it did not extend the time to appeal the unlawful detainer order." Accordingly, the Court ruled that "Snake River's notice of appeal/discretionary review, filed after the

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[5] *See* Declaration of Michael M. Feinberg in Support of Respondent's Motion to Dismiss Based on Mootness at 2-3, filed November 21, 2017. Court of Appeals, Div. III, Case No. 35583-7-III.

[6] *See* Docket in Court of Appeals, Div, III, Case No. 3558-7-III.

superior court issued the writ on August 1, but more than 30 days after the [Stipulation and Order] on unlawful detainer is untimely," and dismissed the matter. CP 774-776.

C. The Second Appeal

Following the dismissal of the first appeal, WA-Holdings filed a motion to dismiss the second appeal based on mootness. While the second appeal was pending, Snake River moved for clarification of the superior court's August 28, 2017, order. The superior court clarified its earlier order and entered an order indicating that it did not intend to rule that the Settlement Agreement was enforceable except to the extent to providing support for the entry of the May 30, 2017 Stipulation and Order, and whether the Settlement Agreement was enforceable, and if so, to what extent, should be determined in the Pierce County Action or in a separate declaratory judgment action. CP 736-37. On January 22, 2018, this Court dismissed the second appeal. CP 780-781.

D. The Judgement for Double Damages and Attorney Fees.

On February 15, 2018, and after the dismissal of Snake River's two unsuccessful appeals, WA-Holdings filed a motion for attorney fees and double damages for the period from August 1, 2017 to the date Snake River vacated the premises. CP 738-746. WA-Holdings also requested its reasonable attorney's fees and costs. *Id.* On February 26, 2018, the superior

court entered judgment (the "Judgement") for double damages as requested by WA-Holdings and awarded WA-Holdings its attorney fees of $55,000 and costs of $697.51, which was less than what WA-Holdings had requested.

Snake River then sought reconsideration of the Judgement. The superior court in a letter dated March 20, 2017, CP 908-909, set forth its reasons for denying the motion for reconsideration and entered an order denying the motion. CP 906-907. In its letter, the court pointed out that the Stipulation and Order had never been the subject of a Civil Rule 60 order to vacate and that the issues that Snake River raised were beyond the court's jurisdiction in an unlawful detainer action. CP 908-909. Snake River timely appealed the Judgement. CP 910-920

IV. ARGUMENT

A. The Superior Court did not Abuse Its Discretion in Entering a Judgment Against the Supersedeas Amount.

The Stipulated Order resolved all the issues related to this unlawful detainer proceeding between WA-Holdings and Snake River, including the right of WA-Holdings to have a writ of restitution entered if Snake River failed to vacate the premises by July 31, 2017. In a prior appeal by Snake River, this Court held that the Stipulation and Order was the final appealable order under CR 54. CP 774-776.

A stipulation resolving all issues in a lawsuit "is an agreement for the final disposition of the case, directed to the court, which the court is bound to carry into effect ...." until it is set aside. *Shepherd v. Cont'l Bank*, 28 Wn. App. 346, 350, 22 P.2d 1310 (1981) (citing *State ex rel. Gould v. Superior Court*, 151 Wn. 413, 418, 276 P. 98 (1929). The Stipulated Order has never been vacated, nor did Snake River ever seek to vacate it. The superior court specifically noted this in its letter ruling dated March 20, 2018, denying Snake River's motion for reconsideration of the order presently on appeal. CP 908-909.

When the superior court entered the Judgment on the supersedeas amount, the unlawful detainer proceeding had run its course, the two appeals filed by Snake River had been dismissed and there remained nothing left to be decided. Snake River, however, argues that the superior court prematurely considered WA-Holdings' motion for judgment on the supersedeas amount and that WA-Holdings in not entitled to an award of attorney fees it incurred in opposing Snake River's meritless collateral attacks on the Stipulation and Order and then Snake River's requests for the Walla Walla superior court to decide matters that were beyond the limited scope of the court's unlawful detainer jurisdiction.

Although Snake River made a calculated strategic decision to collaterally attack the judgment (rather than seeking to vacate it) and to have

the court decide issues over which it lacked jurisdiction in attempt to delay the enforcement of the entry of the Writ of Restitution to which Snake River had stipulated, Snake River's now appears to take the remarkable position that it, not WA-Holdings, is entitled to be awarded fees for its improper collateral attack on the Stipulation and Order. To make its case, Snake River points to subsequent proceedings in the Pierce County Superior Court, which did not in any way address the issue of the Writ of Restitution or Snake River's unlawful detainer of WA-Holdings' property. That Snake River later pursued the relief it sought in an appropriate forum and obtained some measure of the relief, including a modest award of attorney fees[7] is irrelevant to this issue of whether the Walla Walla superior court properly entered judgment on the supersedeas amount based on the proceedings over which the superior court presided and which had been concluded.

The Stipulation and Order having been affirmed by this Court as a final order and all Snake River's appeals attacking the Writ of Restitution having been exhausted, the superior court did not abuse its discretion in

[7] And, contrary to what SRS's contends, while the Pierce County Superior Court in Proceeding did enforce the Settlement Agreement, it rejected SRS's claim that it was entitled to an award of the attorney fees it incurred in the Walla Walla Superior Court; and awarded Snake River only one half of the fees it sought in the in connection with proceeding in the Pierce County Superior Court. SRS's motion for reconsideration to increase the award of attorney fees and for the fees incurred in the Walla Walla case was denied. Snake River has now appealed the Pierce County Courts decision regarding fees.

considering and granting WA-Holdings motion for judgment on the supersedeas amount.

B. The Superior Court Correctly Assessed Double Damages for the Time Snake River Occupied the Premises Following Termination of the Lease

The double damages provision of the Unlawful Detainer statute is intended to have both a deterrent and compensatory affect: it is "designed to deter tenants from retaining possession unlawfully and to ensure that landlords are fully compensated." *Daniels v. Ward*, 35 Wn. App. 697, 707, 669 P.2d 495 (1983). The Washington State Supreme Court has held that "[t]he penalty [of double damages] is imposed for ***the refusal to surrender possession on the termination of the tenancy***, whether it be terminated by the terms of the lease for nonpayment of rent, or for any other causes specified in the statute." *Hinckley v. Casey*, 45 Wn. 430, 431-32 (1907) (emphasis supplied); *Sprincin King St. Partners v. Sound Conditioning Club*, 84 Wn. App. 56, 66 925 P.2d 217 (1996) ("The unquestionable purpose of double damages is to penalize the tenant for the refusal to surrender possession when the tenancy terminates").

Snake River entered into a Stipulation and Order, which this Court held was a final order. The Stipulation and Order required Snake River to vacate and surrender the commercial property described in the Complaint

on or before 11:59 PM on July 31, 2017. Plaintiff did not vacate the premises as agreed and had no right to possession under the lease.

Snake River's argument that there were no unlawful detainer damages ignores the definition of unlawful detainer found in RCW 59.12.030(1). A tenant is guilty of unlawful detainer when it "continues in possession of the property or any part of it and thereof after the expiration of the term for which it is let . . . . [and] the tenancy shall be terminated without notice at the expiration of the specified term or period." *Id.* Snake River thus stipulated in would be in unlawful detainer if it did not vacate the premises by July 30, 2017, and further stipulated that a Writ of Restitution should issue if it did not so vacate. There can be no dispute that after July 30, 2017, Snake River was unlawfully possessing the property

The unquestionable purpose of the unlawful detainer is to penalize the tenant for its unlawful possession of the property. *See Sprincin,* 86 Wn. App at 66 ("statute authorizes a compensatory award during the lawful possession period (past due rent) and a doubling of damages incurred for the unlawful detainer period"). It is apparently Snake River's position that notwithstanding the Stipulation and Order which terminated its right to possession, that it could remain on the premises property, and vacate the premises when it was convenient for Snake River. In effect, Snake River is arguing that after the Writ of Restitution issued, by posting a supersedeas to

stay enforcement of the writ during the pendency of its frivolous and untimely appeal, the bond somehow converted what had been a tenancy for a specific time (which had expired) into an indefinite month to month tenancy under which Snake River was only bound to pay the original undoubled rent. Such a result would undermine both the intent and purpose of the unlawful detainer statute by effectively eliminating any incentive for the tenant to vacate following expiration of the term. *Cf. Armstrong v. Burkett*, 104 Wn. 476, 479, 177 P. 333 (1918). ("If one who enters into possession of business property can keep possession indefinitely by fitting the premises to the uses and convenience of his particular business, by paying his rent, and by the purchase of goods to meet anticipated trade, possession once obtained would be better than any written lease, for the lessee could continue possession at his own will at the rent first stipulated, and unhampered by the usual covenants and conditions of a written lease"). Adopting Snake River's position would undermine the purpose of the unlawful detainer statute by encouraging tenants to abuse the judicial process to delay eviction much the same way that Snake River's did in this case.

Snake River's failure to vacate the premises, essentially frustrated WA-Holdings' ability to re-let the premises. Because WA-Holdings did not know when Snake River would vacate, it made it virtually impossible to

secure another tenant as WA-Holdings it could not make the premises available to a new tenant until Snake River vacated. WA-Holdings was harmed by the failure of Snake River to vacate and an award of double damages is consistent with the intent and purposes of the Unlawful Detainer statute.

C. The Superior Court did not Abuse Its Discretion in Awarding WA-Holdings its Reasonable Attorney Fees

A party may recover attorney fees only when a statute, contract, or recognized ground of equity so permits. *See Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001). Whether a party is entitled to attorney fees is an issue of law that is reviewed de novo. *Little v. King*, 147 Wn. App. 883, 890, 198 P.3d 525 (2008). Whether the fee award is reasonable is a matter of discretion for the trial court, which will not be reviewed unless the reviewing court finds an abuse of discretion. *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805 (2008).

The trial court must use the lodestar method of calculating an award of attorney fees, which requires that the trial court determine that a reasonable number of hours were expended and that the hourly rate is reasonable. *See Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632, 966 P.2d 305 (1998). The trial court must independently decide what is

reasonable, rather than merely relying on billing records. *See Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000). The court must exclude any wasteful or duplicative hours. *See Mahler*, 135 Wn.2d at 434.

Here, the Walla Walla superior court properly employed the lodestar analysis in considering WA-Holdings' request for attorney fees and costs pursuant to the attorney fees provisions contained in both the original lease and the Settlement Agreement. After conducting its analysis, the superior court awarded WA-Holdings less than what it requested. As such, the superior court did not abuse its discretion in awarding to WA-Holdings' its reasonable fees and costs incurred in thwarting Snake River's frivolous attempts to abuse the judicial process in order to temporarily delay the eviction until its new location was permitted.

Snake River complains about duplicative hours. Many of motions brought by Snake River were noted on an emergency basis or on shortened time. After virtually every adverse ruling Snake River moved for reconsideration. As the Court is aware, having to respond to matters not raised in the ordinary course is more difficult and often less efficient than dealing with matters brought on regular notice. In order to timely respond, given the work load and responsibilities of the attorneys involved, it was necessary to divide amongst multiple attorneys the work necessary to adequately respond to the irregular motions filed on shortened time. Any

inefficiency and duplication was the result of Snake River seeking to have matters resolved on an expedited basis.

Snake River also claims that a substantial amount of time was spent in reviewing and responding to Snake River's arguments regarding the enforceability of the Settlement Agreement. Snake River's raised those arguments repeatedly in an improper forum in an attempt to avoid the provisions of the Stipulation and Order, which this Court found to be a final enforceable order. As the superior court held, WA-Holding's fees incurred in responding to Snake River's arguments are reasonable and appropriate. Snake River has failed to present any evidence that the superior court somehow abused its discretion.

The superior court was presented with evidence of the billing rate of each of the WA-Holdings' attorneys and detailed billing statements, which had been reviewed and abridged in order to remove time spent on the Pierce County case.[8] The Superior Court carefully considered plaintiff's fee request and defendant's objections. In its motion WA-Holdings sought $62,163 in attorney fees. CP 738-746, CP 747-751, 783-792. In it reply WA-Holdings requested an additional $6,738.50, representing the time it

[8] Snake River is correct that $30.00 entry on 9/21/2017 was for the Pierce County Case and should not have been included in WA-Holdings' request. But that is immaterial as the superior court awarded WA-Holdings thousands of dollars less than it requested.

had incurred in preparing the motion for judgment on the supersedeas amount, its reply and its estimated time in preparing for and appearing at the hearing. CP 857-863, 864-868. After considering the time records submitted by WA-Holdings' attorneys, the court reduced the amount requested by $13,901.50[9] and awarded WA-Holdings $55,000 in attorney fees. The court did not abuse its discretion in making this attorney fee award.

D. WA-Holdings Is Entitled to an Award of Attorney Fees on Appeal.

Under RAP 18.1(a), reasonable attorney fees may be awarded if allowed by statute, rule, or contract and if a party requests such fees in their opening brief. RAP 18.1(a); *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). The Commercial Lease Agreement upon, which this unlawful detainer action is predicated contains an attorney fee clause. CP 748, 759. The Settlement Agreement, which required Snake River to vacate the premises by July 31, 2017, likewise contains an attorney fee provision. CP 748, 764. WA-Holdings respectfully requests the court award the attorney fees it has incurred in this appeal.

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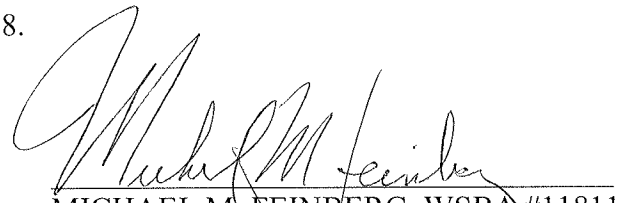
[9] The statement in Appellant's brief that the Court reduced WA-Holdings' request by $7,163 is incorrect as it ignores the additional fees requested in the reply.

V. CONCLUSION

For the reasons stated, because Snake River has failed to establish that the Walla Walla superior court abused its discretion, the Court should affirm the decision of the Walla Walla superior court.

Dated: September 17, 2018.



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CERTIFICATE OF SERVICE

The undersigned certifies that on this day I caused to be served the foregoing document to:

Christopher J. Marston Davies Pearson, P.C. 920 Fawcett P.O. Box 1657 Tacoma, WA 98401 Email: cmarston@dpearson.com	☐ ☐ ☒ ☐ ☒	Via U.S. Mail Via Hand Delivery Via Electronic Mail Via Overnight Mail e-service via court's website

I declare under penalty of perjury under the laws of the state of Washington on September 17, 2018, at Seattle, Washington.

Kami Mejia
Litigation Legal Assistant

KARR TUTTLE CAMPBELL

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