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No. 65217-6-I

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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In Re: The Probate Estate of:  
Ernest A. Howisey, Deceased;

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**REPLY BRIEF OF APPELLANT**

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Original

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Washington Cases:

Bakamus v. Albert, 1 Wn.2d 241, 95 P.2d 767 (1939)..... 6, 7

Other cases:

None.

Constitutional Provisions

None.

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Other Authorities

None.

## **I. SYNOPSIS OF REPLY ARGUMENT**

Appellant Carnahan's reply is simple: Respondents Jensen-Sinnett avoided much discussion of the TEDRA Agreement at issue in their Response Brief because its terms and the applicable law defeat their position. Instead, they resorted to ad hominem attacks on Carnahan, rely on prior legal actions not germane to the instant case and cite to findings irrelevant to the legal issues before the court. Much of their factual citation is without proper reference to the record.

As seen below, Carnahan disposes of Jensen-Sinnett's arguments and, in doing so, confirms the TEDRA Agreement is a fully binding document that should have been enforced according to its terms by the Trial Court.

## **II. REPLY ARGUMENT**

### **A. Jensen-Sinnett do not Contest Validity of the TEDRA Agreement.**

Jensen-Sinnett do not contest Carnahan's core facts. For example, they do not contest they are bound by the TEDRA Agreement (CP 1533-1542) they signed and under which they received financial benefits.

Instead, their background statement of facts (found primarily at pages 1 through 4 of their response brief) is generally devoid of citation to the trial court record. It consists of two ad hominem attacks discussed below.

**B. Jensen-Sinnett Relies on Irrelevant and Mis-Leading Facts.**

1. The Power of Attorney. Lacking facts to rebut Carnahan's facts, Jensen-Sinnett first attempts to impugn Carnahan's credibility by claiming she was the defendant in a power of attorney action under King County Cause #03-4-0587-8 SEA. (the "POA Action"). In the trial, Jensen attempted to pass this action off as a vulnerable adult petition against Carnahan. RP(3/3/2010)205:3-206:22.

The first page of Jensen-Sinnett's Addendum A<sup>1</sup> is missing the full caption of the POA Action<sup>2</sup>; instead, the full caption is seen on the first page of their Addendum B. It lists Frontier Bank and Group Health Cooperative of Puget Sound as Defendants, not Carnahan. Group Health had refused to accept Jensen as the Howiseys' health care agent; she resigned. CP1866:2-3. Carnahan opened the trust account which Frontier

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<sup>1</sup> Jensen-Sinnett's Addendum A is trial Exhibit #107; it was part of the trial record although their Addendum B was not.

defended. (Ex.99, Ex 100) because of predation by Jensen and Sinnett on the funds of the Howisey parents, both diagnosed with dementia. Frontier Bank had refused to turn over the funds to the new financial agent. Other holders of Howisey funds refused to obey this order and the matter wasn't resolved until another hearing three months later. CP1864: 1-3.

In the trial, and earlier to Adult Protective Services which exonerated Carnahan, Jensen accused Carnahan of abuse of the parents she took care of without any help from Jensen. RP(3/2/2010)151:1-3 The accounting Carnahan provided for APS shows Jensen and Sinnett taking as much as \$6500.00 a month from vulnerable parents. (Ex.101:CP1,3-5).

The operative portion of the Order found at Addendum B merely mentions Carnahan as an interested party like her sister, the Respondent Ms. Jensen. However, not only was she not a defendant in that action, but Jensen-Sinnett settled any issues about the POA Action in the TEDRA Agreement. The TEDRA Agreement addressed the POA Action. At CP 1537:1-16 it reads: "Carol Carnahan, Marilyn Jensen and Anne Sinnett do hereby affirmatively fully release one another from all liability related to this agreement, and the administration of the Estate of Ernest Howisey

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<sup>2</sup> It is unknown why Jensen-Sinnett's captions differ; however, given the murky beginning of the case with the indiscriminate use of a notary stamp on several wills it raises a question of the veracity of Jensen-Sinnett's documentation.

under King County Cause Nos. 07-4-04064-9 SEA and 03-4-05875-8 SEA.” (Emphasis added and is the cause number to the POA Action.)

Jensen-Sinnett’s attempt to impugn Carnahan regarding a case they settled any dispute about should be seen as the desperate attempt to create favorable facts that it is.

2. The Guardianship—Not Before the Trial Court. Jensen-Sinnett also attempts to impugn Carnahan’s credibility by relying on guardianship filings (found at Addenda C & D to their Response Brief). However, the trial court did not rely on those filings in this action; instead, the trial court admitted as Trial Exhibit 2 the Psychological Report of R. Renee Eisenhauer, Ph.D. That report confirms Mr. Howisey suffered from impairments.

Jensen-Sinnett’s attempt to impugn Carnahan’s credibility using documents not part of the trial court record should again be seen as a desperate attempt to create favorable facts where none exist.

### 3. Will Contest

Jensen-Sinnett do not actually address the will contest despite their caption, but rather launch further attacks on Carnahan. The fact is that

while Carnahan was making arrangements for her dead father, two wills were presented to the court, and rejected, that left the bulk of the estate to her sister and niece, Jensen and Sinnett. RP(8/1/2007)3-4. The “murky beginning” is described in the appellant’s opening brief on page five. Page six describes the situation up until the mediation which resulted in a settlement agreement under TEDRA.

It should be noted, though, that entry of a later will is not considered by the courts to be a will contest, but rather the duty of the nominated PR to the decedent. The will contest commenced when Jensen-Sinnett objected to entry of the latest will on September 20, 2007.

CP 49-52. The commissioner scheduled a trial in 90 days.

The will of which Jensen-Sinnett was the proponent remained in probate for eight months after death because of the delay for the trial and a further delay for Sinnett’s continuance and the maternity leave of the attorney who drafted the other wills favoring Jensen-Sinnett. CP 117. This attorney signed on for the trial as counsel for the late Ernest Howisey. Ex.60, Ex.61:5. Carnahan moved successfully to have her removed.

Ex. 62.

The will contest reduced the estate by almost half. During the delay the PR installed with limited powers spent \$77,000 but was unable

to move the probate forward except for administering the three creditor claims and preparing an inventory. Howisey died at the peak of the housing market, but the delay placed the sale of his house in the housing market crash of 2008. There was a considerable loss of value, an additional \$21,729 of mortgage interest, and 16 months of taxes and expenses. The house sold on November 25, 2008, five weeks before a foreclosure auction, but at the market price. The promissory note of Jensen-Sinnett had a \$25,000 shortfall, netting \$75,000, and years of litigation ensued.

Mediation on February 6, 2008 brought forth the TEDRA agreement that is at issue here.

4. Jensen-Sinnett relies on Findings of Fact Irrelevant to the Appellate Issues. Although Jensen-Sinnett lists several unchallenged findings of fact, they confuse the difference between the legal issue on appeal and credibility findings of the trial court not at issue.

The penultimate issue on appeal is: “How Binding is a TEDRA agreement that as a matter of legislative command carries the weight of a final court order?” This is a pure issue of law requiring this court to confirm that a trial court must rely on the CR 60 standards applicable to

court orders to set aside a TEDRA Agreement. This analysis does not depend on Carnahan's credibility, or on the unchallenged findings listed in Jensen-Sinnett's Response Brief.

In other words, the unchallenged findings of fact do not create the CR 60 standard that Carnahan claims the Trial Court should have applied.

**C. Jensen-Sinnett Ignores the Language of the TEDRA Agreement.**

The TEDRA Agreement reads in pertinent part:

“Carol Carnahan, Marilyn Jensen and Anne Sinnett do hereby affirmative fully release one another from all liability related to this agreement, and the administration of the Estate of Ernest Howisey under King County Cause Nos. 07-4-04064-9SEA and 03-4-05875-8SEA. In exchange for the consideration set forth in this CR 2A Settlement (which William Jaback, Carol Carnahan, Marilyn Jensen and Anne Sinnett acknowledge is sufficient), Carol Carnahan, Marilyn Jensen and Anne Sinnett hereby release and discharge each other, William Jaback and Partners in Care, their agents, employees, partners and lawyers **from and against any and all claims, liabilities, actions, suits, debts, expenses, attorneys' fees, causes of action, and/or claims for compensation or damage of any kind or nature, whether known or unknown, whether existing now or arising at any time in the future, which arise from or related in any way to the administration of** the durable power of attorney and **the estate of Ernest Howisey.**” (Emphasis added.)

CP 1537:1-16.

The TEDRA Agreement also reads in pertinent part at CP 1535:14-24:

“Marilyn Jensen and Anne Sinnett shall be paid \$200,000 as their beneficial share of the estate and **shall have no further interest or involvement in the administration of this estate.** Marilyn Jensen and Anne Sinnett specifically waive any ownership interest in any asset of the

estate. William Jaback shall issue a check payable to Marilyn Jensen and Anne Sinnett, jointly, in the amount of \$100,000 within 7 days of this agreement and the remainder shall be secured by a note on the Corliss residence at 4% interest, due and payable on the sale of the Corliss residence or within one year of the date of this agreement, whichever occurs sooner.” (Emphasis added.)

Jensen-Sinnett’s response argument is that they did not contract away the right to bring future claims based on future acts arising from Carnahan’s management of the Howisey estate. This argument is wrong because that is exactly what they did when they signed the TEDRA Agreement. That agreement specifically says:

Carol Carnahan, Marilyn Jensen and Anne Sinnett hereby release and discharge each other, . . . from and against **any and all** claims, liabilities, actions, suits, debts, expenses, attorneys’ fees, causes of action, and/or claims for compensation or damage of any kind or nature, **whether known or unknown, whether existing now or arising at any time in the future, which arise from or related in any way to the administration of the durable power of attorney and **the estate of Ernest Howisey.****” (Emphasis added.)

There is no way that text can be interpreted and construed other than to find that Jensen-Sinnett gave up all rights to contest Carnahan’s future acts unless they can meet the CR 60 standard. To hold otherwise defeats the essence of contractual relationships. Carnahan and Jensen-Sinnett bargained for the above language and Carnahan is entitled to its benefit.

Jensen-Sinnett claims no Washington case approves such a broad release; however Carnahan cited Bakamus v. Albert, 1 Wn.2d 241, 95 P.2d 767 (1939) for this proposition in her opening brief. The court in that case quoted the text of the release at issue there. The release in Bakamus was striking similar to the release in the TEDRA Agreement and was upheld. Jensen-Sinnett, apparently recognizing the lack of Washington case law supporting their position, instead rely on a federal employment law case in their attempt to undercut the long-standing Washington contract law stated in Bakamus. Their reliance on non-binding federal employment law to overrule the Washington Supreme Court should be disregarded.

Other Breaches of the Tedra Agreement:

Quite aside from the release clause, Jensen/Sinnett breached all the major clauses in the agreement except the one giving them their inheritance.

The latest will is to be admitted to probate with Carol Carnahan as Successor Personal Representative. Ex 46: CP 3

Jensen and Sinnett filed and lost three actions to remove Carnahan and replace her with themselves. These are documented and discussed in appellant's opening brief on pages 10-11.

(They) shall have no further interest or involvement in the administration of the estate. Ex.46, CP 3:15-16

The court allowed Jensen and Sinnett to have a say in estate management without a consequence. They interfered with the sale of the decedent's automobile (Ex. 80); attempted to replace PR with themselves, CP 349-365; required a court order to obtain their cooperation in escrow in the sale of the decedent's house, (Ex 82, Ex. 50:1-2) brought actions on 5/4/09 (CP 478-491) and 5/13/09( CP 619-620) which triggered a successful revision for the estate (CP 1065-1067). A petition for attorney fees made moot by their loss in the revision was filed on 6/16/08 ( CP at 922-926.) A judgment petition on 11/2/09 (CP 1240-1257) and a citation 11/3/09 (CP 1295-1296) resulted in a continuance, CP 1403, ultimately leading to certification for a trial (1490-1491).

Marilyn Jensen and Anne Sinnett specifically waive any ownership interest in any asset of the estate. Ex.46 CP 3: 16-17

The court allowed Jensen and Sinnett to bid on the decedent's vacation property. RP (3/12/2010) 17

Jensen testified that she would buy the decedent's cabin with her judgment. RP (3/2/2010)144:25-145:9

Each of the undersigned does hereby recognize and agree that there have been no representations made as to valuation of assets.

Each of the undersigned acknowledges that they have had an independent opportunity to research and obtain valuation of the assets. Each of the undersigned releases each other, their counsel and JDR from any liability as to the values set forth. Ex.46 CP 4:10-16

The court allowed Jensen and Sinnett to establish the value of the decedent's automobile, countermanding the Settlement Agreement's instruction that this right was Carnahan's. See Appellant's original brief page 9.

The Personal Property of the estate shall be distributed to Carol Carnahan except for those items listed on exhibit A, attached, which shall be distributed to Marilyn Jensen.

Jensen and Sinnet asked the court to add a provision ordering the sale of personal property in the cabin. The court complied. CP 1666

**D. Jensen-Sinnett's Miscellaneous Responses.**

1. Jensen-Sinnett are Not Creditors. Jensen-Sinnett's claim to be creditors (CP 1662:25-1663:2) enable them to leap-frog over unpaid beneficiaries. However, the TEDRA Agreement states their interest is a "... beneficial share of the estate ...". CP 1535:14-24.

All the TEDRA Agreement did was to embodied their "beneficial share" into the form of a promissory note; it did not elevate them to estate

creditors giving them payment preference prior to distribution of the estate's assets as held by the trial court in Conclusion of Law #9.

Jensen-Sinnett tries to claim that because non-signatories to the TEDRA Agreement raised no objections to it that Jensen-Sinnett gets to define what their status is. However, while a non-signatory to a TEDRA Agreement must honor what the agreeing parties agreed upon, it does not mean they agreed to something not stated in the agreement.

Here, Jensen-Sinnett agreed their interest was that of a beneficial share, not a creditor. As a result, they cannot now assert they are creditors vis-à-vis non-signatories or Carnahan because the TEDRA Agreement does not say they are creditors. Instead, Washington's abatement statutes, Ch. 11.10 RCW, mean their share is to be paid after the specific beneficiaries are paid.

Carnahan sought direction from the court on this issue twice. The Honorable Barbara Mack vacated a Judgment obtained by Jensen and Sinnett as "creditors." CP 1067: 10-12. Judge Mack ruled that:

3. The Commissioner failed to rule on administrative expenses, which take first priority under RCW 11.76.110.

4. In granting judgment to S-J, the Commissioner advanced their priority of payment over other beneficiaries.

5. This Court notes that the specific beneficiaries were neither parties to the settlement agreement nor were they given notice of S-J's TEDRA petition for Judgment on the promissory note, which could affect their share of the estate.

Judge Mack also made note that Jensen and Sinnett had received 88% of the funds owed under the promissory note, and that had they not contested the will, the house could have been sold when the market was up, in which case they would have all their money.

Residual beneficiaries such as Jensen, Sinnett (and Carnahan in her position as heir) are lowest in priority, below the specific beneficiaries and should share equally in any debt. Accordingly, in her Petition for Instruction of May 1, 2009, Carnahan stated her belief that as a residuary beneficiary she would have to pay half of her fees herself. CP 1263. Attorney Bartlett suggested an offset of fees for debt on the note; at that time these numbers were nearly equivalent. CP1264.

2. Challenged Findings. Finding of Fact #9 is incomplete as it needs to have the full waiver/release text to be accurate in light of the issues in this case. This is especially true as Conclusion of Law # 6 obliquely refers to the waiver/release language. In exchange for their inheritance, Jensen/Sinnett must agree to the release clause and honor it.

As to Finding of Fact #15, Jensen-Sinnett basically admits that finding was not agreed. Because all pre-trial orders were interlocutory, whether this order was agreed or not is important. If it was agreed, then

the order is a stipulation not so easily set aside; if the order was not agreed then it was interlocutory. Jensen-Sinnett's attempt to mischaracterize that order is a part of their attempt to make the promissory note a creditor's claim carrying higher repayment priority than a "beneficial interest."

As Findings 19, 20 & 23 Carnahan had every right to rely on the TEDRA Agreement and not provide the notice these refer to. Under the TEDRA Agreement, CP 1535:14-24, Jensen-Sinnett gave up the right to any notice; consequently, these Findings are without support.

Jensen-Sinnett states that unchallenged findings form the basis for Carnahan's removal, personal liability and award of attorney fees to Jensen-Sinnett. The court, however, was specific.

Finding of Fact # 36 reads "Ms. Carnahan was unable or unwilling to say that she would be emotionally capable of transferring this property to the petitioners or some third party if required to do so as part of her responsibilities as personal representative. Carnahan actually testified her emotions wouldn't enter into it. RP (3/3/2010) 203:18-25.

Nonetheless, Conclusion of Law #15 has somehow mutated from that finding. It reads: **Ms Carnahan is removed because she has been unwilling or unable to sell the Beaver Lake property to satisfy the balance of the amounts owing by this estate.** This is linguistic

sleight of hand. Carnahan points out that the administrator appointed in April 2010 to sell the property has made no headway due to the legal and property constraints identified in trial testimony.

**In Conclusion of Law # 11 Carnahan is held personally responsible because she paid specific bequests prior to the Promissory Note, failed to accurately account for the Estate's finances and presented contradictory statements regarding the Estate's finances. Overall she caused loss to the estate through her own fault.**

This conclusion rests on the finding that Jensen and Sinnett are creditors, which they are not. No loss to the estate was shown. Other than purchase of a granola bar (RP(3/2/2010) 189:13-15) no expenditure or receipt in Carnahan's 166 page accounting has been criticized as inappropriate. In Conclusion of Law #6, the Judge crossed out and initialed Jensen/Sinnett's statement that Carnahan has wasted estate assets.

**Attorney fees are awarded under RWC 11.96A because Ms. Carnahan's actions as Personal Representative of the Estate have led to the necessity of Petitioner's Claims and the foregoing trial."**

Carnahan undertook and accomplished what the estate needed most – the sale of the residence at the market price against all odds. Were it not for this eight month effort by Carnahan and her volunteer partner, the shortfall on the Promissory Note would have been much greater than \$25,000. RP (3/3/2010)197-202. Jensen and Sinnett got the net proceeds of \$75,000. . Carnahan also did significant other work for the estate. CP418-461 shows work up to May 1, 2009. Carnahan has received no fees

Jensen/Sinnett state that Carnahan ignored the note. Carnahan tried unsuccessfully to get Jensen/Sinnet to work with her as the market plunged. Ex 81. She suggested arbitration. She suggested that as residuary beneficiary she must pay half her administrative fees herself. CP 1264 She suggested an offset of her administrative fees for debt. CP 1265. She attempted to ask instruction from the Court twice and was thwarted by Jensen Sinnett both times, CP 1346-1348. She held off writing herself a quit claim deed to the vacation cabin- her inheritance- for the possibility it could be shared as a solution to the shortfall of the

note. CP1265. Carnahan's petition for instructions about the note was ultimately certified for trial on Dec. 4, 2009.

The trial was certified by Commissioner Velatagui because the build-up of unheard petitions (due to Jensen and Sinnett's earlier continuance) exceeded the ability of ex parte to deal with them. RP (12/4/2009) 7

Carnahan contends that violations of the provisions of the TEDRA agreement led to the trial.

#### **E. Carnahan's Personal Statement**

Although the following is a side trip from the legal issues at hand, Ms. Carnahan would like to include a status report.

Jensen-Sinnett received \$175,000, or 88% of their agreed inheritance, in 2008.

Carnahan agreed in mediation to take the decedent's cabin in the extended family's seventy year old summer compound, even though the first PR discovered Ernest Howisey held no title.( Ex. 70) Carnahan has no heirs so title wasn't a large concern. She hoped to avoid the litigation by Jensen-Sinnett that has now overwhelmed her 84 to 96 year old aunts and

uncles causing them to hire attorneys to protect their long-time peaceful retreat.

The court, however, ordered the sale of the cabin without making other arrangements for an inheritance for Carnahan. She is a residuary beneficiary under the will installed by the TEDRA agreement.

Carnahan has received no administrative fees for three years work and has a judgment against her.

An administrator appointed in April 2010 has made no progress in the sale of the cabin due to legal and property constraints identified in testimony and the fact that the sale price was set to cover estate debt, not the considerably lower actual value. RP(3/2/2010) 49:13-25. RP (3/2/2010) 196:24-25, 198:1-21. RP(3/3/2010)164-167, 173: 18-25, 174:1-8, 175:1-7.

A new ruling on December 2, 2010 gives the administrator the assistance of a \$325.00 per hour real estate attorney. The Howisey extended family petitioned the court to delay the sale until the results of the appeal are available, but the court declined.

Carnahan's and Jensen-Sinnett's cousin, Marianne Hansen, has been waiting for her bequest for three years now. She is last in priority for proceeds of the sale, despite abatement law.

In fact, Carnahan and her extended family believe the fees and costs to unravel the tangled constraints to the sale are likely to use up the entire proceeds, if the property can be sold at all. In that case, the probate will end as it began, in a flood of unproductive fees and costs.

The Court didn't recognize the historic housing market collapse. Carnahan gets no credit for her eight month effort to sell a house that was eight months in default before she got the keys. She brought as much back to the estate for Jensen and Sinnett - \$75,000- as the first PR spent unproductively.

Although the Judge appeared to be considerably irked by Carnahan's pro se status prior to the trial, Carnahan acted out of economic necessity. An estate attorney, a litigation attorney and a real estate attorney consulted with Carnahan as their special expertise was needed. Mr. Bartlett has been with Ms. Carnahan since February 2009.

#### **F. Restatement of Carnahan Position.**

Simply put Carnahan's position is that she had a binding agreement with Jensen-Sinnett that, as a matter of law, carries the same weight as a final court order. She was entitled to rely upon, and be protected by, the

terms Jensen-Sinnett agree to and under which they received payment. The trial court had no justification to ignore the terms of the TEDRA Agreement and impose personal liability on Carnahan, or to elevate the payment priority of Jensen-Sinnett without setting it aside under the CR 60 standards. While it is unfortunate the family home could not sell for enough to pay Jensen-Sinnett's note that is a risk they accepted in the settlement.

**G Attorneys Fees and Costs Should be Awarded to Carnahan.**

As argued in her opening brief, and pursuant to RAP 18.1, under TEDRA, at RCW 11.96A.150, and the cases construing it, the trial and appellate courts are granted plenary authority to award attorneys fees and costs. Carnahan is entitled to recover her attorneys fees and costs.

**III. CONCLUSION**

Carnahan requests that Court of Appeals:

**A.** Uphold the TEDRA Agreement according to its terms and remand the case to the trial court with direction to dismiss Jensen-Sinnett's claims with prejudice based on the waiver/release language; alternatively,

**B.** The Court should remand the case to the trial court for re-trial using the CR 60 standard thereby requiring Jensen-Sinnett to prove fraud by clear, cogent and convincing evidence before the TEDRA Agreement can be disregarded;

**C.** Award to Carnahan her attorneys fees and costs both on appeal and at the trial court level; and,

**D.** Enter such other relief as deemed appropriate by the Court.

Carol Carnahan appreciates the opportunity to write the reply. It was important to her. Mr. Bartlett will undertake the Oral Argument.

Dated this 28th day of December, 2010.

Respectfully submitted,



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Carol Carnahan, Pro Se  
Appellant

I

**DECLARATION OF SERVICE**

I, Carol Carnahan, hereby declare and state as follows:

On December 29, 2010, I caused to be filed with the Court of Appeals, Division One,  
an original and a copy of Appellant's Reply brief by U.S. Certified mail to:

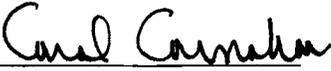
Richard D. Johnson, Court Administrator Clerk  
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On December 29, 2010, I also caused the Appellant's Reply Brief to be delivered by

U.S. Certified Mail to:

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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 to the best of my knowledge.

  
Carol Carnahan

Declaration of Service

Dated December 29, 2010

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