

No. 66777-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NORTHWEST INFRASTRUCTURE, INC., a Washington corporation,

Plaintiff/Appellant

v.

PCL CONSTRUCTION SERVICES, INC., a Washington corporation;
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

Defendants/Third-Party Plaintiffs/Respondents

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a
Washington regional transit authority,

Third-Party Defendant/Respondent.

BRIEF OF RESPONDENTS PCL CONSTRUCTION SERVICES, INC.
AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

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COURT OF APPEALS
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INTRODUCTION

At issue here is the dismissal of Appellant Northwest Infrastructure Inc.'s ("NWI") pass-through claim on a construction project for Respondent Central Puget Sound Regional Transit Authority ("Sound Transit"). The claim was brought by NWI, the subcontractor, and passed through by PCL Construction Services, Inc. ("PCL"),¹ the general contractor, to Sound Transit, the project owner. The NWI claim is based on alleged inaccuracies in Sound Transit documents and is a pass-through claim against Sound Transit. Due to a lack of privity, NWI could not bring its claims and arguments directly against Sound Transit; PCL is essentially caught in the middle, passing through each party's claims and arguments against the other.

During the course of discovery, it became clear that NWI had not complied with the notice and claim requirements of its Subcontract (which incorporated by reference all notice and claim requirements in the Prime Contract between PCL and Sound Transit). Because of the privity issue, Sound Transit filed a motion for summary judgment against PCL based entirely on its argument that NWI failed to comply with its contractually mandated notice and claim requirements. PCL filed a companion motion for summary judgment against NWI on the same grounds. To the extent that NWI failed to comply with the notice and claim requirements of either the Prime Contract or Subcontract, Washington law clearly required the

¹ PCL refers to PCL Construction Services, Inc. and its surety, Fidelity and Deposit Company of Maryland.

dismissal of NWI's claim against PCL and PCL's pass-through claim against Sound Transit.

On May 20, 2010, the trial court granted Sound Transit's Motion for Partial Summary Judgment and PCL's pass-through Motion for Summary Judgment based on NWI's failure to comply with the notice requirements mandated by the Prime Contract and Subcontract. There is no dispute regarding PCL's lack of responsibility for NWI's failure to provide timely written notice. The parties agreed that PCL promptly complied with its obligation to pass through the written notices provided by NWI. There is also no dispute that NWI is contractually entitled only to the same relief for its pass-through claim (if any) that PCL obtains as a middleman in this litigation from Sound Transit. If this Court affirms the summary judgment ruling in favor of Sound Transit, it must also affirm the ruling in favor of PCL and its surety, Fidelity and Deposit Company of Maryland.

I. COUNTER STATEMENT OF THE CASE

This matter arises from the Federal Way Transit Center Project ("Project"), which was completed in February 2006. The Project consisted of the construction of a five story parking garage, storm water detention vault, bus platform and pedestrian bridge connecting the parking garage to the bus platform. CP 155 (*Dahl Decl.*). Sound Transit was the owner of the Project. PCL was the general contractor for the Project, and NWI was the earthwork subcontractor for the Project. CP 160 (*Dahl Decl., Ex. A*); CP 101-123 (*Hornland Decl., Ex. A*).

A. The Prime Contract between PCL and Sound Transit.

On June 25, 2004, Sound Transit awarded the contract for construction of the Project to PCL for \$20,961,000. CP 160 (*Dahl Decl.*, Ex. A). As is standard, the Prime Contract specifies the procedure for submitting requests for change orders and claims against Sound Transit. While the specific procedures for submitting written notice differ depending on the type of claim the contractor is submitting, written notice within a specific and limited number of days is consistently required.

When submitting a claim for a differing site condition, Article 4.11 provides that a contractor “shall immediately upon discovery, and before the conditions are further disturbed, notify the Resident Engineer in writing of [a differing site condition].” CP 164 (*Dahl Decl.*, Ex. B § 4.11(A)). It also states that “no request by the Contractor for an equitable adjustment to the Contract for a Differing Site Condition shall be allowed unless the Contractor has given the required written notice.” CP 165 (*Dahl Decl.*, Ex. B § 4.11(F)).

When submitting a Request for Change Order due to work outside the original scope of the Contract, Article 4.02 governs. It provides that an RFC must be provided “in writing” and that a contractor may not request an RFC “for instances that occurred more than twenty (20) days prior to the request. CP 455 (*Coluccio Decl.*, Ex. 2 § 4.02).

When submitting any claim against Sound Transit, a Notice of Intent to Claim must be provided within 10 days after the discovery of an act or omission by the Contractor and before the work at issue is

performed.

The Notice [of Intent to Claim] shall be submitted within ten (10) days after the event or occurrence giving rise to the potential claim, or . . . if the event or occurrence is claimed to be an act or omission of Sound Transit, a Notice of Intent to Claim shall be given by the Contractor within ten (10) days after the Contractor discovers the act or omission. However, if the event or occurrence is claimed to be an act or omission of Sound Transit, a Notice of Intent to Claim shall be given by the contractor within ten (10) days after the contractor discovers the act or omission and prior to the time for performance of that portion of the Work to which such alleged act or omission relates.

CP 166 (*Dahl Decl.*, Ex. B § 10.01(A)). The Prime Contract further provides that “[f]ailure to comply with these requirements shall constitute a waiver by the Contractor on any right, equitable or otherwise, to bring any such claim against Sound Transit.” *Id.*

B. The Subcontract between NWI and PCL.

On June 24, 2004, after negotiating NWI’s scope of work, PCL and NWI executed a Subcontract for the earthwork portion of the Project. NWI agreed to satisfactorily complete all demolition, erosion control, earthwork and utilities for the Project for \$1,093,332, in accordance with the requirements of the Prime Contract. CP 101-123 (*Hornland Decl.*, Ex. A).

1. Notice Requirements.

As is common in the industry, the Subcontract specifically and broadly incorporates by reference and without qualification the Prime Contract, including its notice requirements.

The Prime Contract is incorporated herein by reference and made an integral part of the Subcontract.

CP 112 (*Hornland Decl.*, Ex. A § 1.1). In case this was not clear enough, the Subcontract also explicitly states that when NWI is pursuing a pass-through claim against Sound Transit, such as the claim at issue, all notice requirements in the Prime Contract flow down to NWI.

When Subcontractor prosecutes or defends any claim described in Subparagraphs 12.3 [“Claims by Owner”] or 12.4 [“Pass-Through Claims”], Subcontractor shall follow all claim procedures in the Prime Contract.

CP 118 (*Hornland Decl.*, Ex. A § 12.5) (emphasis added).

In addition, to give PCL sufficient time to review NWI’s submissions and comply with the notice requirements in the Prime Contract, the Subcontract additionally requires that: (1) NWI provide PCL with written notice of a pass-through claim no later than 72 hours after the event giving rise to the claim, and (2) provide the details of the pass-through claim at least 10 days before the time PCL is required to submit the same information to Sound Transit:

Notice of any claim by Subcontractor which will affect or become part of a claim which Contractor is required by the Prime Contract to make within a specified time period or in a specified manner shall be made in writing no later than seventy-two (72) hours after the occurrence of the event giving rise to the claim. Submittal of the details of any such claim shall be made in writing in sufficient time and sufficient manner to permit Contractor to satisfy the requirements of the Prime Contract. Such submissions shall be received by Contractor not less than ten (10) days preceding the time by which Contractor’s submission must be made.

CP 118 (*Hornland Decl.*, Ex. A § 12.4.2) (emphasis added).

When submitting a claim for costs due to delay, the Subcontract

imposes more stringent notice requirements. It specifies that the “Subcontractor shall have notified Contractor in writing of the cause of Delay no later than seventy-two (72) hours after the occurrence of the event causing the Delay.” CP 118 (*Hornland Decl.*, Ex. A § 12.2).

Finally, the Subcontract provides that NWI waives its right to bring a claim or proceeding against PCL unless these notice procedures are strictly followed:

Subcontractor shall make no claim or initiate any proceeding against Contractor arising out of or relating to the Subcontract, the performance of the Subcontract Work, or otherwise relating to the Project except as specifically provided herein, and then only after all required notice and claims procedures have been strictly followed.

Id. (*Hornland Decl.*, Ex. A § 12.1).

2. Limitations to Pass-Through Claims.

The Subcontract also specifically addresses pass-through claims – such as the claim at issue in this litigation – by NWI against Sound Transit. First, the Subcontract imposes a limited obligation on PCL to pass through NWI claims for which Sound Transit “is or may be responsible.”

If Subcontractor is unsatisfied with any Revision or Construction Change Directive, or otherwise has a claim for which Owner is or may be responsible, Contractor, upon Subcontractor’s timely request and at Subcontractor’s sole expense, will assist Subcontractor in presenting its claims to Owner, Architect and/or Engineer, but in so doing Contractor acts solely as a conduit for such claim and assumes no responsibility or liability therefore.

Id. (*Hornland Decl.*, Ex. A § 12.4.1) (emphasis added).

In addition, the Subcontract explicitly limits NWI’s right to relief

against PCL to PCL's right to relief (if any) against Sound Transit.

Subcontractor binds itself to Contractor and is obligated to Contractor in the same manner and to the same extent that Contractor is bound and obligated to Owner under the Prime Contract. . . . In no event shall Subcontractor be entitled to greater rights, higher entitlements or more relief against Contractor than Contractor actually obtains from Owner on Subcontractor's behalf or with respect to the Subcontract Work.

CP 112 (*Hornland Decl.*, Ex. A § 1.5) (emphasis added). The Subcontract goes on to specifically confirm that NWI is bound to the same consequences of a failure to provide written notice of a pass-through claim as PCL.

Failure of Subcontractor to satisfy the requirements of this [Notice of Pass-Through Claims] Subparagraph shall bind Subcontractor to the same consequences as those to which Contractor is bound.

CP 118 (*Hornland Decl.*, Ex. A § 12.4.2). These provisions confirm that if PCL's pass-through of the NWI claim to Sound Transit is dismissed, NWI's claim against PCL must also be dismissed. The application and impact of the Subcontract provisions relating to pass-through claims have not been contested.

C. NWI's Pass-Through Claim against Sound Transit.

NWI's pass-through claim at issue here consists of two parts. The first part is for additional costs NWI claims it incurred due to the alleged presence of liquefied soil in and around the excavation for the detention tank. NWI labels this part of its claim a differing site condition. CP 7, 8-9 (*NWI's Complaint*, ¶¶ 2.4, 2.7). The second part is for additional costs NWI claims it incurred in excavating and exporting a larger amount of soil

than anticipated. The parties refer to this part of the NWI claim as the additional earthwork claim. NWI ultimately combined the differing site condition claim with its additional earthwork claim and presented them as one claim in the action before the trial court. Both parts of the NWI pass-through claim are based on alleged inaccuracies in the drawings and specifications provided by Sound Transit prior to bid. CP 169-170 and CP 196-208 (*Dahl Decl.*, Exs. C, J). The additional earthwork claim is specifically based on Drawing C3.04. *Id.*

1. NWI's Liquefied Soil Claim against Sound Transit.

NWI's Complaint requests additional compensation due to the presence of liquefied soil in and around the detention tank excavation.² CP 7, 8-9 (*NWI's Complaint*, ¶¶ 2.4, 2.7). NWI testified that it encountered liquefied soil in and around the detention vault excavation by October 14, 2004. CP 149, 153 (*Harold Johnson Dep.*, 203:10-18; 107:9-21). PCL first received written notice of NWI's liquefied soils claim on Friday, December 31, 2004. CP 252 (*Pittman Decl.*, ¶ 2); CP 170 (*Dahl Decl.*, Ex. C). PCL promptly passed NWI's request for a change order through to Sound Transit on Tuesday, January 4, 2005 (directly after the New Year's holiday). CP 169 (*Dahl Decl.*, Ex. C).

Sound Transit denied the pass-through request for a change order

² NWI's request for a change order claimed that the soils report Sound Transit provided to bidders did not mention liquefied soils in the area in and around the excavation for the detention tank, and that the presence of liquefied soil increased its excavating, exporting, and importing costs. CP 170 (*Dahl Decl.*, Ex. C).

on January 10, 2005. CP 171-172 (*Dahl Decl.*, Ex. D). PCL continued working with NWI and Sound Transit to try to assist in resolution of this issue, passing through NWI's supplemental claim information and Sound Transit's responses. CP 173-195 (*Dahl Decl.*, Exs. E-I). Ultimately Sound Transit denied NWI's pass-through claim for liquefied soil on March 30, 2005. CP 193-194 (*Dahl Decl.*, Ex. H).

2. NWI's Additional Earthwork Claim against Sound Transit.

NWI alleges that Sound Transit Drawing C3.04 provided the following inaccurate earthwork numbers: 24,000 cubic yards of soil to be excavated, 16,000 cubic yards of that soil to be used as backfill, and the remaining 8,000 cubic yards of soil to be exported. According to NWI, the site actually required excavation of over 50,000 cubic yards of soil and export of over 25,000 cubic yards of soil. CP 195 (*Dahl Decl.*, Ex. I).

NWI testified that by the fall of 2004, it had determined that "there was more earthwork being moved by NWI than what was specified in Drawing C3.04." *NWI Brief*, 10. NWI did not notify PCL in writing when it first became concerned about the quantity of excavated soil. CP 268 (*NWI 30(b)(6) Dep.*, 114:23-115:6).

PCL reminded NWI that if it was going to submit a claim it needed to do so in accordance with its contract. CP 136 (*NWI 30(b)(6) Dep.*, 119:8-22) (PCL "instructed [NWI] per the contract to develop a claim . . ."). Yet six months after NWI determined it was moving significantly more dirt than specified, NWI had not provided PCL with written notice

of its additional earthwork claim against Sound Transit. CP 251-253 (*Pittman Decl.*). Obviously, PCL had no ability to pass a non-existent NWI claim through to Sound Transit at that time. To try to assist NWI, PCL worked with NWI to draft the written notice of NWI's initial claim for over excavation in the amount of \$821,101. The NWI pass-through claim was finally submitted to Sound Transit on June 28, 2005. CP 252 (*Pittman Decl.*, ¶ 3); CP 195 (*Dahl Decl.*, Ex. I). As noted above, NWI's over-excavation claim relied solely on allegedly inaccurate documents provided by Sound Transit and was asserted as a pass-through claim against Sound Transit.

A large amount of correspondence relating to negotiations between NWI and Sound Transit on the pass-through claim followed. PCL promptly passed through all correspondence from both NWI and Sound Transit – the timeliness of this portion of the process is not in dispute. On August 24, 2005, Sound Transit offered to pay \$231,000 to resolve NWI's over-excavation claim. CP 197 (*Dahl Decl.*, Ex. J). PCL passed that offer through to NWI on August 29, 2005. CP 252 (*Pittman Decl.*, ¶ 4). On October 6, 2005, NWI rejected Sound Transit's offer and submitted a revised additional earthwork claim. CP 255-261 (*Pittman Decl.*, Ex. A). After reviewing the claim, PCL passed through NWI's revised claim for \$1,190,218 to Sound Transit (on October 19, 2005). CP 209 (*Dahl Decl.*, Ex. K). PCL received a new offer to NWI from Sound Transit in the sum of \$534,602 on December 22, 2005, and passed it through to NWI by hand delivery the same day. CP 210-213 (*Dahl Decl.*, Ex. L); CP 252 (*Pittman*

Decl., ¶ 6). On December 30, 2005, PCL passed through NWI's rejection of this offer. CP 263 (*Pittman Decl.*, Ex. B). On January 27, 2006, Sound Transit unilaterally issued Change Order No. 12 for the NWI over-excavation claim in the amount of \$534,602. On February 10, 2006, Sound Transit issued a check for Unilateral Change Order No. 12 to PCL. On February 15, PCL issued a check for \$509,145 to NWI for the amount to be paid by Sound Transit, less PCL's contractual mark-up. CP 253 (*Pittman Decl.*, ¶ 8).

A month after Sound Transit's issuance of the unilateral change order, NWI prepared yet another revised claim for the same additional earthwork issues, but now for an additional \$2.7 million. In revising its additional earthwork claim, NWI included two new components. First, the revised claim requested additional compensation for the costs of the alleged liquefied soil (a claim Sound Transit had previously denied in March 2005 and January 2006). CP 214-221 (*Dahl Decl.*, Exs. M-N). Second, the revised claim requested additional compensation for alleged delay costs incurred by NWI in working on the Project 13 months longer than planned.

PCL received the revised claim on March 24, 2006. CP 253 (*Pittman Decl.*, ¶ 9). By that time, work on the Project had been substantially complete for over a month, yet this was the first time NWI had provided written notice regarding its claim for additional compensation based on schedule delay. CP 251-253 (*Pittman Decl.*); CP 118 (*Hornland Decl.*, Ex. A §12.2). NWI did not mention these delay

impact costs in its original RFC or Notice of Intent to Claim. CP 166 (*Dahl Decl.*, Ex. B § 10.01(A)(2)). On March 27, 2006, PCL passed through the revised claim for \$2,703,723 to Sound Transit.

Shortly after receiving NWI's revised claim, Sound Transit's expert, Navigant Consulting, Inc., worked directly with NWI to complete an audit of NWI's records so that it could better determine the amount, if any, of NWI's entitlement to additional compensation. During the summer of 2006, NWI presented three revised claims directly to Sound Transit and Navigant. CP 222-234 (*Dahl Decl.*, Exs. O-P). After completing the audit, Sound Transit denied NWI's claim on December 7, 2006, and demanded the return of \$186,933.23 of the amount paid in Unilateral Change Order No. 12. CP 229-234 (*Dahl Decl.*, Ex. P). On January 11, 2007, NWI demanded mediation. CP 278 (*Groff Decl.*, Ex. D). On January 15, 2007, PCL passed through NWI's mediation demand. CP 281 (*Groff Decl.*, Ex. E). On July 27, 2007, NWI and Sound Transit attempted, unsuccessfully, to resolve this claim through mediation. PCL attended the mediation, but was not an active participant. CP 265 (*Groff Decl.*, ¶ 7).

Over the next year, negotiations continued between Sound Transit and NWI. During this time, Sound Transit requested that NWI and PCL certify NWI's revised claim. CP 265 (*Groff Decl.*, ¶ 8). Due to a lack of supporting documentation, PCL refused to certify the full amount of the claim as valid and compliant under the Federal False Claims Act, stating,

Based upon the state of the NWI records, PCL has stated

and reiterates here that it will certify the NWI claim only up to the maximum amount that Navigant found, through its prior audit work, was the maximum amount that might be allowable under the contract. That number is \$559,558.

CP 289 (*Groff Decl.*, Ex. F). At this point PCL was stuck between a subcontractor requesting “assistance” under its subcontract to resolve its overstated pass-through claim against the owner, and an owner claiming that the pass-through claim was invalid and possibly fraudulent. There was nothing more for PCL to do.

D. NWI Initiates this Lawsuit.

On March 2, 2009, NWI brought this action against PCL seeking to recover the total amount of its final revised pass-through claim based on the allegation that PCL failed to pursue its pass-through claims against Sound Transit. NWI demanded in its Complaint that PCL pass through NWI’s claims for additional compensation to Sound Transit. CP 9 (*NWI Complaint*, ¶¶ 2.8-2.9). PCL filed a third party complaint against Sound Transit on April 30, 2009, passing the claim through to Sound Transit. PCL did not seek any damages from Sound Transit beyond the amount the Court might find due to NWI.³ CP 20 (*PCL Third Party Complaint*).

E. PCL’s Pass-Through Motion for Summary Judgment against NWI.

On March 5, 2010, Sound Transit brought the Motion for Partial Summary Judgment at issue here. Although Sound Transit’s summary judgment motion was technically against PCL, the arguments in support of

³ Under the Prime Contract, PCL would be entitled to its mark-up if the Court found in NWI’s favor on the pass-through claim.

its motion were functionally asserted against NWI. Sound Transit argued that NWI failed to comply with its contractual notice requirements and therefore waived its right to seek additional compensation for its claim.

Sound Transit specifically argued:

- i) NWI failed to notify both PCL and Sound Transit immediately in writing upon the discovery of the alleged differing site condition at the location of the detention vault.
- ii) NWI failed to provide proper and timely notice to Sound Transit that it had encountered additional quantities of soil during the excavation, backfill, and export of the Project.
- iii) At a minimum, the Court should dismiss NWI's delay claim because NWI failed to abide by the contractual notice requirements for delay claims.

CP 85-96 (*Sound Transit's Mot. for Partial Summ. J.*). Based on these arguments, Sound Transit requested the dismissal of PCL's pass-through claims made on behalf of NWI.

It is undisputed that (1) NWI's liquefied soil and additional earthwork claims were purely pass-through claims against Sound Transit, (2) NWI was bound by the same contractual notice requirements as PCL, (3) PCL properly passed through all written notices of these claims,⁴ and (4) NWI's right to recover against PCL based on its pass-through claims is subject to the notice requirements in the subcontract and limited to PCL's right to recover (if any) against Sound Transit. CP 418, 422, 428, 439

⁴ NWI does allege that it did not receive a December 7, 2006 letter from Sound Transit. But this letter is irrelevant to Sound Transit and PCL's summary judgment motions, and NWI admits that Sound Transit expressly agreed to treat this letter as sent by Sound Transit on January 3, 2007, the day NWI received it. CP 430-431 (*NWI's Opposition*).

(*NWI's Opposition to Mots. for Summ. J.*); CP 236, 248-249 (*PCL Mot. for Summ. J.*). PCL filed a companion motion for partial summary judgment, passing through Sound Transit's motion for partial summary judgment to NWI. On May 20, 2010, the Court granted Sound Transit and PCL's summary judgment motions. The Court found that the undisputed evidence established that NWI failed to comply with the notice and claim requirements of the Prime Contract and the Subcontract. CP 928 – 933.

F. NWI's Post Summary Judgment Motions.

1. Motion for Reconsideration.

On June 1, 2010, NWI filed a motion for reconsideration. CP 934-945.⁵ Sound Transit and PCL asked the court to reject NWI's motion on the grounds that: (1) it was based on new declarations that did not comply with CR 59(a)(4), and (2) even this newly proffered evidence did not create an issue of fact. CP 3373-3407; CP 3408-3417 (*Responses to Mot.*). On July 21, 2010, the trial court denied NWI's motion. CP 2060-2062 (*Order Den. Mot. to Reconsider*). The court found that "NWI failed to meet its burden pursuant to CR 59(a)(4), (7), and (9)." *Id.* at 2061.

2. Motion to Vacate.

Seeking a third bite of the apple, on August 10, 2010 NWI filed a motion to vacate the summary judgment order under CR 54(b). The motion to vacate was based mainly on NWI's mischaracterization of the

⁵ NWI's motion also asked for clarification of the trial court's summary judgment order. CP 935-937. NWI has not assigned error or otherwise challenged the trial court's denial of its motion to clarify.

deposition testimony of Garth Hornland, Senior Manager of Finance and Administration at PCL.

NWI did not attempt to take Mr. Hornland's deposition until July 13, 2010, two months after the summary judgment order. At this time, there were only two issues remaining for discovery: (1) Sound Transit's fraud claim, and (2) NWI's claim for its unpaid retention of \$85,392. Throughout Mr. Hornland's deposition, NWI ignored this fact as well as numerous objections that its questions were outside the scope of the 30(b)(6) deposition and the remaining issues in the case. Since that date, NWI has repeatedly mischaracterized Mr. Hornland's testimony in its efforts to overturn the summary judgment ruling. CP 2416-2539 (*NWI's Mot. to Vacate*); CP 2376-2415 (*Coluccio Decl.*).

Both Sound Transit and PCL opposed NWI's motion to vacate. CP 2569-2578 (*Sound Transit's Opp'n to Pls. Mot. to Vacate*); CP 2615-2628 (*PCL's Opp'n to Pls. Mot. to Vacate*). PCL submitted a declaration by Garth Hornland and expressly pointed out that (contrary to NWI's mischaracterizations) Mr. Hornland's testimony was limited to the following:

(1) *PCL* followed the procedural timeline for passing through documents provided by NWI to Sound Transit;

(2) Mr. Hornland believed that there was a reasonable basis for NWI's initial \$821,101 request for change, but not for NWI's revised claims ranging from \$1.1 million to \$2.7 million (which NWI continues to pursue in this litigation); and

(3) Mr. Hornland disagreed with Sound Transit only on its affirmative fraud claims, which sought rescission of Change Order No. 12 and are not at issue here. *Id.*

On November 12, 2010, without oral argument, the trial court entered an order denying NWI's motion to vacate. CP 2728-2730 (*Order Den. Pls. Mot. to Vacate*).

3. Attorneys' Fees.

During this same time, Sound Transit moved the trial court for an award of attorneys' fees against NWI (or NWI and PCL in the alternative). CP 2063-2071 (*Sound Transit's Mot. for Att'ys Fees and Costs*). PCL argued that if Sound Transit were entitled to fees under RCW 39.04.240, the award should be taxed against NWI. CP 2207-2212 (*PCL's Resp. to Mot. for Att'ys Fees and Costs*); CP 2213-2217 (*PCL's Reply to NWI's Resp. to Sound Transit Mot. for Att'ys Fees*). NWI opposed the motion. CP 2196-2206. On November 12, 2010, the trial court found:

Sound Transit is the prevailing party under RCW 39.04.240. NWI's claims were pass-through claims against Sound Transit. Sound Transit successfully defended against NWI's pass-through claims. As a result, Sound Transit is entitled to recover its reasonable attorney's fees and costs from NWI directly.

CP 2726-2727 (*Order Granting Sound Transit's Mot. for Att'ys Fees and Costs*).

4. Partial Final Judgment.

The parties agreed to enter the summary judgment order, the orders denying the motion for reconsideration and motion to vacate, and the order

awarding Sound Transit attorneys' fees as partial final judgments under CR 54(b). CP 2931-2941 (*Stipulation for Entry of Final J.*). The trial court entered a CR 54(b) judgment with the required findings, and stayed further proceedings pending appeal. CP 2951-2959 (*Order for J. on Less Than All Claims*).

II. ARGUMENT

A. If the Court affirms the dismissal of PCL's pass-through claims against Sound Transit, it must also affirm the dismissal of NWI's claims against PCL.

NWI does not dispute the following points:

(1) NWI's liquefied soil and additional earthwork claims are purely pass-through claims against Sound Transit,

(2) In pursuing its pass-through claims, NWI was bound by the same contractual notice requirements as PCL, as well as additional contractual notice requirements set forth in the Subcontract,

(3) PCL timely passed through all written notices and claim documents provided by NWI and,

(4) NWI's right to recover against PCL based on its pass-through claims is limited to PCL's right to recover (if any) against Sound Transit. CP 418, 422, 428, 439 (*NWI's Opposition*); CP 236, 248-249 (*PCL Mot. for Summ. J.*). If the trial court's decision granting Sound Transit's motion for partial summary judgment against PCL is upheld, the trial court's decision granting PCL's pass-through motion for summary judgment against NWI must also be upheld.

1. The failure to provide timely written notice of its pass-

through claims lies with NWI.

a. NWI was bound by the same contractual notice and claim requirements as PCL.

It is undisputed that NWI was bound by the notice requirements in the Prime Contract and Subcontract. This includes the following:

- Notice of a Differing Site Condition:
 - Written notice “immediately upon discovery, and before the conditions are further disturbed” CP 164 (*Dahl Decl.*, §4.11(A)).
 - Written notice within 48 hours of discovery. CP 113 (*Hornland Decl.*, Ex. A, §3.2).
- Notice of a Request for Change / Intent to Claim:
 - Written notice within 20 days of when instance occurred. CP 455 (*Coluccio Decl.*, Ex. 2, §4.02(B)).
 - Written notice “within ten (10) days after the contractor discovers the act or omission and prior to the time for performance of that portion of the Work to which such alleged act or omission relates.” CP 166 (*Dahl Decl.*, Ex. B, §10.01(A)).
 - Written notice “no later than seventy-two (72) hours after the occurrence of the event giving rise to the claim.” CP 118 (*Hornland Decl.*, Ex. A, §12.4.2).
- Notice of a Delay Claim:
 - Written notice of cause of delay not later than 72 hours after the occurrence causing the delay. CP 118 (*Hornland Decl.*,

Ex. A, §12.2).

b. NWI failed to comply with the contractual notice and claim requirements.

Based on the testimony of NWI's own witnesses and the NWI summary judgment response, NWI did not provide the written notice required by the Prime Contract and the Subcontract. NWI admitted that it knew of the liquefied soil differing site condition by October 14, 2004. CP 153 (*Johnson Dep.*, 203:10-18). Yet NWI does not deny that it did not provide PCL with written notice of the liquefied soil differing site condition until Friday, December 31, 2004, over two months later.

NWI admitted that it believed it was moving more earth than specified in the Sound Transit contract documents (and experiencing the corresponding alleged delay) by early September 2004. CP 135-136 (*NWI Dep.* 113:16-23; 119:8-16). Yet NWI does not deny that the first written notice of its additional earthwork claim was sent to Sound Transit, through PCL, on June 28, 2005, over a year later. Finally, NWI does not deny that it did not provide written notice of the portion of its claim based on delay until March 24, 2006, a year and a half later. NWI may have had the gun, but it did not fire the gun as contractually required.

c. PCL complied with its limited pass-through claim obligations by promptly passing through all written notices and claim documentation provided by NWI.

The Subcontract between PCL and NWI lays out PCL's limited obligations regarding a subcontractor's pass-through claims against the

owner:

If Subcontractor is unsatisfied with any Revision or Construction Change Directive, or otherwise has a claim for which Owner is or may be responsible, Contractor, upon Subcontractor's timely request and at Subcontractor's sole expense, will assist Subcontractor in presenting its claims to Owner, Architect and/or Engineer, but in so doing Contractor acts solely as a conduit for such claim and assumes no responsibility or liability therefore.

Id., § 12.4.1 (emphasis added).

With regard to the liquefied soil claim,⁶ PCL received a written notice of claim from NWI for the first time on Friday, December 31, 2004. CP 252 (*Pittman Decl.*, ¶ 2); CP 169-170 (*Dahl Decl.*, Ex. C). PCL assisted NWI with its pass-through claim against Sound Transit by passing this notice through to Sound Transit directly after the holiday, on Tuesday, January 4, 2005. CP 169-170 (*Dahl Decl.*, Ex. C).

Regarding the additional earthwork claim, PCL did not initially receive any written notice of NWI's pass-through claim against Sound Transit. CP 252 (*Pittman Decl.*, ¶ 3). To try to assist NWI, PCL worked with NWI to draft the written notice provided to Sound Transit on June 28, 2005. CP 252 (*Pittman Decl.*, ¶ 3); CP 195 (*Dahl Decl.*, Ex. I). The timing of subsequent direct negotiations between NWI and Sound Transit regarding this claim are not currently at issue. However, it is undisputed that PCL assisted NWI in presenting its notice and claim to Sound Transit

⁶ NWI has abandoned any argument relating to the dismissal of its claim based on its allegations of liquefied soils by failing to raise this issue. The trial court's decision dismissing this portion of NWI's pass-through claim therefore stands. *Saldin Secs. Inc. v. Snohomish County*, 134 Wn.2d 288, 297 n.4, 949 P.2d 370 (1998); RAP 10.3(a)(6).

by, as NWI admits, timely passing through all written notices and claims provided by NWI on its additional earthwork pass-through claim. CP 417-443 (*NWI's Opposition*).

Regarding the portion of NWI's additional earthwork claim based on the alleged delay costs, PCL received written notice of NWI's alleged delay claim on March 24, 2006. CP 253 (*Pittman Decl.*, ¶ 9). PCL passed this claim through to Sound Transit on March 27, 2006. As Sound Transit argues, any failure to provide timely written notice rests with NWI. CP 214-221 (*Dahl Decl.*, Exs. M-N).

2. NWI's right to recover against PCL cannot be greater than PCL's right to recover against Sound Transit.

With regard to pass-through claims, the Subcontract states,

All rights which Owner may exercise and enforce against Contractor may be exercised and enforced by Contractor against Subcontractor, including any claim for liquidated damages. Subcontractor shall be required to do all things and be bound by all decisions, directives, interpretations, and rulings of Owner, Architect, Engineer, or others authorized to act on behalf of Owner, including all decisions as to the scope of the Subcontract Work, to the same extent that Contractor is bound thereby. In no event shall Subcontractor be entitled to greater rights, higher entitlements or more relief against contractor than Contractor actually obtains from Owner on Subcontractor's behalf or with respect to the Subcontract Work.

CP 112 (*Hornland Decl.*, Ex. A § 1.5) (emphasis added).

In addition, the Subcontract clarifies that if PCL's claim against Sound Transit is dismissed due to NWI's failure to satisfy the notice requirements for pass-through claims, NWI's claim must suffer the same consequences.

Failure of Subcontractor to satisfy the requirements of this Subparagraph [Notice of Pass-Through Claims] shall bind Subcontractor to the same consequences as those to which Contractor is bound.

CP 118 (*Hornland Decl.*, Ex. A § 12.4.2).

Finally, with regard to the delay portion of NWI's pass-through claim, the Subcontract explicitly limits NWI's right to relief against PCL to the amount of compensation actually received from Sound Transit.

If such Delay claims are based upon Owner's action or inaction, Subcontractor's sole remedies against Contractor shall be: (a) a reasonable extension of the time for performance in which to complete the Subcontract Work, provided that a similar extension of time has been granted to Contractor by Owner; and (b) to the extent that Owner pays amounts to Contractor as compensation for the Delay, such payment being a condition precedent to Contractor's obligation hereunder, then Subcontractor shall receive reasonable compensation for such Delay, not to exceed the amount actually received by Contractor as compensation for Subcontractor's Delay. Subcontractor shall only be entitled to the remedies specified herein if Subcontractor shall have notified Contractor in writing of the cause of Delay no later than seventy-two (72) hours after the occurrence of the event causing the Delay.

Id. at § 12.2 (emphasis added).

Under these provisions, NWI's right to recover against PCL for its pass-through claims may not be greater than PCL's right to recover against Sound Transit. NWI has never disputed that its Subcontract expressly limits its right to relief against PCL for these pass-through claims to PCL's right to relief against Sound Transit. If the Court affirms the dismissal of PCL's pass-through claims against Sound Transit, the Court must also affirm the dismissal of NWI's claims against PCL.

3. PCL did not unequivocally waive its notice and claim compliance defenses.

Based on NWI's Brief, any waiver of the notice and claim provisions occurred at Sound Transit's level. CP 441 (*NWI's Opposition*). NWI has not alleged any unequivocal acts by PCL establishing its intent to waive its right to assert a notice defense. However, NWI repeatedly mentions that (1) PCL did not assert that NWI's pass-through claims against Sound Transit were untimely and (2) PCL did not expressly reserve its defenses against NWI's pass-through claims, as though these facts may establish some sort of an implied waiver.

An opposing party has the burden of establishing an implied waiver by "unequivocal acts of conduct evidencing an intent to waive." *Mike M. Johnson v. County of Spokane*, 78 P.3d 161, 150 Wn.2d 375, 386 (2003). When a contract requires written notice, even a party's "actual notice" of an event or claim does not excuse the failure to provide timely written notice. *Mike M. Johnson*, 150 Wn.2d at 391.

PCL's approach to NWI's pass-through claim against Sound Transit has always been to try to remain a neutral party as much as possible, allowing NWI and Sound Transit to resolve their differences. The Subcontract allows PCL to maintain this position by expressly providing that PCL will assist NWI in presenting its pass-through claims, "but in so doing [PCL] acts solely as a conduit for such claim and assumes no responsibility or liability therefore." CP 118 (*Hornland Decl.*, Ex. A § 12.4.1) (emphasis added). In its attempt to remain as neutral as possible and meet its pass-through obligations, PCL took two courses of action: (1) PCL reminded NWI of its need to comply with its contractual notice

and claim requirements, and (2) PCL promptly passed through to Sound Transit all claim documents provided by NWI. CP 136 (*NWI 30(b)(6) Dep.*, 119:8-22) (PCL ‘instructed [NWI] per the contract to develop a claim . . .”).

In the context of a pass-through claim, it was Sound Transit’s responsibility to raise a notice defense to the NWI claim alleging that Sound Transit’s documents were defective. A *general contractor’s* failure to raise a notice defense to a pass-through claim against the *owner* is meaningless and cannot unequivocally evidence an intent to waive that defense. See *Earth Tech Environ. and Infrastructure, Inc. v. Perini/Kiewit/Cashman*, 18 Mass. L. Rptr. 305 (Mass. S. Ct. 2004) (“As long as it remained in th[e] posture [of a pass-through claim], the issue of raising a notice defense or waiver thereof was for [the owner], not [the general contractor] to assert.”); see also *Mike M. Johnson*, 150 Wn.2d at 391 (finding that the [owner] stood to benefit from the mandatory protest and claim procedures; thus . . . [the contractor] simply could not waive enforcement of the provisions”).

Further, there is no requirement that a party continually reserve its right to assert a notice defense. Under Washington law, the burden of establishing waiver is clearly on NWI. *Mike M. Johnson*, 150 Wn.2d at 391. PCL is not required to establish a *lack* of waiver by expressly reserving the right to assert its defenses. See *Am. Safety Cas. Ins. Co. v. City of Olympia*, 162 Wn.2d 762, 770-72, 174 P.3d 54 (2007) (holding that agreement to negotiate claim was *equivocal* conduct that could not

establish an intent to waive). The fact that PCL complied with its obligations by passing through NWI's claim documents and facilitating negotiations between NWI and Sound Transit is clearly *equivocal* conduct that cannot constitute a waiver under *Mike M. Johnson*. *Id*; see also *Mike M. Johnson*, 150 Wn.2d at 392 (finding negotiations did not constitute waiver).

The parties do not dispute that PCL passed through NWI's claims and Sound Transit's responses as required by contract. CP 418, 422, 428, 439 (*NWI's Opposition*). It was NWI's job to comply with all contractual notice requirements. PCL's role was to pass through NWI's claim to Sound Transit and Sound Transit's response to NWI. CP 118 (*Hornland Decl.*, Ex. A § 12.4.1). PCL was not required to reserve its defenses. PCL did not unequivocally evidence any intent to waive its notice defenses. If the Court affirms the dismissal of PCL's pass-through claims against Sound Transit, it must also affirm the dismissal of NWI's claims against PCL.

B. The trial court properly denied NWI's Motion for Reconsideration and Motion to Vacate.

Motions for reconsideration and motions to vacate interlocutory orders are addressed to the sound discretion of the trial court. A trial court's ruling may only be reversed with a showing of manifest abuse of discretion. *Wagner Dev., Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639 (1999); *Zimzores v. Veterans Admin.*, 778 F.2d 264, 267 (5th Cir.1985) (cited with approval by *Washburn v.*

Beatt Equip. Co., 120 Wn.2d 246, 301, 840 P.2d 860 (1992) and *Alwood v. Aukeen Dist. Court*, 94 Wn. App. 396, 401 n.9, 973 P.2d 12 (1999)). A trial court abuses its discretion only if its decision is manifestly unreasonable or rests on untenable grounds or reasons. *Id.*

This Court can quickly dismiss the alleged errors regarding NWI's Motion for Reconsideration and Motion to Vacate. As the trial court decided, neither raises new evidence or creates an issue of fact justifying overturning the summary judgment decision. In support of its Motion for Reconsideration, NWI relies on another declaration from its attorney (CP 946-995 (*Coluccio Decl.*)) and a declaration from NWI's president Hal Johnson. CP 996-1027 (*Johnson Decl.*). Neither presents newly discovered evidence under Civil Rule 59(a)(4). Neither creates an issue of fact regarding when NWI realized it was excavating more earth than it anticipated under the Contract.

NWI relies primarily on a mischaracterization of the deposition testimony of Garth Hornland in support of its Motion to Vacate. But Mr. Hornland's testimony is not "newly discovered evidence." In addition, it is immaterial to the court's ruling that NWI failed to comply with its contractual notice requirements as a matter of law, and does not contradict PCL's summary judgment motion.

While it is clear that deposition testimony taken after a summary judgment ruling is not newly discovered, and that a lay person's (mischaracterized) testimony regarding an issue of law is immaterial, NWI's blatant mischaracterizations of Mr. Hornland's testimony deserve

more attention.

First, NWI states that Mr. Hornland agreed that NWI “fully complied with the contract claim notice and time requirements.” *NWI’s Brief*, 52. However, a simple review of the full deposition transcript clearly establishes that Mr. Hornland was not asked, nor did he testify, whether *NWI* complied with its contractual notice requirements. Rather, Mr. Hornland testified only that *PCL* followed the procedural timeline for passing through documents provided by NWI to Sound Transit, complying with all of its contractual pass-through obligations. As Mr. Hornland explained, he was working with Jim Pittman, *PCL*’s Project Manager, to make sure that *PCL* passed through all written notices, requests for change orders, and claims provided by NWI to Sound Transit in a timely manner. CP 2580-2581, 2591 (*Hornland Decl.*, ¶¶ 5-6, Ex. A, 21:4-23:9, 61:4-63:24). He did not work on site, did not know when NWI discovered its additional earthwork claim, and was not responsible for NWI’s compliance with its contractual notice requirements. CP 2581 (*Hornland Decl.*, ¶ 6).

Second, NWI mischaracterizes Mr. Hornland’s testimony regarding the validity of NWI’s additional earthwork claim. Mr. Hornland’s testimony on this issue related only to NWI’s initial \$821,101 request for an additional earthwork change order. CP 2580 (*Hornland Decl.*, ¶ 3). Mr. Hornland testified that he believed, as did Sound Transit

originally, that there was a reasonable basis for this \$821,101 request.⁷ Mr. Hornland was not asked, and did not testify, regarding the reasonableness or validity of NWI's subsequent additional earthwork claims (which NWI continues to pursue in this litigation) ranging from \$1.1 million to \$2.7 million. PCL was unable to, and did not, certify NWI's revised claims ranging from \$1.1 to \$2.7 million as valid or compliant under the Federal False Claims Act. *Id.* (*Hornland Decl.*, ¶ 4).

Third, NWI mischaracterizes Mr. Hornland's testimony as stating that "Sound Transit's allegations in this litigation . . . were without merit." *NWI's Brief*, 53. Mr. Hornland was not asked, and did not testify, regarding the merit of Sound Transit's position that NWI failed to comply with its contractual notice requirements. Rather, Mr. Hornland testified that he disagreed with Sound Transit's affirmative fraud claims against NWI, which sought rescission of Change Order No. 12 and are not at issue here.

Finally, NWI tries desperately to make something of the unrelated retainage issue between Sound Transit and PCL. As Mr. Hornland explained in his deposition, the full amount of PCL's contract retention was held in an escrow account throughout the course of much of this litigation. As Mr. Hornland testified, it has consistently been PCL's position that the bulk of the retention is unrelated to the claims brought by NWI. CP 2582, 2610-2611 (*Hornland Decl.*, ¶ 9, Ex. A,

⁷ This was the basis for Sound Transit issuing unilateral Change Order Number 12 in the sum of \$534,602 on December 22, 2005.

97:20-103:17); CP 2582 (*Hornland Decl.*, ¶ 8-9). Sound Transit agreed to release the bulk of PCL's retention on June 29, 2010, but refused to release the portion attributable to the NWI Subcontract in the sum of \$85,392. It is undisputed that Sound Transit has not released the portion attributable to NWI and PCL is not obligated to pay it to NWI until it is first paid by Sound Transit. *Id.* Most importantly, Sound Transit's release of the rest of PCL's retention has no bearing on whether NWI complied with its contractual notice and claim requirements or whether the trial court's summary judgment order was correct. The only real complaint NWI has regarding this issue is that Sound Transit is still withholding its retention. The trial court did not abuse its discretion in denying NWI's Motion to Vacate.

C. Sound Transit's attorney fees are properly allocated to NWI.

Recognizing that PCL is not responsible for this lawsuit, the trial court appropriately taxed Sound Transit's attorney fees against NWI. Courts review an award of attorney fees under RCW 39.04.240 for an abuse of discretion. *See Frank Coluccio Constr. Co., Inc. v. King County*, 136 Wn. App. 751, 780, 150 P.3d 1147 (2007). The trial court did not abuse its discretion by taxing NWI, the party initiating the litigation and seeking monetary relief, with Sound Transit's fees and costs incurred in resisting that relief.⁸

⁸ While PCL's contractual request for its attorney fees and costs was not resolved due to the presence of outstanding claims between NWI and PCL, PCL will be renewing this motion at the appropriate time.

RCW 39.04.240, which incorporates RCW 4.84.250 in the context of litigation relating to public works contracts, encourages parties to recognize the true costs of litigation. RCW 39.04.240 states,

The provision of RCW 4.84.250 through 4.84.280 shall apply to an action arising out of a public works contract in which the state or a municipality, or other public body that contracts for public works, is a party

RCW 4.84.270 states,

The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief . . . recovers nothing

If a party chooses to seek relief on a claim arising out of public works contracts, it accepts the additional risk imposed by RCW 39.04.240 that it will be taxed for the prevailing party's attorney fees and costs. This "tax" is designed to discourage non-meritorious claims and encourages settlement. *Hanson v. Estell*, 100 Wn. App. 281, 289, 997 P.2d 426 (2000) ("Out-of-court settlements are thus encouraged and parties are penalized when they unjustifiably bring or resist [] claims.").

In March 2009, NWI initiated this litigation seeking to recover over \$2 million based on its pass-through claim against Sound Transit. CP 5-13 (*Complaint*). In its *Complaint*, NWI based its claim on errors by Sound Transit, not PCL, and specifically demanded that PCL pass its claim through to Sound Transit. CP 6-9 (*Complaint*, ¶¶ 2.2-2.9).⁹ As

⁹ NWI argued that PCL would be breaching its duty of good faith and fair dealings, as well as its fiduciary duties, by not passing through its claims against Sound Transit. CP 9-11 (*Complaint*, ¶¶ 2.8-2.14). NWI specifically stated that "Section 12.4 imposed upon PCL, among other things, an affirmative

NWI demanded, PCL passed through NWI's claim to Sound Transit in its Third Party Complaint. PCL did not assert, and has not asserted, a single direct claim against Sound Transit. CP 15-22 (*PCL Answer and Third Party Compl.*). Subsequently, NWI asserted two cross-claims directly against Sound Transit: one for bad faith pre-litigation conduct, and the other for defamation. CP 35-47 (*NWI Answer and Cross-cl. against Sound Transit*).

This suit, and the cost of defending against it, is the responsibility of NWI, not PCL.¹⁰ NWI chose to seek relief from Sound Transit, through PCL, by bringing this lawsuit. In doing so, NWI knowingly accepted the risk of a "tax" for fees and costs under RCW 39.04.240. NWI is obligated to defend and bear the consequences if Sound Transit successfully resists the relief NWI seeks. If the Court awards Sound Transit its fees and costs, NWI should be the party taxed.

D. PCL is entitled to its attorney fees and costs on appeal.

PCL is entitled to its attorney fees and costs on appeal if permitted by law. RAP 18.1. Section 12.8.4 of the Subcontract between PCL and NWI provides for an award of attorney fees and cost, entitling PCL to an award of its attorney fees and costs on appeal against NWI. CP 101-123 (*Hornland Decl., Ex. A*).

contract duty to pursue on behalf of NWI any claims for which Sound Transit had some or all liability or responsibility." *Id.*

¹⁰ PCL certainly did not have this power with regard to NWI's cross-claims against Sound Transit.

III. CONCLUSION

PCL is caught between an owner that allegedly provided inaccurate contract documents and a subcontractor that alleges damages based on those inaccuracies. In the months and years that have passed since 2004, the dispute between NWI and Sound Transit has escalated in dollar value, accusations and costly litigation. However, it is clear that when NWI provided PCL with written notice or claim documents related to the alleged defective Sound Transit documents, PCL promptly passed them through to Sound Transit. It is also clear that when NWI brought suit against PCL, alleging damages due to those same alleged defective documents, PCL passed the suit through by bringing a third party complaint against Sound Transit. Under these circumstances, the subcontract between PCL and NWI is also clear; NWI is bound by the same result regarding the pass-through claims as PCL. If this Court affirms the trial court's dismissal of the pass-through claims against Sound Transit, the dismissal of NWI's claims against PCL must also be affirmed. Finally, it is clear that this lawsuit is not, and has never been, of PCL's making. Any fees awarded to Sound Transit are properly taxed against NWI.

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Dated this 3rd day of August, 2011.

Respectfully submitted,

GROFF MURPHY, PLLC

A handwritten signature in black ink, appearing to read "David C. Groff", written over a horizontal line.

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Fidelity and Deposit Company of
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served on August 3, 2011, true and correct copies of the foregoing document to the counsel of record listed below, via the method indicated:

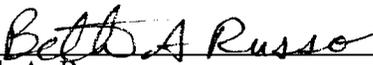
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DATED this 3rd day of August, 2011.



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