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CASE NO. ~~669644~~

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**Court of Appeals  
of the State of Washington  
Division I**

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BORIS PRETRENKO  
Appellant/Defendant,

v.

DISCOVER BANK,  
Respondent/Plaintiff.

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**Brief of Respondent  
Discover Bank**

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## **II. ASSIGNMENT OF ERROR**

Respondent Discover Bank does not assign any error to the decision of the trial court.

## **III. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether abuse of discretion is the applicable standard of review.
2. Whether RCW 4.28.080 (15) shall be liberally construed.
3. Whether substantial rather than strict compliance with RCW 4.28.080 (15) is required.
4. Whether Discover Bank substantially complied with RCW 4.28.080 (15).
5. Whether Mr. Petrenko carried his burden of proving entitlement to vacation of the judgment by clear and convincing evidence.
6. Whether Mr. Petrenko satisfied the requirement of CR 60(e) of providing facts constituting a defense to Discover Bank's claims against him.
7. Whether Discover Bank is entitled to reimbursement of its attorney's fees reasonably incurred in this appeal.

#### **IV. STATEMENT OF THE CASE**

Discover Bank served its summons and complaint by substitute service pursuant to RCW 4.28.080 at Mr. Petrenko's usual abode on January 7, 2012, by delivering them to an adult who declined to identify herself at the time, but who stated to the process server that she resided at the property where service was made, CP-1. That individual subsequently identified herself in a declaration filed with the court below as Lena Petrenko, although she declined to disclose the nature of her relationship with Mr. Petrenko, with whom she shares the same surname, CP-73.

Mr. Petrenko filed an answer to the complaint, CP-4, so he necessarily received actual notice of Discover's lawsuit and the specific allegations contained in the complaint. Thereafter, Discover Bank filed and properly served on Mr. Petrenko a motion for summary judgment, CP-95, to which Mr. Petrenko did not respond, CP-8. Mr. Petrenko does not claim that he was not properly served with the summary judgment motion, nor does he claim that his failure to respond was excusable. Discover's motion was therefore unopposed, and because it was also meritorious, it was granted by the court below. CP-8,9.

Thereafter, Mr. Petrenko filed a motion pursuant to CR 60 to

vacate the trial court's order granting summary judgment, CP-15. That motion was premised on the assertion that service of original process was insufficient. Notably, Mr. Petrenko does *not* claim that he was not properly served with the Motion for Summary Judgment, nor that his failure to respond was excusable, CP-15-24.

The court below entered its order dated January 25, 2013, by which it denied Mr. Petrenko's motion to vacate. The lower court noted that there was no question that Mr. Petrenko received actual notice of the summons and complaint, as evidenced by his filing an answer to the complaint. The court found that substitute service was presumptively valid, and that Mr. Petrenko failed to rebut that presumption of validity by the requisite clear and convincing evidence. CP-85. Mr. Petrenko appeals from that determination.

## V. ARGUMENT

### A. THE APPLICABLE STANDARD OF REVIEW IS WHETHER THE COURT BELOW ABUSED ITS DISCRETION IN DECLINING TO VACATE THE JUDGMENT.

At the trial court level, a motion to vacate a default order under CR 60 is addressed to the sound discretion of the court and is equitable in nature. Fowler v. Johnson, 167 Wn. App. 596, 273 P.3d 1042 (2012). On appeal, a trial court's ruling on a motion to vacate a default judgment

is reviewed for abuse of that discretion. Rosander v. Nightrunners Transport, 147 Wn. App. 392, 196 P.3d 711 (2008).

Mr. Petrenko neither responded to Discover's motion for summary Judgment nor appeared at the hearing, CP-8. He does not claim that he did not receive appropriate notice of that motion, nor does he claim that his failure to respond was excusable. Rather, Mr. Petrenko asserts that service of original process was defective, that the judgment against him is void for lack of jurisdiction and that the court has a nondiscretionary duty to vacate such a judgment.

The return of service, CP-1, is non-defective on its face because it reflects that service was effectuated in accordance with RCW 4.28.080 (15), that is, at the address that is admittedly Mr. Petrenko's usual place of abode, CP-34, by delivering a copy of the summons and complaint to an adult of suitable age and discretion who, although she declined to furnish her name, identified herself to the process server as a resident at that address.

In Washington, a "facially correct return of service is presumed valid and, after judgment is entered, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular." Mandelas v. Gordon, W.D.Wn., 785 F.Supp. 2d 951 (2011),

citing Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745, 749 (1997). Washington law provides that personal service may be effected by delivering a copy of the summons “to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080 (15). The Washington Court of Appeals has upheld returns of service as complying with RCW 4.28.080(15) where the return stated that the process server left copies of the summons and complaint with “John Doe.” Woodruff, *Id.* 945 P.2d at 748–49.

Accordingly, the facially correct return of service is presumed valid, and the burden was on Mr. Petrenko to show by clear and convincing evidence that the service was irregular.

Additionally, because Mr. Petrenko moved to vacate pursuant to RCW 60, he must also satisfy RCW 60(e), which establishes the requirements for vacating a judgment. Pursuant to CR 60(e), Mr. Petrenko’s motion to vacate must be supported by an affidavit asserting “. . . the facts constituting a defense to the action or proceeding.”

In summary, the standard of review by this Court is whether the court below abused its discretion in denying Mr. Petrenko’s motion to vacate. More specifically, given the burdens Mr. Petrenko must carry, the

specific issue is whether the court below abused its discretion in ruling that Mr. Petrenko failed to rebut the presumption of validity by clear and convincing evidence, and whether Mr. Petrenko's affidavits fail to assert facts constituting a defense as required by CR 60(e).

As demonstrated below, because Mr. Petrenko failed to carry these burdens, the court below properly denied his motion to vacate.

B. SERVICE OF PROCESS IS GOVERNED BY RCW 4.28.080, WHICH SHALL BE LIBERALLY CONSTRUED, AND SUBSTANTIAL RATHER THAN STRICT COMPLIANCE IS REQUIRED.

1. Liberal Rather than Strict Construction of RCW 4.28.080 is Required.

Service of process is governed by RCW 4.28.080, which states in relevant part:

The summons shall be served by delivering a copy thereof as follows:

(15) . . . to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

Mr. Petrenko erroneously states in his appellate brief that:

The service of process requirement is taken very seriously in Washington and the appellate courts apply a *stringent scrutiny*.

(Brief of Appellant, page 6, emphasis added.)

Mr. Petrenko then cites a string of cases that, he suggests, support the notion that “stringent scrutiny” of this statute is required. The first such case is Vukich v. Anderson, 97 Wn. App. 684, 985 P.2d 952 (1999). At issue in Vukich was the term “usual abode” as used in RCW 4.28.080(15). Contrary to Mr. Petrenko’s citation to Vukich as requiring “stringent scrutiny” of RCW 4.28.080(15), the court in Vukich actually held that “The term ‘usual abode’ is to be *liberally construed* to effectuate service and uphold jurisdiction of the court.” *Id.* at 687. (Emphasis added.)

Mr. Petrenko also cites Scott v. Goldman, 682 Wn. App. 1, 917 P.2d 131(1996) as requiring ‘stringent scrutiny’ of RCW 4.28.080, but the court actually reached no such holding. What the court in Scott actually held is that of powers set forth in a *general power of attorney* are subject to strict construction. The court also construed the term “guardian” as used in RCW 4.28.080 (13), which is not involved in the present case. The court did not in fact apply strict or stringent scrutiny to the term ‘guardian.’ Rather, the court held that the term ‘guardian’ was not ambiguous and therefore should be construed according to its plain language, and that statutory construction of such an unambiguous term is

unnecessary and improper.

Mr. Petrenko also erroneously cites Gross v. Evert-Rosenberg, 85 Wn. App. 539, 993 P. 2d 439 (1997) as requiring ‘stringent scrutiny’ of RCW 4.28.080. The court in Gross reached no such holding. On the contrary, the court cited with approval the case of Sheldon v. Fettig, 129 Wn. 2d 601, 919 P.2d 1209 (1996) and its holding “. . . that RCW 4.28.080 (15), governing substitute service of process, is to be *liberally construed* in order to effectuate service and uphold the jurisdiction of the court.” Gross, Id. at 440. (Emphasis added.)

In Gross, service was made at a home the defendant owned but did not reside in. The court concluded that it was improper to extend the statute’s requisite liberal construction to find proper substitute service at a place that was not the defendant’s usual abode and where he did not reside.

Finally, the Supreme Court in Salts v. Estes, 133 Wn. 2d 160, 943 P.2d 275 (1997) did not in fact hold that stringent or strict scrutiny of the term ‘resident’ as used in RCW 4.28.080 (15) was required. Rather, the Court held that the term ‘resident’ must be given its ordinary meaning.

It is well established that the terms of RCW 4.28.080 (15) are to be *liberally construed* to effectuate service and uphold jurisdiction of the

court. Sheldon v. Fettig, 129 Wn. 2d 601, 919 P.2d 1209 (1996). Mr. Petrenko's assertion that a stringent or strict construction is required is simply incorrect, and is not supported by the cases he cites in support of that erroneous notion.

2. Substantial rather than Strict Compliance with RCW 4.28.080 (15) is Required.

The court in Overhulse Neighborhood Ass'n v. Thurston County, 94 Wn. App. 593, 972 P.2d 470 (1999), held that the doctrine of substantial compliance is applicable in cases involving both service of original and appellate process. "In determining whether a party has substantially complied with service requirements, the relevant inquiry is whether the party to be served has received actual notice . . . or the notice was served in a manner reasonably calculated to give notice to the opposing party." Skinner v. Civil Service Com'n of City of Medina, 168 Wn. 2d 845, 232 P.3d 558 (2010).

In the present case, both of the alternate means by which substantial compliance may be established were satisfied. Mr. Petrenko in fact received the summons and complaint, to which he filed an answer. Furthermore as demonstrated above, service was effectuated in a manner reasonably calculated to give notice to the party to be served.

It may also be noted that generally, courts draw a distinction between strict and substantial compliance with service statutes depending on whether the type of service under consideration is constructive or personal service. Constructive service statutes provide for service on the Secretary of State or by publication, for example, and require strict compliance. Reiner v. Pittsburg Des Moines Corp., 101 Wn. 2d 475, 680 P.2d 55 (1984). Personal service statutes such as RCW 4.28.080 (15) require only substantial compliance. *Id.*

RCW 4.28.080 states, “Service made in the modes provided in this section [which includes substituted service pursuant to sub-section (15)] is personal service.” Thus, service pursuant to RCW 4.28.080 (15), whether on the defendant or substitute service, is ‘personal service’ for which substantial rather than strict compliance with the statute is required.

In summary, Discover substantially complied with the requirements of RCW 4.28.080 (15) because service was effected in a manner reasonably calculated to give notice to Mr. Petrenko, and because the method of service selected in fact resulted in actual notice to Mr. Petrenko.

C. SERVICE IS PRESUMPTIVELY VALID, AND MR. PETRENKO HAS FAILED TO REBUT THE PRESUMPTION OF VALIDITY BY THE REQUISITE CLEAR AND CONVINCING EVIDENCE.

On its face, the return of service, CP-1, reflects compliance with the requirements of RCW 4.28.080 (15) that substitute service shall be effectuated by leaving a copy of the summons at the house of the defendant's usual abode with a person of suitable age and discretion then resident therein. It is undisputed that the address where service was effectuated was Mr. Petrenko's usual place of abode, CP-34. Furthermore, the return of service reflects that the adult on whom substitute service was made identified herself as a resident at that address.

Because the return of service is facially correct, it is presumed valid, and the burden is on Mr. Petrenko to show by clear and convincing evidence that the service was irregular. Mandelas v. Gordon, W.D.Wn., 785 F.Supp. 2d 951 (2011), citing Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745, 749 (1997). Significantly, the claim that personal jurisdiction was lacking does not somehow relieve Mr. Petrenko of this burden where the return of service is presumptively valid. See Goettemoeller v. Twist, 161 Wn. App. 103, 253 P.3d 405 (2011).

The evidence presented by Mr. Petrenko in support of his motion to vacate consists of several affidavits, the gist of which is that the individual upon whom substitute service was effectuated was not a resident of his usual abode. The return of service, however, reflects that

the individual served stated to the process server that she was a resident. Although that person declined to identify herself by name at the time of service, Mr. Petrenko asserts that she was Lena Petrenko, but does not disclose the nature of her relationship with him. CP-34,73.

The court below ruled that the evidence produced by Mr. Petrenko was not sufficient to carry his burden of proving inadequate service by clear and convincing evidence, CP-85. In arguing that the lower court erred in this respect, Mr. Petrenko relies heavily on Wichert v. Cardwell, 117 Wn. 148, 812 P.2d 858 (1991). He argues (erroneously) that Wichert establishes a ‘three part test’ for evaluating this appeal; that the person served was; (1) an adult child of the defendant or close family member, (2) an overnight resident and (3) the sole occupant. (Brief of Appellant Petrenko, p. 8).

In fact, the court in Wichert specifically identified and explained the statutory purpose and the controlling test as follows:

The purpose of statutes which prescribe the methods of service of process is to provide due process. “The fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity to be heard in turn depends upon notice that a suit is being commenced. However, “[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents....” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Compliance with due process

is described thusly: “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Mullane, at 315, 70 S.Ct. at 657.

*We then must put the method of service employed here to the Mullane test, i.e., whether that method is such that, a plaintiff “desirous of actually informing the absentee might reasonably adopt to accomplish it.”*

*Id.* at 151. (Emphasis added.)

Thus, contrary to Mr. Petrenko’s assertion, the test our Supreme Court in Wichert required is whether the method of service was “reasonably calculated to provide notice to the defendant.” *Id.* at 152. The Wichert Court applied this test to a set of facts quite similar to those in the present case. In Wichert, service was made on the defendant’s 26-year-old daughter who lived elsewhere in her own apartment, but had stayed at the defendant’s residence the night before service.

In applying the test as correctly set forth above, the Court first noted that, like in the present case, “[T]he defendants in fact received the summons and complaint . . .” *Id.* at 150. The Court also noted the dual purposes of the statute, which are not only for the protection of the defendant, but also “. . . for the benefit and protection of parties who have just claims, so that residents of the state could not depart therefrom and defeat their creditors.” *Id.* at 152. The Wichert Court also specifically

declined the invitation of the defendant in that case to apply a strict construction of RCW 4.28.080.

With these principles in mind, the Wichert Court analyzed the statute's phrase "then resident thereof." The Court concluded that "[t]he word 'then' necessarily refers to the time of service; 'therein' refers to the defendant's usual place of abode." *Id.* at 151.

As to the final word in this phrase, 'resident,' the Court stated:

This court has observed that "[e]ach of the terms 'reside,' 'residing,' 'resident,' and 'residence' is elastic. To interpret the sense in which such a term is used, we should look to the object or purpose of the statute in which the term is employed. McGrath v. Stevensen, 194 Wn. 160, 162, 77 P.2d 608 (1938).

The Court therefore looked to the purpose of the statute, stating that "[t]he purpose of statutes which prescribe the methods of service of process is to provide due process," specifically the right to be heard. *Id.* at 151. The Court concluded, as noted above, that the proper test is whether the method of service was "reasonably calculated to provide notice to the defendant," *Id.* at 152, and that service on the defendant's daughter was sufficient even though she actually lived elsewhere.

In reaching this conclusion the Court also noted that "[w]hen a defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the defendant, particularly when that person

is a family member.” *Id.* at 152.

Neither Defendant Petrenko nor Lena Petrenko, upon whom service was actually made, disclosed the exact relationship between Lena Petrenko and the Defendant. However, the burden lies with Mr. Petrenko to establish by clear and convincing evidence that service was improper. It is not Discover’s burden to prove that service was proper. Mandelas v. Gordon, W.D.Wn., 785 F.Supp. 2d 951 (2011), citing Woodruff v. Spence, 88 Wn. App. 565, 945 P.2d 745, 749 (1997). It is reasonable to infer from the fact that Lena Petrenko shares the Defendant’s surname and was in possession of his usual place of abode at the time of service that she is a close family member, which Mr. Petrenko has done nothing to refute, even though the burden of proof is his.

Consistent with the Court’s finding in Wichert, *Id.*, as a family member in possession of the Mr. Petrenko’s usual abode, Lena Petrenko was likely to present the documents to him, and in fact did so. Accordingly, the test which Wichert determined must be applied, i.e., whether the method of service chosen was reasonably calculated to provide actual notice to Mr. Petrenko, is satisfied, and that conclusion is strongly supported by the fact that Mr. Petrenko in fact received the complaint and answered it.

The judgment Mr. Petrenko sought to vacate clearly did not result from inadequate service of original process because he in fact received actual notice of the lawsuit and a copy of the complaint, which he answered. Rather, the judgment resulted from Discover's motion for summary judgment which was properly served, CP-104, and Mr. Petrenko does not contend otherwise. Nor does Mr. Petrenko contend that his failure to respond to that motion was somehow excusable or justified. He chose not to respond, and the judgment entered against him is merely the natural consequence of that choice. Mr. Petrenko made no effort to carry his burden of establishing that his failure to respond to Discover's summary judgment motion was excusable.

**Thus, the judgment in question was not entered because Mr. Petrenko was denied an opportunity to be heard, but rather because he *declined* to be heard despite being afforded the opportunity.**

In summary, the method of service utilized in this case was reasonably likely to provide actual notice of the lawsuit to Mr. Petrenko, and did in fact provide actual notice of Discover's lawsuit. Mr. Petrenko failed to carry his burden by the requisite clear and convincing evidence that the judgment entered against him should be vacated. Consequently, the trial court did not abuse its discretion in declining to vacate the

judgment.

D. MR. PETRENKO FAILED TO SUPPLY FACTS  
DEMONSTRATING AT LEAST A PRIMA FACIE DEFENSE  
AGAINST DISCOVER'S CLAIMS.

CR 60(e) provides that where, as here, a defendant moves to vacate a judgment under CR 60, such a motion shall be supported by “. . . the facts constituting a defense to the action or proceeding.” Significantly, this requirement is not limited to only certain types of CR 60 motions, or only where certain grounds are relied on for vacating the judgment. Rather, it applies by its terms without limitation to any and all motions brought under CR 60.

Mr. Petrenko relies on Allstate v. Khani, 75 Wn. App. 317, 877 P.2d 724 (1994) for the proposition that the requirement of CR 60 that a defendant shall state the facts constituting a defense does not apply where the court had no jurisdiction over the defendant in the first instance. However, Khani is readily distinguished from the present case. In Khani, the trial court found that the defendant demonstrated by clear and convincing evidence that service was made at an address where the defendant did not reside, and that service was therefore defective.

Thus, unlike in the present case, the trial court in Khani specifically ruled that service was *defective*. Nonetheless, the trial court in

Khani denied the defendants's motion to vacate a default judgment on the basis that the motion to vacate was not filed within a reasonable time and was therefore time-barred.

On appeal, the trial court's order denying the motion to vacate was reversed. The appellate court reasoned that because the trial court found service defective, jurisdiction had not been established. A motion to vacate was therefore not time-barred because defective service renders such a judgment void for lack of jurisdiction, which may be challenged at any time. *Id.*

The holding in Khani is therefore readily distinguishable. The trial court in that case erroneously denied a motion to vacate a default judgment on the grounds that it was time-barred, even though it found service to be defective. In the present case, the return of service is correct on its face, and Mr. Petrenko, unlike the defendant in Khani, failed to prove defective service by the requisite clear and convincing evidence.

Thus, in Khani, the return of service was defective and not presumptively valid. In the present case by contrast, the return of service is facially correct and therefore presumptively valid, the burden shifts to the party seeking to vacate the judgment, and the requirement of setting forth facts constituting a defense to the action is applicable, Goettemoeller

v. Twist, 161 Wn. App. 103, 253 P.3d 405(2011), CR 60 (e).

In other words, where service is presumptively valid and the burden shifts to the defendant to prove inadequate service, the court has jurisdiction unless and until the defendant carries his burdens of proving that service was inadequate, *Id.*, and sets forth facts establishing a defense to the action as CR 60 (e) requires.

The evidence presented by Mr. Petrenko in support of his motion to vacate consists of several affidavits, none of which present any facts constituting a defense to the action, as required by CR 60 (e).

Accordingly, Mr. Petrenko has failed to satisfy the requirement of CR 60 (e) that a motion under CR 60 shall state facts constituting a defense to the action. This alone is a sufficient basis upon which the court below denied Mr. Petrenko's motion to vacate pursuant to CR 60.

Moreover, a trial court's decision whether to vacate a judgment is equitable in nature, Fowler v. Johnson, 167 Wn. App. 596 273 P.3d 1042 (2012). From an equitable standpoint, the following factors weigh heavily against vacating the judgment:

- a) Mr. Petrenko received actual notice of the lawsuit and actually answered the complaint;
- b) Mr. Petrenko claims no lack of notice of the motion for

summary judgment that led to the judgment in question;

c) Mr. Petrenko does not claim that his failure to respond to Discover's motion for summary judgment was excusable; and

d) Mr. Petrenko has produced no facts constituting a defense to Discover Bank's claims against him.

Accordingly, the lower court did not abuse its discretion in determining that Mr. Petrenko failed to carry his burden of proving that service of process was inadequate, and equitable considerations also support the lower court's ruling.

E. DISCOVER BANK IS ENTITLED TO REIMBURSEMENT OF ITS ATTORNEY'S FEES INCURRED IN THIS APPEAL.

As Mr. Petrenko acknowledges in his brief, the Cardmember Agreement and RCW 4.84.330 provide that the prevailing party is entitled to reimbursement of its reasonably incurred attorney's fees. At the conclusion of this appeal, Discover Bank will submit the evidence establishing the amount of fees it reasonably incurred in connection with this appeal.

## **VI. CONCLUSION**

Mr. Petrenko failed to carry his burden of proving by clear and convincing evidence that service of original process was insufficient. He

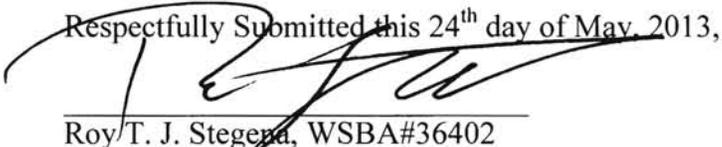
also failed to assert facts constituting a defense to the action as required by CR 60 (e), which Mr. Petrenko invoked.

Mr. Petrenko received actual notice of the lawsuit and the complaint, which he answered. The summary judgment motion that actually led to the judgment Mr. Petrenko moved to vacate was properly served on him, and he does not contend otherwise. Mr. Petrenko failed to respond to that motion, and does not contend that his failure to respond should be excused, nor did he present any facts suggesting the existence of any such excuse for not responding.

Thus, the judgment in question was not entered because Mr. Petrenko was denied an opportunity to be heard, but rather because he declined to be heard despite being afforded the opportunity.

Accordingly, the court below did not abuse its discretion in denying Mr. Petrenko's motion to vacate.

Respectfully Submitted this 24<sup>th</sup> day of May, 2013,



Roy T. J. Steger, WSBA#36402  
Bishop White Marshall & Weibel, P.S.  
Attorneys for Respondent Discover Bank

**CERTIFICATE OF SERVICE**

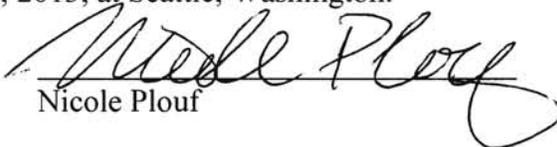
I, Nicole Plouf, certify that on the 22<sup>nd</sup> day of May, 2013, I caused the foregoing document and Supplemental Designation of the Clerk's Papers, to be delivered to the following parties in the manner indicated below:

- By UPS 2 Day Air
- By FedEx Overnight
- By Email
- By Facsimile

- By UPS 2 Day Air
- By FedEx Overnight
- By Email
- By Facsimile

Under penalty of perjury of the laws of the State of Washington, the foregoing is true and correct.

Dated this 22<sup>nd</sup> day of May, 2013, at Seattle, Washington.

  
Nicole Plouf