No. 70143-6-I

COURT OF APPEALS
DIVISION 1
OF THE STATE OF WASHINGTON

WESTERN NATIONAL ASSURANCE COMPANY,
a Washington Corporation,
Respondents,

v.

SHELCON CONSTRUCTION GROUP, LLC, a Washington
Limited Liability Company,
Appellants.

APPELLANT'S REPLY BRIEF

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1. **"Occurrence."** Western National Assurance Co. states that Shelcon has the burden establishing that there was an "occurrence" that caused "property damage." (Resp. Brf. p. 17). SECTION 1 – COVERAGES, COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILTY (1)(b)(1) states that the CGL policy covers property damage caused by an occurrence (CP 18, pg. 62). Although the CGL policy defines "occurrence" as an "accident" (CP 18, pg. 79), the CGL policy nowhere defines "accident." In *Harrison, Plumbing & Heating v. New Hampshire Ins. Group*, 37 Wn.App. 621, 625 (1984), the Court defined "accident" as follows:

> "For the purpose of this policy (the standard CGL policy), a negligent act or omission is an "accident" and, consequently, an "occurrence." (Parenthesis supplied).

Further, the Court in *Yakima Cement Prod. Co. v. Great American Ins. Co.* 93 Wn.2d 210, 216 (1980) stated as follows:

> *216 We note further that the word "accident" is but part of the definition of the broader term "occurrence." As noted the Aerial Agr. Serv. Inc. v. Till, 207 F.Supp. 50, 57-58 (N.D.Miss. 1962):
>
> To begin with, the word "occurrence", to the lay mind, as well as the judicial mind, has a meaning much broader than the word "accident." As these words are generally

> understood, accident means something that must have come about or happened in a certain way, while occurrence means something that happened or came about in ***any*** way. Thus accident is a special type of occurrence, but occurrence goes beyond such special confines and, while including accident, it encompasses many other situations as well.
>
> It would, therefore, seem that from the usual and ordinary meaning of the words used the word "occurrence" extends to events included within the term "accident" and also to such conditions, not caused by accident, which may produce an injury not purposely or deliberately.

In *Acuity v Society Ins.*, 801 N.W.2d 812 (2012), the Wisconsin Court of Appeals examined the meaning of "occurrence" in regard to the standard CGL policy and gave a comprehensive review of current case law at the conclusion of which the Court stated as follows:

> The lessons of American Girl, Glendenning's, and Kalchthaler are that while faulty workmanship is not an "occurrence", faulty workmanship may cause an "occurrence." That is, faulty workmanship may cause an unintended event, such as soil settling in American Girl, the leaking windows in Kalchthaler, or, in this case, the soil erosion, and that event – the "occurrence" – may result in harm to property. *Acuity v Society Ins.*, 801 N.W. 2d 812, 820 (2012).

In *K & L Homes, Inc. v. American Family Mut. Ins. Co.*, 829 N.W. 2d 724, 736 (2013), the Court examined the meaning the "occurrence" within the context of direct damage to the insured's own work resulting in secondary damage to collateral property.

> There is nothing in the definition of "occurrence" that supports that faulty workmanship that damages the property of a third party is a covered "occurrence," but faulty workmanship that damages the work or property of the insured contractor is not an "occurrence." As the Supreme Court of Texas in *Lamar Homes, Inc.*, 242 S.W.3d at 9, explained:
>
> The CGL policy ... does not define an "occurrence" in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident. As one court has observed, no logical basis within the "occurrence" definition allows for distinguishing between damage to the insured's work and damage to some third party's property:
>
> The logical basis for the distinction between damage to the work itself (not caused by an occurrence) and damages to collateral property (caused by an occurrence) is less than clear. Both types of property damage are caused by the same thing—negligent or defective work. One type of damage is no more accidental than the other. Rather, ... the basis for the distinction is not found in the definition of an occurrence but by application of the standard "work performed" and "work product" exclusions found in a CGL policy.

Here, A-2 Venture, LLC alleged an occurrence; namely, during the course of placing fill dirt around the settlement markers, Shelcon negligently removed (CP 18, pg. 61) or negligently destroyed (CP 18, pg. 105) settlement markers which secondarily caused A-2 Venture, LLC's allegedly irreparable loss of use of its property for the construction of homes built on conventional foundations (CP 18, ppg. 61-62).

Even Western National Assurance, Co. itself acknowledged Shelcon's destruction of the settlement markers as an "occurrence" stating in its letter of 3/20/2012 (CP 18, pg. 120) as follows:

> "Any loss of use of the property that was not damaged is deemed to have ***occurred*** at the time of the "Occurrence" that caused the loss of use. ***Here***, that would be removal of the markers." (Emphasis supplied).

2. "Property Damage." Property damage is defined by the CGL policy (CP 18, pg. 80) as follows:

> "Property damage means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; ***or*** (emphasis supplied)
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be

deemed to occur at he time of the "occurrence" that caused it."

Western National Assurance Co. argues that A-2 Ventures, LLC did not lose ***all*** use of the property and therefore there was no coverage for property damage (Resp. Brf. p.22). But, the CGL policy covers "all resulting loss of use" (see above) ***or*** simply "loss of use" (see above). The policy does ***not*** limit its coverage to occurrences resulting in all, total, complete, or 100% loss of use of property.

Western National Assurance Co. argues that A-2 Ventures, LLC only alleged economic loss: not property damage. That is incorrect. A-2 Ventures, LLC alleged loss of use of its property to support the construction of residences built upon conventional foundations. And as a ***result***, A-2 Venture, LLC alleged economic loss for which it sought damages. A-2 Ventures, LLC sued Shelcon for damages to compensate A-2 Ventures, LLC for its economic loss. The CGL policy nowhere defines "damages", but the CGL policy clearly states (CP 18, pg. 67) as follows:

Section 1 - Coverages
Coverage a Bodily Injury and Property Damage Liability
1. Insuring Agreement
   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies.

All property damage results in some measure of economic loss. That is the reason that A-2 Ventures, LLC sued Shelcon for damages as a result of A-2 Ventures, LLC's loss of use of its property to construct homes built upon conventional foundations as a result of Shelcon's negligent removal or destruction of the settlement markers.

Western National Assurance Co. cites the following cases for the proposition the CGL policies do not cover economic loss: *Scottsdale Insurance Co. v. International Protective Agency,* 105 Wn.App. 244 (2011); *Walla Walla College v. Ohio Casualty Insurance Co.,* 149 Wn.App. 726 (2009); *Washington Public Utility Districts' Utilities Systems v. Public Utility District No. 1 of Clallam County*, 112 Wn.2d. 1 (1989); *Tschimperle v. Aetna Casualty & Surety Co.,* 529 N.W. 2d. 421 (1995); *Hartford Accident and Indemnity Co. v. Case Foundation Co.,* 294 N.E.2d. 7 (1973); *Seattle First National Bank v. Washington Insurance Guarantee Association*, 116 Wn.2d 398 (1991).

These cases have been previously addressed by the appellant at CP 27, ppg. 23-32). Each one of these cases is inapplicable because not one of these cases involve an allegation of "loss of use of tangible property" which is the CGL's definition of property damage (CP 18, pg. 80). These cases are not applicable because there was no property damage in any of these cases. Only economic loss. *Scottsdale* involved the loss of a liquor

license. *Walla Walla College* involved diminution in the value of a storage tank. *Washington Public Utility Districts* involved breach of a public official's duty to prudently make investments. *Tschimperle* involved a loss of investment based upon bad advice received from a certified public accountant. *Hartford Accident & Indemnity Co.* involved loss of investment and anticipated profits. *Seattle First National Bank* involved loss of residual values on automobile leases. There was no CGL coverage in any of these six (6) cases because there were no allegations of "loss of use of tangible property" (i.e. property damage).

Western National Assurance Co. (Resp. Brf. p. 25) asserts:

> Diminution in value alone without the triggering "physical injury to tangible property" is not potentially-covered "property damage" under the Western National policies.

This is incorrect. Western National Assurance Co. has left out 'Part B' of Section 17 (CP 18, pg. 80) of the CGL policy. Diminution in value alone as a result of "loss of use of tangible property that is not physically injured" ***is*** plainly and expressly covered by the CGL policy (CP 18, pg. 80). In the case at hand, Shelcon's removal or destruction of the settlement markers was a negligent act of omission that lead to the

secondary consequence of the loss of use of A-2 Ventures, LLC's property of the purpose of construction homes built upon conventional foundations. As a result, A-2 Ventures, LLC allegedly sustained economic loss for this "loss of use of tangible property" and for which it sought economic damages from Shelcon.

3. "Exclusions." Western National Assurance Co. states (Resp. Brf. p. 28):

> "Even if "loss of use" property damage of the subject property was alleged in the complaint, coverage was excluded by 2.m. of the policy, as discussed below. Western National Assurance Co.'s policies specifically exclude coverage for the underlying claim even assuming property damage was alleged. Coverage is defeated by operation of Exclusions J.(5) and J.(6)."

This is not a case involving "even if." Most assuredly, loss of use (property damage) was alleged in the Complaint. The Complaint alleged as follows:

> "There was therefore a total failure to meet the geotechnical requirements of the job so that the property could be ***used*** to construct improvements on"

This equates with loss of use. A-2 Venture, LLC's property could no longer be used to construct improvements on. That is what A-2 Ventures, LLC alleged. For purposes of determining the applicability of the CGL policy exclusions, it is important to note that A-2 Ventures, LLC specifically alleged that

> "when defendants (Shelcons) said negligent (not breach of contract) actions had been discovered. The costs and time of remedying the errors was impractical." (Parenthesis supplied).

The Complaint then alleged that as a result of the total failure to meet the geotechnical requirements of the job, and as a result of A-2 Venture, LLC's loss of use of their property upon which to construct improvements, the value of the property was reduced substantially resulting in economic loss and eventually, A-2 Venture, LLC's lawsuit for damages against damages against Shelcon. The complete series of allegations in the Complaint are as follows:

> "During the site preparation by defendant, settlement markers were put in place as required. The markers were required to be monitored until the full amount of settlements had occurred during and after the fill and compaction.
>
> The employees of the defendant removed the settlement markers without the knowledge of the plaintiff or plaintiff's engineers and continued to install fill on top of the area. This made it impossible to accurately measure the settling. There was therefore a total failure to meet the

> geotechnical requirements of the job so that the property could be used to construct improvements on. When defendants said negligent actions had been discovered, the costs and time of remedying the errors was impractical. The said actions by defendant reduced the value of the property substantially." (CP 18, pg. 62).

Western National Assurance Co. perfectly understood the claim, asserted by A-2 Venture, LLC against Shelcon and recited its understanding as follows:

> "A2 maintains that Shelcon failed to adhere to the Riley Group Geotechnical Report dated October 24, 2005 that was a part of the contract documents. Soils conditions at the site called for the installation of settlement markers to be inspected until 95% compaction was achieved at each level of fill. A2 asserts that Shelcon removed the markers and simply continued to install fill material. Their actions resulted in "a total failure to meet the geotechnical requirements of the job so that the property could be used to construct improvements on. When defendant's said negligent actions had been discovered, the costs and time of remedying the errors was impractical. The said actions by defendant reduced the value of the property substantially."
> (CP 18, pg. 87).

Given the allegations of the complaint, and given the testimony of Scott Haymond at his deposition, and given the CGL policy at hand, none of the CGL policies exclusions are applicable.

The J(6) business exclusion is inapplicable because the J(6) exclusion only applies to "that particular part" of any property that must be "restored, repaired or replaced" because the insured's work was incorrectly performed on it. Here, the "particular part" was the settlement markers. Here, A-2 Ventures, LLC specifically alleged that the settlement markers could not be replaced. More significantly, A-2 Venture, LLC did not file suit for damage to the settlement markers. A-2 Venture, LLLC sued Shelcon for the loss of use of A-2 Venture, LLC's property as a result of the removal or destruction of the settlement markers. See, *Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. 2009).

The (m) exclusion does not apply because exclusion (m) only applies if "such property (referring to property other than the insured's property that cannot be used or is less useful) can be restored to use by the repair, replacement, adjustment or removal of the insured's work." In this case, A-2 Venture, LLC specifically alleged that the "particular part" (i.e. settlement markers) of A-2 Venture, LLC's real property could not be repaired, replaced, or adjusted.

Furthermore, exclusion (m) never applies when the insured's product (i.e. settlement markers) was accidentally and physically injured. See *Couch on Insurance* 3d, §129: 21, Impaired Property Exclusion, quoted at

page 25 of Appellant's Brief. Exclusion (m) applies in situations where, for example, an electrician installs a defective electrical panel and as a result there is not enough electrical power so that the elevators, HVAC, lights, etc. can properly work. Thus, the value of the building is impaired. That is a pure economic loss without physical injury or damage. It is simply a case where the insured installed a product that decreased the economic value of the property. Here, there was no installation or incorporation of any product that devalued the property of A-2 Venture, LLC. On the contrary, A-2 Venture, LLC's Complaint is based on the fact that Shelcon's "product" (i.e. the settlement markers) were ***not*** installed or incorporated into Shelcon's work, but were negligently removed or negligently destroyed. Exclusion (m) is completely inapplicable based on the allegations in A-2 Venture, LLC's Complaint.

The J(5) exclusion does not apply because A-2 Venture, LLC did not claim damages for destruction for damages to the settlement markers, which were damaged during the course of Shelcon's operations. Western National Assurance Co. criticizes respondent's cited authorities as being "narrow" holdings of authority (*Piedmont, Shauff, Acuity*) and would much prefer, although it offers no authorities of its own to the Court, an interpretation that would make "particular part" equal to the entire property owned by A-2 Venture, LLC. Specifically, Western

National Assurance, Co. argues that "the markers at issue covered the whole site as did the fill dirt." (Resp. Brf. p. 37). However, nowhere did A-2 Venture, LLC allege that the settlement markers were installed under the fill dirt through out the entire site. The Complaint (CP 18, pg. 61) simply states that "during the site preparation by defendant, settlement markers were put in place as required." The trial court found that

> "During the course of placing the over-excavated material on the lots, Shelcon either removed or covered or destroyed the previously mentioned four to six settlement markers that were placed." (CP 18, pg. 130 FF No. 49)

Western National Assurance Co. cites *Vandivort Construction Co. v. Seattle Tennis Club*, 11 Wn.App. 303, 308 (1974), for the proposition that the J(5) exclusion applies to any property damage arising out of the insured's operations (Resp. Brf p. 36). If that were truly the law, CJL coverage would be illusory. In *Vandivort Construction Co.*, Vandivort contracted with the Seattle Tennis Club to construct a concrete building housing six (6) tennis courts. During construction in 1966, an earthslide damaged the site. The Court's opinion is silent regarding the cause of the earthslide. Vandivort cleaned up the earthslide. Vandivort paid for the clean-up and submitted a claim to United States Fire Insurance Co. under Vandivort's CGL policy. The claim was denied. Vandivort initiated a

lawsuit against United States Fire Insurance Co. The opinion of the Court of Appeals does not state whether the earthslide damaged all or part of the site, only that "... an earthslide damaged the site." Whatever area of the site that was damaged by the earthslide was remediated by Vandivort. The Court of Appeals held that this area of damages and subsequent remediation was the "particular part" of real property upon which Vandivort was performing operations. Here, A-2 Venture, LLC does not seek compensation for the damages to the settlement markers (i.e. the part of the property that was damaged by Shelcon). Moreover, it is worthy to note that in the Vandivort case, the earthslide damaged property owned by the City of Seattle as well; namely, McGilvra Boulevard. This was damage to property other than the "particular part" upon which Vandivort was working and for which no coverage was provided under United States Fire Insurance Co.'s CGL policy. The City of Seattle initiated an independent action against Vandivort Construction Co. for damages to McGilvra Boulevard. This matter was settled and paid by United States Fire Insurance Co. (see *Vandivort Construction Co.* p. 304, FN. 2).

CONCLUSION

American Best Food, Inc. v. Alea London, Ltd., 168 Wn.2d 398 (2010) extends a clear message which should be applied to this appeal.

Here we have Western National Assurance Co. taking A-2 Venture, LLC' Complaint and applying spins of "mere breach of contract", "mere economic loss", "no physical injury", "only partial loss of use", etc. Here we have Western National Assurance Co. spinning a CGL policy that nowhere defines "damages", "physical", "use", "loss", "tangible", "accident", "loss of use", "particular part", "injury", "property", or "resulting." Here we have Western National Assurance Co. complaining that the appellant's authorities are too "narrow." Here we have Western National Assurance Co. asserting policy exclusions that by their terms clearly do not apply to the case at hand.

Bearing in mind that this is a duty to defend case, the following quote from *American Best Food, Inc. v. Alea London, Ltd.,* 168 Wn.2d 398 (2010) should be considered by this Court in its consideration of this appeal:

> ****696** A. *Duty To Defend*
> [3][4][5][6][7] ¶ 6 We have long held that the duty to defend is different from and broader than the duty to indemnify. *Safeco Ins. Co. of Am. v. Butler,* 118 Wash.2d 383, 392, 823 P.2d 499 (1992) (citing 1A ROWLAND H. LONG, THE LAW OF LIABILITY INSURANCE § 5B.15, at 5B–143 (1986)). The duty to indemnify exists only if the policy *actually covers* the insured's liability. The duty to defend is triggered if the insurance policy *conceivably covers* allegations in the complaint. *Woo v. Fireman's Fund Ins. Co.,* 161 Wash.2d 43, 53, 164 P.3d 454 (2007). "The duty to defend 'arises when a complaint against the

insured, construed liberally, alleges facts which could, if proven, impose liability upon the insured within the policy's coverage.' " ***405***Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wash.2d 751, 760, 58 P.3d 276 (2002) (quoting *Unigard Ins. Co. v. Leven*, 97 Wash.App. 417, 425, 983 P.2d 1155 (1999)). An insurer may not put its own interests ahead of its insured's. *Mut. of Enumclaw Ins. Co. v. T & G Const., Inc.*, 165 Wash.2d 255, 269, 199 P.3d 376 (2008) (citing Butler, 118 Wash.2d at 389, 823 P.2d 499). To that end, it must defend until it is clear that the claim is not covered. The entitlement to a defense may prove to be of greater benefit to the insured than indemnity. *Truck Ins. Exch.*, 147 Wash.2d at 765, 58 P.3d 276.

[8][9][10][11][12] ¶ 7 The insurer is entitled to investigate the facts and dispute the insured's interpretation of the law, but if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. *Id.* at 760, 58 P.3d 276 ("Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its duty to defend.") (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wash.2d 558, 561, 951 P.2d 1124 (1998)). When the facts or the law affecting coverage is disputed, the insurer may defend under a reservation of rights until coverage is settled in a declaratory action. *See id.* at 761, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 93–94, 776 P.2d 123 (1989)). "Once the duty to defend attaches, insurers may not desert policyholders and allow them to incur substantial legal costs while waiting for an indemnity determination." *Id.* Instead,

[i]f the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel.

"When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay."

[14] ¶ 9 "[E]xclusionary clauses are to be most strictly construed against the insurer." *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wash.2d 65, 68, 659 P.2d 509 (1983) (citing *W. Am. Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 4 Wash.App. 221, 480 P.2d 537, overruled on other grounds by 80 Wash.2d 38, 491 P.2d 641 (1971)), *modified on other grounds*, 101 Wash.2d 830, 683 P.2d 186 (1984).

... [17] ¶ 20 Again, if there is any reasonable interpretation of the facts or the law that could result in coverage, the insurer must defend. *Truck Ins. Exch.*, 147 Wash.2d at 760, 58 P.3d 276 (citing *Kirk*, 134 Wash.2d at 561, 951 P.2d 1124). Exclusions are interpreted narrowly. *Phil Schroeder*, 99 Wash.2d at 68, 659 P.2d 509. In order to put the incentives in the right place and because it is often impossible for an insured to prove damages for wrongful refusal to defend, we have established a remedy that does not require it. *See, e.g., Truck Ins. Exch.*, 147 Wash.2d at 765, 58 P.3d 276; *Kirk*, 134 Wash.2d at 560, 951 P.2d 1124; *Butler*, 118 Wash.2d at 393–94, 823 P.2d 499. It cannot be said that the insurer did not put its own interest ahead of its insured when it denied a defense based on an arguable legal interpretation of its own policy. Alea failed to follow well established Washington State law giving the insured the benefit of any doubt as to the duty to defend and failed to avail itself of legal options such as proceeding under a reservation of rights or seeking declaratory relief. Alea's failure to defend based upon a questionable interpretation of law was unreasonable and Alea acted in bad faith as a matter of law.[FN6]

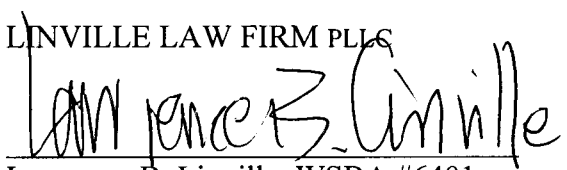
***414** CONCLUSION

[18] ¶ 21 In sum, the duty to defend is different from and broader than the duty to indemnify. *Butler*, 118

Wash.2d at 392, 823 P.2d 499. The duty to defend is triggered when a complaint against an insured, construed liberally, alleges facts which could, if proved, impose liability upon the insured within the policy coverage. *Truck Ins. Exch.*, 147 Wash.2d at 760, 58 P.3d 276. In deciding whether to defend, an insurer may ****701** not put its own interest above that of its insured. *T & G Const., Inc.*, 165 Wash.2d at 269, 199 P.3d 376. An insurer may not refuse to defend based upon an equivocal interpretation of case law to give itself the benefit of the doubt rather than its insured. *Woo*, 161 Wash.2d at 60, 164 P.3d 454. An insured may defend under a reservation of rights and may seek declaratory relief to establish that its policy excludes coverage. *Truck Ins. Exch.*, 147 Wash.2d at 760–61, 58 P.3d 276. Alea's "assault and battery" exclusion does not apply to allegations that postassault negligence enhanced a claimant's injuries. Alea's refusal to defend Café Arizona based upon an arguable interpretation of its policy was unreasonable and therefore in bad faith. Alea breached its duty to defend as a matter of law. We affirm the Court of Appeals in part and remand to the trial court for further proceedings consistent with this opinion. Café Arizona has properly moved for RAP 18.1 and *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wash.2d 37, 52–53, 811 P.2d 673 (1991), expenses and attorney fees. Café Arizona is awarded reasonable expenses and fees.

DATED this 19th day of September, 2013.

LINVILLE LAW FIRM PLLC



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CERTIFICATE OF SERVICE

Kristen Wayman declares as follows:

1. I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-referenced action, and competent to be a witness therein.

2. On the 19th ~~st~~ day of September, 2013, I caused to be served a copy of APPELLANT'S REPLY BRIEF on counsel as follows:

Counsel for Respondent:
Forsberg & Umlauf, P.S.
Attorneys at Law
901 Fifth Ave, Suite 1400
Seattle, WA 98164

[x] VIA PERSONAL DELIVERY

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

Dated this 19th day of September, 2013, at Seattle, Washington.

Kristen Wayman