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IN THE SUPREME COURT OF THE STATE OF WASHINGTON
NO. 977712

PAYTON O. HOFF, Movant,

v.

SAFECO INSURANCE COMPANY OF ILLINOIS, Respondent.

SAFECO INSURANCE COMPANY OF ILLINOIS'S ANSWER TO MOTION FOR DISCRETIONARY REVIEW

Court of Appeals No. 50850-8-II

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I. INTRODUCTION

This appeal asks whether a party can be compelled to disclose its litigation strategy, as shown through its work product and attorney-client communications, based on its unsuccessful attempt to invoke federal diversity jurisdiction. Specifically, Payton Hoff argues that her insurer, Safeco Insurance Company of Illinois ("Safeco"), can be so compelled based solely on the parties' dispute as to whether her claims satisfied the $75,000 diversity jurisdiction threshold. She maintains that Safeco's removal is adequate evidence of civil fraud to justify an in camera review of Safeco's privileged communications and documents.

When the Court of Appeals rejected Hoff's arguments, it properly applied the standard adopted in *Cedell v. Farmers Insurance Company of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013), and in *Richardson v. Government Employees Insurance Company*, 200 Wn. App. 705, 403 P.3d 115 (2017), *review denied*, 190 Wn.2d 1008, 414 P.3d 575 (2018). Under *Cedell*, an underinsured motorist ("UIM") claimant can trigger an *in camera* review of her insurer's attorney-client communications only after presenting facts "adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to evoke the fraud exception has occurred." *Id.* at 698. Because *Cedell* addressed only an insurer's claim handling file, the Court of Appeals in *Richardson* applied *Cedell* to materials developed in the course of litigation, holding that an insured

cannot discovery her insurer's litigation materials without showing how those materials are relevant to the insured's underlying claims. *Richardson*, 200 Wn. App. at 716-17.

Because those decisions dictate the outcome in this case, there is no basis for this Court to review the decision below. The Court of Appeals simply applied the principles from *Cedell* and *Richardson*, concluded that Hoff had presented no evidence of fraud to justify *in camera* review, and therefore held that the trial court's review of Safeco's work product and attorney-client communications was improper. That holding is a straightforward application of *Cedell* and *Richardson*. This Court should therefore deny Plaintiff's petition for review under RAP 13.4(b)(1) and (b)(4).

II. IDENTITY OF THE RESPONDING PARTY

Respondent Safeco Insurance Company of Illinois is a foreign defendant.

III. STATEMENT OF ISSUES

Should this Court decline review when the Court of Appeals correctly applied the standard governing the protection of a UIM insurer's attorney-client communications, as set out by this Court in *Cedell* and applied to materials created during litigation by the lower court in *Richardson*?

IV. STATEMENT OF THE CASE

A. Hoff Filed a Lawsuit Against Safeco for Underinsured Motorist Coverage

This litigation arises out of an underinsured motorist ("UIM") claim Payton Hoff filed with Safeco, following injuries she suffered in a motor vehicle accident. *See* CP 3-5. After the accident, Hoff settled with the adverse driver's insurer for its liability policy limit. CP 365. She also received personal injury protection benefits from Safeco. CP 371. She eventually submitted a UIM claim to Safeco. CP 397. Her policy has a bodily injury policy limit of $50,000. CP 178.

The parties disagreed as to the value of her UIM claim. Hoff, through her mother, demanded payment of $100,000 in UIM benefits, on top of her prior insurance recovery. CP 409. By contrast, Safeco valued Hoff's total damages at between approximately $39,000 and $46,000; based on that assessment, Safeco offered $2,500 in net UIM benefits, after all offsets had been taken. CP 405, 406.

Hoff disputed Safeco's valuation. In November 2016 she filed the current lawsuit. She alleged that Safeco failed to investigate her claim and offered less than what the claim would ultimately be worth, in violation of Washington's Consumer Protection Act[1] and Insurance Fair Conduct Act.[2]

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[1] Chapter 19.86 RCW.
[2] Chapter 48.30 RCW.

CP 4-5. She sought both general and special damages, as well as reasonable costs, attorney fees, and expert witness fees. CP 5.

B. Hoff's Discovery Responses Showed that more than $75,000 Was in Controversy

At the outset of litigation, Safeco sought to assess the possibility for removal of the case to federal court. Hoff's responses on that issue were contradictory. In response to Safeco's first interrogatories, she identified damages that substantially exceeded the diversity threshold of $75,000. *See* CP 147-49. She cited medical special damages of $17,188 and stated that the value of her general damages "is $75,000 exclusive of the third party recovery." CP 148. She added that she would ask for punitive damages, reasonable attorney fees and costs in an unknown amount, and trebling of both general and special damages. CP 149. By contrast, in response to requests for admission by Safeco, Hoff stated that the amount in controversy was less than $75,000. CP 72.

Safeco asked for clarification of the inconsistency. CP 72. Hoff's response was still unclear. CP 454. She acknowledged that her claim's value was what she had stated in discovery – equal to all special and general damages, trebling, and attorney fees – and therefore apparently admitted that damages exceeded $75,000. CP 454. But she added that she was disinclined to litigate in federal court. CP 454. She suggested that she could avoid federal court by stipulating that she could recover only $75,000, even if a jury awarded substantially more. CP 454.

The parties sought to formalize Hoff's concession as to the value of her claim. Safeco proposed a two-paragraph stipulation that would limit relief Hoff could seek to $75,000:

> 1. Now, therefore, Plaintiff and Safeco stipulate that the sum total of all monetary relief that Plaintiff will seek in this action, whether costs, attorney's fees, expert expenses or otherwise, is $75,000.00 or less.
>
> 2. Plaintiff and Safeco further stipulate to the entry of an order in limine that limits Plaintiff from seeking any monetary relief in this action, damages, attorney's fees, costs, or otherwise, in excess of $75,000.

CP 567. Hoff agreed to paragraph 1, but not paragraph 2. She proposed an alternative:

> 2. However, admissible evidence that a trier of fact may consider is not subject to an order in limine. In the event a trier of fact values Plaintiff's claim at more than $75,000, Plaintiff and Safeco agree no money judgment may exceed $75,000.

CP 464.

Safeco rejected Hoff's proposed changes, "because they would introduce an exception that would swallow the whole." CP 572. Safeco pointed out that Hoff's request that she retain the right to claim damages over $75,000 was inconsistent with a stipulation that $75,000 or less was in controversy. CP 572. Safeco stated that if Hoff refused the stipulation and insisted on seeking relief above $75,000, it would file to remove to federal court. CP 572.

C. Safeco Removed to Federal Court Based on the Parties' Inability to Reach an Agreement as to Claim Value

Based on Hoff's refusal to stipulate, Safeco removed the case under the district court's diversity jurisdiction, 28 U.S.C. § 1332(a). *See* CP 19-24. Safeco cited the fact that the parties were citizens of different states and that Hoff had identified damages of over $75,000 in her discovery responses. CP 19-20. Safeco identified the parties' disagreement, but cited authority supporting its claim that Hoff's proposed stipulation was insufficient grounds to limit the amount in controversy. CP 21-22.

Hoff moved for remand, which the district court granted. The court concluded that Hoff could avoid the federal jurisdictional threshold by stipulating that she could neither seek nor recover more than $75,000. CP 645.

D. The Trial Court Compelled Safeco to Submit Its Reasons for Removal for *in Camera* Review

On remand, Hoff attempted to discover the basis for Safeco's removal. She issued an interrogatory requesting that Safeco "explain every reason [it] had for removing." CP 652. Safeco objected on the basis that the requested materials were protected as attorney-client communication and work product. CP 666.

Hoff moved to compel Safeco's response. CP 483-99. She argued that she could overcome Safeco's attorney-client privilege under the civil

fraud exception to that privileged adopted in *Cedell.* CP 491. As evidence of fraud, she cited only the parties' disagreement as to the value of her UIM claim and her statement that removal would inconvenience her. CP 484. On that basis she suggested that the removal was an attempt "to leverage a low ball offer." CP 485. She also theorized that the removal was planned, and therefore that Safeco should be required to produce documents related to the removal, which would be relevant to a jury's decision on whether Safeco had acted in bad faith. CP 487. She requested that the trial court compel Safeco to submit "the entire Payton Hoff claim file . . . and any related documents to current date," including Safeco's litigation file, for *in camera* review. CP 490.

The trial court recognized that the material at issue was subject to attorney-client privilege and work product protection, but nonetheless compelled production for *in camera* review. The court first ruled orally:

> But what [Hoff's counsel] did clearly say is that it's clear from everything that went on, the Plaintiff was limiting her claim to avoid those jurisdictional limits. The fact that in light of that, without any other explanation, uh, the attempt to remove is made leaves open issues of how come. And those can run the gamut. And I'm not going to speculate on what they are. But I certainly think that it's an area that Counsel's entitled to inquire into.
>
> Obviously, we're running into litigation strategy, attorney-client privilege, attorney work product. So it's something of a minefield. But my instruction is to answer

> the interrogatory, create a privilege log, submit anything that's in the privilege log for *in camera* review, and where it goes from there, we'll decide.

RP 8/16/17 at 33:15–34:3. The court entered a written order compelling Safeco to "fully and completely answer this interrogatory or provide to the Court for *in camera* review by September 6, 2017 every reason Safeco had for removing . . . to federal court in Tacoma." CP 825. The court's order did not specify the basis for an implied finding that Hoff had met her burden to show a good faith belief that Safeco had committed fraud.

Safeco moved for reconsideration, which the court denied. The court ruled,

> The written decision of the federal court dismissing the federal filing, and the reasons given for that dismissal, give rise to a factual showing sufficient a reasonable belief [sic] of wrongful conduct sufficient to amount to fraud. In response Safeco has offered no legitimate reason whatsoever for the removal of this case to federal court.

CP 850.

E. The Court of Appeals Reversed the Trial Court

Safeco sought discretionary review of the discovery order. CP 861. The Court of Appeals granted review and reversed the trial court, citing *Cedell* and *Richardson*. *Hoff v. Safeco Ins. Co. of Illinois*, ___ Wn. App. 2d ___, 449 P.3d 667 (2019). The court noted that unlike in other insurance contexts, a UIM insurer like Safeco steps into the shoes of the

third party tortfeasor. *Hoff*, 449 P.3d at 674. For that reason, UIM insurers are entitled to the advice of counsel in strategizing defenses to the same extent as the tortfeasor. *Id.* An insured can therefore discover her insurer's attorney-client communications only in limited circumstances, including under the civil fraud exception, by showing facts sufficient to support a good faith belief by a reasonable person sufficient to show that fraud occurred. *Id.* at 675.

Applying that exception, the court noted that Safeco's decision to remove to federal court "inescapably entails litigation strategy." *Id.* at 675. The court concluded that Hoff had failed to present evidence supporting her claim of fraud, reasoning that "the record is devoid of any evidence to support a reasonable good faith belief that Safeco's removal of the case to federal court was not a legitimate, if unsuccessful, strategy." *Id.* Without any evidence supporting Hoff's claim, the court held that trial court abused its discretion in compelling production for *in camera* review. *Id.* at 676.

V. ARGUMENT

This Court should decline to review the Court of Appeals' decision. The decision below follows directly from the lower court's decision in *Richardson* and this Court's decision in *Cedell*. Those cases make clear that for an insured to overcome her UIM insurer's attorney-client privilege under the civil fraud exception, she must bring forward

evidence of fraud sufficient for a reasonable person to form a good faith belief that fraud occurred. Further, an insured may discover her UIM insurer's work product only by demonstrating a substantial need and inability to discover the relevant material and an inability to obtain the substantial equivalent without undue hardship. The Court of Appeals applied those well-established and uncontroverted principles to Hoff's claim. Because she does not identify how that holding contradicts *Cedell*, this Court should deny her petition.

A. *Cedell* and Related Cases Hold that UIM Insurers Are Entitled to Attorney-Client and Work Product Protections Absent an Insured's Showing to the Contrary

An insurer's ability to raise the attorney-client or work product privileges begins from the premise that insurers owe a quasi-fiduciary duty to their insured.[3] *Cedell*, 176 Wn.2d at 698. This duty applies when an insurer is engaged in investigating, evaluating, or processing a claim. *Id.* at 699. Under these principles, during the claims handling process the attorney-client and work product privileges are irrelevant. *Id.* at 698. But an exception to this rule has long applied in the context of UIM claims,

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[3] When discussing the discovery to which an insured is entitled, decisions of this Court and the Court of Appeals often discuss and analyze the attorney-client and work product doctrines simultaneously. *See, e.g.*, *Cedell*, 176 Wn.2d at 698-99 (discussing the purpose of both doctrines simultaneously); *Richardson*, 200 Wn. App. 705, at 716-17 (same). Nonetheless, it is clear that the two protections are distinct, require a unique analysis, and may both apply to the same documents. *See Cedell*, 176 Wn.2d at 699 n.6. Hoff's appeal addresses only the civil fraud exception to attorney-client privilege, not the separate question of Safeco's work product protection. *See* Petition at 10-11 (stating issue as whether Hoff has "recourse for bad faith conduct").

where the insurer "steps into the shoes of the tortfeasor" and is allowed to "defend as the tortfeasor would defend." *Id.* at 697. Washington's courts have therefore held that UIM insurers, even in bad faith cases, are entitled to attorney-client and work product protections unless the insured can overcome those protections.

1. A UIM Insurer's Attorney-Client Communications Are Protected Unless the Insured Shows the Insurer Was Engaged in Fraud at the Time

Washington's courts have recognized that an insured may overcome her insurer's attorney-client privilege by showing the insurer was engaged in fraud at the time of the communication. The first decision to apply this exception, *Escalante v. Sentry Insurance*, noted that the "civil fraud" exception was based on the idea that attorney-client communications should not be protected when they relate to an insurer's ongoing or future fraudulent conduct. 49 Wn. App. 375, 394, 743 P.2d 832 (1987), *overruled on other grounds by Ellwein v. Hartford Accident & Indem. Co.*, 142 Wn.2d 766, 15 P.3d 640 (2001), *overruled by Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 78 P.3d 1274 (2003). For the exception to apply, the insured must show a "foundation in fact" of bad faith sufficient to show civil fraud. *Id.* To do this, the court required a two-part showing. First, the insured must trigger an *in camera* review by making a factual showing sufficient to raise a good faith belief by a reasonable person that there occurred wrongful conduct sufficient to invoke the

exception. *Id.* Second, if the insured makes the preliminary showing, the trial court can then review the relevant material to determine whether there is a foundation in fact for the fraud allegation. *Id.*

This standard continues in force today, basically unaltered. In *Barry v. USAA*, the court applied the same two-part test to an insured's request for communications made during the handling of her claim. 98 Wn. App. 199, 202, 989 P.2d 1172 (1999). In addition to the *Escalante* test, the court explained that to demonstrate fraud the insured must show both (1) that the insurer was engaged in or planning a fraud at the time of the communication and (2) that the communication furthered that activity. *Id.* at 206. The court also clarified that an insured must do more than merely raise a prima facie case of bad faith insurance or consumer protection violations. *Id.* at 206-07. Those allegations "do not, in and of themselves, constitute a good faith belief that [the insurer] committed fraud." *Id.* at 207. The court concluded that the insured had failed to show sufficient evidence of fraud to justify an *in camera* review.

This Court adopted the standards from *Escalante* and *Barry* in *Cedell*, again in response to a request for the insurer's claim file. *Cedell*, 176 Wn.2d at 690. Although the claim at issue in *Cedell* resulted from a house fire and not UIM coverage, this Court adopted the fraud exception as set out in *Escalante* and *Barry*. *Id.* at 690. This Court recognized that UIM insurers are entitled to the same advice in strategizing defenses as a

tortfeasor. *Id.* at 697. This Court agreed that an insured could overcome her UIM insurer's attorney-client privilege under the fraud exception by showing the insurer engaged in bad faith to defeat a meritorious insurance claim. *Id.* at 700. Under that test, the threshold question is still whether "a reasonable person would have a reasonable belief that an act of bad faith tantamount to civil fraud has occurred." *Cedell*, 176 Wn.2d at 700.

Escalante, *Barry*, and *Cedell* each considered discovery of information and materials created before litigation began. The court in *Richardson* applied these same principles to an insured's discovery requests for her UIM insurer's litigation file – documents, communications, and other information generated by the insurer's attorney after litigation began. 200 Wn. App. at 709 & n.3. The court distinguished *Cedell*, citing the difference between pre-litigation claims handling and post-litigation work product and communications. *Id.* at 715. The court concluded that allowing an insured to access privileged information created during litigation would violate "the purpose of the attorney-client privilege, the work product doctrine, and the purposes of discovery." *Id.* at 716-17. The litigation file was "irrelevant" to the insured's UIM bad faith claim, *id.* at 717, and had "little bearing" on a UIM claim denied months earlier. *Id.* at 720.

2. A UIM Insurer's Work Product Is Protected Unless the Insurer's Mental Impressions Are Directly at Issue and the Insured Shows a Substantial Need for the Discovery

In addition to the attorney-client privilege, materials can be simultaneously protected as work product. *Cedell*, 176 Wn.2d at 699 n.6. Under CR 26(b)(4), a party's materials prepared in anticipation of litigation are discoverable only if the requestor has substantial need in preparing its case and cannot obtain the substantial equivalent without undue hardship.

Although work product protection does not apply to materials relied on by an insurer in the course of determining the limits of UIM coverage, *Barry*, 98 Wn. App. at 208, after litigation begins the work product doctrine applies to the insurer's litigation file, including its attorneys' assessment of the case and trial strategy. *Richardson*, 200 Wn. App. at 717. Therefore, while materials in an insurer's pre-litigation claim file may be discoverable when created in the ordinary course of business, materials produced after litigation begins are not discoverable absent the insurer's ability to show substantial need. *Compare Barry*, 98 Wn. App. at 208 (requiring *in camera* review when insured requested discovery of pre-litigation claim file), *with Richardson*, 200 Wn. App. at 716-17 (rejecting discovery of litigation file where Plaintiff did not show how the file was relevant to her claim). This Court in *Cedell* did not specifically

address the work product protection as applied to UIM insurers. *See Cedell*, 176 Wn.2d at 701.

B. Review Is Not Appropriate Under RAP 13.4(b)(1) Because The Court of Appeals' Decision Is Consistent with *Cedell*

Review is appropriate under RAP 13.4(b)(1) only when the Court of Appeals' decision is in conflict with a decision of this Court.[4] There is no such conflict here. The Court of Appeals' correctly applied the standard from *Cedell*, reciting that Safeco's attorney-client communications are privileged unless Hoff could show factual support sufficient for reasonable person to form a good faith belief that Safeco's removal was fraudulent. *Hoff*, 449 P.3d at 675. The court concluded that Hoff failed to present any factual support for her claim of fraud. *Id.*

The Court of Appeals also correctly distinguished *Cedell*, which addressed only discovery of an insurer's pre-litigation claim file and not the grounds by which an insured could request litigation material. *Hoff*, 449 P.3d at 674. The court properly relied on *Richardson*, which held that litigation material is not discoverable unless the insured can show that the insurer's attorney-client communications and work product are relevant to the insured's bad faith claim. *Richardson*, 200 Wn. App. at 717. The

[4] Hoff also briefly argues that the Court of Appeals' decision conflicts with *Barry*, which would be grounds for review under RAP 13.4(b)(2). *See* Petition at 8. Because *Cedell* and *Barry* apply materially identical standards, the same analysis pertains to each case.

Court of Appeals' decisions in *Richardson* and this case are a direct extension of *Cedell*.

Hoff has not identified how the decision below conflicts with *Cedell*. Instead, she relies solely on an uncorroborated claim that Safeco removed to leverage a favorable settlement. CP 484-85. But if Hoff's theory were correct, then any attempt by an insurer to defend itself would be evidence of fraud. Such a rule would unfairly impede insurers from defending against first party claims. *See Richardson*, 200 Wn. App. at 719 (" 'Allowing litigation conduct to serve as evidence of bad faith would undermine an insurer's right to contest questionable claims and to defend itself against such claims.' " (quoting *Timberlake Const. Co. v. United State Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995)).

Hoff also argues that the Court of Appeals' decision "confers an absolute immunity" on UIM insurers' litigation conduct. Petition at 8.[5] This is not a fair reading of the Court of Appeals' holding. The court recited the proper standard directly from *Cedell*, which requires the insured to make " 'a factual showing adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to [in]voke the fraud exception as occurred.' " *Hoff*, 449 P.3d at 675 (quoting *Cedell*, 176 Wn.2d at 698) (alteration in original). Hoff could have met that

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[5] Hoff also attempts to re-litigate the *Richardson* decision, arguing that case was wrongly decided. *See, e.g.* Petition at 8. But this Court previously denied review in *Richardson*. *Richardson*, 190 Wn.2d 1008.

standard by presenting evidence to support a good faith belief that Safeco's removal was fraudulent. She presented no such evidence, relying instead on only the fact of removal itself. The Court of Appeals correctly concluded that Safeco's removal despite the parties' disagreement was not evidence of fraud. *Id.*

Finally, Hoff attempts to re-litigate the merits of her case, arguing that the Court of Appeals improperly based its decision on the fact that she sought material created during litigation. Hoff suggests that this holding is contrary to *Cedell* because that case never addressed the difference between pre- and post-litigation discovery, and that the Court of Appeals' decision would allow "no recourse for bad faith conduct, post-litigation." Petition at 10-11. Again, this is not a fair reading of *Cedell* or the Court of Appeals' decision in this case.

To begin with, the fact that *Cedell* did not address the distinction between pre-litigation and post-litigation material cuts against Hoff's position. As the Court of Appeals recognized here and in *Richardson*, material created during litigation is materially different from claims handling materials. *Hoff*, 449 P.3d at 674; *Richardson*, 200 Wn. App. at 715. This Court recognized as much in *Cedell*, stating that an insurer's quasi-fiduciary duty to its insured applies only during claims handling. *Cedell*, 176 Wn.2d at 699. The decision below cannot conflict with this

Court's decision in *Cedell* because the two cases addressed materially different issues.

Further, Hoff is incorrect that insureds are without recourse for bad faith litigation conduct. The civil rules provide an insured with other remedies, including motions to strike, compel discovery, and impose sanctions. *Richardson*, 200 Wn. App. at 720. Hoff was free to request those remedies, including by requesting sanctions in federal court if she felt the removal was improper. The district court did not award sanctions. *See* CP 642-46.

Hoff has not identified how the Court of Appeals' decision conflicts with this Court's decision in *Cedell*. Because the opinion below merely applies *Cedell* to new facts, this Court should deny Hoff's petition.

C. Review Is Not Appropriate Under RAP 13.4(b)(4) Because this Case Does Not Present an Issue of Substantial Public Interest

Review is appropriate under RAP 13.4(b)(4) when a petition involves an issue of substantial public interest that should be determined by this Court. This case does not meet that standard for the same reasons discussed above, specifically that the Court of Appeals' decision here and in *Richardson* are extensions of this Court's decision in *Cedell*. A department of this Court already recognized as much, when it denied review in *Richardson*. 190 Wn.2d 1008, 414 P.3d 575 (2018).

Hoff argues that this case presents an opportunity to "define the limits an insurance company must respect when litigating UIM cases."

Petition at 11. But Hoff is again attempting to argue the merits of her case, regarding whether Safeco made an unreasonably low settlement offer in the course of its claims handling. That is the subject of her bad faith claim, which the parties continue to litigate. The issue before this Court is whether Hoff can trigger an *in camera* review of Safeco's work product and attorney-client communications by citing only to Safeco's removal to federal court. Hoff makes no attempt to identify how that question presents an issue of sufficiently substantial public interest to justify review.

VI. CONCLUSION

In its decision below, the Court of Appeals properly applied the standard adopted by this Court in *Cedell*. Under that standard, an insured can discover her UIM insurer's attorney-client communications only when she presents sufficient evidence of civil fraud to raise a good faith belief by a reasonable person that wrongful conduct occurred. Because the Court of Appeals properly applied that rule and concluded that Hoff had presented no such evidence, this Court should deny Hoff's petition.

Respectfully submitted this 14th day of November, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington that on the below date I caused to be served the foregoing document on:

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SIGNED this 14th day of November, 2019, at Seattle, Washington.

s/ Traci Jay
Traci Jay

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November 14, 2019 - 11:09 AM

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