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NO. ~~66119-5-1~~

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SNOPAC PRODUCTS INC., a Washington Corporation

Appellant/Cross-Respondent.

v.

LESLIE BLAKEY SPENCER, and
TAMMY S. BLAKEY,

Respondents/Cross-Appellants,

**RESPONDENTS/CROSS-APPELLANTS' REPLY BRIEF ON
RESPONDENTS' CROSS APPEAL**

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I. REPLY

Respondents Spencer and Blakey (“Spencer”) allege that Snopac’s majority owner, Greg Blakey (“Blakey”) engaged in “oppressive” conduct under the Dissenters’ Rights Statute by violating his duty of good faith and fair dealing owed to them as minority owners in three ways: (1) Blakey diluted the value of their shares for purposes of redeeming their shares in May 2008 and did not disclose key information to them about the value of the company’s primary asset, its fish processing ship, the “Innovator;” (2) Blakey incurred substantial debt and encumbered their 20% ownership interest in Snopac without informing them about what he was doing, or obtaining their approval, or even conducting board meetings to obtain proper company authorization for his spending; and (3) Blakey paid employees “unsupportable bonuses,” including his own daughter, without informing them what he was doing or obtaining their consent. He paid out almost \$800,000 in bonus over a period he unilaterally decided not to make any distributions to the minority owners.

Snopac does not address Blakey’s unfair and deceitful conduct in the redemption process or Blakey’s bonuses to employees. Instead, Snopac focuses on only select instances of Blakey’s unauthorized spending identified in the trial court’s findings and argues that his spending did not breach his duty of fair dealing towards the minority owners and did not diminish the value of their interest in the company. Snopac ignores entirely Blakey’s deceitful conduct in diluting the value of Spencer’s shares for purposes of the redeeming them and Blakey’s other

questionable conduct even though the trial court's findings support the conclusion that Blakey breached his duty of fair dealing and good faith owed to the minority owners in each of the three ways described above.

Snopac also argues in a contradictory manner that even though there was no diminution in value caused by Blakey's unauthorized spending, the trial court took into consideration Blakey's conduct that diminished the value of the company. But Snopac does not respond to Spencer's argument that the trial court's assessment was based on the asset valuation of the company set out in the Attachment to the court's findings, and the Attachment contains no line item or other indication of any value assigned to Blakey's conduct that diminished the value of the shares. Nor is there any indication that the court's asset valuation captured the diminished value caused by Blakey in deceitfully diluting the value of the shares for purposes of redeeming them or in making "seemingly unsupportable bonuses" to employees.¹

Snopac also does not explain how the court took into consideration for example, Blakey's deceitful conduct in not disclosing the \$9.1 million valuation of the Innovator it was using for insurance and financing at the same time that Blakey was ordering his accountant to use a \$3 million value for the Innovator for purposes of redeeming the minority owners' shares. Nor does Snopac explain how the court took into consideration

¹ See, Respondents' Opening brief at 33, FF# 27, CP 675.

Blakey's other unilateral business decisions that resulted in \$9 million in new debt incurred on the Innovator leading up to the May 26, 2008 redemption of the minority owners' shares.² For example, the court's asset valuation of the company does not contain a corresponding increase in the value of the company based on Blakey's total unauthorized investment of over \$11.25 million in the Innovator.³ Snopac leaves unaddressed, as it did at trial, the testimony of Spencer's expert, Kevin Grambush, that the value of the company's assets is equal to the amount invested in the asset less depreciation.⁴ But the asset value of the Innovator used in the court's Attachment is only \$6.25 million, not \$11.2 million, or even the \$9 million Blakey unilaterally decided to spend on the ship renovating it. The resulting diminution in the asset value for the ship of between \$2.75 million and nearly \$5 million is not reflected anywhere in the court's award to Spencer.⁵ Nor does the court's award reflect Blakey's unilateral decision to award "seemingly unsupportable" bonuses to employees over the same years Blakey unilaterally decided not to distribute any profits to the minority owners. FF#'s 27, 16, CP 675, 671.

² See FF#13, CP 670-671.

³ See Respondents' Opening Brief at 2, 5-6; FF#'s 11 – 13.

⁴ See Respondents' Opening Brief at 19-20 (citing Grambush testimony on asset valuation of Dillingham plant) and Brief at 16 (citing Grambush testimony on asset valuation of the Innovator). Snopac does not dispute in its Response, Spencer's assertion in her Opening Brief that it did not object to Grambush's opinion on the proper method for valuing Snopac's assets or his valuation of the company's assets. *Id.*

⁵ Even using Grambush's asset valuation for the Innovator of \$7.8 million produces a diminished value of \$1.55 million compared to the court's asset valuation. See, Opening Brief at 16. This measure of diminished value is not reflected in the court's award either.

The trial court's asset valuation of the company and hence the corresponding "fair value" of Spencer's shares does not contain any award for diminished value caused by Blakey's unilateral actions.

II. FACTS

The trial court's findings contain substantial support for Spencer's allegation that Blakey acted in bad faith in the redemption process. First, Blakey began the redemption process by contacting his accountant, Moss Adams, to find out how he could dilute the minority owner's share value to force them out. FF#23, CP 674. Blakey admitted doing so because he was angry at the minority owners for questioning how he was spending the company's money. After Blakey decided he would dilute the minority owners' shares to get them out of the company, he then hired Moss Adams to redo its December 2007 report that showed a company value of \$2,036,000 and ordered Moss Adams to rely solely on Jacobsen's \$3 million value for the Innovator, instead of Capt. Vincent's prior \$9.1 million value.⁶ Blakey did not disclose Vincent's \$9.1 million value.⁷ Snopac admitted that Vincent's \$9.1 million was not disclosed to the minority owners prior to Snopac tendering only \$20,133 for their shares. *See* Respondents' Opening Brief at 11-12.

While Blakey forced Moss Adams to use Jacobsen's \$3 million value for the Innovator in the redemption process, he used Vincent's \$9.1 million value for the vessel to get financing and insurance. He also used the

⁶ FF# 34; 32, CP 678; 677.

⁷ FF#42, CP681.

depreciated value of \$8.9 million for the Innovator for tax purposes as set out in the company's financial records.⁸ Indeed, on April 28, 2008, only 28 days before the redemption of the shares, Snopac expressly warranted to Snopac's broker that Vincent's \$9.1 million appraisal was the Innovator's "fair market value" and that this was "accurate information" to the "best of its knowledge and belief."⁹ Had Blakey used Vincent's \$9.1 million value for the Innovator in redeeming the minority owner's shares, instead of insisting on Jacobsen's \$3 million value, their shares would have been worth over 30 times more than the \$20,133 Blakey paid them for their shares on May 26, 2008. FF#4, CP 666.

Indeed, a reasonable inference from the facts is that Blakey purposely diluted the share value knowing that he would not be able to pay the fair value of the shares, even at the amount Moss-Adams had calculated in its original 2007 report of over \$200,000 each. Blakey testified that April is a very bad month financially for a fish processing company and Snopac in particular, particularly from the standpoint of cash flow. He testified that in April 2007, for example, he would not have been able to pay the minority owners even \$100,000 for their shares. RP 605. And, he conceded that the obvious effect of ordering Moss-Adams to use Jacobsen's \$3 million value for the Innovator was to diminish the company's value by \$6.837 million. RP 627.

⁸ See Respondents' Opening Brief at 16.

⁹ See, FF#43, CP 681-682. As the court noted, Jacobsen spent only 2 hours doing his valuation of the Innovator. Vincent spent 4-5 days doing his. FF#34, 41, CP 678; 680.

Blakey also timed the redemption in May 2008 to be after he spent \$2.8 million of Snopac's money on renovating the Dillingham plant. He did so, knowing that the plant would not be operational until June, 2008, or one month after the minority owners' shares were redeemed.¹⁰

As discussed above, the court's findings also support the conclusion that Blakey's unilateral actions diminished the value of the minority owners' shares because they did not get the value of the over \$9 million Blakey unilaterally decided to spend on the Innovator without informing the minority owners or even obtaining board approval for his actions.¹¹ Nor did the minority owners receive the added value of the over \$2.8 million in debt Blakey incurred on the Dillingham plant in the five months preceding the May 2008 redemption of their shares because the full value of the debt incurred on the plant could not possibly be realized until after June 2008. As Blakey admitted, he knew the plant would not even be operational until after June 2008. FF# 40, CP 680.

The trial court's asset valuation of the company and corresponding "fair value" for the minority owners' shares also does not include any line item or other calculation for any diminished value caused by Blakey's "seemingly unsupportable bonuses."¹² During the same time, Blakey unilaterally decided not to make any disbursements to the minority

¹⁰ FF#39-40, CP 680.

¹¹ FF#13, 14 and 20, CP 670-71, 673.

¹² See Respondents' Opening Brief at 33-34, FF#27, CP 675.

owners.¹³ The bonuses totaled over \$797,000 in the period from 2003 to 2008 and included \$20,000 in bonuses paid by Blakey to his own daughter, Jenna. *See* Tr. Ex. 18, RP 428-429.

III. LEGAL ARGUMENT

A. Blakey Breached his Fiduciary Duty to the Minority Owners

Snopac concedes that the court's "fair value" appraisal under the Dissenters' Rights Statute is the only remedy available to Spencer to account for any diminution in value caused by the majority owner, Greg Blakey's unilateral business decisions that breached his duty of good faith and fair dealing owed to the minority owners. Snopac Resp. at 37. While Snopac argues that Washington courts have not defined "oppressive" behavior under the statute, the court in *Robblee* defined it as "wrongdoing" that shows "a lack of probity and fair dealing," or "a visible departure from the standards of fair dealing, and a violation of fair play" owed by the majority owner to the minority owners. *See, Robblee v. Robblee*, 68 Wn. App. 69, 76 (1992).¹⁴

As Spencer's opening brief shows, it was a "visible departure from the standards of fair dealing" for Blakey to have spent the company's money, which he admitted was partly the minority owners' money, without informing them what he was doing, without obtaining their consent or even conducting regular board meetings to obtain the

¹³ FF#17, 27, 16, CP 671, 675.

¹⁴ In its brief, Snopac argues that the *Robblee* court did not define "oppressive" behavior. Snopac Brief at 25. Yet the court clearly defines "oppressive" behavior in the above described manner, 68 Wn. App. at 76.

corporation's authorization and approval to spend the money.¹⁵ Blakey clearly violated this duty by spending over \$9 million to renovate the Innovator without informing the minority owners what he was doing, without obtaining their consent and without even so much as conducting a board meeting to obtain proper authorization to spend the company's money. Nor did Blakey provide the minority owners with the company's financial records until they complained about how he was spending the company's money in 2006.¹⁶ The trial court describes Blakey's unilateral decisions and actions as imposing on the company a "crushing debt load" as of the "the redemption date of May 26, 2008." FF#13, 14, CP 671.

The trial court concluded that Respondents met their burden of showing that Blakey engaged in "misconduct." CL#9, CP 691-92. Its conclusion is supported by the factual record and all reasonable inferences from the facts. The facts and inferences from the facts lead to a reasonable conclusion that Blakey's conduct showed "a lack of probity and "fair dealing" when it came to spending the minority owner's money and encumbering their interest in the company. As discussed below, the trial court's asset valuation does not take into consideration that Blakey's unauthorized spending diminished the value of the company.

Blakey's unilateral decisions and actions during the redemption

¹⁵ See, Respondents' opening brief at 31-32, 34, fn. 69, citing *Weinberger v. Uop*, 457 A.2d 701 (Sup. Ct. Del. 1983) (cited with approval in *Sound Infinity, Inc., ex. rel. Pisheyur v. Snyder*, 169 Wn. 2d. 199 (2010)) and *Lees Inns of Am. Inc. v. William R. Lee Irrevocable Trust*, 924 N.E.2d 143, 158 (App. Ind. 2010) (interpreting virtually identical Indiana statute).

¹⁶ FF#3, 14, CP 665, 671.

process also displayed a shockingly deceitful approach to fulfilling his legal obligation to pay the minority owners “fair value” for their shares. His “misconduct” in the redemption process included contacting Moss Adams to find out how to “dilute” the minority owners’ shares and directing Moss Adams to use Jacobsen’s \$3 million value for the Innovator, while hiding from the minority owners Vincent’s much higher \$9.1 million value. Blakey also failed to disclose to the minority owners that Snopac had regularly used Vincent’s \$9.1 million appraisal and had warranted it as accurate to the best of its knowledge and belief on April 28, 2008, only 28 days before the May 26, 2008 redemption.¹⁷

Nor did Blakey reveal Vincent’s \$9.1 million value to Moss Adams or the court appointed appraiser, Duffy. *See, Resp.’ Opening brief at 9, 11-12.* A reasonable inference from the evidence is that Blakey directed Moss Adams to use Jacobsen’s \$3 million value to diminish Snopac’s value by \$6.837 million to avoid having to pay the minority owners fair value for their shares. If he had merely used Vincent’s value for the Innovator to redeem the shares, the way he did to obtain insurance and financing, their shares would have been worth over \$600,000 more than the amount tendered and \$275,000 more than the court awarded.

B. Court’s Asset Valuation Does Not Include Diminished Value

In its Response to the cross-appeal, Snopac asserts in a

¹⁷ FF#46, CP 682.

contradictory manner that Blakey's conduct did not diminish the value of the minority owners' shares, but that the trial court's award of \$350,000 per share somehow took into consideration the diminished value of the shares caused by Blakey's conduct. Snopac Resp. at 40. Snopac does not identify how the trial court took into consideration Blakey's wrongdoing and concedes that "it is unclear whether the trial court took 'misconduct' into account in setting the fair value for Snopac's stock." *Id.* at 41.

But it is not "unclear." It is obvious from the face of the court's asset valuation in the Attachment to the court's findings that it did not include any line item for the diminished value to the company caused by Blakey's misconduct. Had the court done so the amount that represented the "fair value" of the minority owners' shares, *including an award for diminished value*, would not have been identical to the amount represented by their 10% interest in the company based on the court's asset valuation. As the Attachment clearly shows, what the court did was calculate the value of the company based solely on the value of its assets and found that the company's value was \$3,507,059. It then applied the 10% ownership interest represented by each of the minority owners' shares to arrive at the "fair value" of their shares of \$350,706.

Had the court then determined the amount of diminished value caused by Blakey's conduct, it would have added to the \$350,706 total some amount attributable to the diminished value of the company caused by Blakey's conduct. But the court clearly did not do that.

Snopac also argues that "it may be inferred" that the court "already

arbitrarily increased its fair value determination for the Innovator based on its determination that Snopac engaged in ‘misconduct.’” Snopac Resp. at 41. But it does not explain why this is a reasonable inference.

Indeed, Snopac had earlier argued in its Opening Brief that the trial court improperly admitted into evidence and relied on Vincent’s opinion that the Innovator had a value of \$9.1 million. In any event, it is clear that the trial court did not increase the value of the Innovator based either on Vincent’s appraisal or Blakey’s misconduct. It is clear that the court based its \$6.25 value for the Innovator on an asset valuation approach that used the depreciated value of the ship found by Grambush of \$7.8 million and further *discounted* that amount. Grambush’s \$7.8 million value was based on taking the asset value of the ship of \$8.9 million on Snopac’s books and depreciating the value based on time and wear.¹⁸ Snopac did not object to Mr. Grambush’s approach, did not question his qualifications to render such an opinion (he is a CPA and business valuation expert), and did not offer its own value for the Innovator beyond Jacobsen’s \$3 million value that the court appointed business appraiser, Mr. Duffy, refused to consider because Jacobsen was “clueless” and his opinion unreliable.¹⁹

It is also clear that the court’s \$6.25 million value for the ship did not take into account Blakey’s unilateral actions in incurring \$9 million of new debt on the Innovator over the years leading up to the May 2008

¹⁸ Respondents’ Opening Brief at 15-16.

¹⁹ Respondents’ Opening Brief at 25.

redemption of the minority owners' shares. The court's valuation of \$6.25 million is \$2.75 million less than the amount Blakey spent without informing the minority owners, getting their consent or even obtaining the approval of the corporation through its board.

As Snopac has argued in the context of valuing the Dillingham plant, the value of the company's assets should be equal to the amount of the company's investment or indebtedness when doing an asset valuation approach.²⁰ Thus, as Mr. Grambush explained, the asset value of the Dillingham plant was equal to the \$3.23 million invested into the purchase and renovation of the plant. Because this occurred in the five months leading up to the May 2008 redemption of the minority owners' shares, Mr. Grambush did not believe it appropriate to depreciate the value of the plant. Accordingly, he arrived at his \$3.23 million value by simply adding the three separate lines together on Snopac's balance sheet that showed each of its investments in the Dillingham plant. Respondents' Opening Brief at 29-30. The court accepted and incorporated Mr. Grambush's value into its value for the company that is set out in the Attachment to its findings. Again, Snopac did not object to Grambush's approach to valuing the Dillingham plant or his conclusion when submitted to the trial court.

Mr. Grambush used the same approach when he valued the Innovator. But, whereas Blakey had spent \$2.25 million to purchase the

²⁰ See, e.g., Snopac Reply Brief at 22, "[T]hat (the) acquisition and build-out of the Dillingham plant in the 5 months leading up to the redemption did not have a 'commensurate influence reducing its equity' (FF No. 18), but rather for accounting purposes the acquisition of the Dillingham plant should have been a zero sum gain."

Innovator without informing the minority owners or obtaining board approval to do so, and invested another \$9 million into it in the same manner, a total of \$11.15 million, the asset value of the ship on Snopac's books was only \$8.9 million. Grambush then depreciated this value down to \$7.8 million.

Accordingly, it is possible to calculate the diminished value of the Innovator based on Blakey's unilateral decisions without minority owner consent or authorization. It is the difference between the amount of debt Blakey unilaterally incurred less the asset value of the ship at the time of redemption. That difference is either the difference between the court's \$6.25 million value for the ship and the \$11.15 million in debt Blakey incurred on the Innovator, i.e. \$4.90 million, or the difference between Mr. Grambush's \$7.8 million value for the ship and the \$11.15 million in debt Blakey incurred through his unilateral actions, i.e. \$3.35 million.

Of course, as Spencer conceded in her Opening Brief, the trial court is not required to determine with mathematical exactness or certainty the fair value of the company, its assets or the minority owners' shares. *In re Petition of Northwest Greyhound Lines, Inc.*, 41 Wn.2d 672, 678 (1952). So the court could have simply used this evidence and information to arrive at an appropriate amount to reflect the diminished value caused by Blakey's unilateral actions. What was unfair, manifestly unreasonable and error was for the court not to make any award at all.

Nor does the trial court's "fair value" determination include any amount for the diminished value of Respondents' shares caused by

Blakey's deceitful machinations during the redemption process. He owed the minority owners under the Dissenters Rights Statute a duty to pay them "fair value" for their shares as a result of the redemption process. His conduct breached his duty of "fair dealing" he owed to them and demonstrated a "lack of probity" in "the affairs of the company" sufficient for the trial court to find that he had engaged in oppressive conduct in the redemption process. *Robblee, supra.* at 76.

The evidence and all reasonable inferences from the evidence in favor of Spencer, as the prevailing party, clearly lead to a conclusion that Blakey's failure to disclose Vincent's \$9.1 million appraisal of the ship to the minority owners and Snopac's use of it as "accurate information" to "the best of its knowledge and belief" only 28 days before he paid them a mere \$20,133 for their shares was deceitful. His retention of Moss Adams to redo its prior \$2 million valuation of the company and then to limit the scope of what Moss Adams could consider by directing them to use Jacobsen's \$3 million value for the Innovator was similarly deceitful.

Even more so, because Blakey admitted that he was aware that Spencer had concerns about Snopac using Moss Adams to appraise the company for redemption purposes. RP 611-612. Spencer specifically questioned Moss Adams' conflict of interest. RP 608. Her suspicions were clearly justified because Blakey had accidentally sent her an email recounting how he had contacted to Moss Adams to find out how to dilute her shares for purposes of forcing her out of the business.²¹

²¹ FF#'s 23-24, CP 674.

Blakey also admitted that he told Spencer that she could retain her own appraiser, but gave her only 2 days to do so. RP 612-13. Spencer did manage to retain Kevin Grambush. *Id.* But Blakey did not disclose to her or Grambush Vincent's \$9.1 million valuation for the Innovator or that Snopac continued to use it even after Grambush had been retained.²²

Instead, without disclosing this information and relying on Moss Adams' revised report that was based on Jacobson's \$3 million value for the ship, Blakey told Spencer her shares were worthless. He then redeemed them for only \$20,133.²³ As Blakey admitted the net effect of directing Moss Adams to use Jacobsen's value instead of Vincent's value was to diminish the ship's value, and hence the company's value, by \$6.837 million. RP 627.

The trial court's asset valuation of the company does not take into consideration the fact that had Blakey disclosed the Vincent appraisal and Snopac's use of it, Spencer could have used that value to obtain "fair value" for her shares instead of the \$20,133 tendered by Blakey. The trial court's asset value for the ship of \$6.25 million is \$2.75 million less than the \$9.1 million value Snopac warranted was the "fair market value" of the ship in April 2008 and used to obtain insurance and financing.

C. Respondents Offered Evidence of Diminished Value

Snopac argues that Respondents did not offer evidence at trial of the

²² FF#44, CP 682.

²³ FF#43-44, CP 682.

diminished value to their shares caused by Blakey's misconduct, But as discussed above, there was substantial evidence submitted showing the amount of indebtedness caused by Blakey's unilateral actions in incurring over \$9 million in debt on the Innovator without the knowledge of the minority owners, their consent or approval by Snopac's board.²⁴ There was evidence showing the diminution in value of the ship based on a comparison of the amount invested in the ship by Snopac, the ship's stated value on the company's books, Mr. Grambush's value and the value ultimately placed on the ship by the court.²⁵ There was also evidence submitted showing the difference between the amount Snopac warranted was the "fair market value" of the Innovator that was not disclosed to the minority owners, their appraiser, Moss Adams or the court appointed appraiser, and the amount used to redeem the minority owner's shares.

There was also evidence at trial of the amount of "unsupportable bonuses" Blakey paid without the knowledge or consent of the minority owners. The evidence showed \$797,000 in bonuses in the years when Blakey unilaterally chose not to make any distributions to the minority owners, including \$20,000 in bonuses paid by Blakey to his daughter.²⁶

There was evidence from which the trial court could have made an appropriate award for the diminution in value to the company and to the Respondents' 10% interest in the company caused by Blakey's unilateral

²⁴ FF#11, 13-14, CP 669, 671.

²⁵ See, Respondents' Opening Brief at 16, trial Ex. 196.

²⁶ Trial Ex. 18, RP 428-429.

actions and misconduct. The court's order denying Respondents' post-trial motion for such an award shows that the court did not consider any of this evidence because it somehow believed that the asset valuation approach it took to valuing the company and the "fair value" of the Respondents' interest already included a consideration of the diminished value. Clearly it did not and the case should be remanded for the court to make such an award on top of the \$350,706 found as the fair value of the shares based solely on an asset valuation of the company.

IV. REQUEST FOR FEES ON CROSS APPEAL

Based on the trial court's findings, Respondents are entitled to an award of their reasonable fees and costs in this lawsuit under the Dissenters Rights Statute. Accordingly, they are entitled to their fees on appeal. RAP 18.1.²⁷

V. CONCLUSION

For the foregoing reasons, Respondents request that the case be remanded to the trial court on their cross-appeal for the court to make an award for the diminution in value of their 10% interest in Snopac caused by the majority owner's misconduct. Respondents also request an award of their reasonable attorney fees and costs.

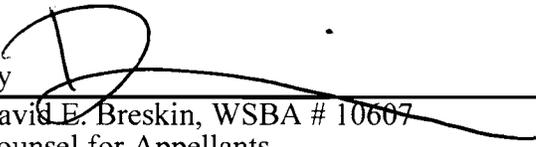
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²⁷ See, e.g., *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 402 (2010) (where prevailing party is entitled to award of reasonable fees below based on a statute, party should be entitled to fees on appeal.); *Bushnell v. Medico Ins. Co.*, 159 Wn. App. 874, 889 (2011) (same).

DATED this 17th day of October, 2011.

BRESKIN JOHNSON & TOWNSEND, PLLC

By 

David E. Breskin, WSBA # 10607
Counsel for Appellants

CERTIFICATE OF SERVICE

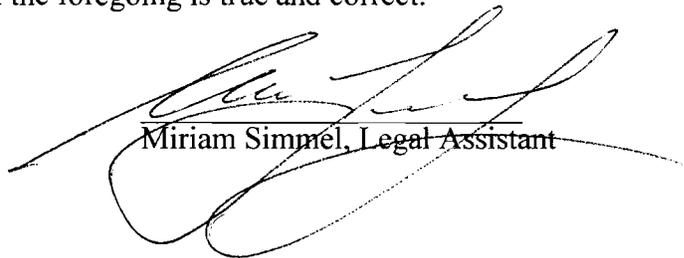
I, Miriam Simmel, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 17th day of October 2011, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

M. Bianchi / A. Gewalt/ S. Small
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- via Court ECF if opted in, and if not then via:
- via E-mail
- via Messenger
- via U.S. Mail

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.



Miriam Simmel, Legal Assistant

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