

67702-1

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No. 67702-1

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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ANTHONY VASQUEZ,

Appellant,

v.

AMERICAN FIRE AND CASUALTY COMPANY,  
an Ohio Corporation,

Respondent.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE MARY YU

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REPLY BRIEF OF APPELLANT

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## I. REPLY ARGUMENT

### A. Mr. Vasquez Is Entitled To UIM Coverage As A Named Insured In American Fire's Business Automotive Policy.

Respondent American Fire and Casualty Company recognizes that under RCW 48.22.030, "once it is determined that a person is insured under the liability section of the policy, that person is also entitled to be considered as an insured under the uninsured motorist endorsement of the policy." ***Rau v. Liberty Mutual Ins. Co.***, 21 Wn. App 326, 329, 585 P.2d 157 (1978) (Resp. Br. at 17). A person named as an insured under the liability section of an auto policy is entitled to UIM benefits "whatever her activity may have been when she was injured by an uninsured motorist." ***Kowal v. Grange Insurance Ass'n***, 110 Wn.2d 239, 245, 751 P.2d 306 (1988).

Mr. Vasquez was a named insured under American Fire's Business Automotive Policy (BAP) (1) as an "employee" of Benchmark Underground Construction, Inc., (2) as the owner of a covered vehicle under a specific endorsement, and (3) as president of Benchmark when sued for vicarious liability. This court should reject American Fire's reliance on policy limitations regarding the circumstances under which its BAP provides coverage for *liability*

claims and hold that those limitations are ineffective to defeat UIM coverage, which applies regardless of the specific activity in which the named insured is engaged.

**1. Mr. Vasquez Is A Named Insured Under American Fire's BAP As An "Employee."**

American Fire acknowledges Washington's broad public policy requiring the extension of UIM coverage to all named insureds, but argues that Washington courts do not "define employees of a corporation as Named Insureds for purposes of coverage under a business auto policy." (Resp. Br. at 3; *see also* Resp. Br at 17-18 (arguing that Washington courts do not extend "UIM coverage to employees of a corporate Named Insured under a business auto policy.)) American Fire alleges a so-called "majority rule around the country: that an injured employee of a corporate Named Insured is not entitled to UIM benefits under a business auto policy when the employee was not using or occupying a covered vehicle at the time of the accident." (Resp. Br. 15-16)

American Fire's analysis is flawed and its assertion of a "majority" rule is not supported by authority. Washington, like other courts, does not "define" who is or is not named as an insured

under a liability policy. Rather, our courts look to the *language of the policy* to determine who is named as an insured. “[T]he court cannot rule out of the contract language which the parties thereto have put into it, nor can the court revise the contract under the theory of construing it, nor can the court create a contract for the parties which they did not make themselves . . . .” ***Farmers Ins. Co. v. Miller***, 87 Wn.2d 70, 73, 549 P.2d 9 (1976).

Mr. Vasquez is entitled to UIM coverage because American Fire’s BAP expressly provides auto liability coverage for “any employee” of policyholder Benchmark. Mr. Vasquez, as an “employee” of Benchmark, is a named insured under American Fire’s *business* auto policy in the same way that a “family member” of a policyholder is a named insured in a *personal* auto liability policy.<sup>1</sup> ***Jain v. State Farm Mut. Auto. Ins. Co.***, 130 Wn.2d 688, 690, 926 P.2d 923 (1996) (“Under the terms of the policy, Sungeeta Jain, as a relative of her father, is a named insured.”).

American Fire acknowledges that the term “insured” is defined in the policy as “...any person or organization qualifying as an insured in the ‘Who is an Insured’ provision of the applicable

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<sup>1</sup> Mr. Vasquez also qualified as a named insured in additional ways under the BAP as discussed below.

coverage.” (Resp. Br. at 6) The applicable coverage in this case is the auto liability coverage because anyone insured thereunder is entitled by law to broad UIM coverage. American Fire further acknowledges that it amended the “Who is an Insured” section of its liability coverage to add as a named insured:

Any employee of yours **while using** a covered “auto” you don’t own, hire or borrow in **your** business or **your** personal affairs.

(CP 69; Resp. Br. at 8) It is undisputed that Mr. Vasquez was an employee of Benchmark. That should conclude the analysis. As an “employee” and therefore a named insured under the auto liability coverage, Mr. Vasquez is entitled by law to UIM coverage for the injuries he sustained as a pedestrian caused by the negligence of an underinsured motorist.

American Fire impermissibly attempts to narrow the broad UIM coverage available for “employees” as named insureds by citing to the restrictions contained in the liability portions of its BAP, arguing that since its auto liability policy covered Mr. Vasquez only when he was “using” a motor vehicle, he is not entitled UIM benefits as a pedestrian. American Fire compares the liability coverage restriction for employees (“while using a covered ‘auto’... in your

business or your personal affairs”) with the UIM definition of an insured (“anyone ‘occupying’ a covered auto...”) (Resp. Br. at 8-9, 20-22), and concludes that “UIM coverage is afforded only to those **occupying** a covered auto at the time of the loss. Mr. Vasquez was not.” (Resp. Br. at 10) (emphasis in original) Our Supreme Court rejected a similar argument in ***Federated American Ins. Co. v. Raynes***, 88 Wn.2d 439, 563 P.2d 815 (1997).

Raynes claimed UIM benefits under his auto policy for injuries caused by an underinsured motorist while he was driving his motorcycle. The motorcycle was not listed on the auto policy. The insurer argued that denying UIM benefits to Raynes did not violate RCW 48.22.030 because the insured would not have had *liability coverage* under the auto policy while operating his motorcycle and therefore the UIM portion of the policy was not narrower than the liability coverage. The Supreme Court rejected the argument:

[O]nce it is determined that a person is an insured under the policy, that person is entitled to uninsured motorist coverage. Respondent is the named insured in FAI’s policy. Exclusion (b) [to the policy’s liability’s coverage] does not narrow the definition of insured so as to exclude respondent from being an insured under the policy. Rather, the exclusion merely excludes [liability] coverage when the insured is injured in a

certain situation, *i.e.* occupying a car owned by him but not insured by FAI. This attempt to exclude [UIM] coverage for an insured is impermissible under RCW 48.22.030.

**Raynes**, 88 Wn.2d at 444.

Similarly, in **Kowal v Grange Ins. Ass'n**, 110 Wn.2d 239, 751 P.2d 306 (1988), Grange argued that since the policy's liability provisions only covered the policy-holder's daughter when she was using one of two "covered auto(s)," it could restrict UIM coverage for the daughter to situations where she was occupying a "covered auto." **Kowal**, 110 Wn.2d at 243-44. The daughter was injured while riding as a passenger in an uninsured vehicle. The Supreme Court rejected Grange's attempt to use *liability* coverage restrictions to narrow the definition of a UIM insured:

As an insured, she [the daughter, Kelly Kowal] is entitled to the protection of the underinsured motorist coverage of the policy which provides coverage for her whatever her activity may have been when she was injured by an underinsured motorist.

Kelly Kowal is an "insured" under the liability section and is therefore an insured under the underinsured motorist endorsement as well. **Once it is determined that a person is an insured under the policy, the person is entitled to underinsured motorist coverage and that coverage is not dependent on the insured occupying a vehicle named in the policy.**

**Kowal**, 110 Wn.2d at 245 (citation omitted, emphasis added).

All named insureds under auto liability coverage, therefore, have broad UIM coverage as a matter of law. If there were *no* UIM endorsement in the American Fire BAP, there would still be UIM coverage for Benchmark employees and supervisors such as Mr. Vasquez because they are insureds named in the policy and Washington's UIM statute mandates broad UIM coverage for them.<sup>2</sup>

While there are always coverage restrictions in auto *liability* policies, such restrictions cannot be used to narrow UIM coverage for named insureds. If they could, no insured would ever receive UIM protection for injuries suffered as a pedestrian. American Fire cites no case from any jurisdiction holding that employees named as insureds in an auto liability policy are anything other than "named insureds."

The two Louisiana cases cited by the parties, ***Hobbs v. Rhodes***, 667 So.2d 1112 (La. App. 1995), *writ denied*, 672 So.2d 691 (La. 1996) (App. Br. at 24-25) and ***Valentine v. Bonneville Ins. Co.***, 691 So.2d 665 (La. 1997) (Resp. Br. at 31-32), highlight

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<sup>2</sup> American Fire's UIM endorsement in this case actually *adds* insureds under its UIM coverage. American Fire's UIM endorsement adds as UIM insureds *anyone else* while occupying a covered auto. (CP 73)

the distinction between the “rocking chair coverage” granted to an employee who is listed as a named insured, and the denial of coverage to an employee whose employer is the sole named insured.

Hobbs, like Mr. Vasquez, was injured as a pedestrian. Hobbs claimed uninsured benefits under his employer’s business auto coverage with National Union Fire Ins. Co. The National Union BAP contained an addendum almost identical to American Fire’s Masterpak Endorsement. This addendum expanded the definition of an “insured” for liability purposes to include employees:

The following is added to the LIABILITY COVERAGE WHO IS AN INSURED provision: Any employee of your [sic] is an “insured” while using a covered “auto” you don’t own, hire or borrow in your business or personal affairs.

**Hobbs**, 667 So.2d at 1115-16. The Louisiana Court of Appeals held that this language specifically provided auto liability coverage for employees such as Hobbs and that Hobbs was entitled to full uninsured motorist benefits. The Louisiana court rejected National Union’s claim that there had to be a relationship between Hobbs and a covered auto by noting that “[UIM] coverage attaches to the person not the vehicle...” and that “[t]he uninsured motorists

protection covers the insured...while riding in uninsured vehicles, while riding in commercial vehicles, while pedestrians or while rocking on the front porch.” *Hobbs*, 667 So.2d at 1117.

By contrast, *Valentine v. Bonneville Ins. Co.*, 691 So.2d 665 (La. 1997), relied upon by American Fire, did *not* involve policy language expanding the definition of an insured to include “any employee” of the policy holder. In *Valentine*, a sheriff’s deputy was injured by an uninsured motorist while directing traffic. The named insured on the policy was the “Webster Parish Sheriff’s Department.” There were no other named insureds. The Court held that the injured deputy was not entitled to the broad UIM coverage owed to a named insured:

The Named Insured under the Commercial Union policy is the Webster Parish Sheriff’s Department, not the individual deputies. Under the policy, a named insured is provided UM coverage wherever he is, whatever he is doing, and regardless of whether he is on the job or merely tending to his private affairs.

*Valentine*, 691 So.2d at 669.

If the policy in *Valentine* had included an endorsement expanding the definition of an “insured” to include “any employee” of the Sheriff’s Department, Deputy Valentine would have been entitled to broad UIM coverage as a named insured. Here,

American Fire *did* expand the definition of “insured” to include “any employee” of Benchmark and charged a premium for Benchmark’s five employees. (CP 52) As a named insured under the policy in this and other ways, Mr. Vasquez is entitled to UIM coverage for injuries suffered as a pedestrian.

American Fire also points out the distinction under Washington law between “first party” insureds named in the policy and “other insureds,” to argue that employees like Mr. Vasquez are not named insureds as employees, but “other insureds” who have coverage only while occupying a covered vehicle. (Resp. Br. at 18, discussing ***Blackburn v. Safeco Ins. Co.***, 115 Wn.2d 82, 794 P.2d 1259 (1990)) ***Blackburn*** did not involve a business auto policy or provide direct liability coverage to the UIM claimant. ***Blackburn*** was a complete stranger to the policy under which he was claiming UIM benefits. The policy belonged to the auto dealership that owned the vehicle. ***Blackburn*** was injured as a passenger in the vehicle while it was being test driven by his friend. 115 Wn.2d at 84. Mr. Vasquez, on the other hand, was a named insured as a “employee” and in other ways under the policy, and his personally owned

vehicle was specifically insured for both liability and UIM coverage by (and only by) American Fire's BAP.

The other Washington cases cited by American Fire are similarly inapposite. In ***General Ins. Co. of America v. Icelandic Builders, Inc.***, 24 Wn. App. 656, 604 P.2d 966 (1979), the *only* named insured in the policy was the policyholder, a corporation. The Court of Appeals rejected a UIM claim by the son of the owner of the corporation who was injured while operating his personal vehicle. The son and his father were directors of the corporation. The policy defined an "insured", in pertinent part, as

(a) The named insured and any designated insured and, while residents of the same household, the spouse and relatives of either;

***Icelandic Builders***, 24 Wn. App. at 658. The Court of Appeals observed: "The named insured is the corporation and there is no other designated insured." 24 Wn. App. at 660. The son was denied UIM benefits because he was not an insured named in the policy. Here, like the employee in ***Hobbs*** and in contrast to the son in ***Icelandic***, Mr. Vasquez is a named insured as an employee (and in other ways discussed below) and is entitled to UIM benefits.

American Fire also relies on ***Continental Cas. Co. v. Darch***, 27 Wn. App. 726, 620 P.2d 1005 (1980), *rev. denied*, 95 Wn.2d 1013 (1981). Darch argued that he was a named insured who could “stack” and receive UIM benefits for all 35 trucks that his employer owned. The court instead held that he was entitled to a single UIM coverage under the “other” insurance clause of his employer’s policy. ***Darch*** is of little value here because Mr. Darch *did* receive UIM benefits under his employer’s policy.<sup>3</sup>

The court in ***Darch*** noted that there were two classes of insureds permitted by the UIM statute: 1) named insureds and 2) those protected only when using certain vehicles. Mr. Darch was not named as an insured in his company’s auto policy:

The policy lawfully defines Darch as an “insured” of the second class covered only when using certain vehicles.

***Darch***, 27 Wn. App. at 730. American Fire rearranges the policy language in ***Darch*** to argue, incorrectly, that employees were also named insureds in that case:

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<sup>3</sup> By the time the ***Darch*** opinion was written, the legislature had already amended RCW 48.22.030 to allow insurers to include “anti-stacking” language in their UIM endorsements.

In *Darch*, the definition of “insured” included “(2) an employee of the named insured or of such lessee or borrower...**while using** an owned automobile or a hired automobile with the permission of the named insured.” The Court determined that Darch, an employee, was not the Named Insured.

(Resp.Br. at 29) In fact, this quoted language is from the “other” insured portion of the policy. 27 Wn. App. at 730. In its entirety, the liability section of the policy in *Darch*, with the portions quoted by American Fire emphasized and in their correct order, defined “insured” as:

- (a) the named insured;
- (b) any partner or executive officer thereof, but with respect to a non-owned automobile only while such automobile is being used in the business of the named insured;
- (c) any other person **while using an owned automobile or a hired automobile with the permission of the named insured**, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, but with respect to bodily injury or property damage arising out of the loading or unloading thereof, such other person shall be an insured only if he is:
  - (1) a lessee or borrower of the automobile, or
  - (2) **an employee of the named insured or of such lessee or borrower;**

- (d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a),(b) or (c) above.

**Darch**, 27 Wn. App. at 728-29 (emphasis added).

Comparing the actual policy language in **Darch** with American Fire's version of it is revealing. The first portion of American Fire's version of the **Darch** policy (“(2) an employee of the named insured or of such lessee or borrower”) is found at the end of the “other” insured clause and restricts who will be an “other” insured in the limited context of “loading or unloading” a covered vehicle. The second portion of American Fire's version of the **Darch** policy (“... while using an owned automobile or a hired automobile with the permission of the named insured.”) comes from the *beginning* of the “other” insured clause and is not limited to “loading or unloading” a vehicle. By reversing the position of these two portions of the “other” insured clause in **Darch**, American Fire makes it appear as if Mr. Darch was a named insured like Mr. Vasquez. However, it is clear from reading the *Darch* policy language in context that employees were not named insureds. Here, in contrast to **Darch**, Mr. Vasquez is a named insured as an

employee (and in other ways discussed below) and is entitled to UIM benefits.

The other case cited by American Fire, **Smith v. Continental Cas. Co.**, 128 Wn.2d 73, 904 P.2d 749 (1995), did not involve policy language naming employees as insureds. The UIM claimant in **Smith** was injured while driving a vehicle that was not identified in the policy at issue and, unlike Mr. Vasquez, had separate UIM coverage under his own policy. **Smith**, 128 Wn.2d at 83 (“Respondent was protected for underinsured motorist coverage under his own policy . . . He is not entitled to that same protection as an ‘additional insured’ under the policy . . . issued to his employer”). Because Mr. Vasquez was entitled to liability coverage under the American Fire BAP as an “employee,” the trial court erred in holding that he was not entitled to UIM coverage as a “named insured” under the policy.

## **2. The “Hired Autos” Endorsement Expanded the Definition of “You.”**

While Mr. Vasquez is a named insured as an “employee,” American Fire also issued an endorsement that expanded the definition of “you” (the named insured). The policy, read as a whole, including the Hired Auto Endorsement and the Schedule of

Covered Autos, expands the definition of insureds beyond the corporation to include Mr. Vasquez personally as the named insured.

American Fire concedes that it included Mr. Vasquez's personally owned 2007 Ford F-350 pick-up ("F-350") in the Declarations as a "covered vehicle." American Fire charged a separate premium for "underinsured motorist bodily injury" coverage for Mr. Vasquez's F-350. (CP 51) Mr. Vasquez did not have any other auto insurance coverage, liability or UIM, from any other insurer. These material facts are undisputed.

American Fire's Hired Autos Endorsement modified the BAP so that any auto described in the Declarations was included as a "covered 'auto' **you** own:"

A. Any "auto" described in the Schedule will be considered a covered "auto" **you** own and not a covered "auto" you hire, borrow or lease under the coverage for which it is a covered auto.

(CP 77) (emphasis added) This language thus includes Mr. Vasquez within the definition of "you": the named insured.

American Fire argues that the endorsement "is irrelevant" because "[n]o rented or leased vehicles are identified in the

schedules” to the endorsement (Resp. Br. at 7), but fails to address the plain language of the Hired Autos Endorsement:

If no entry appears above [in the Schedule of the Endorsement], information required to complete this endorsement will be shown in the Declarations as applicable to this endorsement.

(CP 77)

Because Mr. Vasquez’s F-350 is listed in the Declarations, it is included in the “Schedule” of the Hired Autos Endorsement and “...will be considered a covered ‘auto’ **you** own...” (CP 77) (emphasis added). American Fire’s claim that the Hired Autos Endorsement is “irrelevant” is wrong. That endorsement clearly expands the definition of “you” to include Mr. Vasquez, as a named insured.

**3. American Fire Treated Mr. Vasquez As “You” For Purposes Of Coverage Under the BAP.**

American Fire concedes that it paid Mr. Vasquez’s medical expenses under its “Auto Medical Payments Coverage” Endorsement to the BAP (CP 79-80), but fails to explain why the term “you” in that endorsement should be interpreted any differently than under the liability definition of the BAP. The medical payments endorsement identified “an insured” to include:

**B. WHO IS AN INSURED.**

1. **You** while “occupying” or, while a pedestrian, when struck by any “auto”.

(CP 79) (emphasis added)

American Fire makes no argument that “You” in the medical endorsement is defined more broadly than “You” under the liability portion of its BAP, arguing only that UIM and medical payment (PIP) are “separate and distinct types of insurance coverage,” and that “(a)n injured person may receive medical payments coverage but still not be entitled to UIM coverage. . . .” (Resp. Br. at 30, n.5) The term “you” has the same definition *throughout* American Fire’s BAP, including its auto liability coverage and its medical payments coverage. American Fire’s conduct is forceful evidence that Mr. Vasquez is a “named insured” under its policy. See **Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.**, 120 Wn.2d 573, 580, 844 P.2d 428 (1993) (courts must consider contractual intent by reference to “subsequent acts and conduct of the parties to the contract”).

**4. Mr. Vasquez Was a Named Insured For Vicarious Liability And Therefore Entitled To UIM Benefits.**

American Fire also improperly relies on limitations in its *liability* coverage to deny Mr. Vasquez UIM benefits under the

“vicarious liability” portion of its BAP, which provides liability coverage to:

- c. Anyone liable for the conduct of an “insured” described above but only to the extent of that liability.

(CP 56) As President and construction supervisor of Benchmark, Mr. Vasquez was insured if vicariously “liable for the conduct of” other employees/insureds. He is therefore a named insured entitled to UIM benefits under this separate and independent portion of the American Fire BAP.<sup>4</sup>

American Fire’s argument, that there can be no UIM benefits “because there is no claim based on vicarious liability,” (Resp. Br. at 10), is a *non sequiter*. This is a claim by Mr. Vasquez for UIM benefits under American Fire’s BAP. As a named insured under its auto liability coverage for vicarious liability, Mr. Vasquez is entitled to UIM protection.

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<sup>4</sup> American Fire attempts to distinguish *DeSaga v. West Bend Mutual Ins. Co.*, 391 Ill. App. 3d 1062, 910 N.E.2d 159, 331 Ill. Dec. 86 (2009), *app. denied*, 236 Ill.2d 552 (2010) on the ground that the court held that the decedent employee was “occupying” a covered vehicle when he was struck and killed while retrieving cargo that had fallen off the employer’s truck, (Resp. Br. at 33 n. 8), but “the broad definition of “occupying” was only the second, alternate basis for the court’s holding. 910 N.E.2d at 167. The court first rejected the insurer’s argument that UIM coverage could be narrower than coverage under the liability portion of the policy, which not only provided coverage for “anyone using a covered vehicle,” but as in this case also covered “**anyone liable for the conduct of an ‘insured.’**” 910 N.E.2d at 162. (emphasis added)

**B. Only Mr. Vasquez, Not American Fire, Is Entitled To Attorney Fees As A Prevailing Party In This Coverage Dispute.**

The court should reverse and direct an award of attorney fees to Mr. Vasquez because he was forced to sue American Fire to obtain the UIM coverage under its policy. In a dispute over insurance coverage, only the insured may recover attorney fees as a prevailing party. *McGeevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 34-39, 904 P.2d 731 (1995) (reaffirming that *Olympic Steamship* “authorizes an award of attorney fees exclusively to insureds, not insurers.”). See *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn.2d 37, 54, 811 P.2d 673 (1991). American Fire has identified no statute, no provision of the parties’ contract or any recognized ground in equity that could support its claim for attorney fees on appeal, even if it prevails on appeal. This court should reject American Fire’s fee request and award Mr. Vasquez his attorney fees in the trial court and on appeal.

**II. CONCLUSION**

If American Fire did not want to provide broad UIM coverage to Mr. Vasquez, it should not have:

- Named Benchmark “employee(s)” like Mr. Vasquez as insureds, charging a premium for such coverage.

- Expanded the definition of “you” (the named insured) to include Mr. Vasquez and charged a separate UIM premium specifically for Mr. Vasquez’s personally owned F-350. (Under the Hired Autos Endorsement any vehicle named in the Declarations was a vehicle “you” own. Mr. Vasquez owned the F-350 listed in the Declarations, thereby qualifying as “you”), and
- Named as insureds persons like Mr. Vasquez who were exposed to “vicarious liability” claims for the conduct of other insureds/employees.

This court should reverse, direct summary judgment in favor of Mr. Vasquez, and award him attorney fees in securing UIM coverage.

Dated this 9<sup>th</sup> day of May, 2012.

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**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 9, 2012, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 9<sup>th</sup> day of May, 2012.

  
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Victoria K. Isaksen