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COURT OF APPEALS  
DIVISION II

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No. 40015-4-II

STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MARJORIE M. ARNOLD, Individually and as  
Personal Representative of the Estate of  
REUBEN J. ARNOLD; and DANIEL J. ARNOLD, Individually,

Appellants,

v.

LOCKHEED SHIPBUILDING CORPORATION,

Respondent,

and

SABERHAGEN HOLDINGS, INC., as successor to TACOMA  
ASBESTOS COMPANY and THE BROWER COMPANY;  
AMERICAN OPTICAL CORPORATION; THE BOEING COMPANY;  
CERTAINTEED CORPORATION;  
C.H. MURPHY/CLARK-ULLMAN, INC.;  
D&G MECHANICAL INSULATION, INC.;  
HANSON PERMANENTE CEMENT, INC., f/k/a KAISER CEMENT  
CORPORATION; KAISER GYPSUM COMPANY, INC.;  
INTERNATIONAL PAPER COMPANY, individually and as successor to  
ST. REGIS PAPER COMPANY and CHAMPION INTERNATIONAL  
CORP.; KIPPER & SONS FABRICATORS, INC.;  
LOCKHEED SHIPBUILDING COMPANY; LONE STAR  
INDUSTRIES, INC., individually and as successor-in-interest to  
PIONEER SAND & GRAVEL COMPANY; MARIANA PROPERTIES,  
INC., as successor-in-interest to Hooker Chemical Company; J. M.  
MARTINAC SHIPBUILDING CORPORATION; METALCLAD  
INSULATION CORPORATION; MILLERCOORS, LLC, as successor-  
in-interest to Olympia Brewing Company; MINE SAFETY  
APPLIANCES COMPANY; NORTH SAFETY PRODUCTS USA;  
OCCIDENTAL CHEMICAL CORPORATION, as successor-in-interest to

Hooker Chemical Company; P-G INDUSTRIES, INC., as successor in interest to PRYOR GIGGEY CO., INC.; PIONEER AMERICAS, LLC, as successor-in-interest to Hooker Chemical Company; RAYONIER, INC.; RILEY POWER, INC., a/k/a RILEY STOKER CORP., f/k/a BABCOCK BORSIG POWER, INC., f/k/a D.B. RILEY, INC.; SEQUOIA VENTURES, INC., formerly known as and as successor in interest to BECHTEL CORPORATION, BECHTEL, INC. BECHTEL MCCONE COMPANY, BECHTEL GROUP, INC.; SIMPSON TIMBER COMPANY; TODD PACIFIC SHIPYARDS CORPORATION, Individually and as successor-in-interest to TODD SHIPYARDS CORPORATION; TODD SHIPYARDS CORPORATION, Individually and as successor-in-interest to TODD PACIFIC SHIPYARDS CORPORATION; TRANE U.S., INC., f/k/a AMERICAN STANDARD, INC., Individually and as parent and alter ego of AMERICAN BOILER CORP., WESTINGHOUSE AIR BRAKE COMPANY and KEWANEE BOILER COMPANY, a division of AMERICAN RADIATOR & STANDARD SANITARY COMPANY; TRICO CONTRACTING, INC.; UNION CARBIDE CORPORATION; WEYERHAEUSER COMPANY, ZURN INDUSTRIES LLC; GOULDS PUMPS (IPG), INC.; FLETCHER CONSTRUCTION COMPANY NORTH AMERICA; and PACIFICORP, dba PACIFIC POWER & LIGHT COMPANY,

Defendants.

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BRIEF OF APPELLANTS ARNOLD

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## A. INTRODUCTION

This case involves Reuben and Daniel Arnold, victims of asbestos exposure. Respondent Lockheed was the premises owner and general contractor on Reuben Arnold's worksite in the 1960's when he was exposed to massive amounts of asbestos dust, which he also brought home on his clothing to his son Daniel.

One of the Arnolds' theories of liability regarding Lockheed was that the federal Walsh-Healey Act – which specifically mandated that measures be taken to prevent asbestos exposure – was a potential source of a common law duty of care. They sought discovery from Lockheed regarding federal contracts in the 1960's that might have referenced the Act. Lockheed did not disclose them prior to judgment.

Lockheed successfully obtained summary judgment in the negligence action by convincing the trial court that as a mere premises owner and general contractor, rather than as Arnold's employer, it was not governed by Walsh-Healey. Therefore, Lockheed argued, using that statute as a source of the common law duty of care was inappropriate.

Six months after summary judgment, in another asbestos liability action, Lockheed produced multiple contracts from the 1960's that included clauses obligating Lockheed to comply with the Walsh-Healey Act. Immediately upon obtaining these documents, the Arnolds moved for

relief from the judgment based on CR 60(b)(3)'s grounds of "newly discovered evidence. Their motion was denied.

This new evidence, which was not, and could not have been, obtained before trial, is material support for the Arnolds' claim that Lockheed owed them a common law duty of care to prevent them from being harmed by asbestos.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

The trial court abused its discretion in entering its order denying the Arnold's motion for relief under CR 60(b)(3) on November 13, 2009.

(2) Issue Pertaining to Assignments of Error

Is a CR 60(b)(3) motion for relief from judgment appropriate if evidence is discovered long after summary judgment that was in the sole control of the opposing party, was diligently sought and never produced, and provided critical evidence in support of the nonmoving party's position on summary judgment that the trial court characterized as a "close call?" (Assignment of Error No. 1)

C. STATEMENT OF THE CASE<sup>1</sup>

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<sup>1</sup> The Arnolds have also appealed the order granting summary judgment to Lockheed, entered February 7, 2009. That appeal is currently before this Court under Cause No. 39055-8. The Arnolds moved to consolidate the two cases; the motion was denied. In order to save this Court and the trial court the time and resources involved in re-preparing the entire 3000 page record, the Arnolds simply cite to the clerk's papers

The Arnolds suspected that, as a major federal government contractor, Lockheed probably had documents in its possession indicating that it was required to meet the safety standards of the Walsh-Healey Public Contracts Act.

Walsh-Healey mandated that federal contracts must be performed in a way that protected workers from many workplace hazards, including and specifically, the hazards of asbestos. Walsh-Healey's regulations were promulgated in 1952 in response to "hard, cold statistics on industrial accidents in the United States." CP1 1206. Because of the "human suffering, sorrow, and misery which follow deaths and injuries into the homes of American workers," the Act established workplace safety rules and requirements that applied to companies performing government contracts in excess of \$10,000. *Id.* The regulations required control measures including personal protective equipment, air cleaning equipment, dressing rooms and other sanitation facilities. CP1 1232-33.

41 C.F.R. § 50-204.50 states:

Gases, vapors, dusts, fumes and mists – All dust, mists, fumes, gases or other atmospheric impurities generated in connection with an operation or process, emitted into or disseminated throughout areas where persons are employed . . . should be controlled by the methods set forth under

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already on file with this Court in the associated case. Clerk's papers references from Cause No. 39055-8 are designated "CP1." References to the clerk's papers associated with Cause Number 40015-4 (this appeal) are referred to as "CP2."

“Control Measures” below. Where there is any doubt concerning the presence of a harmful condition, the contractor should have determinations made of the kind and amount of atmospheric impurities from samples taken at a point or points in the breathing zone of workers during normal operations.

*Control Measures* – One or more of the following methods should be used to control harmful dusts, mists, fumes, gases or other atmospheric impurities:

- (1) Enclosure of such process or operation.
- (2) Isolation or rearrangement of such process or operation.
- (3) Substitution of non-toxic materials.
- (4) Wet methods.
- (5) Dilution by general ventilation.
- (6) Local exhaust ventilation.

During discovery, the Arnolds specifically requested federal contracts from Lockheed that were in effect in the 1960’s. CP2 \_\_\_\_.<sup>2</sup> Rather than responding to specific discovery requests by producing specific documents, Lockheed produced well over one million documents in 773 boxes at a law office in Los Angeles. *Id.* Counsel for the Arnolds sent seven staff members, including four lawyers and three paralegals, to Los Angeles on three separate occasions encompassing a week of document review in late 2008. The Arnolds’ counsel diligently and thoroughly reviewed the over one million documents produced by Lockheed, and the contracts were not among them. CP2 \_\_\_\_.

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<sup>2</sup> Counsel for the Arnolds mistakenly believed that the declarations associated with the CR 60 motion had been designated. That oversight has been corrected, and when the trial court issues its index to clerk’s papers, the Arnolds will file a corrected brief with these citations included.

After the 773 boxes were searched and the contracts were not among them, a discovery conference was held. During that conference, counsel for the Arnolds identified that among documents Lockheed had produced, they could not find “contracts between Lockheed and the federal government for shipbuilding during the 1960’s, the period relevant to Rueben Arnold’s exposure.” CP2 \_\_. The Arnolds’ counsel explained that the contracts were relevant to a “key area of inquiry.” *Id.* Lockheed’s counsel claimed that they too wanted to see such documents, and were also still looking for them. *Id.* They were never produced.

Lockheed filed a motion for summary judgment in early 2009, claiming that it owed no duty to Reuben or Daniel as they were employees of independent contractors. CP1 161-82.<sup>3</sup> The Arnolds responded that certain workplace safety statutes provided sources of common law duties of care to protect workers from the dangers of asbestos. CP1 391. One such source cited was the federal Walsh-Healey Act. *Id.* Lockheed replied that it was not subject to Walsh-Healey because it applied only to “employers,” and Lockheed was not Reuben Arnold’s employer. VRP 2/9/09 at 30.

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<sup>3</sup> Lockheed filed a motion to strike portions of the declaration of Brian Ladenburg submitted in opposition to its motion for summary judgment, CP1 1747-63, but the trial court denied that motion. CP1 2772.

The trial court granted the motion. CP1 2771-72. The trial court's oral ruling focused only on the retained control issue and did not address either the statutory-based duty of Lockheed or its responsibility under premises liability principles:

I am going to grant summary judgment in regards to Daniel and the primary exposure. I just don't think there's any evidence that he was exposed in 1979. That has to be speculation.

I think it's a really close question in regards to what Lockheed's responsibility obligation was to Reuben Arnold. And I did look at the Kamla and the Kinney cases very closely, and I think that the evidence that is before the Court is that Lockheed didn't have control over the means and manner of the work. Certainly, they had the obligation to coordinate with the subcontractors, and make sure that the timing was right and those kinds of things, but in everything that I looked at, I did not see that they had control of the means and manner of how the work was done, and how the asbestos-related insulation was being installed, and how that worked.

So it is, I think, a pretty close call, but I am going to grant summary judgment in regards to that as well. I don't think Lockheed was the general contractor, and I don't think the statutory duty applies, either. So I'm granting summary judgment.

RP 31-32.

The Arnolds moved for reconsideration, providing the trial court additional critical evidence of Reuben's exposure to asbestos in a sprayed form. CP1 2809-3435. Notwithstanding the evidence adduced by the Arnolds, without any analysis, the trial court granted Lockheed's motion

to strike the testimony and denied the Arnolds' motion for reconsideration. CP1 3555.

Six months after the trial court granted summary judgment in this case, Lockheed was involved in discovery in another case. It produced for the first time shipbuilding contracts from the 1960s stating that as a federal contractor, Lockheed was in fact subject to Walsh-Healey. CP2 \_\_\_.

Then, in August 2009, Lockheed's CR 30(b)(6) witness affirmed that the Walsh-Healey Act applied to Lockheed pursuant to federal government contracts:

Q. Topic 11 is Lockheed's work safety and industrial hygiene duties under the Walsh-Healey Act and Lockheed's record in terms of compliance with that statute and its related regulations dealing with the management of hazardous dusts, including asbestos....

...

...Did you – in reviewing the documents, did you run across any reference to the Walsh-Healey Public Contracts Act?

A. I did. The Walsh-Healey Act is mentioned either in the contract or in the general specifications of the contract – contracts for a number of these vessels.

Having finally obtained the evidence controlled by Lockheed and unavailable before summary judgment, the Arnolds moved for relief from summary judgment under CR 60(b)(3). CP2 1. The trial court denied the motion. This timely appeal followed.

D. SUMMARY OF ARGUMENT

Lockheed secured summary judgment on the duty issue by convincing the trial court that it was not subject to Walsh-Healey because it was not an employer. The newly discovered contracts prove otherwise, and will probably change the outcome of summary judgment. The contracts were not disclosed during discovery despite diligent efforts by counsel for the Arnolds. The contracts are material. The trial court abused its discretion.

E. ARGUMENT

(1) Standard of Review on CR 60(b)(3) Motions

This Court reviews a trial court's decision to reopen on the grounds of newly discovered evidence under CR 60(b)(3) for abuse of discretion. *Lockett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999), *review denied*, 140 Wn.2d 1026 (2000). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.* at 309-10. CR 60(b)(3) authorizes a court to vacate a judgment on the basis of newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b). The test for newly discovered evidence under CR 60(b)(3) is the same as the test under CR 59, and CR 60(b)(3) specifically refers to CR 59. 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 60* at 553 (5th ed. 2006).

Evidence is “newly discovered” only if it (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). A motion based on newly discovered evidence must be denied if any one of the five factors is not satisfied. *Holaday v. Merceri*, 49 Wn. App. 321, 330, 742 P.2d 127, *review denied*, 108 Wn.2d 1035 (1987).

(2) The Evidence Will Probably Change the Outcome of Summary Judgment Because Lockheed Denied Walsh-Healey Provided a Statutory Source of Common Law Duty

The first element of the newly discovered evidence test under CR 60(b)(3) is whether the proffered evidence would probably change the outcome of the proceeding. *Go2Net*, 115 Wn. App. at 88.

Since 1936, under the Walsh-Healey Act, 41 U.S.C. § 35, federal contractors have owed a duty to their employees to provide a safe and sanitary workplace. That statute provides for federal contractors:

(d) That no part of such contract will be performed nor will any of the material, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or

part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

The purpose of the Act is to ensure that such contractors who receive the benefit of federal business do not offend fair social standards of employment. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128, 60 S. Ct. 869, 84 L.Ed. 1108 (1940).

The United States Department of Labor promulgated regulations to protect workers and third parties from exposure to asbestos dust. The Walsh-Healey regulations call for the use of special protective clothing, shower facilities, and the establishment of dressing rooms for workers exposed to hazardous materials, in order to protect third parties against take-home or carry-out exposures. 41 C.F.R. § 50-204.50. These regulations are all designed to protect the class of persons foreseeably endangered when employees wear work clothes home after working in an asbestos-contaminated work environment: The workers and their families. The harm to be protected against is the exact harm sustained here -- exposure to asbestos on the job and from take-home exposure. The hazard of work clothing serving as a conduit for carcinogenic material was one of the particular hazards the United States Department of Labor contemplated when it enacted these regulations:

Workers who handle or are exposed to harmful materials in such a manner that contact of work clothes with street

clothes will communicate to the latter the harmful substances accumulated during working hours should be provided with facilities which will prevent this contact. . .

CP1 1233.

The new evidence suggesting that Lockheed was subject to Walsh-Healey in federal government contracts would probably have changed the outcome of summary judgment. Lockheed argued during summary judgment that as a contractor rather than an employer, it was not an entity to which Walsh-Healey might apply. VRP 2/9/09 at 30. Had these contracts been in evidence at the time of summary judgment, they would have stood to contradict Lockheed's claims. The contracts demonstrate that Lockheed was subject to the requirements of the Walsh-Healey Act; it had a duty to implement the Walsh-Healey regulations pertaining to the prevention of workplace and take-home asbestos exposure.

Regardless of whether the contracts governing Lockheed under which Arnold worked required statutory compliance with Walsh-Healey, its regulations can establish the duty of care owed by Lockheed to the Arnolds in a negligence action. In *Zimko v. American Cyanamid*, 905 So.2d 465 (La. App. 2005), *writ denied*, 925 So.2d 538 (La. 2006), for example, the court held that Walsh-Healey's asbestos regulations established the duty owed by an employer for the exposure of an employee's household to asbestos. Noting that the employer's general

duty was to act reasonably in view of the foreseeable risks of danger to household members, the regulations confirmed foreseeability in the duty analysis. *Id.* at 482. *See also, Goede v. Aerojet General Corp.*, 143 S.W.3d 14 (Mo. App. 2004) (no prejudice to missile producer in evidence and argument on Walsh-Healey in mesothelioma case).

Washington law is no stranger to the concept that violation of federal workplace safety regulations can establish a duty of care. For example, federal regulations for stevedoring employees established the duty owed by a ship owner to stevedores to provide a seaworthy (or safe) vessel for their work. *Vogel v. Alaska S.S. Co.*, 69 Wn.2d 497, 501-02, 419 P.2d 141 (1969); *Cresap v. Pacific Inland Navigation Co.*, 78 Wn.2d 563, 566-67, 478 P.2d 223 (1970).

This question of whether an applicable statutory duty informed the common law duty of care was critical at summary judgment, in which the trial court ruled that Lockheed had no duty to the Arnolds. VRP 2/9/09 at 32. The trial court was persuaded that there was no genuine issue of material fact regarding whether Lockheed was subject to any statutory provisions that might have established a common law duty of care. Had the evidence in question been part of the record at the time of summary judgment, the trial court would probably have ruled differently.

(3) The Contracts Were Discovered Since Summary Judgment Was Entered and Could Not Have Been Discovered Before Trial

The next two elements of the newly discovered evidence test are closely linked: whether the evidence was discovered after the proceeding in question, and whether it could have been discovered before trial. *Go2Net*, 115 Wn. App. at 88. A mere allegation of diligence is not sufficient; the moving party must state facts that explain why the evidence was not available for trial. *Peoples v. City of Puyallup*, 142 Wash. 247, 248, 252 P. 685 (1927); *Vance v. Offices of Thurston County Comm'rs*, 117 Wn. App. 660, 71 P.3d 680 (2003), *review denied*, 151 Wn.2d 1013 (2004).

These contracts were not obtained before summary judgment. Lockheed conceded this fact by failing to argue that the documents were produced. CP2 15-25. In fact, Lockheed argued below that although the Arnolds requested federal government contracts with Lockheed during the 1960's, they "never requested the government contracts directly implicated by the *Fischer* litigation." CP2 20. Despite having millions of pages of documents to review, counsel for the Arnolds assembled a team, traveled to Los Angeles, and thoroughly searched them all. The contracts were not among those documents, nor were they produced at any other time prior to summary judgment. CP2 \_\_\_\_\_.

The contracts also could not have been obtained by the Arnolds prior to summary judgment. They were in the sole control of Lockheed at all times. The only way the Arnolds could have obtained them is through the discovery process. The Arnolds undertook every means possible within that process to obtain the contracts from Lockheed. CP2 \_\_\_.

Counsel for the Arnolds was diligent regarding requesting the contracts, about specifying to Lockheed that they were critical, and about following up on that request in a discovery conference. Lockheed did not produce them. Short of raiding Lockheed's offices, the Arnolds could not have discovered these documents before summary judgment.

(4) The Evidence Is Material and Is Not Cumulative or Impeaching

The final elements of the test for newly discovered evidence are whether the evidence is material and not merely cumulative or impeaching. *Go2Net*, 115 Wn. App. at 88.

Impeaching evidence is evidence whose sole purpose is to discredit a witness, and not to prove any material fact. *State v. Brent*, 28 Wn.2d 501, 504, 183 P.2d 495 (1947). Although new evidence may in fact be impeaching, it is not "merely impeaching" under the rules if it also serves as evidence of substantive point of law or fact. In *State v. Savaria*, 82 Wn. App. 832, 919 P.2d 1263 (1996), *overruled in part on other grounds by*

*State v. C.G.*, 150 Wn.2d 604, 611, 80 P.3d 594 (2003), Division One of this Court ordered a new trial based on post-trial discovery of telephone records that cast doubt on the story of the alleged victim of telephone harassment. *Id.* at 838. This Court considered the “impeachment” evidence so “devastating” to the credibility of the victim that a new trial was mandated. However, it also noted that the evidence about the phone call went directly to a critical element of the crime of harassment. *Id.*

Here, the evidence is not merely impeaching. The contracts are offered to directly prove a material fact: that Lockheed was not exempt from the requirements of the Walsh-Healey Act simply because it was a contractor and not an employer. Although the evidence does indirectly support Lockheed’s CR 30(b)(6) witness, it also proves a substantive point of law. Lockheed’s claim at summary judgment that Walsh-Healey could not appropriately be a source of the common law duty of care as a matter of law was incorrect.

The question of cumulative evidence was addressed in *Roe v. Snyder*, 100 Wash. 311, 170 P. 1027 (1918), where an admission of a party opponent was discovered after trial. The issue in *Snyder* was whether a client agreed to a flat or a contingent fee. *Snyder*, 100 Wash. at 313. After trial and a verdict in favor of the client, several individuals filed affidavits swearing that the client confided that the fee was

contingent. *Id.* The *Snyder* court held that the new evidence bore directly on the central issue regarding the fee: at the trial there was no evidence of any extra judicial admission by either party as to what the contract was. *Snyder*, 100 Wash. at 315. This was substantive evidence directed to the same point as that in issue at the trial, but it was not evidence of the same kind as that adduced at the trial. *Id.*

Here, as in *Snyder*, the contracts contained evidence directed a summary judgment issue: whether or not Walsh-Healey was a proper source of a common law duty of care for Lockheed. Although the Arnolds argued at summary judgment that Walsh-Healey applied, and that circumstantial evidence suggested it should apply, there was no direct evidence of the kind contained in these contracts.

The contracts are not evidence of the “same kind as that adduced at trial,” and therefore, are neither cumulative. Nor are the contracts merely impeaching.

#### F. CONCLUSION

Despite having made every diligent effort to discover these contracts before summary judgment, the Arnolds were unable to obtain them from Lockheed. Finally, six months after the fact, Lockheed disclosed them in another matter. Had the trial court viewed this evidence

prior to summary judgment, Lockheed's motion would probably have been denied and this case set for trial.

Having met all five elements of the test for newly discovered evidence under CR 60(b)(3), the Arnolds have demonstrated that relief from the judgment was appropriate. The trial court's order should be reversed, and this case remanded for further proceedings.

DATED this 12<sup>th</sup> day of March, 2010.

Respectfully submitted,



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DECLARATION OF SERVICE

STATE OF WASHINGTON

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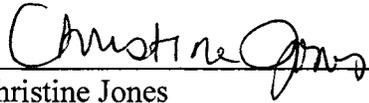
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 15, 2010, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick