

ORIGINAL

Case No. 41261-6

COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON

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PAUL M. WOLFF CO., a foreign corporation,

Appellant,

vs.

KEITH MILLER, an individual, and FINAL CONCRETE, LLC,  
Washington limited liability company,

Respondents.

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STATE OF WASHINGTON  
BY DEPUTY

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**BRIEF OF RESPONDENTS**

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## A. INTRODUCTION

Below, the Appellant-Plaintiff pled multiple claims against the Defendants-Respondents. *See* CP 1-5 (“Complaint for Damages”). All claims were dismissed via summary judgment. *See* CP 83 (“Order Granting Defendants’ Motion for Summary Judgment”, p.2, ¶1, lns.16-17).

On this appeal, the Appellant has “confined” its case to only one of the claims, specifically the claim that Respondents somehow breached a common law fiduciary duty. *See Brief of Petitioner*, p.1 (1<sup>st</sup> ¶). Appellant has effectively waived all other claims. *See* RAP 12.1(a) (stating the general rule that “the appellate court will decide a case only on the basis of issues set forth by the parties in their briefs); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692-693, 15 P.3d 115 (2000) (“Only issues raised in the assignments of error . . . and *argued* to the appellate court are considered on appeal.”).

Further curtailing its appeal, Appellant’s assignments of error focus exclusively on choice of law issues. By contrast, Appellant offers no argument whatsoever as to the sufficiency/non-sufficiency of its evidence. *See Brief of Petitioner*, p.2 (“Assignments of Error”). As such, Appellant has effectively waived that issue. Appellant cannot resurrect the issue via its “Reply”. *See e.g., State v. Pleasant*, 38 Wn. App. 78, 81,

684 P.2d 761 (1984) (Division Two) (“An issue cannot be raised for the first time in a reply brief.”).

Below, the Respondents directly challenged the sufficiency of the Appellant’s evidence, in addition to also challenging whether Washington or California law was applicable. *See* CP 66 (“The defense challenges the sufficiency of the plaintiff’s evidence on the claim that the defendants supposedly breached a ‘fiduciary duty’ owed to the plaintiff.”); *see also* CP 48. It is well established that an appellate court may affirm a lower decision on any basis that the record adequately supports. *See e.g.*, *Mudarri v. State*, 147 Wn. App. 590, 600, 196 P.3d 153 (2009) (Division Two), *review denied*, 166 Wn.2d 1003 (2009). It is immaterial whether the lower decision was based on Respondents’ challenge to the sufficiency of the evidence, or, conversely, whether it was based on Respondents’ arguments about the applicable law. Both arguments were made below, so each is properly before this court. *See e.g.*, *Tropiano v. City of Tacoma*, 105 Wn.2d 873, 876-877, 718 P.2d 801 (1986).<sup>1</sup>

Thus, even if Appellant’s arguments about the choice of law are correct (which Respondents do not concede), the lower decision may still

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<sup>1</sup> Notably, the Appellant declined to submit any affidavits or declarations below. *See* CP 71 (stating, “no additional affidavits and evidence are needed”); *see also* RP 4. The Appellant cannot offer new or additional evidence in an effort to substantiate its appeal. *See Webstad v. Stortini*, 83 Wn. App. 857, 862, n.3, 924 P.2d 940 (1996) (Division Two).

be affirmed on the basis that Appellant lacks sufficient evidence to substantiate its claim.

Appellant also does not challenge the dismissal as it pertains to Final Concrete, LLC. Rather, Appellant only challenges the dismissal as it pertains to Mr. Miller personally. *See Brief of Petitioner*, pp.1-2. Again, this constitutes a waiver.<sup>2</sup>

B. STATEMENT OF THE CASE (and response to Appellant's "Statement of the Case")

B.1. The Parties

Paul M. Wolff Company ("PMWC") is currently a Utah corporation. *See* CP 1. However, when the underlying "Employee Agreement" was signed in 2004, PMWC was a California corporation. *See* CP 6 (¶A.1. stating, "'Company' means Paul M. Wolff Co. a corporation of the state of California"); *see also* RP 2. The Appellant fails to acknowledge this fact. *See Brief of Petitioner*, pp.3-4. Instead, Appellant argues that California supposedly "has no substantial relationship to the parties". *See id.*, p.11.

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<sup>2</sup> In its pagination, the *Brief of Petitioner* served upon the Respondents is slightly peculiar. Pages 1, 2, 4, 6, 7, 14, and perhaps others, have significant blank space. The words do not fill the page. By pointing this out, Respondents simply want to confirm that the version served is, in fact, the full and accurate version.

Keith Miller is currently a Washington resident, and was likewise a Washington resident when he signed the Employee Agreement. *See* CP 1, 13; CP 12. He signed the contract in Washington. *See* CP 12. However, PMWC signed the contract in California. *Id.*; *see also* RP 18. The Appellant also fails to acknowledge this fact. *See Brief of Petitioner*, pp.3-4. Instead, Appellant argues that “none of the contemplated activities of the parties to the agreement were expected to take place in California.” *See id.*, p.11. The exact date that PMWC transitioned from being a California corporation to a Utah corporation is not specifically established on the existing factual record. However, there is no evidence to suggest that the switch occurred concurrently with, or immediately after, its execution of the agreement. It must have operated in California for at least some time.

During his employment by PMWC, Mr. Miller worked in a multistate territory. At a minimum, his territory included Washington, Oregon, and Alaska. *See* RP 17-18; *see also* CP 45. The Appellant fails to acknowledge this fact, as well. *See Brief of Petitioner*, pp.3-4. Instead, Appellant suggests that Mr. Miller only worked in Washington. *See id.*, p.11. That suggestion is directly refuted by Mr. Miller’s declaration testimony, and the Appellant cannot point to anything in the record to dispute Mr. Miller on the issue -- he worked in Washington and other

states. *See* CP 45 (stating that he successfully brokered the “UPS Expansion Project in Portland, Oregon” on behalf of PMWC.).

## B.2. The Contract

The Employee Agreement did not establish any guaranteed or minimum term of employment -- Mr. Miller remained an at-will employee. *See* CP 6-12. Nor did it establish any minimum notice requirement prior to termination -- either side could terminate the employment relation immediately. *See id.*

Covenants of non-disclosure and non-competition occupy the majority of the agreement. *Id.* As written, the non-competition covenant would apply for two years immediately following termination of the employment relation. *See* CP 8-9 (“Employee Agreement”, ¶¶E-F). However, the Appellant has waived all claims related to these covenants. *See Brief of Petitioner*, p.1. In fact, the Appellant previously acknowledged that it was abandoning these claims because “California law generally prohibits non-competition on [*sic*] agreements and will not enforce them.” *See* CP 50.

The agreement also contained a choice of law clause, which is directly implicated by this appeal. *See Brief of Petitioner*, pp.3, 10-15. In relevant part, it provides as follows:

Company and I acknowledge and agree that the law of California shall govern the respective rights and obligations of the parties in this employee agreement.

CP 11.

As written, the choice of law clause specifies that all “rights and obligations” are governed by California law. *Id.* However, the Appellant argues that the clause supposedly only applies “in the event of a breach of contract”. *See Brief of Petitioner*, p.5.

The agreement did not expressly recite or establish any duty of loyalty. *See* CP 6-12. The Appellant concedes this fact. *See Brief of Petitioner*, p.5 (arguing that the duty of loyalty supposedly was an “independent obligation”). In fact, the Appellant goes so far as to say, “there is nothing in the contract that even arguably speaks to a fiduciary duty.” *See id.*, p.9.

The agreement did not expressly require Mr. Miller to devote his exclusive efforts to PMWC. *See* CP 6-12. Nor did it prohibit him from starting a non-competitive business. *See id.*

### B.3. Type of Work

During his employment by PMWC, Mr. Miller was exclusively a commission-based salesman. *See* CP 45. He did not receive any base

salary. *Id.* On behalf of PMWC, he submitted bids for concrete coating applications on commercial projects, such as to-be-constructed large retail stores. *Id.*; *see also* RP 3. He had discretion to choose which projects to submit bids on, and the number of projects that would be bid. *See* CP 45. There was no quota or any minimum requirement. He could work very hard and bid a significant number of projects, in hopes of generating high commissions. Or he could choose to work less hard and bid a smaller number of projects. *Id.*

PMWC exclusively works on commercial projects. *See* CP 56. Salesmen, such as Mr. Miller, were strictly forbid from submitting bids on residential projects. *Id.* In addition, the salesmen were not allowed to submit bids for joint filler applications, even as part of a commercial project. *Id.* Those things - residential work and joint filler projects - were simply outside PMWC's scope of business.

#### B.4. Final Concrete

Mr. Miller formed Final Concrete, LLC in September, 2008. *See* CP 56 (Ins.10-11). He did not have any grand plans, and he did not commence business immediately. *See* CP 56. Knowing that PMWC didn't do residential projects or joint filler work, Mr. Miller recognized those specialties as an under-served area of the market. *See* RP 3.

Final Concrete did not exist when Mr. Miller signed the Employee Agreement in 2004. *See* CP 12. Thus, it could not have contemporaneously signed the agreement. Nor is there any evidence to suggest that Final Concrete subsequently signed the agreement, such as via an addenda, after Final Concrete was formed.

Final Concrete was never employed by, nor otherwise associated with PMWC. Perhaps for this reason, the Appellant's fiduciary duty claim only alleges that Mr. Miller personally committed a violation. No violation is expressly alleged against Final Concrete. *See* CP 4 (¶12). Likewise, within its "Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment", the Appellant confined its argument to Mr. Miller personally. *See* CP 74 (Ins.10-12). Accordingly, the Respondents argued below that Final Concrete should be dismissed as a threshold matter. *See* CP 66-67, 69; RP 12-13. The Respondents persist in that position before this court.

#### B.5. Resignation and Start-up of Final Concrete

Prior to Mr. Miller's resignation from PMWC, he submitted roughly 10-12 bids via Final Concrete. *See* CP 56-57. The record establishes - without any dispute - that those bids were just small joint filler projects, which, again, is something that PMWC didn't do. *See* CP

57. Yet again, this fact is ignored by the Appellant. *See Brief of Petitioner*, pp.3-4. Instead, the Appellant blurs the distinction between commercial and residential work, generically labeling these bids as “for flooring projects”. *See id.*, p.4.

Regardless, there is no evidence to prove or suggest that PMWC bid, or wanted to bid, on any of the projects. Nor is there any evidence that Mr. Miller’s superiors at PMWC expected him to submit bids on these projects, which were outside of PMWC’s range of operations. The Appellant stresses that Mr. Miller was a “management level trainee” and that his “duties were executive in nature”. *See Brief of Petitioner*, pp.3, 15. But there is no evidence to prove or suggest that Mr. Miller was somehow empowered to disregard the established parameters of PMWC’s operations.

The record establishes - without any dispute - that the projects bid by Final Concrete were not slated to begin until after the date that Mr. Miller ultimately resigned from PMWC. *See CP 44 (Ins.27-30)*. This too is unacknowledged by the Appellant. *See Brief of Petitioner*, pp.3-4.

Mr. Miller explains that “[n]o contracts were signed, no money exchanged hands, no materials were ordered, and no materials were applied” by Final Concrete until after he had resigned from PMWC. *See CP 44 (Ins.26-27)*. The record does not contain any evidence that

contradicts Mr. Miller's account in this regard, and the Appellant makes no effort to even argue these issues. *Brief of Petitioner*, pp.3-15.

The Appellant notes that Final Concrete was formed before Mr. Miller resigned and that he didn't immediately tell PMWC that he had formed Final Concrete. *See Brief of Petitioner*, p.3. However, these issues are complete "red herrings", which the Respondents will demonstrate below. Moreover, it was months after Mr. Miller's resignation that Final Concrete finally commenced business (*i.e.*, generated revenue), and that business was in no way competitive with PMWC. *See CP 45, 56.*

### C. ARGUMENT

#### C.1. The Appellant Lacks Sufficient Evidence.

Regardless of whether Washington or California law is applied, the Appellant does not possess sufficient evidence to substantiate its claim. The actions of Mr. Miller and Final Concrete have not inflicted any injury upon PMWC and were not actionable.

The Appellant argues that Mr. Miller somehow violated a duty of "loyalty". *See Brief of Petitioner*, p.9. But the Appellant offers no meaningful explanation. How was Mr. Miller disloyal? The Employee Agreement did not obligate Mr. Miller to devote his exclusive efforts to

PMWC, nor did it preclude him from starting a separate business. *See* CP 6-12. Final Concrete did compete with PMWC on bids or projects, but instead focused on projects manifestly outside of PMWC's established parameters of operation. *See e.g.*, CP 65.

In effect, the Appellant's position is that its commission-based salesmen should not be allowed to engage in any commerce separate from PMWC. This is not a situation where a salaried employee stole trade secrets, diverted business to a competitor, or started a competing business himself. Rather, all Mr. Miller did was form a non-competitive business, albeit within the same industry, and then resign his commission-based job at PMWC.

Is it the mere act of resigning that the Appellant thinks was disloyal? That can't be a sufficient answer, because Mr. Miller was an at-will employee. *See* CP 6-12 ("Employee Agreement", which doesn't establish any term of employment). The Appellant characterizes Mr. Miller's resignation as "abrupt[]" (*see Brief of Petitioner*, p.4), but the agreement did not require any minimum notice prior to Mr. Miller's resignation. *See* CP 6-12. Nor is there any evidence to prove or suggest that Mr. Miller's resignation somehow unreasonably hindered PMWC's operations or made projects fall through.

Alternatively, perhaps the Appellant is arguing that Mr. Miller was

disloyal because his new business is in the same industry? This too isn't a sufficient answer. Appellant has not identified (or even attempted to identify) any provision of the contract or any legal authority that supposedly obligated Mr. Miller to exit the concrete business upon resigning.

The Appellant cites *Racine v. Bender* for the proposition that an employee cannot "disregard[] his employer's rights, [and] visit ruin upon him." See *Brief of Petitioner*, p.12 (citing *Racine v. Bender*, 141 Wn. 606, 611, 252 P.2d 115 (1927)). Be that as it may, what "rights" of PMWC did Mr. Miller disregard? How has any "ruin" been inflicted upon PMWC? The Appellant offers no answers, and the record doesn't bare these things out. The Appellant might have a theory, but it doesn't have evidence.

The Appellant argues that Mr. Miller "was tasked with procuring contracts and business for his employer in another state, with little direct oversight." See *Brief of Petitioner*, p.12. So what? There is nothing in the record to prove or suggest that Mr. Miller failed to procure sufficient business for PMWC during his employment, nor does Appellant actually make that argument. Is it disloyal for any procuring agent, who operated with little oversight, to eventually resign and then stay in the same industry? Certainly Mr. Miller's status as a management "trainee" doesn't impose any extra restriction over-and-above those applicable to other

workers, and the Appellant offers no argument or authority in that regard.

Citing the California decision of *Fowler v. Varian Associates*, the Appellant argues that an employer is entitled to its workers' "undivided loyalty." See *Brief of Petitioner*, p.15 (citing *Fowler v. Varian Associates, Inc.*, 196 Cal. App.3d 34, 41, 241 Cal. Rptr. 539 (1987)). However, the Appellant conveniently overlooks that the *Fowler* case also indicates that "California law does permit an employee to seek other employment and even to make some 'preparations to compete' before resigning." See *Fowler v. Varian Associates*, 196 Cal. App.3d at 41. On this point, Washington law and California law are consistent.

Washington courts typically follow the *Restatement of Agency*. See e.g., *Rahman v. State*, 170 Wn.2d 810, 818, 246 P.3d 182 (2011). The *Restatement* plainly states that a worker is free to prepare for competition, including incorporating a new business. See e.g., *Restatement (Second) of Agency*, §393 (specifically, comment "a", 2<sup>nd</sup> ¶, and comment "e"); *Restatement (Third) of Agency*, §8.04 (including comment "b", 5<sup>th</sup> ¶, and comment "c", 1<sup>st</sup>, 4<sup>th</sup> & 5<sup>th</sup> ¶¶). Moreover, the worker does not have to disclose his plans to his current employer, nor does he have to tell his employer that he has incorporated a business. See *Restatement (Third) of Agency*, §8.04 (comment "c", 5<sup>th</sup> ¶).

Properly understood, the duty of loyalty prohibits a worker from

actually competing with his employer or from assisting competitors prior to resigning -- it does not restrict the employee from starting a non-competitive business. See *Restatement (Second) of Agency*, §393; *Restatement (Third) of Agency*, §8.04. Here, the established record is devoid of any evidence whereby Appellant can conceivably prove that Mr. Miller was disloyal. His actions were not competitive with, nor detrimental to PMWC. This is dispositive, regardless of which state's law is applied.

#### C.2. California Law Should Apply.

As to the choice of law, the Appellant's first argument is to suggest that "due process of law" can only be obtained under Washington law, but not under California law. See *Brief of Petitioner*, p.8. That suggestion is absurd.

The Appellant's second argument is a non-sequitur. First, the Appellant says that "all of the language [within the contract] pertaining to Miller's duty of loyalty to PMWC was voided by operation of California law". See *Brief of Petitioner*, p.9. Building from there, the Appellant argues that it would be "incongruous" to apply California law on all aspects of the duty of loyalty. See *id.* This conclusion does not follow from the premise. If the parties' choice of California law trumps their

written specifics on the duty of loyalty, then why would another state's law take over and impose unwritten terms? How can two different bodies of substantive law simultaneously govern a singular issue? If the parties' choice of California law is partially operative as to the duty of loyalty, then it must be fully and exclusively operative on the issue.

The Appellant has not presented any authority to the effect that Washington courts always apply Washington's version of the duty of loyalty, such that it would constitute an unavoidable matter of public policy. At most, the Appellant cites *Racine v. Bender* for the proposition a worker cannot simply disregard his employer's rights. See *Brief of Petitioner*, p.12 (citing *Racine v. Bender*, 141 Wn. at 611). But Mr. Miller didn't do so. Rather, the parties agreed that the law of California would govern the issue, and California law happens to be less restrictive than Washington law.

The Appellant's third argument is similarly unsound. The Appellant's aim is to negate any potential application of subpart (1) of the *Restatement (Second) of Conflicts of Law* §187. See *Brief of Petitioner*, p.11 (1<sup>st</sup> full ¶). Toward that end, the Appellant argues that "Miller's fiduciary duty to PMWC is not made explicit in the terms of the contract itself." *Id.* However, that isn't the inquiry posed by subpart (1). Rather, subpart (1) focuses on whether "the particular issue is one which the

parties could have resolved by an explicit provision” -- not whether they actually did so. *See Restatement (Second) of Conflicts of Law*, §187(1); *accord, Brief of Petitioner*, p.10.

The Appellant has not offered any authority, whether under California or Washington law, to the effect that these parties were somehow unable to modify the duty of loyalty. Quite the contrary, the official comments to the *Restatement of Agency* explicitly indicate that “[a] principal may consent to conduct by an agent that would otherwise breach” the duty. *See Restatement (Third) of Agency*, §8.04 (comment “a”, 2<sup>nd</sup> ¶). This confirms that the issue is one the parties could have explicitly addressed within the contract. In fact, they did so, both via the attempted non-competition covenants and via their selection of California law. By adopting California law, the parties adopted all substantive aspects of California law, including its general conception of the duty of loyalty (which is rather limited).

It follows that the Appellant’s analysis is deficient. The Appellant’s proffered explanation as to why subpart (1) doesn’t apply is both unsound and conclusory. By asserting rather than arguing/demonstrating that subpart (1) doesn’t apply, the Appellant has effectively squandered its opportunity. *See e.g., State v. Pleasant*, 38 Wn. App. at 81 (Division Two) (“An issue cannot be raised for the first time in

a reply brief.”).

The Appellant’s fourth argument pertains to subpart (2)(a) of the *Restatement (Second) of Conflicts of Law* §187. *See Brief of Petitioner*, pp.11-12. This subpart establishes a two-part test. The initial inquiry is whether the parties’ chosen law has a “substantial relationship to the parties or the transaction”. *See Restatement (Second) of Conflicts of Law*, §187(2)(a). The second inquiry is whether, in absence of such substantial relationship, there is another “reasonable basis for the parties’ choice”. *See id.* If either portion of the test is satisfied, then the parties’ chosen law will be applied even if the given issue was not generally amenable to freedom of contract. *See id.*, §187(2).

Both inquiries under subpart (2)(a) are satisfied in the instant case. First, California unquestionably did have a substantial relationship to PMWC. When it signed the contract, PMWC was domiciled in California. *See* CP 6. Second, the parties’ choice was a reasonable one. Mr. Miller’s territory spanned multiple states. *See* RP 17-18; *see also* CP 45. A choice needed to be made; it would have been unworkable for the standard to fluctuate from project to project. As a California company at the time, PMWC should have been familiar with California law, and it is logical that the parties would chose a body of law that one (or both) of them knew.

The Appellant's fifth argument pertains to subpart (2)(b). The Appellant argues that "upholding the fiduciary obligation of an agent to a principal is a fundamental public policy of the State of Washington." See *Brief of Petitioner*, p.12. This argument misses the mark. California, like Washington, has a version of the duty of loyalty. The Appellant has not presented any authority to the effect that only Washington's version comports with public policy. Stated another way, why would California's version somehow offend the public policy of Washington? The Appellant offers no answer. Quite the contrary, the Appellant goes on to cite California precedent saying a worker "may not transfer his loyalty to a competitor." See *Brief of Petitioner*, p.15 (citing *Stokes v. Dole Nut Co.*, 41 Cal. App.4d 285, 295, 48 Cal. Rptr.2d 673 (1995)). That notion is consistent with Washington law; the Appellant simply doesn't possess evidence to prove the violation.

For all of these reasons, the parties' choice of California law ought to be upheld. The Appellant has not sufficiently demonstrated that the lower court's application of California law was erroneous.

C.3. Under California Law, the Appellant's Claim Was Properly Dismissed

The Appellant's final argument is that "California does recognize

the common law claim of Breach of Fiduciary Duty”. *See Brief of Petitioner*, p.15. However, this does not mean that the Appellant’s claim was wrongly dismissed. It’s not merely a question of whether the specific claim is cognizable under California law, but also whether the Appellant has sufficient evidence.

The Appellant argues that Mr. Miller’s position was sufficiently “executive in nature” to trigger the duty, although the Appellant offers no authority for the point. *See id.*, pp.15-16. But even if the duty applies (in whatever form), the Appellant had the burden to prove that the duty was breached, and the Appellant hasn’t done so. This is detrimental to the Appellant’s claim.

#### D. CONCLUSION.

The lower decision should be affirmed. The Appellant’s claim for breach of fiduciary duty is fundamentally invalid as against Final Concrete, because no relationship ever existed between Final Concrete and PMWC.

With respect to Mr. Miller, the parties’ choice of California law should be upheld. The duty of loyalty can be modified by freedom of contract. By adopting California law, the parties selected a less-onerous version of the duty of loyalty. Regardless, Mr. Miller has not competed

with PMWC and did not otherwise inflict any injury upon PMWC. The established record is simply devoid of any evidence whereby PMWC could conceivably prove that Mr. Miller was actionably disloyal.

DATED this 25<sup>th</sup> day of March, 2011.

A handwritten signature in black ink, appearing to read 'D. R. CASE', written over a horizontal line.

D. R. (ROB) CASE (WSBA #34313)  
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DECLARATION OF SERVICE

I, CHERYL I. BRICE, do hereby declare and state: On this day, in Yakima, Washington, I sent copies of this document via overnight U.S. Express mail, with postage prepaid, to the following:

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and, further, that on this day, I mailed a copy of this document to the following by U.S. Mail, postage prepaid:

Peter T. Petrich (one copy)  
Michael Sanders  
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11 MAR 20 11 9:28  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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

SIGNED at Yakima, Washington, on March 25, 2011.

  
\_\_\_\_\_  
CHERYL I. BRICE