

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 41565-8-II

DANIEL OMER,

Plaintiff/Respondent,

v.

THE ALPS CREDIT UNION,

Defendant/Appellant.

On Appeal from the Superior Court of the State of Washington
In and for the County of Pierce
Superior Court Docket Number 08-2-15380-6

APPELLANT'S REPLY BRIEF

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STATE OF WASHINGTON
BY [Signature]
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A. ARGUMENT

The Credit Union is the only appellant in this case. Omer has accepted and agreed to the facts as they are stated in the Credit Union's Opening Brief. *Brief of Respondent* at 5.

Given that the parties are in agreement that the relevant facts of this case are accurately set forth in the Credit Union's Opening Brief, the Credit Union submits the Introduction section in Omer's Brief of Respondent — which noticeably contains no support *whatsoever* in the record — has absolutely no relevance to or bearing on the merits of this appeal.

While the Credit Union recognizes RAP 10.3(a)(3) provides that “[t]he introduction need not contain citations to the record of authority,” that rule contemplates a concise introduction. However, Omer's “Introduction” constitutes twenty-five percent (25%) of his brief, and goes far beyond merely introducing the issues. The Credit Union maintains that Omer has sought to impermissibly rely on RAP 10.3(a)(3) by opposing the Credit Union's appeal without making any citations to the record. The Credit Union further submits this Court should disregard Omer's Introduction, and the discussion of the imaginary “straw man” scheme therein, because the Arbitrator concluded as a matter of law that neither the Credit Union nor Endeavor defrauded Omer in any way, shape, or form. Had Omer sought appellate review of the Arbitrator's ruling that

neither the Credit Union nor Endeavor defrauded him, Omer could have filed a cross-appeal, but this never happened.

Regardless, the Credit Union submits the Court should vacate the judgment that was entered on the arbitration award and the award itself for the following reasons.

I. There Is No Question That The Arbitrator's Decision Exceeds The Parties' Submission.

Tellingly, Omer does not dispute the Credit Union's interpretation of the parties' Arbitration Agreement. Omer therefore concedes that the parties agreed to submit only Omer's claims for (1) judicial foreclosure; (2) fraud; (3) conspiracy; (4) piercing of the corporate veil; (5) agency; and (6) violation of the Little RICO statute to binding arbitration. Therefore, the Arbitrator's decision with respect to any other claim that the parties did not agree to submit to arbitration is void and beyond the Arbitrator's authority, as is the trial court's entry of judgment on such a claim. *See Anderson v. Farmers Insur. Co.*, 83 Wn. App. 725, 730-31, 923 P.2d 713 (1996) ("If the arbitrators exceed their authority under the agreement, the award is deemed void and the court has no jurisdiction to confirm it under RCW 7.04.150.").

Omer's concession that the Arbitration Agreement applies only to the claims that Omer included in his First Amended Complaint should end the inquiry. After all, there is no dispute that the First Amended Complaint included no third-party beneficiary claim, nor is there any denying the fact that the Arbitrator ruled in favor of Omer only on this particular claim.

Questions of arbitrability, such as whether the Arbitration Agreement extended to the third-party beneficiary claim, are reviewed *de*

novo. See *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 45, 17 P.3d 1266 (2001). Whether claims are arbitrable is governed by the parties' agreement to arbitrate, and the arbitrator has authority "to resolve *only those questions properly submitted to the arbitrator . . .*" *Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 498, 500, 946 P.2d 388 (1997) (emphasis added). Arbitration "should not be invoked to resolve disputes that the parties have not agreed to arbitrate." *King County v. Boeing Co.*, 18 Wn. App. 595, 603, 570 P.2d 713 (1977). The parties' written agreement to submit to arbitration is critical for determining the scope of the arbitrator's power. *Sullivan v. Great American Ins. Co.*, 23 Wn. App. 242, 246, 594 P.2d 454 (1979).

Here, Omer would have this Court believe that the parties voluntarily bestowed upon the Arbitrator the power to decide any and all potential and unpled claims and issues between them because the Arbitration Agreement does not specifically provide for the exclusion of such things. However, the problem with this notion is that it is contrary to controlling Washington law. Under Washington law, the Arbitrator had only the power that was affirmatively and purposefully vested in him by way of the Arbitration Agreement. See, e.g., *id.* at 246, 594 P.2d 454. Any power that was not specifically bestowed upon the Arbitrator by way of the Arbitration Agreement, such as the ability to (a) inquire about or propose to Omer's counsel new claims, (b) grant motions to amend the pleadings to conform to the evidence as to such claims over the Credit Union's objection, and (c) decide this case based solely on such "new" claims, was not actually at the Arbitrator's disposal.

Of course, the parties certainly could have agreed to provide the Arbitrator more extensive authority. For example, they could have granted

the Arbitrator the power to decide all claims and counterclaims as might thereafter be pled or asserted. The parties might also have granted the Arbitrator the ability to rule on motions to amend the pleadings to conform to the evidence. However, the parties never reached such an accord, as seen from the four corners of the Arbitration Agreement itself.

Moreover, even if the term “claims” in the Arbitration Agreement could somehow be deemed to be ambiguous, the only extrinsic evidence in the record that speaks to the meaning of this term came from Mr. Wessell. Mr. Wessell has declared the Credit Union never intended the term “claims” to include claims that were not pled or known to be in existence at the time the parties entered into the Arbitration Agreement.

The Credit Union submits this case is similar to *Anderson*, 83 Wn. App. at 733, 923 P.2d 713, a case in which the Washington Court of Appeals reversed the judgment of the trial court after determining the trial court exceeded its authority when it ruled on an issue that the parties never submitted to binding arbitration. In *Anderson*, an underinsured motorists (“UIM”) insurance policy provided for arbitration of the “issue” of the amount of the UIM payment. *Id.* at 732. There being no evidence that the parties had given the arbitrators any instructions modifying this grant of authority, this Court determined that the arbitrators had authority to enter an award only within the policy limits. *Id.* In reviewing the *Anderson* trial court’s entry of findings and conclusions regarding the insurer’s alleged bad faith, this Court held that the arbitrators neither considered, nor had the authority to consider, the insurer’s bad faith. *Id.* at 733. The trial court therefore exceeded its authority in entering findings and conclusions concerning bad faith. *Id.*

The trial court also exceeded its authority in this case. Just as the *Anderson* parties submitted only a specific “issue” to arbitration, the parties hereto submitted only certain “claims” to arbitration. Because there is no dispute that the Arbitration Agreement granted the Arbitrator the power to decide only the “claims” asserted in Omer’s First Amended Complaint — which noticeably did not include a third-party beneficiary claim or any other kind of breach of contract claim — the Arbitrator acted beyond his authority by raising the third-party beneficiary theory of recovery with Omer’s counsel and ruling in favor of Omer on this cause of action. The trial court then erred by entering judgment on the arbitration award in favor of Omer because the parties never agreed to submit a third-party beneficiary claim to arbitration.

II. The Arbitrator’s Misconduct is Clear on the Face of the Award And The Papers Delivered With It.

Appellate review is limited to “the face of the award, or, at least, . . . some paper delivered with it.” *Lent’s, Inc. v. Santa Fe Engineers, Inc.*, 29 Wn. App. 257, 265, 628 P.2d 488 (1981). This Court should disregard Omer’s attempts to shield the Arbitrator’s misconduct from review based on an impermissibly restrictive interpretation of the “face of the arbitration award.” The Arbitrator’s two letters to counsel for the parties, namely, the preliminary and final award, certainly constitute the “face of the award” and must be considered in their entirety.

At the trial court level, Omer attempted to limit review of the final arbitration award by excising from the award all of the Arbitrator’s findings, analysis, and conclusions, thereby restricting review to only the

last sentence of the award. To support his strained position, Omer has relied upon *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989). However, the *Westmark* case is inapplicable to this case. In *Westmark*, the arbitrator's opinion "consist[ed] largely of random observations about the case in general and about some of the evidence." *Id.* The party seeking to vacate the *Westmark* award argued that the arbitrator's random musings were "findings" that were not supported by the evidence, and that the arbitrator therefore imperfectly exercised his powers by failing to make a complete and final decision. This Court disagreed, finding that two sentences of the award were sufficient to cover all of the issues in the case and indicate the relief to which each party was entitled. In other words, the arbitrator's "random musings" did not detract from the arbitrator's decision and award. The import of the *Westmark* decision was not that the remainder of the award was shielded from review, but that two sentences of the arbitrator's decision operated to satisfy the arbitrator's duties in that particular case.

The holding of *Westmark* is limited by its irregular facts. The *Westmark* opinion makes no attempt to differentiate between random musings and "awards" in other cases involving arbitrations. Here, unlike the arbitration award in *Westmark*, the Arbitrator's preliminary and final awards are thorough and well-reasoned, and the awards are certainly a far cry from the random observations in *Westmark*. There is simply no basis,

in law or in fact, for limiting review to the Arbitrator's preliminary award, or to the last two sentences of the Arbitrator's final decision.

Although the *Expert Drywall, Inc. v. Ellis-Don Construction, Inc.*, 86 Wn. App. 884, 939 P.2d 1258 (1997) case that Omer has cited quoted *Westmark* with approval, the scope of appellate review in *Expert Drywall* was not nearly as limited as Omer would have this Court believe. In *Expert Drywall*, the arbitrator's award disposed of the parties' claims and addressed attorneys' fees in paragraph 11 of the award as follows: "I do not find any contractual or equitable authority with regard to attorney's fees and costs. *I specifically find that I do not have the authority to award attorney's fees and costs pursuant to RCW 60.28 et seq., as such authority lies solely with the Superior Court.*" *Id.* at 888-89, 939 P.2d 1258 (emphasis in original). In Omer's view, the *Expert Drywall* arbitration award would not include the italicized language regarding the arbitrator's reasoning. However, the *Expert Drywall* court was not so limited, and it instead devoted several pages to determining whether the italicized language was legally sound. Ultimately, the *Expert Drywall* court upheld the arbitrator's refusal to grant attorneys' fees on a different basis. *See id.* at 891.

As in *Expert Drywall*, this Court should consider the entirety of the preliminary and final awards to determine whether the Arbitrator manifested impartiality (RCW 7.04.230(1)(b)(i)), engaged in misconduct

(RCW 7.04.230(1)(b)(iii)), or acted beyond his authority (RCW 7.04.230(1)(d)).

The *Davidson v. Hensen* case that Omer has cited does nothing to support his position, as that case is readily distinguishable from this case. In *Davidson*, the arbitrator ruled in favor of a contractor who sought arbitration of his claim for amounts due under a contract with homeowners for whom the contractor provided remodeling services. 135 Wn.2d 112, 116, 954 P.2d 1327 (1998). After the arbitration hearing concluded and before the arbitrator issued an award, the homeowners moved to reopen the arbitration hearing to present evidence that the contractor's contractor registration and bonding had lapsed during the period in question. *Id.*, 954 P.2d 1327. The arbitrator denied the motion and issued an award in favor of the contractor. *Id.* at 117, 954 P.2d 1327. The Washington Supreme Court upheld the decision, holding that "[n]ew evidence is not an enumerated ground for overturning the arbitration award; thus, the [homeowners] have offered no viable basis for disturbing the arbitration award." *Id.* at 124, 954 P.2d 1327. Of course, the Credit Union has asked neither the trial court nor this Court to consider any new evidence. As such, the *Davidson* case is inapplicable.

Moreover, it bears mentioning again that the Arbitrator could have shielded the fact that he is the one who raised the third-party beneficiary theory of recovery from appellate review. Frankly, the Credit Union acknowledges it would be hard pressed to obtain effective appellate

review of the Arbitrator's conduct in this case if the Arbitrator had not readily admitted, in writing and on the face of the award itself, that he was the impetus behind Omer's assertion of a third-party beneficiary claim. To his credit, the Arbitrator admitted in his final award that he is the one who raised the new legal theory on which Omer prevailed. In doing so, the Arbitrator framed this issue for appeal by openly admitting on the face of the award that he proposed the third-party beneficiary claim to Omer: "I as the arbitrator did raise the breach of contract theory as a possible theory of recovery" CP 573.

Given that the face of the award demonstrates the Arbitrator's partiality and misconduct, there is no question that appellate review of the award is warranted.

III. The Arbitrator Committed Misconduct By Proposing A New Legal Theory to Omer's Attorneys.

Taken together, the Arbitrator's actions in this case amount to evident partiality, misconduct prejudicing the Credit Union's rights, and the Arbitrator's surpassing of his powers within the meaning of RCW 7.04A.230(1). The trial court erred in entering judgment on the arbitration award and refusing to vacate the award under RCW 7.04A.230(1)(b)(i), RCW 7.04A.230(1)(b)(iii), and RCW 7.04A.230(1)(d) for these reasons.

It bears mentioning that this case is not simply about whether an arbitrator, absent a specific grant of authority from the parties, has the power to decide motions to amend pleadings to conform to the evidence. Instead, the crux of this case is whether an arbitrator presiding over a voluntary, binding arbitration may (a) propose an entirely new theory of liability and a new claim to one of the parties; (b) grant that party's

subsequent oral motion to amend the pleadings to conform the evidence in order to assert this claim that the arbitrator himself has suggested; and then (c) rule in favor of the moving party based solely upon the claim that the arbitrator himself raised.

By engaging in this conduct, the Arbitrator acted as an advocate and not as a neutral (RCW 7.04A.230(1)(b)(i)) and inserted himself into the proceedings to the detriment of the Credit Union (RCW 7.04A.230(1)(b)(iii)). Unfortunately, the arbitration ultimately turned on a third-party beneficiary claim that the Credit Union never agreed to arbitrate. *See* RCW 7.04A.230(1)(d).

As for Omer's reliance on *Morgan Bros., Inc. v. Haskell Corporation, Inc.*, 24 Wn. App. 773, 604 P.2d 1294 (1979), this reliance is misplaced. In *Morgan Bros.*, the third-party plaintiff obtained partial summary judgment against a corporation. That corporation was later the subject of an involuntary petition in bankruptcy, and the bankrupt corporation moved for a stay of proceedings due to the bankruptcy. *Id.* at 779, 604 P.2d 1294. During argument on the motion, the third-party plaintiff contended that even if the trial court granted the stay as to the bankrupt corporation, trial against the bankrupt corporation's parent corporation should continue on the theory of disregarding the corporate entity. The parent corporation argued on appeal that trial should not have commenced because disregard of the corporate entity had not been pled. Division I of the Washington Court of Appeals held that the trial court did not abuse its discretion in allowing trial to proceed because the two

corporations were closely held and shared common officers and directors, the evidence involved was the same, and both corporations were represented by the same counsel. *Id.* at 780.

Importantly, *Morgan Bros.* did not involve an arbitration proceeding. More importantly, it was the third-party plaintiff in *Morgan Bros.* that proposed the new theory of liability on its own behalf, ***not the judge***. The fact is *Morgan Bros.* did not address the propriety or impropriety of an arbitrator granting a motion to amend the pleadings to conform to the evidence in a case such as this.

Relying upon *Smith v. Michigan Lumber Co.*, 43 Wash. 402, 86 P. 652 (1906), an opinion rendered during Teddy Roosevelt's administration, Omer contends that the Credit Union should have moved to continue the arbitration hearing. This contention is belied by the procedural posture of the case at the time the Arbitrator proposed the third-party beneficiary claim to Omer. Omer had concluded his case in chief, and the Credit Union had moved for a directed verdict on the grounds that Omer had failed to present any evidence in support of his claims for fraud, civil conspiracy, and violation of the Little RICO statute. The Arbitrator ultimately agreed such claims were not viable, as reflected in his award in favor of the Credit Union as to each of the claims that Omer had pled as of that time. CP 573 ("I decided for Plaintiff based on breach of contract but dismissed all three fraud theories which were alleged in the pleadings. The

decision was not based on tort liability.”).¹ During the course of the argument on the Credit Union’s motion for directed verdict, the Arbitrator inquired why Omer had not pled a third-party beneficiary claim, thereby indicating that the existence of such a claim might have bearing on the outcome of the motion for directed verdict. Omer then made a motion to amend the pleadings to conform to the evidence to assert such a claim, and the rest is history.

In sum, there was no reasoned basis to request a continuance in response to the Arbitrator’s decision to allow the case to proceed with respect to the new claim that he himself proposed. The result of the Arbitrator’s conduct in this regard is that it effectively forced the Credit Union to submit a third-party beneficiary claim to arbitration when it had never actually agreed to do so. A motion for a continuance, even if it had been granted, would not have cured this prejudice, for the horse had already been let out of the barn, so to speak. Nevertheless, the Credit Union vigorously opposed the arbitration of the new third-party beneficiary claim, and it did everything it could have done to prevent and remedy the prejudice caused by the Arbitrator’s conduct in bringing this claim to bear. Regardless, the fact is the Credit Union was not required to seek a continuance in order to obtain judicial review of the Arbitrator’s final ruling on the third-party beneficiary claim.

¹ This language is excerpted from the Arbitrator’s final decision. Curiously, Omer’s Brief of Respondent is silent as to why Omer elected to move to confirm only the Arbitrator’s preliminary decision as opposed to the “Final Decision.”

IV. The Wessell Declaration Is The Best And Only Evidence Of The Arbitrator's Conduct During The Arbitration.

This Court's consideration of the Arbitrator's suggestion that Omer amend his complaint to assert a third-party beneficiary claim is not at odds with the policy of limiting judicial review to the face of the arbitration award. The purpose of this policy is to preclude *de novo* review of the award by way of a re-evaluation of the evidence considered by the arbitrator. See *Lent's*, 29 Wn. App. at 265, 628 P.2d 488 ("If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause de novo, it is but reasonable to presume that they would have so declared. . . . (T)he errors and mistakes contemplated by the statute must appear on the face of the award, or, at least, in some paper delivered with it."), quoting *Moen v. State*, 13 Wn. App. 145, 533 P.2d 862 (1975)).

The fact is this Court's consideration of the Arbitrator's actions in this case does not offend this policy. After all, the Credit Union is not seeking a substantive review of the merits concerning the one and only claim upon which Omer prevailed. Similarly, the Credit Union is not asking this Court to re-weigh the evidence presented to the Arbitrator. Instead, the Credit Union merely seeks a ruling as to the propriety of the Arbitrator's conduct in (a) asking Omer's counsel why Omer did not plead a third-party beneficiary claim, (b) subsequently permitting Omer to amend his complaint a second time in order to assert this new legal theory

that the Arbitrator himself raised, and (c) then ruling in Omer's favor solely as to that claim. This Court's review of the Arbitrator's above-described actions does not require this Court to reconsider the evidence that was submitted to the Arbitrator.

Moreover, even if the Arbitrator's admission on the face of the award that he is the one who raised the sole legal theory that Omer prevailed upon were not enough, there are circumstances when review necessarily must not be limited merely to the face of the award, and both parties recognize that this case presents such circumstances. For example, the trial court in *Davidson* held that "[t]he Court is limited to reviewing the award on its face *unless* a party was deprived of a full and fair hearing, of the right to submit evidence, or the arbitrator's actions came within the stated grounds for finding misconduct. . . ." *Davidson*, 135 Wn.2d at 117 n.2, 954 P.2d 1327 (emphasis added). In *Davidson*, this Court, which was later affirmed by the Washington Supreme Court, similarly implied that the "face of the award rule" would not bar full consideration of the trial court's jurisdiction to confirm the award. The Court cited the general rule that "judicial review of an arbitration award is limited to the face of the award" but noted in a footnote: "A court, however, has no jurisdiction to enter a void judgment and no jurisdiction to confirm a void arbitration award" *Davidson v. Hensen*, 85 Wn. App. 187, 192 n.3, 933 P.2d 1050 (1997) (citations omitted).

Given that the Wessell declaration is not offered to dispute the substantive merits of Omer's claims, the Court should not limit its review to the face of the arbitration award, and the Court should consider the Wessell declaration when rendering its decision.²

Omer has at least implicitly conceded that this Court may properly consider what occurred during the arbitration hearing because Omer, too, has recounted these events. While the arbitration hearing was not transcribed, the Court can nevertheless consider what occurred during the hearing because (1) the Wessell declaration recounts the relevant events under penalty of perjury; (2) the Wessell declaration is unrebutted, and there is no contrary *evidence* as to what occurred during the arbitration; and (3) Omer has freely adopted the Credit Union's statement of facts. *See Brief of Respondent at 5; see also Davidson v. Hensen*, 135 Wn.2d at 116, 954 P.2d 1327 ("Although the exact nature and scope of the questioning is disputed because there is no transcript of the arbitration hearing, it is undisputed the parties questioned Hensen about his registration status.").

Noticeably lacking from Omer's brief is any citation to the record supporting Omer's account of what occurred at the arbitration hearing. Again, Omer's brief is replete with factual assertions that draw no support from the record. This omission is particularly glaring as to the events recounted in the Wessell declaration, including the Arbitrator's query as to

² If any party is asking this Court to review the substantive merits of Omer's claims, it is certainly Omer, who persists in mischaracterizing the Credit Union as "fraudulent" despite the Arbitrator's ruling in favor of the Credit Union and Endeavor as to Omer's fraud, conspiracy, and Little RICO act claims.

why Omer did not plead a third-party beneficiary claim. This is because the *only evidence* in the record as to the Arbitrator's question concerning the third-party beneficiary claim is the Wessell Declaration. Mr. Wessell's declaration testimony that the Arbitrator asked *why* (not "*whether*") Omer had not pled a third-party beneficiary claim is un rebutted.

Omer's belated attempt to re-characterize the Arbitrator's question is disingenuous at best and deceitful at worst. The Arbitrator did not (as Omer contends without factual support) inquire "*whether*" Omer had pled a third-party beneficiary claim. The Court therefore need not address whether such a question would amount to misconduct. After all, the Arbitrator undoubtedly read Omer's First Amended Complaint in anticipation of the arbitration and was familiar with the general nature of Omer's tort claims set forth therein before the arbitration began.

Instead, knowing full well that Omer had not pled a third-party beneficiary claim, the Arbitrator inquired "*why*" Omer had not pled such a claim. CP 510. The Arbitrator did not ask an innocuous factual question. Instead, the Arbitrator's question suggested to Omer and his two attorneys that Omer should have pled a third-party beneficiary claim. Taking his cue from the Arbitrator, Omer orally moved to amend his First Amended Complaint to assert such a claim, the Arbitrator granted this motion, and the Arbitrator then ruled in favor of Omer *solely as to this new claim*. The Court's consideration of this highly unusual sequence of events does not require the Court to reweigh any of the evidence considered by the

Arbitrator or to make a decision on the merits. The issue before the Court is procedural, and the Court may properly consider the unrebutted procedural facts that were supplied in the Wessell declaration under penalty of perjury.

V. **Sound Public Policy Requires The Vacation Of The Judgment Entered On The Arbitration Award.**

The Credit Union is mindful that Washington favors the arbitration of disputes and the finality of decisions in binding arbitrations. These policies are not so strong, though, as to force parties to submit to binding arbitration against their will. It remains the law of Washington that binding arbitration is a wholly voluntarily process, and that the parties retain the right to determine whether to submit their disputes to binding arbitration and, if so, the scope of the arbitrator's authority in arbitrating such disputes. Washington's public policy favoring arbitration would be undermined if parties were divested of this control, and arbitration therefore "should not be invoked to resolve disputes that the parties have not agreed to arbitrate." *Boeing*, 18 Wn. App. at 603, 570 P.2d 713.

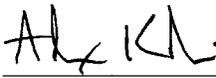
The evidence regarding the Arbitrator's misconduct in this case is both clear and uncontroverted. A ruling in favor of the Credit Union will preserve the integrity of the arbitration process and ensure that parties are not dissuaded from pursuing binding arbitration for fear that arbitrators will be permitted to exceed their neutral role by raising new claims and theories on one party's behalf and then allowing the outcome of the arbitration to entirely turn on these new claims and theories.

B. CONCLUSION

Based on the foregoing, the Credit Union respectfully asks this Court to vacate the judgment that was entered on the arbitration award and vacate the arbitration award itself.

RESPECTFULLY SUBMITTED this 7 day of July, 2011.

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Certificate of Service

I certify that on the 7 day of July, 2011, I caused to be served on the person(s) below a true and correct copy of the foregoing document at the address(es) and in the manner(s) stated below:

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

DATED at Tacoma, Washington this 7 day of July, 2011.



Alexander S. Kleinberg, WSBA # 34449

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BY [unclear]
[unclear]