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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

SAYED ZIA EHSANI, a single man,
Appellant,

Appeal No. **53645-1-I**

GUITTY ZAMANI, a single woman,
Cross-Appellant,

Trial Ct # 97-2-30285-4 SEA
King County Superior Court

vs.

**BRIEF OF CROSS-
APPELLANT ZAMANI IN
RESPONSE TO BRIEF OF
APPELLANT EHSANI**

THE MCCULLOUGH FAMILY
PARTNERSHIP, et al.
Respondents.

 ORIGINAL

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**BRIEF LIMITED TO ISSUES
RAISED BY EHSANI'S BRIEF**

Pursuant to this court's ordered dated August 5, 2005, cross-appellant-Zamani hereby responds to appellant Ehsani's brief.

Ehsani's brief on this appeal attempts to assert numerous unpleaded, unsupported, spurious, and defamatory claims against Zamani based on Ehsani's self-serving interpretation of documents he has attached to his brief. The parties in this case had an eight-day trial in April 2000. Ehsani was represented by counsel at every stage of the pre-trial proceedings, at the eight-day trial in April 2000, and at the proceedings on remand below.

This court noted at footnote 2 of its Unpublished Opinion filed September 23, 2002, that:

“Ehsani named Zamani as co-plaintiff and pleaded no claims against her. Throughout the course of the trial he stated several times that he made no claims against Zamani. But besides his claim against the McCulloughs , much of the time at trial was spent by Ehsani seeking amounts for unpleaded claims against Zamani.”

CP 5

On 5/11/2005 this court issued an order stating:

"It is the responsibility of the party seeking review to provide this court with a record sufficient to allow review. It appears that appellant has failed to designate clerk's papers and has chosen instead to append copies of documents rather than designating clerk's papers as required by RAP 9.6 and citing to specific pages as

required by RAP 10.4(f). This court cannot rely on records submitted by a party and will only accept clerk's papers transmitted by the trial court. RAP 9.8. In view of the long history of this case, appellant's brief is accepted but may be of limited use to the court because no clerk's papers are cited. The motion to strike appellant Sayed Zia Ehsani's brief is denied."

Although this court issued the foregoing order on 5/11/2005 Ehsani has, to the undersigned's knowledge, made no effort to correct these deficiencies in his brief. Given these deficiencies, Zamani submits this limited responding brief.

ZAMANI'S CLAIM IS AGAINST EHSANI'S SHARE OF THE HOLDBACK FUND WHICH WAS TAKEN INTO THE POSSESSION OF McCULLOUGH'S TRIAL LAWYER WHO ALSO REPRESENTED McCULLOUGH'S ON THE FIRST APPEAL WHICH RESULTED IN REVERSAL OF THE ORIGINAL JUDGMENT ENTERED JUNE 27, 2000

This court's Unpublished Opinion filed September 23, 2002, provides that Zamani shall receive an additional \$32,377.20 from the holdback fund as reimbursement for Ehsani's proportional share of certain expenditures made by Zamani in 1996:

"As between Ehsani and Zamani, Zamani has a claim to an additional portion of the \$200,000 holdback that was awarded in the judgment. In 1996, Zamani incurred expenses to cure the defaults on the McCulloughs' obligation to First Community Bank to keep the hotel from foreclosure by the bank. This was done to protect the interest of both Zamani and Ehsani. Those undisputed sums are delinquent King County property taxes in the amount of \$27,008.29 and arrearages and fees to the bank of \$56,116.74 for a total of \$83,125.03.

Zamani is entitled to receive contribution of Ehsani's proportionate share (2.95%) of those taxes and fees, an amount of approximately \$32,377.20 off the top of the \$200,000 holdback before dividing the remainder. The remaining \$167,622.80 is to be distributed by the appropriate percentages, 38.95% to Ehsani and 61.05% to Zamani."

On remand, Zamani pointed out to the trial court that making payment of Ehsani's \$32,377.20 38.95% proportionate share of the taxes, arrearages, and fees *off the top* of the \$200,000 holdback fund results in the reimbursement being charged against funds that belong 61.05% to Zamani and, thus, in Zamani being charged for 61.05% of Ehsani's reimbursement. The trial court asked for supplemental briefing on this issue. Zamani provided the requested briefing and Ehsani did not. CP 287 - 290; CP 291 - 293. The trial court agreed with Zamani and ordered as follows on December 12, 2003:

* * * *

3. ZAMANI'S ADDITIONAL CLAIM AGAINST THE HOLDBACK FUND:

The Court of Appeals identifies an additional \$32,377.20 due Zamani from Ehsani for contributions she made for taxes and mortgage arrears to save the property from foreclosure. The dollar amount identified by the Court of Appeals is no disputed.

The methods of calculating the distribution in the opinion are inconsistent. The court requested supplemental briefing from the Plaintiffs on this point.

Ehsani declined to file supplemental briefing on this issue. The court has considered the supplemental briefing on this point filed by Zamani. Based thereon it is:

ORDERED that Zamani shall have judgment against Ehsani for \$32,377.20 from his 38.95% share of the holdback.

* * * *

CP 291 - 293

It bears repeating and emphasis that the trial court's order expressly provides that:

“Zamani have judgment against Ehsani for \$32,377.20 *from his 38.95% share of the holdback.*”
(emphasis added)

CP 293

The trial court's order on remand expressly provides that Zamani's claim to reimbursement of the \$32,377.20 is against Ehsani's share of the holdback fund. Ehsani's \$77,900 share of the holdback fund was taken by garnishment into the possession of McCulloughs' lawyer, David Cullen, the respondent on this appeal.

RAP 12.8 provides clearly and unequivocally that:

“If a party has voluntarily or involuntarily partially or wholly satisfied a trial court decision which is modified by the appellate court, **the trial court shall enter orders and authorize the issuance of process appropriate to restore to the party any property taken from that party**, the value of the property, or in appropriate circumstances, provide restitution. An

interest in property acquired by a purchaser in good faith, under a decision subsequently reversed or modified, shall not be affected by the reversal or modification of that decision.”

(emphasis added)

The full \$77,900 of Ehsani’s share of the holdback fund was taken involuntarily via garnishment by McCulloughs’ lawyer David Cullen, who represented McCulloughs on the first appeal in this case.

Mr. Cullen took possession of the entire \$77,900 holdback fund which includes the \$32,377.20 awarded by this court and the trial court on remand to Zamani. Her claim against respondent Cullen for restoration of her share of those funds is a proper and cognizable claim under the clear terms of RAP 12.8 despite any arguments of Ehsani and Cullen to the contrary.

**ZAMANI’S CLAIM TO RESTORATION OF THE \$32,377.20
WAS NOT EXTINGUISHED BY THE MAY 28, 1999
AGREEMENT FOR CONVEYANCE AND MUTUAL RELEASE
OF CLAIMS**

Ehsani, like Cullen, argues that Zamani’s claims asserted in the trial court and on this appeal are in violation of the AGREEMENT FOR CONVEYANCE AND MUTUAL RELEASE OF CLAIMS signed by Zamani and the McCulloughs on May 28, 1999. (CP 277 – 286) In fact, Zamani has not violated the release agreement.

Paragraph 5 of the release provides:

“5. Upon approval by the Bank of McCulloughs’ conveyance hereunder to Zamani, which shall be sought and obtained as expeditiously as possible, and in any event within ten days after the date of this contract, and upon execution and recording of a non-merger deed from McCulloughs to Zamani, the provisions of this contract for mutual release of claims between Zamani and McCulloughs shall become effective. **Such conveyance and recordation shall occur within 20 days after Friday, May 28, 1999, or this contract will become null and void.**” (emphasis added)

CP 279; EXH 7

The Deed in Lieu of Foreclosure (copy attached) was executed and recorded by McCulloughs was admitted in evidence as Exhibit 9 at the eight-day trial held in April 2000 and is designated as part of Zamani’s clerk’s papers on this appeal. The deed reveals that it was executed by McCulloughs on June 22, 1999, twenty-five days after May 28, 1999, and recorded on July 7, 1999, forty days after May 28, 1999. Thus, by the express terms of paragraph 5 of the release agreement the release became null and void when not executed and recorded within 20 days after May 28. None-the-less, Zamani accepted the conveyance and did not pursue a deficiency or other claim against McCulloughs at the trial in April 2000.

Additionally, paragraph 7 of the release agreement states clearly that Zamani’s release of claims against the McCulloughs applies only to her 61.05% share of the Note and Deed of Trust and that Zamani does not release McCulloughs or their agents from all claims in general whether

past, present, future, known, or unknown, as implied by Ehsani's and Cullen's argument.

Paragraph 7 of the release agreement provides:

"7. Mutual Release of Claims: Subject to the conditions set forth in paragraph 5, above, Zamani and McCulloughs do hereby release one-another, their parent or subsidiary corporations, affiliates, directors, officers, management personnel, insurers and sureties, agents, employees, predecessors or successors, and assigns, jointly and severally, from all claims, counterclaims, damages, actions, causes of action, or suits of any kind or nature, arising now or in the future or related in any way to the transaction by which the McCulloughs purchased the Hotel, the 9/1/92 Installment Note and Deed of Trust, McCulloughs' operation of the Hotel to June 13, 1996, and Zamani's operation of the Hotel on and after June 13, 1996.

"The release of claims set forth in the preceding paragraph is not intended to and does not extend to or inure to the benefit of Zia Ehsani. McCulloughs do not hereby release Ehsani from any claims.

"Zamani's release of claims against McCulloughs applies only to her 61.05% share of the Note and Deed of Trust. Zamani has no power to and does not purport to release McCulloughs from any claims that have been or could be made by Zia Ehsani."

(emphasis added)

CP 278; EXH 7

Ehsani was not a party to the release agreement. Under its express terms the release "*does not extend to or inure to the benefit of Zia Ehsani.*" Thus, Ehsani has no standing to claim any benefit under that agreement on this appeal. CP 278; EXH 7

Paragraph 9 of the release agreement pertains only to Ehsani's claim for deficiency against the McCulloughs under his 38.95% share of the Note and Deed of Trust. This paragraph has no bearing on Zamani's request that Cullen be required to restore the holdback fund taken by garnishment pursuant to the December 12, 2003, ORDER ON REMAND. The holdback fund represents proceeds of sale. Zamani's claim to restoration of these funds is not prohibited by any section of the release agreement. (CP 291 – 293).

Ehsani's other assertions against Zamani are not addressed in this brief as they are unsupported by reference to clerk's papers, by any intelligible argument or citation to authority, and were waived by failure to assert them in the trial court, and by failure to assign error to the trial court's failure to address those issues below. An issue not addressed in the trial court will not be considered on appeal. Berg v. Ting, 125 Wn.2d 544, 555; 886 P.2d 564 (1995); Kramarevcky v. Department of Social & Health Servs., 122 Wn.2d 738, 750, 863 P.2d 535 (1993).

ZAMANI IS ENTITLED TO INTEREST ON THE JUDGMENT OF \$32,377.20 AT 12% PER ANNUM, THE MAXIMUM RATE ALLOWED UNDER RCW 19.52.020

RCW 4.56.110 provides that interest on judgments is mandatory and specifies as follows:

“(4) Except as provided under subsections (1), (2), and (3) of this section, judgments shall bear interest

from the date of entry at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered. The method for determining an interest rate prescribed by this subsection is also the method for determining the "rate applicable to civil judgments" for purposes of RCW 10.82.090."

Post-judgment interest on the judgment in Zamani's favor should accrue beginning on the date judgment which was reversed on appeal was originally entered, i.e. June 27, 2000. CP 339

RCW 19.52.020(1) provides that:

"Any rate of interest shall be legal so long as the rate of interest does not exceed the higher of: **(a) Twelve percent per annum**; or **(b)** four percentage points above the equivalent coupon issue yield (as published by the Board of Governors of the Federal Reserve System) of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the later of (i) the establishment of the interest rate by written agreement of the parties to the contract, or (ii) any adjustment in the interest rate in the case of a written agreement permitting an adjustment in the interest rate. No person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater interest for the loan or forbearance of any money, goods, or things in action."

(emphasis supplied)

**ZAMANI SHOULD BE AWARDED HER COSTS AND
ATTORNEY FEES UNDER RAP 18.9(A) BECAUSE
EHSANI'S APPEAL IS FRIVOLOUS AS TO ZAMANI**

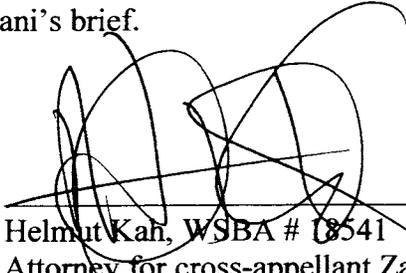
Because Ehsani's brief raises no reasonably debatable issues as to Zamani, it is frivolous. Ehsani should pay Zamani's attorney fees and costs allocable to the review and response to Ehsani's brief. RAP 18.9(a); Foisy v. Conroy, 101 Wn. App. 36, 43, 4 P.3d 140, review denied, 142 Wn.2d 1010 (2000).

CONCLUSION

Zamani's claim to restoration of that portion of the holdback fund in which she has an interest should be granted. Zamani's claim to the \$32,377.20, plus interest, was not extinguished by the May 28, 1999, Agreement for Conveyance and Mutual Release of Claims. On remand, the trial court should enter an order and judgment requiring respondent Cullen to restore \$32,377.20 of the garnished \$77,900 holdback fund to Zamani together with post-judgment interest at 12% from June 27, 2000, with the remainder payable to Ehsani.

Ehsani should pay Zamani's attorney fees and costs on this appeal to the extent attributable to Ehsani's brief.

Respectfully submitted,


Helmut Kah, WSBA # 18541
Attorney for cross-appellant Zamani

CERTIFICATION OF FILING AND SERVICE BY MAIL

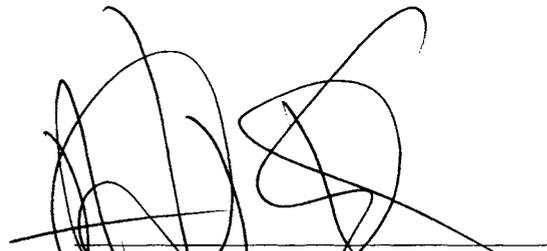
I hereby certify that on September 12, 2005, I mailed this brief to the following addressees / parties with priority mail postage prepaid:

Sayed Zia Ehsani
23400 Maestro Place
West Hills, CA 91304
Phone: 818-704-6460
Appellant, Pro se

Christopher I. Brain
A. Janay Ferguson
Attorneys at Law
Tousley Brain & Stephens PLLC
1700 7th Ave Ste 2200
Seattle WA 98101-1332
Phone: 206-682-5600
Attorneys for Respondent David Cullen

The Court of Appeals of
the State of Washington
Division I
One Union Square
600 University Street
Seattle, WA 98101-1176

DATED this 12th day of September 2005.



Helmut Kah, WSBA # 18541
Attorney for cross-appellant Zamani

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KING COUNTY, WA
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When Recorded Mail To:

Helmut Kah, Attorney at Law
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Phone: (425) 402-3033
Fax: (425) 487-4862

DEED IN LIEU OF FORECLOSURE

GRANTORS: David E. McCullough, Chong R. McCullough, Edward F. McCullough, The McCullough Family Partnership, and The McCullough Group, Inc.

GRANTEE: Guitty Zamani (formerly known as Guitty Zamani Ehsani)

Legal Description: Lots 1-2, Block 3, Lochleven, Plats Vol 16, Page 46, King County, WA

Assessor's tax parcel ID#: 438920-0090-00

Reference Nos. of Documents Released or Assigned: 9209011551

The GRANTORS, David E. McCullough, Chong R. McCullough, Edward F. McCullough, The McCullough Family Partnership, and The McCullough Group, Inc., convey and quitclaim to the GRANTEE, Guitty Zamani (formerly known as Guitty Zamani Ehsani), a single woman, as her sole and separate property, the following described real estate, situated in the County of King, State of Washington, including any after-acquired title:

Lots 1 and 2, Block 3, Lochleven, according to the plat thereof, recorded in Volume 16 of Plats, Page 46, in King County, Washington, Situate in King County, Washington

PROPERTY ADDRESS: 475 – 100th Avenue Northeast, Bellevue, Washington 98004

Together with all furniture, furnishings, appliances, fixtures, equipment, personal property, inventory, books, papers, documents, accounts, instruments, rights to payment, goodwill and intangible property located at the premises of and/or belonging to the business known as La Residence Suite Hotel. 475 – 100th Avenue Northeast, Bellevue, Washington 98004

This deed is an absolute conveyance of title, in effect as well as in form, and is not intended as a mortgage, trust conveyance, or security of any kind.

The consideration for this conveyance is (1) the mutual release of claims between the Grantors and the Grantee hereunder, and (2) in lieu of foreclosure of Guitty Zamani's 61.05% share of the following described Deed of Trust:

Guitty Zamani, fna Guitty Zamani Ehsani, and Zia Ehsani, are the owners and holders of a promissory note dated September 1, 1992 in the original principal sum of \$1,000,000.00 which is secured by Deed of Trust of the same date, which is recorded at Recording No. 9209011551 in the records of King County, Washington. Said Deed of Trust is presently the

DEED IN LIEU OF FORECLOSURE (McCullough -> Zamani) – Page 1 of 5



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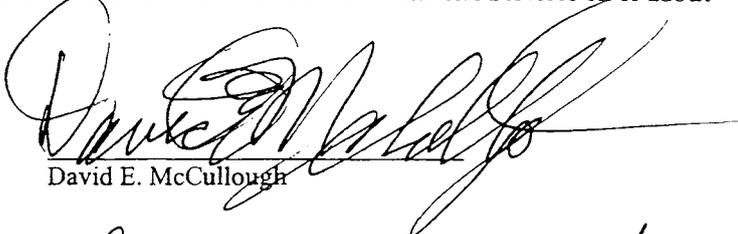
PAGE 001 OF 005
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KING COUNTY, WA

subject of a judicial foreclosure proceeding pending in King County Superior Court cause number 97-2-30285-4.

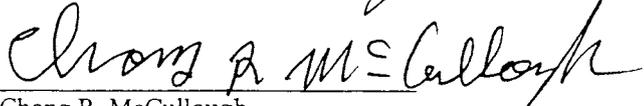
This deed is not intended to, does not, and shall not effect a merger of the legal title hereby conveyed to Guitty Zamani with the equitable title she holds pursuant to the Deed of Trust described in the preceding paragraph and under the Decree of Dissolution of Marriage entered in King County Superior Court cause number 92-3-07306-8 on or about March 30, 1994. The legal title hereby conveyed to Guitty Zamani as a result of this conveyance shall remain separate and distinct from the equitable title she holds pursuant to the Decree of Dissolution of Marriage and said Deed of Trust.

The Grantors warrant that they have placed no encumbrances against the property subsequent to September 1992 other than the Deed of Trust executed in favor of Centrum Financial Services on or about May 28, 1999.

SIGNED: June 22, 1999

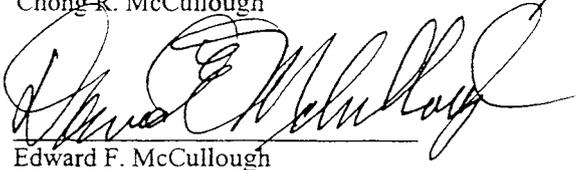

David E. McCullough

SIGNED: June 22, 1999


Chong R. McCullough

SIGNED: June 22, 1999

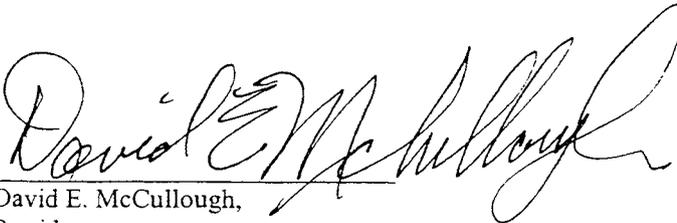
attorney in fact for


Edward F. McCullough

THE McCULLOUGH GROUP, INC.:

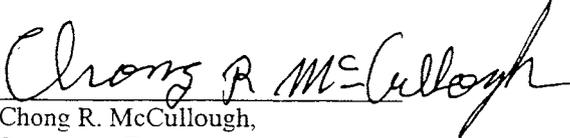
SIGNED: June 22, 1999

By


David E. McCullough,
President

SIGNED: June 22, 1999

By


Chong R. McCullough,
Secretary - Treasurer



THE McCULLOUGH FAMILY PARTNERSHIP:

SIGNED: June 22, 1999

By *David E. McCullough*
David E. McCullough,
Partner

SIGNED: June 22, 1999

By *Chong R. McCullough*
Chong R. McCullough,
Partner

SIGNED: June 22, 1999

attorney in fact for
By *David E. McCullough*
Edward F. McCullough,
Partner

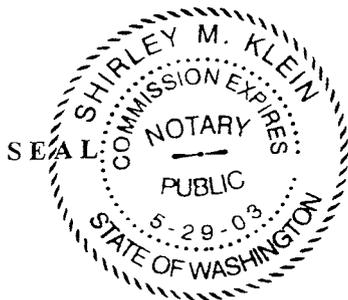
ACKNOWLEDGMENTS

Individuals / Partners:

State of Washington)
) ss.
County of King)

On this day personally appeared before me **David E. McCullough** to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 22 day of June, 1999.



Shirley M. Klein
Notary Public in and for the state of
Washington, residing at *Chehalis*

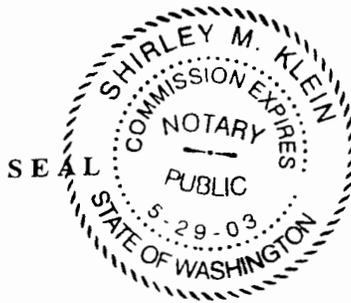
My commission expires: *5-29-03*



State of Washington)
) ss.
County of King)

On this day personally appeared before me **Chong R. McCullough** to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that she signed the same as her free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 22 day of June, 1999.



Shirley M. Klein
Notary Public in and for the state of
Washington, residing at Chehalis

My commission expires: 5-29-03

State of Washington)
) ss.
County of King)

On this day personally appeared before me **Edward F. McCullough** to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal this 22 day of June, 1999.



Shirley M. Klein
Notary Public in and for the state of
Washington, residing at Chehalis

My commission expires: 5-29-03



Corporation:

State of Washington)
) ss.
County of King)

On this 22 day of June 1999 before me personally appeared **David E. McCullough**, to me known to be the **President** of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.



Shirley M. Klein
Notary Public in and for the state of
Washington, residing at Chelalis

My commission expires: 5-29-03

State of Washington)
) ss.
County of King)

On this 22 day of June, 1999 before me personally appeared **Chong R. McCullough**, to me known to be the **Secretary - Treasurer** of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that she was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.



Shirley M. Klein
Notary Public in and for the state of
Washington, residing at Chelalis

My commission expires: 5-29-03

