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No. 85535-8

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 39171-6-II)

LEO MACIAS and PATRICIA MACIAS,

Plaintiffs-Petitioners,

v.

SABERHAGEN HOLDINGS, INC., et al.,

Defendants-Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

Matthew P. Bergman
Brian F. Ladenburg
BERGMAN, DRAPER & FROCKT
614 First Avenue, Fourth Floor
Seattle, WA 98104
(206) 957-9510

John W. Phillips
Matthew Geyman
PHILLIPS LAW GROUP, PLLC
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104
(206) 382-6163

Attorneys for Plaintiffs-Petitioners

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I. INTRODUCTION

The common law owes its glory to its ability to cope with new situations. Its principles are not mere printed fiats, but are living tools to be used in solving emergent problems.¹

This case affords the Court an important opportunity to clarify its decisions in *Simonetta v. Viad Corp.*, 165 Wn.2d 341, 197 P.3d 127 (2008), and *Braaten v. Saberhagen Holdings*, 165 Wn.2d 373, 198 P.3d 493 (2008), and to prevent them from being misused by litigants and misapplied by Washington courts. Those decisions establish a “general rule,”² not a “printed fiat,” that a manufacturer does not have a duty to warn of dangers presented by a product for which the manufacturer is not within the chain of distribution.

There are exceptions to that general rule, some of which the Court alluded to in *Simonetta* and *Braaten*. The Court should make clear here that it did not intend *Simonetta* and *Braaten* to establish an

¹ *Senear v. Daily Journal-American*, 97 Wn.2d 148, 152, 641 P.2d 1180 (1982) (quoting *Mills v. Orcas Power & Light Co.*, 56 Wn.2d 807, 819, 355 P.2d 781 (1960) (internal quotations omitted)).

² See, e.g., *Simonetta*, 165 Wn.2d at 353 (stating that the duty to warn “generally” does not extend beyond dangers presented by manufacturer’s own product) (emphasis added); *Braaten*, 165 Wn.2d at 380 (applying that “general rule” to asbestos in replacement packing and gaskets); *id.* at 385 (stating that the “law generally does not require a manufacturer to study and analyze the products of others and warn users of the risks of those products”) (emphasis added).

absolute rule, subject only to fixed exceptions. Rather, the Court provided litigants and Washington courts with a *general* rule and analytical tools to determine if an exception to that general rule may be appropriate under the facts of a particular case.

Here, the Court is asked to decide if the manufacturers of a safety product – respirators whose specific purpose is to be worn in hazardous environments to filter and collect hazardous substances so they do not enter the lungs – have a duty to warn regarding the proper use and cleaning of the respirators so as to avoid contact with the hazardous substances that the respirators are designed to filter and collect, but which admittedly are not substances as to which the manufacturers are in the chain of distribution.

The Court of Appeals applied this Court's decisions in *Simonetta* and *Braaten* mechanically and inflexibly, and held that the safety purpose of the respirators was not "relevant" to the existence of a duty to warn because Defendants-Respondents (the "Respirator Manufacturers") were not in the chain of distribution of the asbestos fibers that their respirators were designed to filter and collect. *See Macias v. Mine Safety Appliances Co.*, 158 Wn. App. 931, 942, 244 P.3d 978 (2010) (holding that safety purpose of the respirators was not "relevant to the question of whether the manufacturer owes a duty to warn").

This Court should repudiate such an illogical premise and hold that the Respirator Manufacturers had a duty to warn Plaintiff-Petitioner (“Mr. Macias”) for two principal reasons. First, they had a duty to warn users about proper handling and cleaning of their respirators because the respirators interact with airborne asbestos to concentrate asbestos in the filters of the respirators and thus create a *new and different risk* associated with asbestos. The respirators themselves contributed to the risk posed by asbestos by collecting and concentrating the asbestos, and the Respirator Manufacturers stand in the best position to warn of that risk.

Second, the Respirator Manufacturers had a duty to warn because the respirators, by their purpose and inherent nature, were designed to protect users by filtering and collecting asbestos fibers and other hazardous substances that would otherwise reach the lungs. The Respirator Manufacturers stand in the best position to warn users about how to properly use and maintain their own safety products to avoid contact with the hazardous substances that the respirators are specifically designed to filter and collect.

II. ISSUE PRESENTED

Did the Court of Appeals err in holding that this Court’s decisions in *Simonetta* and *Braaten* require the conclusion that the Respirator Manufacturers had no duty to warn about proper use and

handling of the respirators to avoid contact with the hazardous substances the respirators were designed to filter and collect, even though the respirators created a new hazard by concentrating the asbestos dust to which Mr. Macias was exposed, and even though the very purpose of the respirators was to capture hazardous substances and thus protect users?

III. FACTUAL BACKGROUND

From 1978 to 2004, Mr. Macias worked as a tool keeper at Todd Shipyards where his daily duties included cleaning respirators and replacing used filters after they were returned to the tool room by other workers who wore the respirators to protect themselves from asbestos exposure. CP 217, 220, 228-240 & 405. During busy periods he handled “hundreds” or “thousands” of the respirators and dirty filters in a single shift. CP 405. The respirators were made by the Respirator Manufacturers. CP 228 & 406.

Mr. Macias did not know he was at risk from the asbestos dust collected and concentrated by the respirators and filters. CP 241-242. He never saw a warning on the respirators advising him to take precautions when handling or maintaining them, such as wearing a respirator himself when doing his work or wetting the used respirators before cleaning them and replacing the filters. *Id.* Had he been so warned, he would have heeded the warnings. CP 242.

In contrast to Mr. Macias' lack of knowledge, the Respirator Manufacturers knew that "inhalation of asbestos dust was potentially harmful to human health." CP 533. One Respirator Manufacturer admitted that its respirators were "designed to help protect users against asbestos." CP 532 (admission of Defendant-Respondent North Safety); *see also* CP 532-533 (further admitting that it intended users to "periodically clean" the respirators and "periodically replace the cartridges").

IV. ARGUMENT

A. The Respirator Manufacturers Had a Duty to Warn Because Their Respirators Combined with a Hazardous Substance to Create a New Hazard.

Respirators contain filters. Those filters filter out hazardous substances in the air and concentrate those hazardous substances in and around the filter. Those filters need to be periodically replaced. It was Mr. Macias' job to replace used filters with new filters. CP 220, 228-240 & 405. The filters concentrated the asbestos fibers in one place by trapping the fibers and preventing them from entering the lungs, and in doing so, they created a new and different hazard associated with cleaning the respirators and replacing the used filters. *See* CP 234-235 (Mr. Macias' testimony describing his work cleaning and maintaining used respirators and stating that he would "undo the

filters and throw them in the garbage can” and that the filters “would be all stained” and often “full of dust”).

Respirator users are not likely to remove and replace the filters in the air-contaminated environments where they wear the respirators to perform other tasks because they need to keep wearing the respirators in those environments. Once they have left those contaminated environments, they may mistakenly believe that the danger has been eliminated. It is thus important for the Respirator Manufacturers to warn users how to handle the respirators after use, clean them, and replace the filters without inhaling the asbestos fibers collected and concentrated by the respirators. Yet Mr. Macias was never warned of this new and different hazard created by the interaction of the respirators with the airborne asbestos they were specifically designed to collect and concentrate. CP 241-242.

In *Braaten*, this Court discussed the exception to the “general rule” in cases where the “*combination*” of a manufacturer’s product and another product creates a “*dangerous condition*.” *Braaten*, 165 Wn.2d at 385 n.7 (emphasis added; citing *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222, 226 (N.Y. App. 1992)). As this Court noted in *Braaten*, even the manufacturer defendants conceded that a duty to warn may be imposed where, as here (and unlike in *Simonetta* and *Braaten*), the manufacturer’s product “when used with another

product, *synergistically* creates a hazardous condition.” *Braaten*, 165 Wn.2d at 383 (emphasis added). This Court should conclude that this exception applies squarely to this case where the purpose of the respirators was to capture and concentrate hazardous products through filtration but, in so doing, the respirators created a new risk associated with the handling of the respirators and replacement of the used filters in which the airborne contaminants are concentrated.

This Court’s decision in *Duvon v. Rockwell International*, 116 Wn.2d 749, 807 P.2d 876 (1991), is instructive. The product in that case was a portable exhauster that was designed to remove ammonia fumes from tanks to allow workers to safely enter the tanks and take in-tank photographs. *Id.* at 751. The plaintiff was exposed to the toxic ammonia gas and seriously injured as a result of a valve that was left open, thus permitting accumulation of the toxic gas, when the ventilation/filter system was down while he was trying to repair the exhauster. *Id.* The plaintiff alleged that Rockwell, which manufactured the exhauster, was negligent for “fail[ing] to provide adequate procedure guidance to shut the inlet butterfly valve when the ventilation/filter system was down.” *Id.*

This Court analyzed Rockwell’s negligence liability under Section 388 of the Restatement (Second) of Torts. *Duvon*, 116 Wn.2d at 758-59. The Court quoted the statement in Section 388, subsection

(c), that one who supplies a product may be liable for “fail[ing] to exercise reasonable care to inform [the user] of its dangerous condition or of the facts which make it likely to be dangerous,” and held that Rockwell could be liable for failing to warn the plaintiff about the steps necessary to avoid exposure to toxic gas when working on the exhauster. *Id.* at 759. The Court reached that conclusion despite the fact that the product that injured the plaintiff was the ammonia gas, and not the exhauster, in light of the dangerous condition created by the *combination* of the exhauster and the ammonia gas against which the exhauster was designed to protect. *Id.*

The Court of Appeals attempted to distinguish *Duvon* by describing it as a case in which “the manufacturer’s own product malfunctioned due to an alleged manufacturing or design defect.” *Macias*, 158 Wn. App. at 944. However, as this Court noted in *Duvon*, the failure to warn in that case was the manufacturer’s “failure to provide adequate procedure guidance to shut the inlet butterfly valve when the ventilation/filter system was down,” and there was no defect in the butterfly valve, which was simply left open. *Duvon*, 116 Wn.2d at 750-51. The hazard that created the duty to warn was the dangerous *combination* – after a non-defective valve was left open –

of the exhauster and the ammonia fumes that the exhauster was intended to remove from the tanks. *Id.*³

Duvon and *Braaten* both establish that the Court of Appeals erred in failing to hold that the Respirator Manufacturers had a duty to warn because the “*combination*” of the respirators and the hazardous products or substances that the respirators captured and concentrated create a new “*dangerous condition.*” *Braaten*, 165 Wn.2d at 385 n.7.

Imposing a duty to warn on the Respirator Manufacturers is also consistent with the policy underlying the common law duty to warn, because the Respirator Manufacturers were and are in the best position to know and warn users such as Mr. Macias, who clean and maintain the respirators, about the hazardous condition created by the combination of their respirators with the hazardous substances against which their respirators are intended to protect.⁴ Otherwise, manufacturers of safety products designed to protect against exposure

³ Because of the procedural posture of *Duvon*, this Court stated that its analysis of the duty to warn was not “conclusive or binding,” but “merely illustrative of the fact that a duty could be owed.” *Duvon*, 116 Wn.2d at 756. Nonetheless, the Court’s detailed analysis is highly persuasive and transferable, and should be followed here.

⁴ See, e.g., *Simonetta*, 165 Wn.2d at 355 (“We justify imposing liability on the defendant who . . . is in the best position to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained”); *Wells v. City of Vancouver*, 77 Wn.2d 800, 810 & n.3, 467 P.2d 292 (1970) (other policy considerations in establishment of duty include party’s “relative ability to adopt practical means of preventing injury”).

to hazardous substances (HazMat suits, welding shields, hazardous waste storage tanks, x-ray or nuclear radiation screens, etc.) would never have a duty to warn users of steps necessary to avoid exposures to the hazardous substances against which their products are designed to protect, even where the combination of their safety products and the other hazardous products create a dangerous new hazard. Under this exception to the “general rule” of *Simonetta* and *Braaten*, this Court should hold that the Respirator Defendants had a duty to warn concerning the safe cleaning and maintenance of their respirators and filters.

Apparently recognizing the strength of the foregoing argument, the Respirator Manufacturers have asserted that this Court should not consider it because Mr. Macias did not make it to the Superior Court, which denied the Respirator Manufacturers’ summary judgment motions on other grounds.⁵ In fact, this argument *was* raised in oral argument before the Superior Court by Mr. Macias’ counsel.⁶ Further, Mr. Macias has consistently claimed that the Respirator

⁵ See Answer to Petition for Review, dated February 11, 2011, on file herein, at 4.

⁶ See Verbatim Report of Proceedings, dated April 23, 2009, at 27 (oral argument by Mr. Macias’ counsel, showing a respirator and arguing that Mr. Macias’ “job was to unscrew the respirator . . . and clean it out here” and that “[t]here would be dust accumulated in the [yoke] of the product here, and we contend that there was exposure”).

Manufacturers owed a duty to warn. Thus, even if this were a new argument (which it is not), it would not be a new *claim*, but simply an alternative *argument* in support of his consistent claim that he was owed a duty. *See Yee v. Escondido*, 503 U.S. 519, 534 (1992) (once a “claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below”).⁷ Moreover, because this argument is well-supported by the record and further buttresses the Superior Court’s denial of the Respirator Manufacturer’s summary judgment motions, it should be considered because “an appellate court can sustain the trial court’s judgment on any theory established by the pleadings and supported by the proof, even if the trial court did not consider it.” *Lamon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

B. The Respirator Manufacturers Had a Duty to Warn Because the Respirators Were Designed to Protect Against Hazardous Substances and that Safety Purpose Logically Requires Finding a Duty to Warn.

The Respirator Manufacturers also had a duty to warn because the respirators, by their very purpose and inherent nature, were designed to protect users by filtering and collecting asbestos fibers and other hazardous substances that would otherwise reach the lungs.

⁷ *See also Burns v. Miller*, 107 Wn.2d 778, 783, 733 P.2d 522 (1987) (reversing Court of Appeals decision and affirming Superior Court’s ruling granting party’s claim for attorney fees based on new argument in support of attorney fee claim that was raised for the first time on appeal).

The Court of Appeals misinterpreted this Court's holdings in *Braaten* and *Simonetta* when it held that "our Supreme Court has made clear that the purpose of the product is not what gives rise to the duty to warn." *Macias*, 158 Wn. App. at 951. Respectfully, this Court has provided no such clarity. This Court held, rather, that "foreseeability" of injury is not a *sufficient* basis to establish the existence of a duty. See *Simonetta*, 165 Wn.2d at 349 n.4 & 357; *Braaten*, 165 Wn.2d at 388 n.8. That does not mean that where, as here, a product's inherent purpose makes an injury "foreseeable," that fact somehow disqualifies consideration of the product's purpose in determining if a duty exists.

The fact that safety respirators such as the ones at issue here are designed to prevent human exposure to hazardous substances means not only that they will foreseeably work in an environment where hazardous products are present, but also that the Respirator Manufacturers specifically developed and designed them – and consumers use and reasonably rely on them – to prevent exposure to those other hazardous products. Unlike the products at issue in *Simonetta* and *Braaten*, these respirators were specifically *intended* and *designed* to protect against the hazardous products to which Mr. Macias was in fact exposed.

Mr. Macias' warning claims focus strictly on the intent and design characteristics of the respirators, which were specifically

intended to protect against airborne hazardous substances such as the asbestos fibers to which he was exposed. This distinction is emphasized by this Court's limiting observation in *Simonetta* that there was "no claim that the evaporator *itself* contained an unsafe design feature." *Simonetta*, 165 Wn.2d at 361 (emphasis added). Here, in contrast, Plaintiffs *do* claim that the respirators *themselves* contained an unsafe design feature — they contained inadequate warnings and safety instructions regarding the safe use, handling, cleaning and maintenance of the respirators and used filters that were necessary to ensure that the respirators accomplished their purpose, namely, protection from exposure to hazardous substances. *See Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 757-59, 818 P.2d 1337 (1992) (holding that baby oil manufacturer had duty to warn based on intended use and intrinsic nature of product, noting that "baby oil is *distinguishable from other products*" and "[w]hat makes baby oil unique, and what is the *sine qua non* of our decision, is that baby oil is *intended for use on babies*") (emphasis added).

Again, the same policy considerations discussed above that underlie the common law duty to warn as enunciated in *Braaten*, *Simonetta* and other Washington cases strongly support finding that the Respirator Manufacturers had a duty to warn of the hazards

created by use of their respirators, whose *purpose and function* was to protect against such exposure.⁸

The Respirator Manufacturers attempt to deflect the force of this argument by noting that Mr. Macias did not wear the respirators, but simply cleaned them and replaced the used filters. This is a distinction without a difference. First, the Respirator Manufacturers' attempted distinction is disingenuous, as they have argued (and the Court of Appeals held) that the purpose of a product is irrelevant to whether the manufacturer has a duty to the wearer *or* cleaner of the respirator. Second, what matters here is that both the wearers and cleaners of the respirators are "users" of the mask. Use involves wearing, cleaning, replacing filters and storing.⁹ That field of use defines the scope of the Respirator Manufacturers' duty to warn, particularly where, as here (*see* Section IV. A., above), the designed use of the respirator creates *new and different risks* in cleaning and replacing cartridges that have concentrated the filtered hazardous

⁸ *See, e.g., Simonetta*, 165 Wn.2d at 355 (in determining duty, court should consider party's ability "to know of the dangerous aspects of the product and to translate that knowledge into a cost of production against which liability insurance can be obtained"); *Wells*, 77 Wn.2d at 810 n.3 (court may also consider party's "ability to adopt practical means of preventing injury").

⁹ As previously noted, North Safety admits that it "*intended* users to periodically clean the . . . respirators" and "periodically replace the cartridges." CP 532-533 (emphasis added).

substances. *See Duvon*, 116 Wn.2d at 751 & 758-59 (product was an exhauster designed to remove toxic ammonia gas from tanks to allow workers to safely enter the tanks and take in-tank photographs; *held*, that manufacturer's duty to warn included a duty to warn the plaintiff, an electrician who was repairing the product, about steps necessary to avoid exposure to toxic gas during repair).¹⁰

Given the inherent safety purpose of the respirators, there is no more suitable entity upon which to impose a duty to warn than the manufacturers of these respirators whose purpose was to prevent exposure to the specific hazardous substance that harmed Mr. Macias. *See Simonetta*, 165 Wn.2d at 355 (discussing policy for placing duty to warn on entity in "best position to know of the dangerous aspects of the product"); *Braaten*, 165 Wn.2d at 392 (same); *see also Ayers*, 117 Wn.2d at 757-59 (discussing policy supporting duty to warn based on intrinsic nature of product). As this Court has observed:

The evaluation of the product in terms of the reasonable expectations of the ordinary customer allows the trier of fact to take into account *the intrinsic nature of the product*.

¹⁰ *See also, e.g., Miller v. Anetsberger Bros., Inc.*, 508 N.Y.S.2d 954, 956 (N.Y. App. 1986) (manufacturer's duty to warn included "duty to warn the plaintiff of dangers of cleaning the machine"); *Hertzfeld v. Hayward Pool Prods., Inc.*, 2007 WL 4563446, *10 (Ohio App. Dec. 31, 2007) (same).

Little v. PPG Industries, Inc., 92 Wn.2d 118, 122, 594 P.2d 911
(1979) (emphasis added).

The record demonstrates that at least one of the Respirator Manufacturers, North Safety, logically provided warnings regarding proper use and maintenance of its respirators to prevent hazardous exposure, warning users in its product manual that the “*replacement of air-purifying elements must be done in a safe area containing uncontaminated, breathable air.*” CP 533 (emphasis added). Yet under the Respirator Manufacturers’ reading of the law, they would have no duty to provide any warnings. The legal rule they would have this Court announce would mean that a manufacturer of safety products made to protect against exposure to hazardous substances (again, think of a HazMat suit, welding shield, hazardous waste storage tank, x-ray or nuclear radiation screen, etc.) would never have a duty *under any circumstances* to warn of steps necessary to avoid exposures to hazardous substances they did not manufacture, even though the very purpose and design of their safety products was to protect against such exposures.

The law in Washington and elsewhere does not absolve safety equipment manufacturers of the duty to warn about hazardous

exposures that their safety products are designed to guard against and prevent.¹¹ Who is in a better position to obtain insurance against risk of hazardous product exposure than the manufacturer whose product is designed to protect against exposure to the hazardous product in the first place? Certainly the asbestos manufacturers had a duty to warn of the danger of their product. But just as certainly, Respirator Manufacturers have a duty to warn how to avoid exposure to the asbestos collected by their respirators and filters because the respirators are specifically designed to guard against and prevent such exposure. The Respirator Manufacturers know far more than asbestos manufacturers about how the respirators work around airborne asbestos and how they must be safely used, cleaned and maintained to avoid asbestos exposure.

C. The Respirator Manufacturers Had a Duty to Warn Under WPLA Under Both the Risk-Utility Test and the Consumer Expectations Test.

To the extent that Mr. Macias' asbestos exposure occurred after July 26, 1981, the effective date of the Washington Products Liability Act, RCW 7.72 *et seq.* ("WPLA"), this Court should also hold that the Respirator Manufacturers had a duty to warn concerning

¹¹ See Mr. Macias' brief filed in the Court of Appeals, Division II in this matter, dated December 10, 2009, entitled "Brief of Respondents," at 25-37 (citing numerous cases from Washington and other jurisdictions involving respirators and similar safety products).

the safe cleaning and maintenance of their respirators and filters under the risk-utility test and the consumer expectations test of WPLA.¹²

WPLA imposes strict liability for failure to adequately warn based on two alternative tests, the “risk-utility test” and “consumer expectations” test. *See Ayers*, 117 Wn.2d at 763-66 (discussing these independent tests for determining duty to warn under RCW 7.72.030). And importantly, the “relevant product” for purposes of this analysis is not the asbestos dust that Mr. Macias inhaled, but the respirators that gave rise to his products liability claim based on the Respirator Manufacturer’s failure to warn. *See* RCW 7.72.010(2), (3) & (4) (defining “relevant product”).

Under the risk-utility test, there is no question that the Respirator Manufacturers could – and in the case of North Safety, in fact *did* – provide warnings about use, cleaning and replacement of filters to prevent exposure to asbestos. Given the seriousness of the potential harm and the slight burden of providing a simple warning (such as the one that North Safety in fact provided), a reasonable jury

¹² The respirators used at Todd Shipyards that Mr. Macias cleaned and maintained in the tool room were American Optical respirators from 1978 until the “early 1980s,” and Mine Safety and North Safety respirators from “the early 1980s” until the conclusion of his employment there in 2004. CP 217 & 220-223.

could and should find that the respirators required an adequate warning concerning the proper cleaning and maintenance of the used respirators and filters. *See Ayers*, 117 Wn.2d at 765.

Likewise, under the consumer expectations test, there is no question that consumers expect safety product manufacturers to provide such warnings. Nor is there any dispute on this record that if such warnings had been given, Mr. Macias would have followed them and avoided his lethal exposure to the asbestos fibers. *See CP 242*. Again, a reasonable jury could and should find that without adequate warnings, the respirators were unsafe to an extent beyond that contemplated by the ordinary consumer, and that the likelihood and gravity of potential were sufficiently great, when balanced against the minimal burden of providing warnings, to require a warning under the consumer expectations test as well. *See Ayers*, 117 Wn.2d at 766.

Thus, following this Court's duty-to-warn analysis in *Ayers*, and focusing on the "relevant product" as defined in WPLA, namely the respirators, and not the asbestos dust, the Court should conclude that the Respirator Manufacturers also had a duty to warn under WPLA. *See Ayers*, 117 Wn.2d at 763-66 (holding that product was

not reasonably safe because warnings were inadequate under both risk-utility and consumer expectation tests).

IV. CONCLUSION

Plaintiffs respectfully request that this Court affirm the Superior Court's denial of the Respirator Manufacturers' summary judgment motions, reverse the Court of Appeals' decision, and remand this case for trial.

DATED this 29th day of April, 2011.

Respectfully submitted,

BERGMAN, DRAPER & FROCKT

By: 
Matthew P. Bergman, WSBA #20894
Brian F. Ladenburg, WSBA #29531

PHILLIPS LAW GROUP, PLLC

By: 
John W. Phillips, WSBA #12185
Matthew Geyman, WSBA #17544

Counsel for Plaintiffs-Petitioners

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Attached for filing are the Supplemental Brief of Petitioners, and Certificate of Service, in the matter of Macias v. Saberhagen Holdings, Inc., et al., No. 85535-8.

Matt Geyman

Phillips Law Group, PLLC

315 Fifth Ave. S., Suite 1000

Seattle, WA 98104

tel (206) 382-1168

fax (206) 382-6168

email: mgeyman@jphillipslaw.com

www.jphillipslaw.com