

86739-9

No. 86739-9

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 286, Petitioner

v.

PORT OF SEATTLE, Respondent

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ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. STATEMENT OF THE CASE.....	1
A. Mark Cann’s workplace behavior leads to his termination .....	1
1. Despite the Port’s clear policies and training on harassment, Mark Cann ties a noose in an open work area at the Port .....	2
2. Cann shows no remorse for his act .....	3
3. The Port terminates Cann for violating its anti-harassment policy .....	3
B. After a hearing, the arbitrator reinstates Cann with full back pay except for a 20-day suspension and no other discipline .....	4
C. The Superior Court vacates the Award as against public policy .....	4
D. The Court of Appeals affirms the Superior Court’s vacation of the Award .....	6
III. ARGUMENT .....	7
A. Discretionary review is granted only if considerations of RAP 13.4 are met and they are not here. ....	7
B. The Court of Appeals decision is not in conflict with Kitsap County .....	8
1. In Kitsap County, unlike here, there was no clear public policy placing an affirmative duty on the employer to correct or prevent the employee’s acts. ....	8
2. The Union misinterprets the Court’s holding in Kitsap County .....	10

3.	The Union’s interpretation of the public policy exception would effectively abolish it when workplace harassment is at issue .....	12
4.	The Court of Appeals’ decision does require analysis, but does not lead to confusion, and is consistent with Kitsap County .....	14
5.	The Court of Appeals’ decision does not invite trial court judges to second-guess the factual findings and remedies of labor arbitrators .....	15
C.	The decision in this case does not involve an issue of substantial public interest.....	16
1.	The Court of Appeals’ decision will not lead trial courts to review labor arbitration decisions on the merits.....	16
2.	The Court of Appeals’ decision will not destroy the public policy of finality in labor arbitrations .	16
3.	The participation of an amicus does not automatically mean that an issue is of substantial public interest.....	18
4.	This Court has already ruled on potential issues of substantial public interest in this case.....	18
IV.	CONCLUSION.....	20

TABLE OF AUTHORITIES

Pages

CASES

*Antonius v. King County*, 153 Wn.2d 256, 103 P.2d 729  
(2004) .....19

*City of Brooklyn Center v. Law Enforcement Labor Servs.,  
Inc.*, 635 N.W.2d 236 (Minn. App. 2001) .....11

*Kitsap County Deputy Sheriff's Guild v. Kitsap County*,  
167 Wn.2d 428, 219 P.3d 675 (2009)..... 1, 7, 8, 9, 10  
.....11, 12, 13, 14  
.....15, 16, 17, 19

STATUTORY AUTHORITY

Minnesota Human Rights Act.....11

Title VII of the Civil Rights Act of 1964.....11

Washington Law Against Discrimination (“WLAD”) .....5, 6, 8, 10  
.....11, 12, 13  
.....19

## I. INTRODUCTION

Petitioner International Union of Operating Engineers, Local 286 (the “Union”) requests that this Court accept review of a decision of Division I of the Court of Appeals affirming vacation of a labor arbitration award. This Court should deny review because the Union does not satisfy this Court’s standard for accepting review under RAP 13.4(b)

The Court of Appeals’ decision does not conflict with any of this Court’s decisions, including its recent decision in *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 167 Wn.2d 428, 219 P.3d 675 (2009) (“*Kitsap County*”). In fact, the Court of Appeals applied this Court’s holdings from *Kitsap County* in coming to its decision. Moreover, this case does not present any issues of substantial public interest that have not already been considered and ruled upon by this Court in prior cases. For these reasons, described in more detail below, Respondent Port of Seattle (the “Port”) respectfully requests that this Court deny the Union’s Petition for Review.

## II. STATEMENT OF THE CASE

### A. **Mark Cann’s workplace behavior leads to his termination.**

The Port and the Union were parties to a Collective Bargaining Agreement for the period June 1, 2007 through May 31, 2009 (the “CBA”), which covered certain Port employees, including Cann, and

prohibited discrimination by employees on the basis of race. CP 637 (citing Section 4.01 of CBA). The Port also has a written anti-harassment policy (“HR-22”) that forbids harassment in the workplace. CP 638 (quoting HR-22). The Port is clear, including in HR-22, that it has zero tolerance for harassment at the workplace, and that a violation can subject an employee to immediate termination. *Id.* Cann testified he understood that he would be fired if he violated HR-22. CP 223 (Cann PERC hearing testimony).

The Port developed an online training program to support its anti-harassment policy. CP 646. The training provides information about harassment, and makes clear that the intent of the person who makes a statement or displays an object in violation of the policy does not matter. CP 488 (anti-harassment training slide). The training also warns potential harassers that “[a]ny harassing behavior...can result in disciplinary action, up to and including termination.” CP 646 (Award) (emphasis added). Cann testified that he took this training. *Id.*

**1. Despite the Port’s clear policies and training on harassment, Mark Cann ties a noose in an open work area at the Port.**

On December 17, 2007, while on duty, Cann tied a hangman’s noose in a rope and hung the noose on a rail overlooking an open, commonly used and traveled work area at the Port. CP 636; 648.

An African-American Port employee, Rafael Rivera, with whom Cann had a recent falling out, was working approximately 30 feet away from where Cann hung the noose. CP 211-212. The sight of the hangman's noose caused Mr. Rivera to "relive a time in [his] life that was demeaning, degrading, humiliating, and de-humanizing." CP 308-309; CP 448. Mr. Rivera served in the Navy and was stationed in Jacksonville, Florida in the 1960s and "witnessed first hand and lived daily with racism." *Id.* Mr. Rivera and the day shift foreman at the Port reported the noose to Port management. CP 652 (Award).

**2. Cann shows no remorse for his act.**

Even after learning that Mr. Rivera was offended by the noose, Cann could not muster a sincere apology. CP 652. In the course of his apology, Cann produced a definition of "noose" from a dictionary, "apparently to counter the notion that he had tied a noose." *Id.* He also testified that he has tied and displayed hangman's nooses in the workplace on prior occasions, as an outgrowth of his "twisted" sense of humor. CP 235-236 (Cann PERC hearing testimony).

**3. The Port terminates Cann for violating its anti-harassment policy.**

Under the CBA, the Port may discipline or terminate the employment of any employee for just cause. CP 637 (citing Section 7.07

of the CBA). On February 11, 2008 the Port terminated Cann for violating HR-22. CP 35 (termination letter).

**B. After a hearing, the arbitrator reinstates Cann with full back pay except for a 20-day suspension, and no other discipline.**

The Union grieved on behalf of Cann, and requested arbitration of the grievance pursuant to the CBA between the parties. The parties agreed to have the matter heard by arbitrator Anthony Vivenzio, who presided over a two-day hearing on October 13 and 14, 2008. The arbitrator issued his award (the "Award") on February 2, 2009. *See* CP 633-658.

The arbitrator found that the Port met all of the tests for "just cause" discipline of Cann, concluding "that on December 12, 2007, grievant Cann performed acts constituting a violation of the Employer's anti-harassment policy, warranting discipline, even substantial discipline." CP 653 (emphasis added). However, the arbitrator concluded that termination was too harsh a punishment, and directed that the Port reinstate Cann to his prior position, with full back pay, except for a 20 day suspension. CP 655-57.

**C. The Superior Court vacates the Award as against public policy.**

On February 25, 2009, the Port timely applied to King County Superior Court for a Writ of Certiorari to review the Award, which Writ

was granted by Judge Paris Kallas on April 1, 2009. CP 740-741. The Port filed a Motion to Vacate the Award on public policy grounds on June 17, 2009. CP 726. In turn, the Union filed a Motion for Summary Judgment on the same day, requesting that the trial court enforce the Award. *Id.* King County Superior Court Judge Gonzalez announced his oral ruling on the cross-motions on August 3, 2009, and issued a written order on February 4, 2010. CP 725-727.

The Superior Court vacated the Award “because it violates Washington’s explicit, well-defined, and dominant public policy prohibiting discrimination in the workplace.” *Id.* The Superior Court explained the rationale for its ruling as follows:

Employers have an affirmative duty to provide a workplace free from racial harassment and discrimination. Employees have a right to such a workplace. The Award undermined the well-defined, explicit and dominant public policy expressed in [the Washington Law Against Discrimination (“WLAD”)] because it was excessively lenient. Under the Award Mr. Cann was ordered back to work with back pay and without significant consequence, without training or other warning.

CP 727.

As part of its order, the Superior Court reinstated Cann to his former position at the Port. CP 726. Cann returned to work at the Port on September 22, 2009, and remains employed at the Port. *Id.* The Superior Court also ordered the Port to pay Cann six months of back pay, reduced

by any other compensation that Cann received during that time period. *Id.* And the court ordered Cann to submit a letter of apology and to complete the Port's training on diversity and anti-harassment issues, both of which Cann did upon his reinstatement. CP 726-727. Finally, the Superior Court ordered that if Cann violated the Port's anti-harassment policy again in the four-year period following his reinstatement, then he would be terminated without further process. CP 727.

**D. The Court of Appeals affirms the Superior Court's vacation of the Award.**

The Union appealed the Superior Court's ruling to Division I of the Court of Appeals. After considering the parties' briefs and oral argument, the Court of Appeals unanimously affirmed the Superior Court's ruling that the Award should be vacated, but ruled that the Superior Court exceeded its authority in fashioning alternate discipline for Cann. Appendix to Petition for Review, A- 17.

In affirming the Superior Court's vacation of the Award, the Court of Appeals held that WLAD "contains an explicit, well-defined, and dominant public policy with the dual purpose of ending current discrimination and preventing future discrimination." A- 10. Holding that "the policies of the WLAD require that an arbitration award be substantial enough to discourage repeat behavior," the Court of Appeals vacated the

Award because it “failed to provide an adequate sanction for the employee’s conduct and did not allow the Port to fulfill its affirmative legal duty to provide a discrimination-free workplace...” A- 15. In coming to its decision, the Court of Appeals expressly considered and rejected the Union’s argument that vacating the Award would conflict with this Court’s ruling in *Kitsap County*. A- 15-17.

The Union seeks review of this ruling. The Port raises no issues for review in response to the Union’s Petition.

### **III. ARGUMENT**

#### **A. Discretionary review is granted only if considerations of RAP 13.4 are met and they are not here.**

This Court established the criteria for acceptance of discretionary review. Under RAP 13.4, this Court will accept review only if an appellate court decision conflicts with a decision of this Court or another appellate court, involves a significant question of constitutional law, or “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b). The Union asserts that review should be accepted here because the Court of Appeals ruling conflicts with this Court’s ruling in *Kitsap County*, and because it raises an issue of substantial public interest. The decision of the Court of Appeals does not conflict with this Court’s decision in *Kitsap County*, and does not raise an

issue of substantial public interest. Therefore, this Court should not accept review.

**B. The Court of Appeals decision is not in conflict with *Kitsap County*.**

The Union argues in its Petition for Review that the Court should accept review because the Court of Appeals' decision conflicts with this Court's ruling in *Kitsap County*. Under *Kitsap County*, this Court held that "[i]n order to vacate an arbitrator's decision as contrary to public policy, the public policy must be explicit, well defined, and dominant." *Kitsap County*, 167 Wn.2d at 431.

Here, the Court of Appeals did just that. It evaluated the Award against the specifically-analyzed and identified explicit, well-defined, and dominant public policy in WLAD of deterring harassment in the workplace, and concluded that the Award violated the public policy because it was too lenient to prevent harassment in the workplace. Therefore, the Court of Appeals fully complied with the holdings of this Court in *Kitsap County* in vacating the Award.

**1. In *Kitsap County*, unlike here, there was no clear public policy placing an affirmative duty on the employer to correct or prevent the employee's acts.**

The employer in *Kitsap County*, the Kitsap County Sheriff's

Office, terminated the employment of Deputy Brian LaFrance for multiple incidents of misconduct, including dishonesty to his employer. *Kitsap County*, 167 Wn.2d at 431-432. LaFrance's union grieved his termination and a labor arbitrator reinstated LaFrance. *Id.* at 432-33. However, his reinstatement was without back pay for the four year period from his placement on administrative leave until he was reinstated. *Id.* Also, the arbitrator upheld Kitsap County's allegations of misconduct, and allowed Kitsap County to place three final written warnings in LaFrance's personnel file. *Id.*

In identifying a Washington public policy that the award reinstating LaFrance allegedly violated, the Sheriff's Office pointed to criminal statutes prohibiting anyone from knowingly making false statements to public servants, statutes prohibiting public officers from knowingly making false statements, and the *Brady* rule, which requires prosecutors to disclose exculpatory evidence, including evidence that an involved police officer was found to be untruthful. *Id.* at 436 and 438.

This Court held that the proffered sources of public policy were not adequate to vacate the award because they did not "prohibit[] persons found to be untruthful from serving as officers or plac[e] an affirmative duty on counties to prevent police officers from ever being untruthful." *Id.* at 437. Ultimately, this Court held that "[t]he Court of Appeals erred

when it vacated the arbitrator's award without explaining the explicit, well-defined, and dominant public policy violated by that award." *Id.* at 439.

Here, unlike in *Kitsap County*, the Superior Court and the Court of Appeals identified an explicit, well-defined, and dominant public policy prohibiting harassment in the workplace and imposing an affirmative duty on employers to eradicate such harassment, embodied in WLAD, which supported vacation of the Award. CP 726-727 and A- 8-10.

**2. The Union misinterprets the Court's holding in *Kitsap County*.**

The Union asserts that because the public policy identified and applied by the Court of Appeals does not specifically "set[] any particular threshold of discipline which a public employer must impose on a worker found guilty of misconduct," the Court of Appeals did not properly vacate the Award under *Kitsap County*. Petition for Review at 9-10. But, as noted by the Court of Appeals in considering and rejecting this very argument, the Union reads *Kitsap County* too narrowly. This Court did not in *Kitsap County* require that a public policy provide a specific blueprint for every possible scenario and potential violation of such policy; rather, the Court held that in order to support vacation of an arbitration award, a public policy must be "explicit, well-defined, and

dominant.” *Kitsap County*, 167 Wn.2d at 431.

Although this Court in *Kitsap County* did not directly determine whether WLAD embodies an “explicit, well-defined, and dominant” public policy that could support vacation of an arbitration award, it is apparent from the Court’s opinion that this is the case. After finding that Kitsap County’s proffered criminal statutes did not provide an explicit, well defined, and dominant public policy, the Court pointed to examples of such policies in other states, *including “the affirmative duty under federal statute [(Title VII of the Civil Rights Act of 1964)] to prevent sexual harassment by law enforcement officers.”* *Id.* at 437 (citing *City of Brooklyn Center v. Law Enforcement Labor Servs., Inc.*, 635 N.W.2d 236, 242-44 (Minn. App. 2001) (emphasis added). In finding a “well-defined and dominant” public policy against sexual harassment in the workplace, the court in *City of Brooklyn* noted that both Title VII and the Minnesota Human Rights Act, like WLAD, prohibit employers from engaging in harassment, and, as in Washington, that employers have an affirmative duty to prevent such harassment in the workplace. *City of Brooklyn*, 635 N.W.2d at 243.

Highlighting anti-harassment laws in the *Kitsap County* opinion as representing an explicit, well-defined, and dominant public policy that could support vacation of an arbitration award strongly suggests that this

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Court would view WLAD as embodying such an acceptable explicit, well-defined, and dominant public policy. Therefore, there is no conflict between the Court of Appeals' decision and this Court's opinion in *Kitsap County*.

**3. The Union's interpretation of the public policy exception would effectively abolish it when workplace harassment is at issue.**

The Union cannot be correct in its interpretation of this Court's holding in *Kitsap County* because its reading would lead to an absurd result. Under the Union's suggested interpretation, in order for the public policy exception ever to be applicable in a workplace harassment situation, there would have to be a statute, regulation or case law that contained an exhaustive listing of all the ways in which an employee might violate his employer's anti-harassment policy, and corresponding mandatory discipline for each theoretical violation. Literally, a statute, regulation or case(s) would need to specify, for example, that the punishment for a single racially offensive remark heard by one co-worker is a three-day unpaid suspension; the punishment for a second similar incident is a ten-day unpaid suspension; the punishment for displaying a racially offensive cartoon in an open part of the work area is a thirty-day unpaid suspension and one-year probation; the list would need to go on

and on to cover innumerable potential violations and punishments, not only covering acts focused on race, but also addressing potential harassing conduct based on each of the protected classes articulated in WLAD.

Although the Union may wish for such a preposterous interpretation of the public policy exception in order to support its goal of absolute finality of labor arbitration decisions, it cites no authority from *Kitsap County* or any other source that supports such a result. The Port acknowledges that the review of arbitration awards in Washington is narrow, but it is not so narrow that the exception adopted by this Court in *Kitsap County* could never apply absent a law specifying the severity of discipline for each specific WLAD violation.

The Port is unaware of any Washington or federal authority that contains the theoretical exhaustive chart of potential acts of workplace harassment and the corresponding required punishment for engaging in the listed behavior. Thus, under the Union's interpretation of this Court's opinion in *Kitsap County*, the public policy exception would *never* be applicable in cases involving workplace harassment or discrimination. Such a result is inconsistent with Washington's strong public policy, as identified by the Court of Appeals, to deter and eradicate discrimination in Washington. And, critically here, such a result is inconsistent with this Court's holdings in *Kitsap County*.

**4. The Court of Appeals' decision does require analysis, but does not lead to confusion, and is consistent with *Kitsap County*.**

The Union asserts that the Court of Appeals' decision cannot be reconciled with *Kitsap County* because it will lead to serious confusion as to when a public policy is explicit, well-defined, and dominant enough to provide a basis for vacating an arbitration award. Petition for Review at 10. The inquiry mandated by the Court of Appeals *and* this Court in *Kitsap County* will necessarily require judicial analysis as to whether a proffered public policy is sufficiently explicit, well-defined, and dominant to support vacation of an arbitration decision, and, if the policy meets that standard, whether the arbitration award violates the policy. However, the necessity of this analysis does not create confusion.

As the Court of Appeals noted in its opinion, “[t]he judicially created public policy exception to labor arbitration awards is a fact-specific, contextually sensitive doctrine and therefore well suited to development through the common law mode of adjudication.” A- 17. The mere fact that a court must engage in analysis to determine whether an arbitration award should be vacated, rather than being specifically directed how to rule by a statute, does not mean that the process is improper. Courts engage in such analysis on a regular basis, including this Court in *Kitsap County*. See *Kitsap County*, 167 Wn.2d at 436-439.

**5. The Court of Appeals' decision does not invite trial court judges to second-guess the factual findings and remedies of labor arbitrators.**

The Union alleges that the Court of Appeals decision would overrule *Kitsap County* because it would “permit state court judges to second-guess the factual findings and remedies issued by labor arbitrators and impose their own personal brand of justice...” Petition for Review at 10. This is a tortured interpretation of the Court of Appeals decision.

The Court of Appeals, consistent with this Court's holdings in *Kitsap County*, did not review the merits of the underlying dispute, and left undisturbed the arbitrator's factual findings: “[w]e do not review the merits of the underlying dispute; the arbitrator is the final judge of both the facts and the law, and no review will lie in a mistake in either.” A-7-8. *See also Kitsap County*, 167 Wn.2d at 434-435 (permitting only limited review of arbitration decisions, and not allowing review for mistakes of law or fact). Similarly, the Court of Appeals confirmed that it limited its review to “whether the arbitrator acted illegally by exceeding his or her authority under the collective bargaining agreement.” *Id.* and A- 7. And the Court of Appeals explicitly prevented trial courts from “imposing their own personal brand of justice” by holding that the Superior Court exceeded the scope of its authority when it substituted its own

determination of appropriate discipline for the arbitrator's. A- 17. The Court of Appeals' rulings were entirely consistent with this Court's holdings in *Kitsap County*, and will not lead to "vigilante justice" by the trial courts, as suggested by the Union.

**C. The decision in this case does not involve an issue of substantial public interest.**

**1. The Court of Appeals' decision will not lead trial courts to review labor arbitration decisions on the merits.**

The Union asserts that this case must be reviewed by the Supreme Court because it "effectively throws the courthouse doors wide open for trial courts to review public sector labor arbitration decisions on the merits." Petition for Review at 12. As discussed immediately above in Section B-4, this is simply not the case; the Court of Appeals expressly limited its review of arbitration decisions to the narrow contours and for the limited purpose permitted by this Court in *Kitsap County*.

**2. The Court of Appeals' decision will not destroy the public policy of finality in labor arbitrations.**

The Union asserts that the Court of Appeals has "discarded" the policy of finality in labor arbitrations in coming to its decision, and that this Court must review that decision to avoid every labor arbitration being reviewed by the trial court. Petition for Review at 12-13. This alarmist

prediction is not only unrealistic, but not permitted under the narrow conditions for review outlined by the Court of Appeals.

Both this Court and the Court of Appeals carefully considered the competing policy concerns between the finality of arbitration awards and matters of critical public interest. *See A-7 and Kitsap County*, 167 Wn.2d at 434-435. Balancing these competing concerns, this Court and the Court of Appeals both held that only a narrow review of arbitration awards should be permitted, to determine whether the awards at issue violate an explicit, well-defined, and dominant public policy. *A- 8 and Kitsap County*, 167 Wn.2d at 435. This standard, utilized by federal courts and many other state's courts, has not resulted in the wholesale erosion of finality in labor arbitration that is predicted by the Union.

Moreover, the Court of Appeals' decision only potentially affects arbitration decisions regarding workplace harassment. The Court expressly limited its holding to this context, and refused to "attempt to define the outer limits of the enforceability of labor arbitration awards..." *A -17*. Therefore, the universe of labor arbitration awards potentially reviewable under the Court of Appeals decision is a relatively small subset of all labor arbitration cases. Any speculative increase in the number of awards from this subset that are reviewed by the trial courts is not an issue of substantial public interest.

**3. The participation of an *amicus* does not automatically mean that an issue is of substantial public interest.**

Finally, the Union argues that the participation of the Washington State Labor Council as *amicus curiae* before the Court of Appeals establishes substantial public interest for purposes of accepting review. Although there are no published decisions addressing the Union's argument, this cannot be the case. If the Union were correct, then this Court would accept for review every case wherein an *amicus* appeared on behalf of one of the parties. Not only is this an unlikely result, but one that could be easily manipulated by the parties if the Union were correct.

The Washington State Labor Counsel's ("WSLC") concern regarding finality of labor awards in light of the Court of Appeals' decision has been addressed in detail above. The Court of Appeals and this Court have set stringent guidelines for review of labor decisions that will not result in the flood of reviewed awards predicted by the WSLC. WSLC's concern does not raise an issue of substantial public interest to warrant review by this Court.

**4. This Court has already ruled on potential issues of substantial public interest in this case.**

The Port concedes that this case raises several issues that are potentially of substantial public interest – the purpose and policies

embodied by WLAD, the finality of labor arbitration awards, and when arbitration awards can be vacated based on a violation of public policy. However, this Court has already ruled on all of these issues in prior decisions. In *Antonius v. King County*, 153 Wn.2d 256, 267-68, 103 P.2d 729 (2004), among other cases, this Court held that a person has a right to hold employment without discrimination under WLAD, and that Washington's discrimination statutes embody "public policy of the highest priority." Similarly, the Court considered the need for finality of arbitration decisions in *Kitsap County*, and balanced that need against public policy in adopting the narrowly-tailored standard for reviewing arbitration awards on public policy grounds. *Kitsap County*, 167 Wn.2d at 434-36. Even if the Union is correct that this case raises issues of substantial public interest, there is no need to accept review to address them, because they have already been addressed by this Court. The Court should not waste time and resources reconsidering issues already explored in prior opinions.

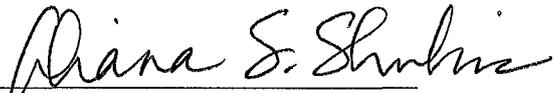
#### IV. CONCLUSION

This case is not one of the rare, exceptional circumstances where this Court should accept review. The decision of the Court of Appeals is consistent with the decisions of this Court. The issues of public interest in this case have already been ruled on in prior decisions. This Court should not accept review.

Dated this this 16th day of December, 2011.

Respectfully submitted,

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