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No. 88036-1

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

AARON HUNDTOFTE AND KENT ALEXANDER,

Plaintiffs,

v.

IGNACIO ENCARNACIÓN AND KARLA FARIAS,

Defendants-Petitioners,

KING COUNTY SUPERIOR COURT,

Intervenor-Respondent.

AMICUS CURIAE MEMORANDUM OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION and
WASHINGTON COALITION FOR OPEN GOVERNMENT

Katherine George
WSBA No. 36288
HARRISON-BENIS LLP
2101 Fourth Avenue, Suite 1900
Seattle, WA 98121
(425) 802-1052
Attorney for Amici

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I. INTRODUCTION

When there is no statute, rule or extraordinary circumstance justifying secrecy, Article I, Section 10 requires court records to remain indexed in the Superior Court Management Information System (SCOMIS). If civil defendants are allowed to erase their names from the SCOMIS index simply because of generalized fears that true information might be used unfairly, this state's courts will be inundated with sealing motions in all kinds of cases. All it would take to permanently hide the existence of a lawsuit, once it has settled, is an uncontested assertion that the suit never had merit and therefore is not worthy of public inquiry. Considering that most lawsuits are settled without any decision on the merits, affirming the trial court in this case would create a loophole large enough to swallow the constitutional guarantee of open court records.

The public relies on SCOMIS, an online database which indexes case files by the parties' names, to tell the truth about who has been sued. To remove the names of parties from SCOMIS index, so that it appears they were never sued, is worse than hiding the truth. It is a deliberate misrepresentation. In this case, some tenants who were sued for eviction obtained an order erasing their names from the SCOMIS index for the purpose of creating a false impression that they were not, in fact, sued.

This calculated omission, if upheld, will breed public mistrust of courts by rendering the SCOMIS index incomplete and unreliable.

The premise of this appeal is that landlords will draw unfair inferences from eviction suits, but the Legislature has rejected the policy of concealment advocated here. State law allows credit agencies to report eviction suits – regardless of outcome - for seven years after filing. Moreover, credit reporting agencies have a First Amendment right to distribute truthful information which they collect from courts at the time suits are filed. Therefore, landlords will *still* be able to learn whether prospective tenants have been sued for eviction in the past, even if those tenants have persuaded the courts to erase their names from SCOMIS. The trial court failed to consider this issue of futility, although it was identified as relevant in the similar case of Indigo Real Estate Services v. Rousey, 151 Wn.App. 941 (2009).

If Washington courts want to prevent landlords from unfairly denying housing based on incomplete information, they should provide *more* information, not less. Just as GR 15(d) requires public case indices to include the notation “vacated” for vacated criminal convictions, courts could use the rulemaking process to require a SCOMIS notation indicating “dismissal” when a credit-related suit is settled or dismissed on the merits.

That would be fair to *all* defendants who avoid eviction, including those lacking the wherewithal to file motions to conceal eviction suits. And it would protect the public's right to open court records embodied in Article I, Section 10 of the Washington Constitution.

II. INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a non-profit trade association representing 25 daily newspapers in Washington. Washington Newspaper Publishers Association (WNPA) is a non-profit trade association representing 140 weekly community newspapers in this state. Washington Coalition for Open Government (WCOG) is a non-profit statewide organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. These three nonpartisan organizations advocate for public access to government records, including court records, as part of government accountability to the citizens of this state.

The organizations participated as amici below at the request of the Court of Appeals, and have a strong interest in upholding that Court's sound reasoning in this case. The organizations' members often use the SCOMIS index of cases to identify and research newsworthy cases. The ability to search SCOMIS by parties' names is essential to accessing

important court records. Newspapers' ability to fully inform readers about their courts would be impaired if the indexed names of any litigants can be hidden based on speculative, generalized fears of harm. More generally, Allied, WNPA and WCOG often participate as amici in cases involving Article I, Section 10 and have a strong interest in strictly adhering to the constitutional requirement to limit closures to exceptional circumstances.

III. DISCUSSION

A. Petitioners Did Not Meet the Strict Test for Concealment.

1. **Hiding dismissed eviction suits is not an identified compelling concern under GR 15.**

Under GR 15(c)(2), a court may seal or redact a record only if concealment "is justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(c)(2) lists several "sufficient privacy or safety concerns that may be weighed against the public interest" in deciding a sealing or redaction motion. A renter's interest in concealing the mere existence of a dismissed eviction suit is not among the enumerated "sufficient" concerns. As the Court of Appeals correctly observed, "the absence of a Supreme Court rule limiting access" to settled eviction suits "should be considered

in weighing” the private and public interests at issue here. Hundtofte v. Encarnacion, 169 Wn.App. 498, 514 (2012).¹

Not only is there no identified “privacy” right to hide landlord-tenant disputes, the Legislature has protected landlords’ and creditors’ right to know about such disputes. The Fair Credit Reporting Act, RCW 19.182.040(1)(b), allows credit reporting agencies to report any eviction suit filed within the last seven years, without regard to the outcome of the suit. As the Court of Appeals explained:

Here, the trial court’s redaction order is particularly problematic, in that it...contravened a legislative declaration of public policy set forth in the Fair Credit Reporting Act.

Hundtofte, 169 Wn.App. at 522.

This Court should confirm that a generalized fear of unfair practices is not an “identified compelling circumstance” justifying removal of parties’ names from public indices under GR 15(c)(2)(F). Otherwise, parties could hide their settled lawsuits from public scrutiny simply by speculating about how unknown third parties might act. In this case, the petitioners had a promise from their former landlords to provide a good

¹ Moreover, as King County has argued, there is no statute authorizing courts to destroy SCOMIS records of parties’ names based on avoiding eviction. A court record may not be destroyed unless a statute expressly authorizes destruction. GR 15(h)(1). Removing a party’s name from the SCOMIS index makes the electronic record of the case permanently irretrievable by the public, and therefore constitutes destruction. GR 15(b)(3).

reference (CP 2), there was no evidence of any specific rental application pending at the time they sought the SCOMIS index erasure order, and their true names were not even listed in SCOMIS index to begin with.² A perceived threat based on generalized assumptions is far short of compelling.

It is *not* true that the Court of Appeals held sweepingly that “as a matter of law, protecting a family’s ability to obtain housing is not a compelling enough interest to justify even the slightest redaction of a court record.” Supp. Brief of Petitioners, p. 1. Quite to the contrary, the Court emphasized the need for a “case-by-case analysis” of whether a compelling circumstance justifies secrecy. Hundtofte, 169 Wn.App. at 519-20, 522. But the Court was rightly concerned that, if it upheld the

² In ordering removal of the renters’ names from SCOMIS, the trial court incorrectly found: “Upon the filing of this action...Defendants’ Ignacio Encarción and Norma Karla Farias’s names were listed in the Court’s information system as the defendants in an unlawful detainer action.” CP 727-28. But the record shows the renters’ real names were *not* listed in the system. CP 287-293. On the contrary, SCOMIS identified “N. Karla Farras,” not Norma Karla Farias, as the defendant. CP 291, 293. In fact, the evidence showed that the only “Farias” listed in SCOMIS at the time of the GR 15 motion was Carlos Farias, a plaintiff in a wrongful death case. CP 291. Also, the record shows that Ignacio Encarción’s name was backwards in SCOMIS, as if Ignacio was his last name. CP 287, 289. After ADN, WNPA and WCOG called attention to the wrong names in their amicus brief below, the Court of Appeals fixed the names in the case title as explained in Footnote 1 of its opinion.

The fact that SCOMIS misnamed the petitioners undermines the trial court’s conclusion that SCOMIS presented a serious and imminent threat to their ability to obtain housing. CP 730. A landlord would have to assume that Farras really is Farias, and Ignacio really is Encarción, in order to connect the SCOMIS records to the petitioners. The petitioners never explained how their privacy could be threatened by court records which did not actually name them.

name-erasing order based on the “ordinary” circumstance that the suit was settled without an eviction, “all similarly-situated unlawful detainer action defendants would be entitled to the same extraordinary relief.” *Id.* at 519, 521. The Court of Appeals recognized that the facts of this case do not rise to the compelling level necessary to hide the entire case from public scrutiny by erasing names in SCOMIS. *Id.* at 516 (“the circumstances herein cannot reasonably be distinguished from those of any other defendant in an unlawful detainer action who is not ultimately evicted”).

2. Under the Ishikawa test, a generalized fear of unfairness is insufficient to overcome the public interest in accurate SCOMIS records.

In order to justify removal of their names from the courts’ online index, the petitioners were required to satisfy the five-part *Ishikawa*³ test as well as GR 15. *State v. Waldon*, 148 Wn.App. 952, 967 (2009); *State v. Richardson*, ___ Wn.2d ___ (May 9, 2013) (Slip Op., p. 7) (“the presumption that court records are open would be meaningless if court dockets could be sealed without justification”). Under the constitutional *Ishikawa* test, the moving party must show a need for redaction or sealing and “state the interests or rights which give rise to that need.” *Rousey*, 151 Wn.App. at 948. “If closure and/or sealing is sought to further any right or interest besides the defendant’s right to a fair trial, *a serious and*

³ Referring to *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

imminent threat to some other important interest must be shown.” Id. at 948 (italics added). The test also requires: an opportunity for the public to object; analysis of whether the method of curtailing access is the least restrictive possible and effective in protecting the threatened interest; weighing the competing interests of the secrecy proponent and the public; and an order that is no broader in application or duration than necessary to serve its purpose. Id. at 949. Courts must decide on a case-by-case basis whether to erase names from SCOMIS. Rousey, 151 Wn.App. at 952.

Here, there was no evidence of a serious and imminent threat that any particular housing would be denied to petitioners due to SCOMIS. There was simply a presumption that, because one landlord allegedly rejected petitioners solely because they were once sued for eviction, other landlords would do the same thing. CP 730. Of primary concern, the trial court failed to give due weight to the public interest in applying the Ishikawa test.

- a. Public interest does not depend on a finding of liability.

A major flaw in the trial court’s reasoning is that, if a defendant is not found culpable, the public’s interest is diminished. CP 730. The trial court undervalued the public interest in settled cases.

Relatively few cases in our state - only 7,498 of 734,973 proceedings statewide in 2012 - are resolved by trial or summary judgment determining liability.⁴ Thus, the vast majority of Washington court actions never reach the merits. If settlement alone could justify concealment of court records, most of the cases which consume public court resources would be removed from public view. Washington's justice system would operate largely as a private forum for disputes, contrary to the Article I, Section 10 mandate for open administration of justice.

The purpose of Article I, Section 10 is to show how the entire justice system works. Rufer v. Abbott Laboratories, 154 Wn.2d 530, 548-49 (2005). Article I, Section 10 applies to *all* court filings and activities, not just results.

As previously noted, the right [to the open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.

Id. (italics in original). When parties take their disputes into the public court system, they are subject to the constitutional presumption of

⁴ See "Caseloads of the Courts of Washington" at: <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=trlyr> and <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=&fileID=hrgyr>.

openness which yields only to “fundamental rights.” Dreiling v. Jain, 151 Wn.2d 900, 908-09 (2004) (Article I, Section 10 “guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases”).

The lack of a judgment on the merits does not make cases any less interesting or important. In Re Marriage of Treseler and Treadwell, 145 Wn. App. 278, 282, 285 (2008) (rejecting the notion that the public has no interest in a record unless it is “used by the court to make a decision”). On the contrary, when private settlements prevent the courts from acting on societal problems, the need for public awareness is greater. For example, a defective toy may continue to injure children if the manufacturer quietly settles product liability suits. The public cannot protect its interests if defendants may shield their names from indices, blocking access to files simply because judgment was avoided.⁵

Mere allegations raise red flags that are important to the public’s ability to safeguard its interests. Ammons v. Wash. Dept. of Social and Health Services, 648 F.3d 1020, 1032-33 (9th Cir. 2011) (hospital manager

⁵ Public access to evidence of prior incidents can be important to compensating victims in negligence or product liability suits which require proof that the defendant had notice of the danger. See, e.g., RCW 7.72.030 (likelihood of harm at the time of manufacture is an element of product liability); Musci v. Graoch Associates Ltd. Partnership No. 12, 144 Wn.2d 847, 859 (2001) (plaintiff in unsafe premises suit must prove landlord had notice of dangerous condition).

had a duty to monitor an employee even though he was officially exonerated of allegations that he molested a minor patient, and the manager should have taken steps to prevent abuse of a second patient). The public oversight protected by Article I, Section 10 includes evaluating whether lingering concerns arise from settled disputes.

Landlords are aware that “the vast majority of filed unlawful detainer suits are resolved prior to an actual court hearing.” CP 23. Thus, they must rely on settled cases for most of the available clues about which renters’ applications warrant further investigation. If the courts erase defendants’ names from SCOMIS whenever eviction suits are dropped, landlords will be forced to rely more heavily on credit reporting agencies collecting records at the time of filing. This will promote the very practice the petitioners seek to avoid – screening tenants based on incomplete information. Moreover, landlords believe that the mere filing of a suit is significant because it shows that “a landlord elected to take the time and expense to file.” CP 23. In sum, because records of settled cases have information useful to the public, this Court should clarify that privacy interests do not overcome public interests simply because there was no finding of culpability.

- b. The merits were not decided and cannot be the basis for concealment.

Here, in ordering King County to remove the renters' names from SCOMIS, the trial court stated that they "raised a meritorious defense," and that their lack of culpability is the reason why their interest in secrecy outweighs the public interest in open court records. CP 728, 730. Actually, this case settled out of court when the landlords paid the renters to move out. CP 41-42. The merits were never decided.

Based on unchallenged assertions by the petitioners, the trial court concluded that they "did nothing improper...; therefore, public access to the SCOMIS record will not assist landlords in detecting or screening out irresponsible tenants." CP 730. But the trial court failed to address the Notice to Terminate Tenancy stating that petitioners did not meet requirements for a credit check, criminal background check, employment check, rental history and completing documents. CP 70. Also, as the Court of Appeals stated, "inculpability is not a necessary conclusion to be drawn from the settlement of a lawsuit," especially when there is no adversarial process. Hundtofte, 169 Wn.App. at 516. This Court should clarify that unchallenged assertions of a meritorious defense are not sufficient grounds to conceal court records.

To hold otherwise is to erect an impossible barrier to public access. After a settlement, plaintiffs have no reason to debate the merits and may

be contractually obligated to remain silent. If public access to a settled lawsuit depends on proving the plaintiff's claims, a third party must step into the plaintiff's shoes and carry a costly and impractical burden of proof. Such a requirement would vitiate Article I, Section 10 by forcing proponents of openness to spend their own resources to litigate issues that the parties themselves declined to litigate.

This concern is especially compelling here, where a public agency – King County Superior Court – would be forced to expend scarce taxpayer resources untangling a dispute between private parties just to vindicate a public right of openness. In fact, King County did not attempt to prove the merits of the case. CP 295 (accepting the renters' statement of facts). In sum, if Article I, Section 10 is to maintain its vitality, public access to court records cannot depend on finding that a defendant is culpable when the parties have declined to litigate that question.

B. Names Are Public Even When Privacy Concerns are Greatest.

GR 15 reflects the sound principle that, even when privacy concerns are compelling, identities of the parties are of such importance that they must remain publicly available through SCOMIS. GR 15(c)(4) provides that names of the parties must remain in public indices even when an *entire* court file is sealed. GR 15(c)(4) says:

The existence of a court file sealed in its entirety, unless protected by statute, is available for viewing by the public on court indices. The information on the court indices is limited to the case number, *names of the parties*, the notation ‘case sealed,’ the case type and cause of action in civil cases...

(italics added.) Thus, even when safety or privacy concerns are so great as to require concealing every word of every pleading in a case, *the indexed names of the parties are still public information*.

State v. McEnry, 124 Wn.App. 918 (2004), illustrates that the public has a right to access court records concerning an exonerated person. In that case, a trial court sealed the entire file of a drug and firearm case after the convictions were vacated. Id. at 920. The Court of Appeals reversed the sealing order because the defendant merely speculated that an open file would harm his future employment and housing, and because the public interest was not considered. Id. at 926 (“McEnry conceded that potential loss of housing...was ‘not an issue’ because he owns his home”).

Significantly, McEnry’s criminal court file was open to public scrutiny although RCW 9.94A.640 released him “from all penalties and disabilities resulting from the offense.” McEnry, 124 Wn.App. at 926. The statute even gave McEnry the right to say he was never convicted. RCW 9.94A.640(3). But Article I, Section 10 prevents the courts from being complicit in that falsehood, and allows the public to learn the whole

truth – both that someone was convicted, and that the conviction was vacated. McEntry at 927. Similarly here, where petitioners avoided eviction, the public has a right to know that the case was brought and also that it was dismissed.

This principle of making all cases discoverable is reflected in GR 15(d). When a court vacates a criminal conviction and orders records sealed, the “public court indices” still must show “the adult or juvenile’s name” as well as the case number, case type, and the notation “vacated.” GR 15(d). If the courts can use the notation “vacated” or “case sealed” in an index, surely they can place a “dismissed” or “no eviction” notation in SCOMIS as an alternative to erasing defendants’ names. This Court should hold that public confidence requires providing more information rather than less, and that the least restrictive method of protecting the renters’ housing interests is to add a notation to SCOMIS instead of removing the renters’ names.

C. There Was No Evidence that Erasing the Renters’ Names From SCOMIS Would Stop Landlord Rejections.

Trial courts should not hide defendants’ names without ensuring it would actually accomplish the intended purpose - preventing landlords from learning they were sued. Rousey, 151 Wn.App. at 953.

The [Rousey] record is silent as to when private tenant screening services first acquire the identity of parties to a pending unlawful detainer action. If this information is first retrieved either at the time of filing or entry of the order of dismissal, the relief requested by Rousey may not accomplish her goal nor that of similarly situated tenants in the future. Evidence from a tenant screening service as to when this information is collected and how it is disseminated could inform the trial court about this issue.

Id. Despite this guidance, the trial court here made no finding as to whether the renters' names appeared in previously compiled credit reports. CP 727-733. This error alone warranted reversal because, under the Ishikawa test, the method of curtailing access must be effective in protecting the threatened interest. Rousey at 949, 953.⁶

D. Government May Not Suppress Truthful Reporting of Suits.

U.D. Registry, Inc. v. State of California, 34 Cal.App.4th 107, 109-110, 40 Cal.Rptr.2d 228 (Cal. App. Div. 2, 1995), dealt with a California statute which prohibited credit reporting agencies from reporting eviction suits "unless the lessor was the prevailing party." Under the statute, cases resolved by settlement could not be reported unless the tenant agreed to the reporting. Id. The court struck down the statute as unconstitutional, holding that a state may not suppress the dissemination of concededly truthful information simply because of fears regarding the effect of the

⁶ The petitioners acknowledge that tenant screening companies commonly develop lists of eviction defendants for later use by landlords. CP 6-7; Brief of Respondents, p. 19.

information. Id. at 109. The court explained that credit reports are protected by the First Amendment, stating:

Section 1785.13, subdivision (a)(3) seeks to limit the free flow of information for fear of its misuse by landlords.... ‘There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them...’

Id. at 115-116 (citations omitted).

In sum, credit agencies have a First Amendment right to report truthful information about eviction filings. Accordingly, erasing the information from SCOMIS will not prevent landlords from learning about such suits. It will merely undermine public trust in the courts as an open and accurate source of information.

E. The Legislature Wants Landlords to Know About Suits.

Washington’s Fair Credit Reporting Act of 1993 limits which “items of information” may be reported by credit reporting agencies. RCW 19.182.040(1). The act says a consumer report may not include “suits and judgments that, from date of entry, antedate the report by more than seven years.” RCW 19.182.040(1)(b). This reflects a policy that landlords *should* know about eviction suits filed within the past seven

years. Also, the Legislature does not limit reporting based on *results* of suits, reflecting a policy that mere filings are important. As long as an agency reasonably ensures accuracy, it may report suits regardless of outcome. RCW 19.18.060(2).

Moreover, RCW 59.18.580, which prohibits rejection of a tenant based on status as a domestic violence victim, allows “adverse housing decisions based on other lawful factors within the landlord’s knowledge.” If the Legislature wanted to prohibit landlords from rejecting tenants based on eviction suits that are dismissed, it would have said so. In sum, this Court should decline to adopt policies which the Legislature has rejected.

F. The Constitutional Right to Privacy Does Not Apply To Electronic Court Records.

Article I, Section 7 says: “No person shall be disturbed in his private affairs...without authority of law.” Courts have recognized two kinds of protected privacy interests: 1) autonomous decisionmaking involving issues of marriage, procreation, family, child rearing and education; and 2) nondisclosure of “intimate” personal information, but only when there is no legitimate government interest in disclosure.

O’Hartigan v. Dep’t. of Personnel, 118 Wn.2d 111, 117 (1991).

Listing litigants’ names in SCOMIS reveals nothing of an intimate nature and serves a legitimate government interest, the open administration

of justice guaranteed by Article I, Section 10. Accordingly, neither Rousey nor any other published opinion holds that Article I, Section 7 prohibits court clerks from disclosing that a party has been sued. Such a holding would make no sense, since the information is not obtained through a warrantless intrusion into a party's home or private activities. Rather, the court system passively receives the names of litigants when suits are filed. The government is not disturbing any private affairs by listing basic filing information in SCOMIS.

Moreover, if this Court held for the first time that Article I, Section 7 extends to non-intimate matters such as landlord-tenant disputes, the courts will face similar name-erasure motions in all kinds of commercial cases. A consumer who settles a collection suit by paying the debt could assert a privacy interest in preventing future creditors from learning about the suit. A corporate executive who successfully defends against a discrimination suit could assert a privacy interest in hiding the suit from future employers. In sum, names of defendants in eviction suits are not entitled to privacy protection.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the trial court and affirm the Court of Appeals.

Dated this 14th day of May 2013.

HARRISON-BENIS LLP

By: s/Katherine A. George
Katherine George, WSBA No. 36288

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on May 14, 2013, I served the foregoing Amicus Curiae Memorandum and related motion by email, per agreement, to:

Eric Dunn, Leticia Camacho, and Allyson Grace O'Malley-Jones
Northwest Justice Project
401 Second Ave. S., Ste. 407
Seattle, Washington 98104

David Seaver, Sarah Jackson, Thomas William Kuffel
Deputy Prosecuting Attorneys
500 4th Ave., Ste 900
Seattle, WA 98104-2316

Douglas B. Klunder
ACLU of Washington Foundation
901 5th Ave., Ste 630
Seattle, WA 98164

Leona Correia Bratz
Snohomish County Legal Services
2731 Wetmore Ave., Suite 410
Everett, WA 98201

Rory B. O'Sullivan
King County Bar Association
1200 5th Ave., Suite 600
Seattle, WA 98101

s/Katherine A. George
KATHERINE A. GEORGE

OFFICE RECEPTIONIST, CLERK

To: Kathy George
Cc: roryo@kcba.org; leonab@snocolegal.org; allysono@nwjustice.org; leticiac@nwjustice.org; EricD@nwjustice.org; sarah.jackson@kingcounty.gov; thomas.kuffel@kingcounty.gov; david.seaver@kingcounty.gov; 'Doug Klunder'
Subject: RE: filing in 88036-1 - Ignacio Encarnacion, et al. v. Aaron Hundtofte, et al.

Rec'd 5-14-13

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Subject: filing in 88036-1 - Ignacio Encarnacion, et al. v. Aaron Hundtofte, et al.

Please accept for filing in *Hundtofte v. Encarnacion*, No. 88036, the attached Motion for Leave to File Amicus Brief and related Amicus Curiae Memorandum of Allied Daily Newspapers of WA, the WA Newspaper Publishers Association and WA Coalition for Open Government. The person filing the document is Katherine George, WSBA #36288, phone 425 802-1052, email kgeorge@hbslegal.com.

Thank you,

Katherine A. George
Of Counsel
Harrison-Benis LLP
2101 Fourth Avenue, Ste 1900
Seattle, Washington 98121
Cell 425 802-1052
Fax 206 448-1843