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No. 91998-4

Court of Appeals No. 71345-1-I
King County Superior Court No. 13-2-06781-1 SEA

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CANDANCE NOLL, Individually and as Personal Representative of the Estate of Donald Noll, Deceased,

APPELLANT,

v.

SPECIAL ELECTRIC COMPANY, INC.,

RESPONDENT.

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BRIEF OF APPELLANT

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INTRODUCTION

This case arises out of Donald Noll's development of and death from malignant pleural mesothelioma – a rare form of cancer which attacks the lining of the lung and which is caused by exposure to asbestos. All of Mr. Noll's exposures to asbestos occurred in the State of Washington. Defendants named in the case included the manufacturers, sellers, and suppliers of asbestos and asbestos-containing products, including the Respondent, Special Electric Company, Inc. Special Electric, through related companies, sold raw asbestos to CertainTeed Corporation, which used that asbestos as an ingredient for asbestos-cement pipe sold through regular channels of interstate commerce into Washington. The sole question involved in this appeal is whether Washington courts may exercise specific personal jurisdiction over Special Electric under the stream-of-commerce doctrine. The trial court declined to do so and granted Special Electric's motion to dismiss. Plaintiff-Appellant Candance Noll seeks reversal of that decision.

ASSIGNMENTS OF ERROR

Candance Noll filed this appeal raising the following:

Assignments of Error

No. 1: The trial court erred in granting Special Electric Company, Inc.'s CR 12(b) Motion to Dismiss for Lack of Personal Jurisdiction.

No. 2: The trial court erred in denying Plaintiffs' Motion to Reconsider to the extent that it refused to vacate its prior order dismissing Special Electric Company, Inc.

Issues Pertaining to Assignments of Error

No. 1: Does the exercise of personal jurisdiction over Special Electric Company, Inc. for the claims raised herein satisfy the requirements of RCW 4.28.185 and comport with due process? *(Assignments of Error Nos. 1 and 2)*

STATEMENT OF THE CASE

(I)
FACTUAL HISTORY

Special Electric Company is one of several companies that were operated by Richard Wareham. Special Electric was incorporated in Wisconsin by Mr. Wareham in 1957 and was originally in the business of selling and distributing electrical insulation products. CP 102, 208. Special Asbestos Co. was incorporated by Mr. Wareham in 1969 and was in the business of distributing raw asbestos to various manufacturers of asbestos-containing products throughout the United States. CP 218. Special Asbestos was eventually renamed as Special Materials Co. CP 223. Special Electric was an active participant in the asbestos distribution

business and directly shared in the profits derived therefrom. It is sued herein on theories of joint venture, alter ego and/or direct participation for asbestos sales by Special Materials, which no longer exists.[1] Special Electric has neither conceded nor contested the validity of such theories for purposes of the merits of the case; rather, the trial court and the parties assumed that Special Electric is a potentially responsible party for purposes of its personal jurisdiction motion. CP 244.[2]

CertainTeed Corporation manufactured building products, including asbestos-cement pipe, and was a regular customer of Special Asbestos l/k/a Special Materials and Special Electric (collectively "Special"). Between 1975 and 1981, Special regularly supplied CertainTeed with large quantities of "crocidolite" a/k/a "blue asbestos" for use in the manufacture of CertainTeed's asbestos-cement pipe. CP 125-134. Special pursued and secured a five-year requirements contract with CertainTeed's pipe division, under which Special was the predominant supplier of crocidolite to that division beginning in 1978. CP 136, 138.

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[1] Special Electric is now, essentially, a shell that exists solely to hold insurance policies providing coverage for asbestos-related injuries and otherwise deal with claims filed by those injured as a result of having been exposed to asbestos sold by the Special companies. *See Melendrez v. Superior Ct., State of Cal.*, 215 Cal.App.4th 1343, 156 Cal.Rptr.3d 335 (2013) (setting out recent history and current status of Special Electric and related companies).

[2] At least one court has recognized the existence of a question of fact on this point. CR 210-11.

CertainTeed's asbestos-cement *sewer* pipe also contained chrysotile (white) asbestos in addition to crocidolite (blue) asbestos. CP 307-08. All asbestos-cement pipe made by CertainTeed in the relevant years contained some amount of crocidolite (blue) asbestos. CP 307-08.

CertainTeed sold asbestos-cement pipe nationwide in interstate commerce, and had done so for years by the time Special began supplying it with the asbestos used to make such pipe. CP 302. CertainTeed had plants for manufacturing asbestos-cement pipe in the following locations: Riverside, California; Hillsboro, Texas; St. Louis, Missouri; Ambler, Pennsylvania; and, most important, Santa Clara, California. CP 300. CertainTeed's Santa Clara plant generally served the north west-coast market, including Washington State. CP 175-204.

Special supplied most, if not all, of the crocidolite used by CertainTeed's Santa Clara plant at least from 1977 through 1979. CP 274. Special also sold and delivered a substantial amount of chrysotile to the Santa Clara plant during this same period. CP 144-73. [3] A substantial

[3] The handwritten chart at CP 274 sets out all sources of all asbestos received at CertainTeed's Santa Clara plant for the years 1962 through 1982, and does not, by itself, indicate which ones were sources for crocidolite asbestos versus chrysotile asbestos. However, the testimony of CertainTeed employee Robert Hartman makes clear that the only sources for crocidolite during 1977 through 1979 were General Mining and Cape Asbestos. CP 294-96. The chart at CP 274 shows that some 95% of the crocidolite received at Santa Clara was General Mining asbestos. Special was the distributor for General Mining crocidolite at

quantity of CertainTeed asbestos-cement pipe made at the Santa Clara pipe plant was regularly sold to customers in Washington. CP 175-204. Most, if not all, of such asbestos-cement pipe was made with asbestos supplied by Special during the times at issue.

Special, at times, had offices and sales staff in: Chicago, Illinois; Cleveland, Ohio; Dayton, Ohio; Des Moines, Iowa; New York, New York; Smithfield, North Carolina; Santa Ana, California; Winter Park, Colorado; and St. Louis, Missouri. CP 213. Although none of the affiliated Special companies had offices in Washington during the years at issue, they, too, were a nationwide operation and served a national, interstate market.

Decedent Donald Noll was a resident of the State Washington. CP 2. He was employed as a carpenter and construction worker in Washington for many years. CP 2-3. Mr. Noll was exposed to asbestos from materials and products manufactured and supplied by several companies in the course of that work. CP 2-3. A substantial portion of Mr. Noll's exposure resulted from his work installing CertainTeed asbestos-cement pipe from the Santa Clara plant, including sewer pipe that contained chrysotile (white) as well as crocidolite (blue) asbestos. CP 295, 307-08. Mr. Noll

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the times relevant to this case. CP 138, 216, 229. Special was also the distributor for chrysotile from Calaveras at such times. CP 144-73.

cut CertainTeed pipe on numerous occasions from 1977 through 1979 or was in the near vicinity of others doing so. CP 311-12.

In January 2013, Mr. Noll was diagnosed with malignant mesothelioma, an aggressive and ultimately fatal cancer of the lining around the lungs. CP 2. He died of that disease on September 28, 2013.

(II)
PROCEDURAL HISTORY

Donald and Candance Noll filed their original Complaint on February 26, 2013, while Mr. Noll was still alive. CP 1. Special Electric entered a limited appearance on March 18, 2013. CP 6. It attended Mr. Noll's discovery and preservation depositions in April 2013.

Special Electric filed its motion to dismiss for lack of personal jurisdiction on April 11, 2013. CP 12. Plaintiffs opposed that motion, arguing that the court could exercise specific jurisdiction where, as here, Special supplied a component (ingredient) in interstate commerce used to manufacture a finished product regularly sold in interstate commerce, including through established channels into the State of Washington. CP 100-11. The trial court granted the motion by Order dated May 10, 2013 and dismissed the case against Special Electric "with prejudice" on the ground that personal jurisdiction was lacking. CP 252-53.

The trial court's Order granting Special Electric's motion contains no analysis or explanation of its reasoning. Statements made by the court at the hearing on the matter indicate that its decision was based largely upon the court's adoption and interpretation of the plurality opinion from *J. McIntyre Machinery, Ltd. v Nicastro*, 131 S.Ct. 2780 (2011). In this regard, the trial court indicated that the "*McIntyre* case is probably the best analysis we have at this point in time with regard to how far long-arm jurisdiction is going to extend." RP 31. The trial court acknowledged that Special could have predicted that its asbestos was entering Washington State but, following the plurality from *McIntyre Machinery*, held that due process also required a showing of "proactive targeting" of the forum by the defendant. RP 31. Finding no such showing in this case, the court granted Special Electric's motion. RP 31; CP 252-53.

Plaintiffs moved for reconsideration, asserting that the trial court erred in applying *McIntyre Machinery* and noting that defendant cited that decision only passingly in its reply brief. CP 257-68. Plaintiffs also asserted, in the alternative, that a dismissal for lack of personal jurisdiction should be "without prejudice." CP 410. By Order dated June 14, 2013, the trial court denied the motion for reconsideration in substance and declined to vacate its prior order dismissing Special Electric. CP 408-09.

The court did modify its original order to make the dismissal without prejudice. CP 408-09.

At that time, the case remained pending against several defendants other than Special Electric. Plaintiffs declined to seek an immediate appeal. Following Mr. Noll's death from mesothelioma, Mrs. Noll, the Plaintiff-Appellant here, filed an amended complaint asserting wrongful death and survival claims. She eventually settled with, or voluntarily dismissed, most of the other defendants. CP 410-11. After obtaining a final order dismissing any remaining defendants and claims, Plaintiff-Appellant filed this timely appeal from the two Orders dismissing her claims against Special Electric for lack of personal jurisdiction. CP 413-14.

STANDARD OF REVIEW

Where, as here, the underlying operative facts are not in dispute, the trial court's decision on a motion to dismiss for lack of personal jurisdiction is subject to *de novo* review. *See Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 725, 981 P.2d 454 (1999). Moreover, the allegations of the complaint are taken as true, and the plaintiff asserting jurisdiction need only have provided evidence sufficient to make a prima facie showing that jurisdiction is proper. *Id.*

ARGUMENT

(I)
SUMMARY

This appeal involves the propriety of asserting specific jurisdiction, under the stream-of-commerce doctrine, over a component supplier that regularly sold a known toxic material (asbestos) in interstate commerce for use in manufacturing products (asbestos-cement pipe) that were to be sold through existing channels of interstate commerce, including channels regularly flowing into the State of Washington. Such exercise of specific jurisdiction, under the circumstances presented here, satisfies the requirements of the Washington long-arm statute and comports with the requirements of due process. *See e.g. Tyee Construction Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963). Accordingly, Candance Noll respectfully submits that the court below erred in granting Defendant-Respondent Special Electric Company, Inc.'s motion to dismiss and requests that said decision be reversed.

The injury in question occurred in Washington. Donald Noll was exposed in Washington to asbestos that Special sold to CertainTeed and contracted mesothelioma here as a result. Accordingly, Special committed tortious acts in Washington under the long-arm statute, RCW 4.28.185(1). *See Smith v. York Food Machinery*, 81 Wn.2d 719, 722, 504 P.2d 782,

(1972); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 471, 403 P.2d 351 (1965). Said injury also arises from or relates to the acts upon which specific jurisdiction is predicated—namely, Special's supplying asbestos to CertainTeed. *See Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989); *York Food Mach. Co.*, 81 Wn.2d at 722.

Washington courts, applying the stream-of-commerce doctrine, have consistently held that placing goods in the general, broad stream of commerce constitutes a purposeful act directed at Washington that satisfies the minimum contacts requirement. *See Nixon v. Cohn*, 62 Wn.2d 987, 385 P.2d 305 (1963); *Oliver v. American Motors Corp.*, 70 Wn..2d 875, 425 P.2d 647 (1967); *York Food Mach. Co.*, 81 Wn.2d 719, 504 P.2d 782; *Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258, 487 P.2d 234 (1971). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980) (citing with approval *Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (1961)). In the case at bar, Special regularly supplied asbestos to a manufacturer that had established channels of distribution for finished asbestos products in Washington, as well as the nation as a whole. Such activity on the part of Special constitutes 'purposefully directing' activity towards Washington, and falls squarely within the parameters of stream-

of-commerce jurisdiction as exercised by the courts of this State for some fifty years.

Washington decisions applying the stream-of-commerce doctrine are consistent with *World-Wide Volkswagen*, which remains the last majority ruling by the U.S. Supreme Court concerning stream-of-commerce jurisdiction and, therefore, the controlling precedent. *See Grange Insurance Association v. State*, 110 Wn.2d 752, 761, 757 P.2d 933 (1988). The split plurality decisions in subsequent U.S. Supreme Court decisions are not binding precedent and should not be followed in Washington. Other courts may debate whether purposefulness requires more than just awareness that a product might be sold in a particular state, but such is not the case in Washington, where awareness suffices. *See Grange Ins. Assoc.*, 110 Wn.2d at 761. Respectfully, therefore, the court below erred when it relied upon the reasoning of the plurality from *J. McIntyre Machinery, Ltd. v Nicastro*, 131 S.Ct. 2780 (2011) to dismiss Special Electric. After *McIntyre Machinery*, courts in sister states have continued to assert stream-of-commerce jurisdiction over component suppliers in circumstances analogous to those presented here. *See, e.g., Russell v. SNFA*, 370 Ill.Dec. 12, 987 N.E.2d 778 (Ill. 2013); *Sproul v. Rob & Charles, Inc.*, 304 P.3d 18, 26 (N.M. App. 2012); *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867 (Or. 2012). Even if Washington were to

give some effect to the non-binding plurality decision from *McIntyre Machinery*, Special *did* target Washington because it knowingly sold asbestos to a manufacturer with established outlets for finished asbestos products in Washington.

Under these circumstances, it is not offensive to fair play or substantial justice to require Special to answer here for the harm caused by the carcinogenic material it sold for incorporation into products being distributed here. *See Omstead*, 5 Wn.App. at 268.

(II)
LEGAL DISCUSSION

Assertions of personal jurisdiction over non-resident defendants are analyzed under one of two approaches—specific or general. Specific jurisdiction looks to the defendant's contacts with the forum State which are related to the claims at issue and, thus, arose or existed at the time that relevant events occurred. *See Hein v. Taco Bell, Inc.,* 60 Wn.App. 325, 328, 803 P.2d 329, 331 (1991). General jurisdiction looks to the totality of defendant's contacts with the forum State as of the time suit is filed, regardless of their relationship to the claims at issue. *Id.* General jurisdiction requires more extensive and systematic contacts with the forum state. *See Crose v. Volkswagenwerk Aktiengesellschaft*, 88 Wn.2d 50, 54, 558 P.2d 764, 766-67 (1977). Specific jurisdiction, by contrast,

requires only minimum contacts and, in some cases, can be predicated upon the commission of a single act or transaction directed at the forum state. *See CTVC of Hawaii Co., Ltd. v. Shinawatra*, 82 Wn.App. 699, 710, 919 P.2d 1243, 1249-50 (1996) (sufficiency of contacts determined by quality and nature of contacts, not the number of acts).

Mrs. Noll relies upon specific jurisdiction—in particular, the stream of commerce doctrine, which was first articulated by the Illinois Supreme Court in *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761 (Ill. 1961), adopted by Washington courts in *Nixon v. Cohn*, 62 Wn.2d 987, 385 P.2d 305 (1963), and by the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). The U.S. Supreme Court has reaffirmed the continued vitality of this doctrine, as articulated in *World-Wide Volkswagen*, in two of its recent decisions. *See Daimler AG v. Bauman*, 134 S.Ct. 746, 757 (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2855 (2011). *See also Russell v. SNFA*, 370 Ill.Dec. 12, 987 N.E.2d 778, 793 (Ill. 2013) ("although a general jurisdiction case, a unanimous court reaffirmed *World-Wide Volkswagen*'s stream-of-commerce analysis on questions of specific jurisdiction") (*citing Goodyear*, 131 S.Ct. at 2855).

In terms of specific analysis, the assertion of personal jurisdiction over an out-of-state defendant must: (1) come within one of the provisions of

the Washington long-arm statute, RCW 4.28.185; and (2) comport with Due Process. As a practical matter, these two requirements overlap because "RCW 4.28.185 represents a legislative intent to assert personal jurisdiction over a foreign corporation to the full extent permitted by due process." *Byron Nelson Co. v. Orchard Mgmt.*, 95 Wn.App. 462, 465, 975 P.2d 555 (1999). *See also Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258, 487 P.2d 234 (1971) (*citing Tyee Construction Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963)).

Both requirements are satisfied in the case at bar. Accordingly, Mrs. Noll respectfully submits that the court below erred in declining to exercise jurisdiction and in granting Special Electric's motion to dismiss, and that said decision should be reversed.

(A)
The Exercise of Jurisdiction Over Special Electric Satisfies the Requirements of RCW 4.28.185

The Washington long-arm statute, RCW 4.28.185(1), as it relates to specific jurisdiction, provides in pertinent part:

> Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person … to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> (a) The transaction of any business within this state;

(b) The commission of a tortious act within this state.

Washington courts have typically analyzed cases involving the sale of defective or dangerous products under the tortious act provision of the statute. *See Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258, 263, 487 P.2d 234 (1971). It is well established that a party commits a tortious act in the State of Washington, for purposes of the long-arm statute, if the injury occurs here. *See Smith v. York Food Machinery*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 471, 403 P.2d 351 (1965); *Nixon v. Cohn*, 62 Wn.2d 987, 995-97, 385 P.2d 305 (1963). The defendant need not enter the State in order to commit a tortious act that satisfies the statute. Such requirement is satisfied even where all of the defendant's negligent acts occur outside of Washington, provided the injury occurs here. *See York Food Mach.*, 81 Wn.2d at 722; *Nixon*, 62 Wn.2d at 987.

Additionally, for purposes of specific jurisdiction, the acts or transactions comprising the jurisdictional contacts must be related to the cause of action sued-upon. *See Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989); *York Food Mach.*., 81 Wn.2d at 722. In the case at bar, the injury occurred in Washington. Donald Noll was exposed to Special's asbestos here. He contracted mesothelioma and died

here. He was a resident of Washington throughout these events. Candance Noll, his widow, is and has been a Washington resident.

The acts comprising the jurisdictional contacts—Special's placing a known toxic and hazardous substance into the stream of interstate commerce with a substantial portion of it aimed at Washington by supplying it to CertainTeed—are directly related to the claims at issue. Plaintiff alleges that the asbestos that Special supplied to CertainTeed caused or contributed to causing Mr. Noll's mesothelioma in Washington. Such assertions, if proved at trial, would satisfy Washington's standards for proof of causation in an asbestos personal-injury case. *See e.g.*, *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 246-48, 744 P.2d 605 (1987).

(B)
The Exercise of Jurisdiction Over Special Electric Comports with Due Process

Washington courts follow the three-part analysis set out in *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 381 P.2d 245 (1963) for determining if the exercise of long-arm jurisdiction comports with due process. Under the *Tyee* analysis, due process is satisfied where, as here: (1) the non-resident defendant purposefully committed an act or acts or consummated a transaction in Washington; (2) the cause of action arises from or is connected with such acts or transaction; and, (3) the exercise of jurisdiction would not offend traditional notions of fair play

and substantial justice. 62 Wn.2d at 115-16. *Tyee* employs the same basic three-part framework later prescribed by the U.S. Supreme Court, albeit with slightly different phrasing. *See Grange Insurance Association v. State*, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (*Tyee* analysis is substantively the same as that prescribed by U.S. Supreme Court).

(1)
Special Committed Purposeful Acts Directed at Washington
Sufficient to Establish the Requisite Minimum Contacts

The controversy in the case at bar and the decision below focuses on the first prong of the *Tyee* test, which encompasses the issue of whether there are minimum contacts sufficient to support jurisdiction. Here, as in most cases, the propriety of exercising jurisdiction turns on the minimum contacts analysis. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, 105 S.Ct. 2174 (1985) ("the constitutional touchstone remains whether the defendant purposefully established minimum contacts in the forum State"). In this regard, sufficient minimum contacts exist, and a "forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S.Ct. 559 (1980).

The record in the case at bar clearly makes more than a prima facie showing that Special delivered asbestos to CertainTeed in interstate commerce with the expectation that its asbestos would be used in pipe sold in other states, including Washington. Special knew or should have known, when it began supplying the Santa Clara plant and when it entered into a requirements arrangement with CertainTeed, that CertainTeed asbestos pipe from Santa Clara was regularly sold to customers in Washington. Under well-established Washington law consistent with the U.S. Supreme Court's still-controlling decision in *World-Wide Volkswagen*, such a showing more than suffices to confer specific jurisdiction over Special Electric for asbestos cancer caused by the presence and use of its asbestos in Washington.

(a)
Jurisdiction Over Special Electric is Proper
Pursuant to Well-Established Washington Precedent
Applying the Stream-of-Commerce Doctrine

Even prior to *World-Wide Volkswagen*, Washington adopted and accepted "the broad stream of commerce concept" as a basis for specific jurisdiction. *Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258, 267, 487 P.2d 234 (1971) *aff'd per curium* 80 Wn.2d 720, 497 P.2d 1310 (1972) (adopting court of appeals opinion as opinion of Washington Supreme Court). *See also Smith v. York Food Machinery Co.*, 81 Wn.2d 719, 722,

504 P.2d 782 (1972); *Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 403 P.2d 351 (1965); *Nixon v. Cohn*, 62 Wn.2d 987, 995-97, 385 P.2d 305 (1963). In Washington, it is well-settled that "purposeful contacts are established when an out-of-state manufacturer places its products in the stream of interstate commerce, because under those circumstances it is fair to charge the manufacturer with knowledge that its conduct might have consequences in another state." *Grange Ins. Ass'n.*, 110 Wn.2d at 761 (*citing York Food Mach.*, 81 Wn.2d at 723). *See also Omstead*, 5 Wn.App. at 270, ("purposeful act" requirement is satisfied in a stream of commerce case when a party places goods in the stream of commerce or sends them into any other state) (*citing, inter alia, Gray v. American Radiator and Standard Sanitary Corp.*, 22 Ill.Dec. 432, 176 N.E.2d 761 (Ill. 1961)).

The modern stream-of-commerce doctrine was first articulated by the Illinois Supreme Court in *Gray v. American Radiator*, 22 Ill.Dec. 432, 176 N.E.2d 761 (1961) and adopted by Washington shortly thereafter in *Nixon*, 62 Wn.2d at 995, 385 P.2d at 310 (1963).[4] *Gray* was cited with approval in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 298, 100 S.Ct. 559 (1980), and has been cited and followed in several decisions by

[4] As the Court there observed, Washington's long-arm statute is copied almost verbatim from the Illinois version. *See Nixon*, 62 Wn.2d at 995.

Washington courts following *Nixon*. *See, e.g. Oliver*, 70 Wn.2d at 887-88; *York Food Mach.*, 81 Wn.2d at 724; *Omstead*, 5 Wn.App. at 266. Like the case at bar, *Gray* involved the assertion of jurisdiction over the supplier of a component used by another to make a product that was later sold in the forum state and caused injury there. *See* 176 N.E.2d at 762 (Illinois resident injured in Illinois by water heater explosion caused by defective valve made by defendant in Ohio and supplied to water heater manufacturer in Pennsylvania). *See also World-Wide Volkswagen*, 444 U.S. at 297, ("if the sale of a product of a manufacturer ... is not an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve *directly or indirectly*, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise" causes injury there) (*emphasis added*).

In *Omstead*, the court held that Washington had jurisdiction over a Japanese maker of PVC pipe, which was supplied through several intermediaries, where it was foreseeable that the pipe would be used in the United States and, thus, in any state including Washington. 5 Wn.App. at 269, (citing *Quigley v. Spano Crane Sales & Service, Inc.*, 70 Wn.2d 198, 422 P.2d 512 (1967)). In *York Food Machinery*, the plaintiff was injured in Washington while cleaning a defective machine manufactured by the

non-resident defendants and originally sold to a company in Idaho. 81 Wn.2d at 720. The Court held that jurisdiction over the defendants was appropriate because the companies had purposefully exploited the potential out-of-state market for their products by "knowingly making out-of-state sales by placing their products in the broad stream of interstate commerce." 81 Wn.2d at 724.

Golden Gate Hop Ranch is particularly instructive and squarely on point as to the case at bar. There, the court held that personal jurisdiction existed over the non-resident supplier of a chemical, heptachlor, which caused damage to crops in Washington. Just as in the case at bar, the defendant did not sell the offending material directly to customers in Washington, but rather supplied it to others who used it as an ingredient in pesticides delivered to farmers in Washington. 66 Wn.2d at 471. *See also*, *World-Wide Volkswagen*, 444 U.S. at 297 (defendant can be subject to jurisdiction by *indirectly* serving markets in the forum state); *Futureselect Portfolio Mgmt. v. Tremont Group Holdings, Inc.*, 175 Wn.App. 840, 886-87, 309 P.3d 555 (2013) (jurisdiction proper for acts committed indirectly through another). The defendant in *Golden Gate Hop Ranch* had also advised that the chemical was safe for use on hops in a letter sent to the plaintiff's parent company in New York. The Court held that the letter, and defendant's placing material into the stream of

commerce which caused injury in Washington, justified the exercise of jurisdiction, although all of those acts occurred outside the State. *See* 66 Wn.2d at 471.

Respectfully, and consistent with the above controlling authorities, the trial court should have denied Special Electric's motion to dismiss. Indeed, exercising jurisdiction over Special Electric here does not even depend upon the very broadest expressions and applications of the stream-of-commerce doctrine, under which any regular interstate sales could subject a seller to jurisdiction in any state. Here, Special entered into an arrangement to regularly supply asbestos to the maker of asbestos pipe with established channels for distributing pipe containing such asbestos into the State of Washington, as well as other states.

As noted, the only explanation given for not denying the motion to dismiss was the trial court's statement at the hearing that *McIntyre Machinery* "is probably the best analysis we have at this point in time with regard to how far long-arm jurisdiction is going to extend," its interpretation of *McIntyre Machinery* to require "some kind of proactive targeting" of the forum state by the defendant, and its concluding that no such showing was made. In this regard, the court below erred in two respects. First, it gave binding effect to a plurality opinion from *McIntyre Machinery*. Second, assuming that "targeting" is even an issue here, the

trial court erred by concluding that Special's activities did not meet a reasonable definition of that term.

(b)

World-Wide Volkswagen, *Not* McIntyre Machinery, *Remains the Controlling U.S. Supreme Court Precedent in Stream-of-Commerce Cases*

The trial court erred by giving controlling effect to Justice Kennedy's plurality opinion from *J. McIntyre Machinery, Ltd. v Nicastro*, 131 S.Ct. 2780 (2011). It is well established that plurality opinions are not binding precedent. *See Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990 (1977) (when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgmen[t] on the narrowest grounds"). In similar fashion, the Court's stream-of-commerce decision in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 107 S.Ct. 1026 (1987) resulted in competing pluralities with no majority opinion. Thus, the Supreme Court's last binding pronouncement concerning the stream-of-commerce doctrine remains *World-Wide Volkswagen*. *See, e.g.*, *Sproul v. Rob & Charles, Inc.*, 304 P.3d 18, 26 (N.M. App. 2012) ("[b]ecause the United States Supreme Court's splintered view of minimum contacts in *Asahi* and *J. McIntyre Machinery* provide no clear rule on this issue and because the plurality opinions in those cases are not the precedential holdings of the

Court, a defendant's contacts with [this State] continue to be evaluated by the stream of commerce standard as described in *World-Wide Volkswagen*").

No Washington appellate-level court has yet considered the impact of *McIntyre Machinery*. The Court in *Grange Insurance Association* noted that *Asahi* produced no majority opinion as to what constitutes "purposefulness" for purposes of minimum contacts. 110 Wn.2d at 761 (1988). It further observed that, although some courts continue to debate whether purposefulness requires more than awareness that a product might be sold in a particular state, there is no such split or ambiguity in Washington—awareness is enough. *See id.* Given Washington's adherence to *World-Wide Volkswagen* following the decision in *Asahi*, there was no reason for the court below to depart from that jurisprudence and apply the plurality reasoning from *McIntyre Machinery*.

In *World-Wide Volkswagen*, the Court recognized two related limitations on the exercise of stream-of-commerce jurisdiction. The distribution of the injury-causing product into the forum state cannot be "an isolated occurrence," but must result from efforts to regularly serve that market. *See* 444 U.S. at 297. The Court also held that jurisdiction should not lie against a retailer which makes an in-state sale to an end-use customer, who then carriers the product to another state. *Id.*, at 296. This

follows the reasoning of the Washington Supreme Court from almost two decades earlier in *Oliver*. *See* 70 Wn.2d at 889. Neither limitation precludes the exercise of jurisdiction over Special Electric here. Special regularly supplied asbestos to the Santa Clara plant, which regularly sold asbestos pipe in Washington. Special was not a retailer selling to end-use customers in its home state. It was a component / ingredient supplier, like defendants in *Golden Gate Hop Ranch* and *Gray*, which crossed state lines to supply component materials to a manufacturer with an established national distribution.

The "narrowest grounds" for the outcome in *McIntyre Machinery* are found in Justice Breyer's concurrence. Writing for himself and Justice Alito, Justice Breyer took issue with the plurality's "strict rules that limit jurisdiction where a defendant does not intend to submit to power of a sovereign and cannot be said to have targeted the forum." 131 S.Ct. at 2793 (*internal quotations omitted*). According to Justice Breyer, the case could be decided under either of the competing, non-binding views expressed by the opposing pluralities in *Asahi*. *See* 131 S.Ct. at 2792. The plaintiff did not show any regular flow or regular course of sales of the defendant's products in New Jersey. *Id.* (citing Justice Brennan's plurality opinion in *Asahi*, 480 U.S. 102, 117). Likewise, the plaintiff failed to show "something more" than placement of a product in the

stream of commerce." *Id.* (citing Justice O'Connor's plurality opinion in *Asahi*, 480 U.S at 112).

Several courts considering the application of *McIntyre Machinery* have recognized that Justice Breyer's concurrence – and not the plurality opinion – represents the Court's holding because it is based on narrower and already-established grounds. *See e.g. Ainsworth v. Moffett Engineering, Ltd.*, 716 F.3d 174, 178 (5th Cir. 2013); *AFTG-TG, LLC v. Nuvoton Technology Corp.*, 689 F.3d 1358, 1362-63 (Fed. Cir. 2012); *Russell v. SNFA*, 370 Ill.Dec. 12, 987 N.E.2d 778 (Ill. 2013); *Sproul*, 304 P.3d 18 (N.M. App. 2012); *Willemsen v. Invacare Corp.*, 352 Or. 191, 282 P.3d 867 (Or. 2012); *State v. NV Sumatra Tobacco Trading Co.*, 403 S.W.3d 726, 756 (Tenn. 2013). *See also*, *Read v. Moe*, 899 F.Supp.2d 1024, 1031-32 (W.D. Wash. 2012). The sister-state decisions in *Sproul* (New Mexico), *Willemsen* (Oregon) and *Russell* (Illinois) should be particularly persuasive because—like the case at bar—all three cases involved assertions of jurisdiction over a non-resident component supplier.

Sproul involved an indemnity claim against the Chinese manufacturer of a quick-release mechanism for bicycles, which failed and caused injury in New Mexico. The court stated that the case was governed by the standard set forth in *World-Wide Volkswagen*, not "any of the competing versions of the stream of commerce theories" from *Asahi* or *McIntyre*

Machinery. *Sproul*, 304 P.3d at 23. According to the court, neither *World-Wide Volkswagen* nor state precedent required that a defendant direct its activities specifically at the forum state. 304 P.3d at 28-29. Consistent with Washington precedent, the court in *Sproul* concluded that *World-Wide Volkswagen* requires only "that the defendant place the product into the stream of commerce with the expectation that it will be purchased by users in the forum state." 304 P.3d at 29 (*emphasis by court*) (*citing* 444 U.S. at 297-98). Thus, the court held that the manufacturer of the quick-release mechanism established sufficient minimum contacts "by placing the quick-release mechanism into the stream of commerce with the intent to distribute the product worldwide, including the United States." 304 P.3d at 25.

Willemsen was a wrongful death case involving a fire caused by a defective battery charger manufactured by a nonresident defendant and sold to an Ohio manufacturer of motorized wheelchairs. *See* 282 P.3d at 870. The wheelchair manufacturer, much like CertainTeed here, regularly distributed chargers with wheelchairs that it sold nationwide, including in Oregon. *Id.* Over a two year period, the wheelchair manufacturer sold more than a thousand units in Oregon, most of which included a charger supplied by the defendant. 282 P.3d at 870-71. The defendant had no other contact with Oregon. 282 P.3d at 871. The Oregon courts declined

to dismiss for lack of personal jurisdiction, and the defendant petitioned the U.S. Supreme Court for certiorari. *Id.* After deciding *McIntyre Machinery*, the Court granted the petition and simply remanded the case for reconsideration in light of that decision. *See* 282 P.3d at 870-71. On remand, the Oregon Supreme Court determined that Justice Breyer's concurring opinion represented the "holding" in *McIntyre Machinery*. *Id.*, at 873 (*citing Marks*, 430 U.S. at 193). Because the defective charger in question was part of a regular flow of over a thousand units sold in Oregon, the court held that due process permitted the exercise of personal jurisdiction. *See* 282 P.3d at 874, 877.

Russell was a wrongful death case against, *inter alia*, the French manufacturer of an allegedly defective tail-rotor bearing incorporated into a helicopter that crashed, killing the pilot. The Illinois Supreme Court held that the "defendant ha[d] the requisite minimum contacts with Illinois" because it "knowingly used a distributor…to distribute and market its products throughout the world, including the United States and Illinois," and that such distributor "made multiple sales of [defendant's] products in Illinois." 987 N.E.2d at 797. Notwithstanding that the divergent opinions in *McIntyre Machinery* left application of the doctrine "[un]settled," the court in *Russell* aptly observed that "the Court [in *McIntyre Machinery*] unanimously endorsed the continued validity of the

stream-of-commerce theory…to establish specific personal jurisdiction." *Id.*, at 793 (*also citing Goodyear*, 131 S.Ct. at 2855). Taking a more restrictive view than in *Sproul* and *Willemsen*, the Illinois court concluded that at least six justices would hold that isolated sales in the forum state do not support jurisdiction, even if the defendant knows that "its products are distributed through a nationwide system that *might* to…any of the fifty states." *Id.* (*emphasis by court; quotations omitted*). Rather, as to component suppliers, Illinois would require that the defendant be "aware that the final product is being marketed in the forum State." *Id.* (*quotations omitted*).

Jurisdiction over Special Electric is clearly proper under Washington's pre-*McIntyre Machinery* decisions. It would clearly be proper under the post-*McIntyre Machinery* decisions in *Sproul* and *Willemsen*, which adhere to the rule that nationwide distribution is alone sufficient. Jurisdiction would also be proper here under the more restrictive post-*McIntyre Machinery* view in *Russell*, because Special supplied asbestos to a manufacturer with established sales in Washington as well as nationwide.

(c)
Even if McIntyre Machinery *Is Regarded as Persuasive,*
Jurisdiction Is Still Proper Over Special Electric

It is plausible to conclude that, after *Asahi* and *McIntyre Machinery*, a state can no longer assert jurisdiction over a non-U.S. defendant based solely upon its having directed distribution to the United States as a whole without any knowledge or expectation that its products would be sold in the forum state in particular. Such was the conclusion of the court in *Russell*, and such conclusion affords a reasonable meaning to the concept of "targeting the forum." Such view does not require that the forum be singled-out in some manner; nor does it preclude asserting jurisdiction over a defendant that targets multiple states, as Special did here. In this regard, the court below erred—not only by giving *McIntyre Machinery* controlling effect, but also by reading too much into the concept of "targeting." When Special supplied asbestos to CertainTeed with at least constructive awareness that significant portions of the pipe made with its asbestos would be sold in Washington, Special *did* "target" the Washington market. Nothing in *McIntyre Machinery* or *Asahi* undermines the well-established jurisprudence that allows jurisdiction over a defendant that "indirectly" distributes goods into the forum state, including suppliers of components or ingredients used by others to make finished products. *See World-Wide Volkswagen*, 444 U.S. at 297; *Golden Gate Hop Ranch*,

66 Wn.2d 469; *Gray v. Amer. Radiator*, 22 Ill.2d 432; *Sproul*, 304 P.3d 18; *Willemsen*, 282 P.3d 867; *Russell*, 987 N.E.2d 778.

Additionally, one cannot overlook the fact that both *McIntyre Machinery* (British) and *Asahi* (Japanese) involved attempts to assert jurisdiction over defendants from foreign nations, not merely from another state. Regardless of where the asbestos it distributed originated, Special Electric was and is a Wisconsin corporation – not a company from Japan, China or Britain. Indeed, the U.S. Supreme Court has now very recently and quite expressly held in a unanimous decision that considerations of "international comity" call for restricting expansive assertions of jurisdiction over defendants from foreign nations, even where such exercise of jurisdiction has been upheld as applied across state lines. *See Daimler v. Bauman*, 134 S.Ct. at 762-63 (2014). It is further noteworthy that, in that same opinion, the Court reaffirmed the vitality of the stream-of-commerce doctrine as a basis for specific jurisdiction. *See* 134 S.Ct. at 757 (noting additionally that specific jurisdiction has developed to be more expansive that general jurisdiction). *See also Goodyear Dunlop Tire Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2855 (same).

Finally, aside from how one might interpret the opinions in *McIntyre Machinery*, that case is simply and readily distinguishable on its facts from the matter at hand. In *McIntyre Machinery*, the plaintiff was injured in

New Jersey by machinery made by a British manufacturer. The manufacturer engaged a U.S. distributor to market its products in this country, but there was no showing that the distributor established outlets or regular sales in particular states, much less in New Jersey. The evidence showed only a single sale of the manufacturer's machines into New Jersey – the one at issue in the case. *McIntyre Machinery*, 131 S.Ct. at 2786. Here, by contrast, CertainTeed had an established market in Washington (and elsewhere) for the pipe made with Special's asbestos. The asbestos that injured Mr. Noll was not part of a one-time sale, but the result of a regular course of dealing between Special and CertainTeed that carried asbestos into Washington via the "regular and anticipated flow" of commerce not some "unpredictable currents or eddies." *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 116-17, 107 S.Ct. 1026, 1034-35 (Brennan, J. *concurring*).

(2)
The Exercise of Jurisdiction Over Special Electric
Meets the Second and Third Requirements of the *Tyee* Analysis

(a)
Special's Contacts with Washington Relate to the Claims at Issue

The issue with regard to the second prong of the *Tyee* Due Process analysis is whether the alleged acts comprising minimum contacts are genuinely related to plaintiff's claims *against the defendant in question.*

That prong is satisfied in a stream-of-commerce context where the goods or product placed in the stream of commerce are the same ones that cause the injury in Washington. *See Smith v. York Food Mach. Co.*, 81 Wn.2d 719, 722, 504 P.2d 782 (1972). In more general terms, Washington courts have employed a "but-for" test, which is unquestionably met here. *See Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 783 P.2d 78 (1989). Special Electric would not be a defendant in this case (i.e. the Nolls would have had no claim against it) "but for" Special's having placed asbestos in the stream of commerce by selling it to CertainTeed and, in particular, delivering it to the Santa Clara plant. All of Mr. Noll's exposures to asbestos from Special occurred in the course of his work with CertainTeed asbestos-cement pipe in Washington. Therefore, the acts comprising Defendant's minimum contacts (placing asbestos in the stream of commerce) are unquestionably related to Plaintiff's claim that Special's acts contributed to causing Mr. Noll's mesothelioma.[5]

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[5] As noted above, such exposure meets Washington's standards for proof of causation in an asbestos personal-injury case. *See e.g., Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 246-48, 744 P.2d 605 (1987). It is also worth noting that, although Plaintiff-Appellant is required to make only a prima facie case for purposes of establishing jurisdiction, she provided records and evidence below detailing Special's sales of asbestos to CertainTeed and deliveries to the Santa Clara plant.

(b)

The Exercise of Jurisdiction Over Special Electric
Does Not Offend Traditional Notions of Fair Play and Substantial Justice

In determining whether the exercise of jurisdiction over a particular defendant would offend traditional notions of fair play and substantial justice, Washington Courts consider: (1) the quality, nature, and extent of the defendant's activity in Washington; (2) the relative convenience of the parties in maintaining the action here; (3) the benefits and protections of Washington's laws afforded the parties; and (4) the basic equities of the situation. *See Tyee Construction Co. v. Dulien Steel Products, Inc. of Washington*, 62 Wn.2d. 106, 115, 381 P.2d 245; *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn.App. 699, 720, 919 P.2d 1243 (1996). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S.Ct. 559 (1980). There is authority for the proposition that defendants, rather than plaintiffs, bear the burden of persuasion on this point. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477, 105 S.Ct. 2174 (1985) (sometimes these considerations bolster the reasonableness of jurisdiction on a lesser showing of minimum contacts; on the other hand, a defendant that has purposeful minimum contacts must make a compelling case to defeat jurisdiction). In any event, such considerations weigh decisively in favor of exercising jurisdiction over Special Electric here.

Mr. Noll was exposed to asbestos in Washington from multiple sources. Aside from states that might have general jurisdiction over all potentially liable parties, Washington is the only place where Plaintiffs could use specific jurisdiction to bring all potentially liable entities before one court in one case. There is no basis to conclude that Plaintiffs could have pursued claims against any other defendant in Special Electric's home state of Wisconsin, or that California (where it delivered the asbestos at issue) would maintain jurisdiction over all or most other defendants. Accordingly, declining jurisdiction over Special Electric would compel Appellant Mrs. Noll and others similarly situated to split their causes of action among multiple jurisdictions as a matter of course—a process that would be not only inconvenient, but also fraught with the possibility of inconsistent adjudications. *See e.g. CTVC of Hawaii*, 82 Wn.App. at 720-21.

Washington, moreover, has a clear interest in protecting its residents—like Mr. Noll—from companies that supply known hazardous materials in interstate commerce to manufacturers selling hazardous finished products in Washington. *See Precision Laboratory Plastics, Inc. v. Micro Test, Inc.*, 96 Wn.App. 721, 729-30, 981 P.2d 454 (1999). Mr. Noll was not injured by the isolated failure of a generally safe component, but by Special's placing a known carcinogen in a flow of interstate commerce

with channels aimed at Washington. *See e.g. Omstead v. Brader Heaters, Inc.*, 5 Wn.App. 258, 268, 487 P.2d 234 ("[w]e do not regard it as offensive to fair play or substantial justice … to require a manufacturer to defend [its] product wherever [it itself] has placed it, either directly or through the normal distributive channels of trade") (*quoting Duple Motor Bodies, Ltd. v. Hollingsworth*, 417 F.2d 231 (9th Cir. 1969)).

Where, as here, the defendant has purposefully derived benefits from its interstate commercial activities, it would be unfair to allow it to escape responsibility for the harm caused by those very activities. *See Futureselect Portfolio Mgmt. v. Tremont Group Holdings, Inc.*, 175 Wn.App. 840, 891, 309 P.3d 555 (2013). Special clearly benefited from supplying asbestos to a manufacturer that sold pipe in many states, as opposed to only where it had manufacturing facilities. If CertainTeed had limited its market for selling pipe containing Special's asbestos to California, Texas, Missouri and Pennsylvania, CertainTeed would have sold far less pipe and thus required far less asbestos from Special. More specifically, Special benefitted from the fact that CertainTeed regularly sold pipe from Santa Clara into Washington because more pipe sales for CertainTeed meant more asbestos sales and more profit for Special. Accordingly, it does not offend any notion of fair play and substantial

justice to require Special Electric to answer in Washington for the harm caused by the carcinogen that it profited from directing here.

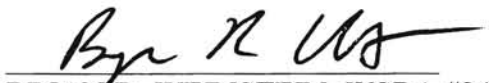
CONCLUSION

For the reasons herein stated, it is respectfully submitted that the trial court erred in granting Special Electric Company's motion to dismiss. Because the exercise of jurisdiction over Special Electric satisfies the requirements of the long-arm statute and comports with due process, Plaintiff-Appellant Candice Noll respectfully requests that this Court reverse said decision and remand the matter for further proceedings against Special Electric.

DATED this 31st day of March, 2014.

Respectfully submitted,

WEINSTEIN COUTURE PLLC



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COURT OF APPEALS, DIVISION I OF THE STATE OF WASHINGTON

CANDANCE NOLL, Individually and as Personal Representative of the Estate of Donald Noll, Deceased, Plaintiff/Petitioner, vs. SPECIAL ELECTRIC COMPANY, INC., Defendant/Respondent.	NO. 71345-1-I DECLARATION OF SERVICE

I, Dana Lueck-Mammen, declare and state as follows:

1. I am and at all times herein a citizen of the United States, a resident of King County, Washington, and am over the age of 18 years.

2. On the 31st day of March 2014, I caused to be served true and correct copies of:

   (1) Brief of Appellant; and
   (2) Declaration of Service, on the following:

I. Via Electronic Mail, With Consent:

Counsel For:

Special Electric Company	( )	Legal Messenger
Melissa K. Roeder, V/SBA No. 30836	( )	Facsimile
Polly K, Becker, WSBA No. 19822	( )	U.S. Mail
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 31st day of March 2014.

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