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IN THE SUPREME COURT  
STATE OF WASHINGTON

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SHAMROCK PAVING, INC, a Washington corporation,

Petitioner,

v.

HARLAN D. DOUGLASS and MAXINE H. DOUGLASS,  
husband and wife,

Respondents.

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SUPPLEMENTAL BRIEF OF PETITIONER  
SHAMROCK PAVING, INC.

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Petitioner Shamrock Paving, Inc. (“Shamrock”), through counsel, submits the following supplemental brief pursuant to RAP 13.7(d).

## I. INTRODUCTION

The trial court found that the “negligible amount” of petroleum released onto Douglass’ property did not threaten human health or the environment and did not require remediation. The record fully supports that finding. Two environmental experts testified that the concentrations of petroleum in soil samples collected from the property did not pose a threat to humans or the environment. The second of these witnesses went on to explain that the concentrations were too low to pose even a *potential* threat. The trial court, sitting as the trier of fact, was entitled to credit this testimony.

The fact that one of the soil samples tested at the “cleanup level” set by the Department of Ecology does not change the result. Contrary to Douglass’ assertions, the DOE’s cleanup levels are not intended to mark the line between actual and potential threats. Quite the opposite, cleanup levels mark the point at which DOE considers human health and the environment to be *presumptively protected*.

The fact that the release was harmless forecloses any right to relief. As Division II has long recognized, recovery of “remedial action” costs is contingent upon the plaintiff proving that the release posed a threat—or at

least a potential threat—to human health or the environment. Division III’s newly-minted exception to this rule for investigative costs cannot be squared with the plain language of the statute.

But even if MTCA allows recovery of investigative costs in the absence of an actual or potential threat, it would be premature to declare Douglass the prevailing party. An award of remedial action costs must be “based on such equitable factors as the court determines are appropriate.” RCW 70.105D.080. If the case is remanded, Douglass could be awarded all \$950 in investigative costs, some fraction of that amount, or nothing at all. The prevailing party determination must account for what, if anything, Douglass actually recovers.

## **II. STATEMENT OF THE CASE**

Shamrock inadvertently spilled small amounts of petroleum onto Douglass’ property while using the property as a staging area for a paving project. Dissatisfied with Shamrock’s efforts to restore the property to its original condition, Douglas hired an environmental scientist to perform soil testing. The results of that testing confirmed that there was no cause for concern. Nonetheless, Douglas proceeded to remove 68 tons of soil. He then sued Shamrock under the Model Toxics Control Act (“MTCA”) to recover the cost of the testing (\$950) and removing the soil (\$12,236).

The trial court, sitting as the trier of fact, found that the “negligible

amount” of petroleum released did not pose an actual or potential threat to humans or the environment and did therefore not warrant a cleanup. The court entered judgment for Shamrock and ordered Douglass to pay \$97,263 in attorney’s fees and costs as the non-prevailing party.

The Court of Appeals affirmed the finding that the release was harmless. Nevertheless, the court reversed. In its view, Douglass’ soil testing qualified as “remedial action” under MTCA, even though there was no threat or potential threat that needed to be remediated. The court thus remanded for a hearing to determine what portion of the \$950 in soil testing costs, if any, Douglass should be awarded. The court further declared that Douglass, rather than Shamrock, was the prevailing party and was entitled to an award of “total” fees and costs.

### **III. STATEMENT OF THE ISSUES**

1. Whether substantial evidence supports the trial court’s finding that the “negligible amount” of lube oil released onto Douglass’ property did not pose an actual or potential threat to human health or the environment.
2. Whether soil testing that confirmed that the release was harmless amounts to “remedial action” within the meaning of RCW 70.105D.020(33) such that Douglass can potentially recover the cost of the testing as a remedial action cost.
3. If the case is remanded for a potential award of soil testing costs, whether the prevailing party determination under MTCA’s fee-shifting provision must account for what, if anything, Douglass is actually awarded after the trial court balances any equitable factors it deems appropriate.

#### IV. ARGUMENT

**A. The Court should affirm the trial court’s finding that the amount of lube oil released did not pose a threat or potential threat to human health or the environment.**

1. The finding that the release did not pose a threat or potential threat is supported by substantial evidence.

The trial court found that the “negligible amount” of lube oil released onto the property did not pose an actual or potential threat to human health or the environment. CP 476, 479. This finding was supported by substantial evidence. The central issue at trial was whether the levels of lube oil detected through soil testing performed by Douglass’ environmental scientist, Jon Welge, were indicative of a threat or potential threat that required remedial action. The test results were as follows:

	<b>Sample #1</b>	<b>Sample #2</b>	<b>Sample #3</b>
Date Obtained	11/14/13	1/24/14	1/24/14
Lube Oil Concentration	<b>2,000 mg/kg</b>	<b>800 mg/kg</b>	<b>400 mg/kg</b>

VRP 289-90, ll. 22-1.

Two witnesses who reviewed these results testified that there was no threat or potential threat. The first was Phil Leinart, a hydro geologist employed by the Washington State Department of Ecology (“DOE”). Mr.

Leinart testified that, based upon his 25 years' of experience conducting MTCA investigations and managing toxic cleanup projects for DOE, the lube oil concentrations identified by Mr. Welge did not meet the criteria for a release of a hazardous substance under MTCA and did not pose a threat to human health or the environment.<sup>1</sup> VRP 594-95, ll. 23-12; 630, ll. 9-25.

The second witness was Jeff Lambert, an environmental scientist and professional engineer who has advised commercial property owners on MTCA issues since 1988. VRP 637, ll. 2-25. Mr. Lambert testified unequivocally that the lube oil concentrations identified by Mr. Welge did not pose even a potential threat:

Q: Okay. If you could please read the results for the lube oil test from November 14, 2013?

A: Yes. It's 2,000 parts per million.<sup>2</sup>

Q: Okay. Now, also, what were the two tests on January 24, 2014? What did they come in at?

A: 400 and 800.

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<sup>1</sup> Douglass contends that Mr. Leinart must have been testifying about the condition of the property in its post-cleanup state because he had not reviewed Mr. Welge's pre-cleanup test results. Cross-Petition at 13-15. Contrary to Douglass' assertion, Mr. Leinart was fully aware of the pre-cleanup test results and discussed them with Mr. Welge. VRP 615-16, ll. 14-3. As the trial court and Court of Appeals appropriately concluded, those pre-cleanup results were the focus of Mr. Leinart's testimony. *Douglass v. Shamrock Paving, Inc.*, 196 Wn. App. 849, 859 n.10 (2016).

<sup>2</sup> Parts per million (ppm) is the same measurement as milligrams per kilogram (mg/kg). VRP 270, ll. 8-14.

Q: As a practical matter in your experience, what does that mean for a landowner in the state of Washington?

A: There's no reporting requirement, and no remedial action is required.

Q: Okay. At those levels of lube oil that you've just mentioned, do you consider the lube oil to be a threat or potential threat to human health or the environment?

A: No.

VRP 648, ll. 17-5; *see also* VRP at 657-58, ll. 18-10; 672-73, ll. 1-14.

The trial court expressly relied on Mr. Leinart's and Mr. Lambert's testimony in finding that the amount of lube oil released did not pose a threat or potential threat to human health or the environment. CP 476, 479. As the fact finder, the trial court had broad discretion to credit this testimony in deciding a disputed question of fact. *See In re Marriage of Harrington*, 85 Wn. App. 613, 637 (1997) (when sitting as a trier of fact, trial court has "broad latitude" in evaluating expert opinion testimony); *Matter of Marriage of Sedlock*, 69 Wn. App. 484, 498 (1993) ("It is the province of the trial court, and not [an appellate] court, to weigh the expert testimony."). Viewed in the light most favorable to Shamrock, *see City of University Place v. McGuire*, 144 Wn.2d 640, 562 (2001), this testimony is more than sufficient to support the finding that there was no threat or potential threat to human health or the environment.

2. Douglass' reliance on the "cleanup level" established by the Department of Ecology is misplaced because cleanup levels are presumptively protective of human health and the environment.

Douglass suggests that lube oil at a concentration of 2,000 mg/kg poses at least a potential threat because 2,000 mg/kg is the "cleanup level" established by DOE. Though somewhat unclear, Douglass seems to be arguing that a concentration of 2,000 mg/kg should be deemed a potential threat "by definition" because DOE treats anything in excess of that level as an *actual* threat. See Cross-Petition at 11 ("If the legislature only intended that levels of contamination exceeding 2,000 mg/kg be mitigated, (*actual threat*), there would be no need to include the word *potential*." (emphasis in original)); Cross-Petition at 12 ("If a level of 2,001 mg/kg constitutes a threat, it defies logic to blindly accept the premise that a contamination level of 2,000 mg/kg is not at least, by definition, a potential threat.").

At the outset, it bears noting that only one of the soil samples tested at the "cleanup level." The other two samples, at 800 mg/kg and 400 mg/kg, came nowhere close. Douglass' expert, Mr. Welge, testified that he utilized sampling procedures that were designed to produce a "representative" picture of the entire property. VRP 274, ll. 1-7; 332, ll. 20-21; 334, ll. 16-19. He further testified that having three samples rather

than one “increase[d] [his] confidence” that the results, taken as a whole, were in fact representative of the property’s true condition.<sup>3</sup> VRP 278, 10-14. In view of this testimony that the results should be considered as a whole, Douglass’ myopic focus on the highest result is unwarranted.

In any event, the premise of Douglass’ argument—that anything in excess of the cleanup level poses an actual threat—is flawed. Contrary to Douglass’ suggestion, the cleanup levels established by DOE do not mark the threshold at which a toxic substance becomes an actual threat. Quite the opposite: the cleanup levels are DOE’s conservative estimate of the point at which *safety* is achieved.

As defined by DOE, a cleanup level is the “concentration of a hazardous substance . . . that is determined to be *protective* of human health and the environment.” WAC 173-340-700(2) (emphasis added). Stated differently, the cleanup level is the reduced level of contamination that DOE strives to achieve when it undertakes a cleanup action. Once that level is achieved, human health and the environment are sufficiently protected and no further action is required. *See* WAC 173-340-702(5) (“Cleanup actions that achieve cleanup levels at the applicable point of

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<sup>3</sup> On cross-examination by Shamrock’s counsel, Mr. Welge conceded that the first test result, at more than twice the concentrations identified in the second and third results, could have been an “anomaly.” VRP 350, ll. 1-7.

compliance . . . shall be *presumed to be protective* of human health and the environment.”) (emphasis added).

Importantly, DOE errs on the side of safety when setting cleanup levels. By DOE’s own account, the level assigned to each toxic substance reflects the agency’s “conservative” estimate of the concentration at which human health and the environment are sufficiently protected. *See* WAC 173-340-900, Table 740-1, footnote (a) (explaining that values assigned are “intended to provide *conservative* cleanup levels for sites undergoing routine cleanup actions”) (emphasis added). Mr. Leinart emphasized the conservative nature of DOE’s estimates at trial, noting that a cleanup level is “a *conservative* value that protects human health and the environment . . . it’s recognized as a *conservative* value that will protect you and the health of the environment.” VRP 618-19, ll. 25-4 (emphasis added).

As should be apparent, a test result at the precise cleanup level established by DOE does not suggest a potential threat. Indeed, DOE would presume that such a result does *not* pose a threat and does not require remedial action. WAC 173-340-702(5). The Court should reject the argument that a concentration of 2,000 mg/kg automatically qualifies as a potential threat and defer to the trial court’s finding that no potential threat existed on the facts presented.

**B. Douglass is not entitled to recover the cost of investigating the release as a “remedial action” cost because he failed to prove that the release posed an actual or potential threat to human health or the environment.**

MTCA allows a private party who takes “remedial action” in response to a release of a hazardous substance to bring a claim to recover the costs incurred in taking such action. RCW 70.105D.080. Division II has long held that recovery of remedial action costs is contingent upon the plaintiff proving that the defendant’s release caused an actual or potential threat to human health or the environment. *City of Seattle (Seattle City Light) v. Wash. Dep’t of Transp.*, 98 Wn. App. 165, 176 (1999). The trial court dutifully applied that precedent and entered judgment for Shamrock upon finding that the release was harmless. CP 474-80.

Division III reached a different outcome on appeal. In its view, the requirement that a plaintiff prove an actual or potential threat only applies to recovery of *cleanup* costs. When the plaintiff has incurred separate costs *investigating* the release, the court reasoned, it may recover those costs as a matter of right—even when the investigation proves that the release was harmless. That holding should be reversed for the reasons addressed below.

1. The plain language of RCW 70.105D.020(33) confirms that proof of an actual or potential threat is a prerequisite to recovery of remedial action costs, including investigative costs.

The question presented is whether a MTCA plaintiff can recover investigative costs as a matter of right in every case, or whether the plaintiff must prove that the release caused an actual or potential threat to human health or the environment. The answer lies in the statute's definition of "remedial action," which reads as follows:

"remedial action" means any action or expenditure . . . to identify, eliminate, or minimize any *threat or potential threat* posed by hazardous substances to human health or the environment including any investigative and monitoring activities with respect to any release or threatened release of a hazardous substance and any health assessments or health effects studies conducted in order to determine the risk or potential risk to human health.

RCW 70.105D.020(33) (emphasis added).

The operative language is "to identify . . . any threat or potential threat." The trial court correctly interpreted this language as a reference to the act of *positively identifying* threats and potential threats. Under that interpretation, "remedial action" extends only to actions that *result in the identification of* an actual or potential threat. Stated differently, an action is only "remedial" to the extent that it identifies a threat or potential threat that needs to be remediated; if no actual or potential threat is found to

exist, then the action is not “remedial” within the meaning of RCW 70.105D.020(33) and cannot support an award of remedial action costs.

Division III’s interpretation extends not only to actions that positively identify an actual or potential threat, but also to any action “to discern whether such a threat exists.” *Douglass v. Shamrock Paving, Inc.*, 196 Wn. App. 849, 858 (2016). This broader interpretation effectively allows a plaintiff to recover investigative costs as a matter of right. Instead of requiring proof that the defendant’s release *caused* an actual or potential threat, Division III’s rule simply requires the plaintiff to produce a receipt for investigative costs. This strict liability approach cannot be squared with the statute’s plain language.

When interpreting a statute, a court’s primary objective is to give effect to the Legislature’s intent. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9 (2002). When the meaning of the statute is plain on its face, a court must treat that meaning as a definitive expression of legislative intent. *Id.* at 9-10. As a corollary, a court may not add words to a statute unless doing so is “imperatively required to make the statute rational.” *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 526 (2007); *see also Dep’t of Licensing v. Cannon*, 147 Wn.2d 41, 57 (2002) (court may not add words to a statute, even if it believes the Legislature “intended

something else but did not adequately express it,” unless imperatively required to make the statute rational).

As illustrated below, Division III’s interpretation adds words that the Legislature chose not to use:

<b>RCW 70.105D.020(33) – “Remedial Action”</b>	
Statutory Text	Division III Interpretation
to identify . . . any . . . threat or potential threat posed by hazardous substances	to identify <u>whether</u> . . . any . . . threat or potential threat posed by hazardous substances <u>exists</u>

Adding “whether” and “exists” is not imperatively required to make the statute rational. Indeed, the statute is perfectly rational as drafted. The plain-language construction—that “remedial action” only extends to actions that positively identify an actual or potential threat—ensures that defendants will not be forced to pay remedial action costs unless some minimum level of culpability has been established. By requiring proof of (1) an actual threat, or (2) a potential threat, the Legislature stopped decidedly short of a strict liability standard.

Division III nonetheless adopted a strict liability standard because it wanted to “encourage[] good stewardship and promote[] preservation of the environment.” *Douglass*, 196 Wn. App. at 857. Shamrock agrees that that these are critically important objectives. What Division III failed to

recognize, however, is that MTCA advances those objectives on its face, without the need for liberal judicial construction. The critical point is that “remedial action” extends to both actual threats and *potential* threats. To recover investigative costs, a plaintiff need only prove that a release posed a mere prospect of harm. The plaintiff need not prove that harm has been caused or will be caused; a mere possibility of harm (present or future) is sufficient. That low standard should be easily satisfied in the mine run of cases. But where, as here, the court weighs the evidence and concludes that there was no potential threat whatsoever, recovery of investigative costs is not permitted.

2. Division III’s “de minimis” exception to proving an actual or potential threat is untenable.

Perhaps recognizing that it was departing from the plain language of the statute, Division III felt compelled to note that “[t]his is not a case where the amount of hazardous waste released onto the property was so clearly de minimis that no action was needed to ensure lack of danger.” *Douglass*, 196 Wn. App. at 858. Had the release been de minimis, the court reasoned, soil testing “would not have been warranted.” *Id.* at 858 n.8. But, given that release consisted of more than just a few drops of oil, “[the] circumstances justified an investigation.” *Id.* at 858.

This reasoning is completely divorced from the statute. MTCA doesn't say anything about "de minimis" releases. Nor does it call for courts to make subjective determinations about whether an investigation is "warranted" or "justified." To the contrary, the statute speaks of *threats* and *potential threats* to humans and the environment—things that can be measured and scientifically proven. Carving out a "de minimis" exception causes the statute to become unhinged from its proof-based moorings.

Had the Legislature intended for plaintiffs to recover investigative costs as a matter of right in every case, it easily could have said so. But the Legislature instead chose to impose a minimal burden of proof. The Court should respect that decision and hold that plaintiffs claiming remedial action costs must prove that a release resulted in a threat—or at the very least, a *potential* threat—to human health or the environment. Under that proper construction, Douglass cannot recover investigative costs.

**C. If the case is remanded, the prevailing party determination under RCW 70.105D.080 must account for the amount of remedial action costs, if any, Douglass is awarded after all equitable factors have been considered.**

If the Court agrees that Douglass cannot recover investigative costs, it need not review Division III's erroneous application of MTCA's fee-shifting provision. In that event, Shamrock will have completely

prevailed and would be entitled to the attorney's fees and costs previously awarded by the trial court, along with an award of fees and costs incurred on appeal. The Court need only address the fee-shifting issue if it affirms Division III's limited remand for a hearing on how much of the \$950.00 in investigative costs should be awarded based upon any equitable factors the trial court wishes to consider.

Recovering remedial action costs is a two-step process. First, the plaintiff must establish liability. That requires proof that (1) the plaintiff owns the property; (2) the defendant released a hazardous substance; (3) the plaintiff took "remedial action" in response to the release;<sup>4</sup> and (4) the remedial action was the substantial equivalent of a cleanup managed by the Department of Ecology. RCW 70.105D.040; *Seattle City Light*, 98 Wn. App. at 169-70.

Second, the plaintiff must move for an award of costs "based on such equitable factors as the court determines are appropriate." RCW 70.105D.080. Courts have broad discretion in identifying and weighing equitable factors. *Dash Point Village Assocs. v. Exxon Corp.*, 86 Wn. App. 596, 607 (1997); *PacifiCorp. Env'tl. Remediation Co. v. Wash. Dep't of Transp.*, 162 Wn. App. 627, 665 (2011). Factors commonly considered

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<sup>4</sup> This is the only disputed element on appeal. See Section IV.B, *supra*.

include, *inter alia*, the amount of hazardous waste involved, the toxicity of the substance, and the extent to which the costs incurred by the plaintiff were necessary to remediate a threat or potential threat. *PacifiCorp.*, 162 Wn. App. at 665; *Douglass*, 196 Wn. App. at 858. Courts may consider “several factors, a few factors, or only one determining factor depending on the totality of circumstances presented.” *PacifiCorp.*, 162 Wn. App. at 665-66 (quotation omitted).

Importantly, proving liability at step one does not always result in an award of remedial action costs at step two. As explained in *Seattle City Light*, the defendant “may be required to pay *complete* response costs, or may not be required to pay *any* response costs, or may be required to pay some *intermediate* amount,” depending upon how the court balances the equities. 98 Wn. App. at 175 (emphasis added) (quotation omitted).

Division III reversed at step one, concluding that Douglass had established liability under the court’s broad (and erroneous) interpretation of “remedial action.” *Douglass*, 196 Wn. App. at 858-59. The court thus remanded for a determination of what, if anything, Douglass was entitled to recover based upon the equitable factors the trial court deemed relevant. *Id.* at 859-60.

Rather than ending its analysis there, Division III went on to hold that Douglass was entitled to an award of “total attorney’s fees and costs” as the prevailing party. *Id.* at 860. Because Douglass had “established the elements of a contribution claim,” the court reasoned, he had “prevailed” under RCW 70.105D.080 regardless of what might happen on remand. *Id.*

That decision should be reversed. As noted above, establishing liability at step one does not automatically result in recovery of remedial action costs at step two. Because recovery of remedial action costs is “based on such equitable factors as the court determines are appropriate,” RCW 70.105D.080, the prevailing party determination cannot be made until after the trial court performs that analysis. Depending upon how the court applies the equitable factors, Douglass might recover all \$950.00 in investigative costs, some lesser amount, or nothing whatsoever.

It should go without saying that a plaintiff who recovers nothing is not a “prevailing” party in any sense of the word. Yet that is precisely what Division III’s decision allows. If that decision is upheld, the sole requirement for attaining prevailing party status will be “establishing the elements” of a contribution claim. *Douglass*, 196 Wn. App. at 860. Whether the plaintiff actually recovers any remedial action costs will be irrelevant. Going forward, defendants could be assessed thousands or

even hundreds of thousands of dollars in attorney's fees without paying a penny in compensatory damages.

The purpose of a two-way fee shifting statute is to “punish frivolous litigation and encourage meritorious litigation.” *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667 (1999). Division III has turned that purpose on its head. Awarding attorney's fees and costs to plaintiffs who “establish the elements” of a contribution claim, without regard to what, if anything, they actually recover, will invariably result in more borderline and frivolous claims being filed.

This case illustrates the point. As the trial court and Division III properly concluded, the cleanup undertaken by Douglass was completely unnecessary because the results of the pre-cleanup soil testing confirmed that the property “was not sufficiently contaminated to pose a threat or potential threat to human health or the environment” and did not require remedial cleanup. *Douglass*, 196 Wn. App. at 858, 860. Despite having confirmed that fact, Douglass charged ahead with a cleanup and then sued Shamrock to recover the full cost. Predictably, Douglass was defeated by his own test results at trial and was subsequently assessed more than \$97,000 in attorney's fees as the non-prevailing party.

Douglass' decision to charge ahead with a cleanup is a "negative equity" that cuts against an award of remedial action costs. *Douglass*, 196 Wn. App. at 858, 860. If the case is remanded on the investigative costs issue, Shamrock will argue that Douglass should not recover any of the \$950.00 in investigative costs in view of his inequitable conduct. If the trial court agrees, then Shamrock will have completely prevailed. But, under Division III's reasoning, Douglass would still be the prevailing party by virtue of having "established the elements" of his claim.

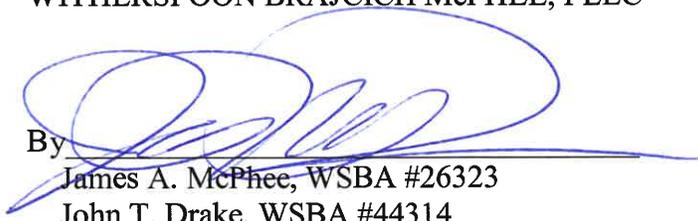
The more sensible approach is to allow the trial court to make the prevailing party determination after it has considered the equities of the case and decided what, if anything, Douglass will be awarded. Shamrock respectfully requests that the decision below be reversed.

## V. CONCLUSION

Shamrock respectfully requests that the Court reverse the Court of Appeals' decision and reinstate the trial court's judgment.

RESPECTFULLY SUBMITTED this 12th day of June, 2017.

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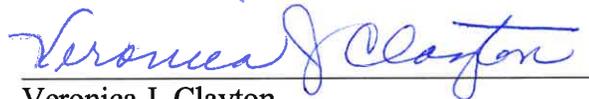
*Attorneys for Petitioner Shamrock Paving, Inc.*

**CERTIFICATE OF SERVICE**

I, Veronica J. Clayton, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 12th day of June, 2017.

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<input checked="" type="checkbox"/>	HAND DELIVERED	601 W. Main Ave., Suite 1212
<input type="checkbox"/>	OVERNIGHT MAIL	Spokane, WA 99201
<input type="checkbox"/>	TELECOPY (FAX) TO:	<u>marigail@dctp.wa.gov</u>
<input checked="" type="checkbox"/>	EMAIL	

<input type="checkbox"/>	U.S. MAIL	Steven J. Hassing
<input type="checkbox"/>	HAND DELIVERED	425 Calabria Court
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<input type="checkbox"/>	TELECOPY (FAX) TO:	<u>sjh@hassinglaw.com</u>
<input checked="" type="checkbox"/>	EMAIL TO:	

  
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Veronica J. Clayton