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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 95013-0

SUPREME COURT OF THE STATE OF WASHINGTON

OLYMPIC PENINSULA NARCOTICS ENFORCEMENT TEAM;  
CLALLAM COUNTY SHERIFF BILL BENEDICT;  
CLALLAM COUNTY SHERIFF'S DEPARTMENT; AND  
CLALLAM COUNTY

Appellants,

v.

REAL PROPERTY KNOWN AS  
(1) JUNCTION CITY LOTS 1 - 12 INCLUSIVE, BLOCK 35;  
(2) LOT 2 OF THE NELSON SHORT PLAT LOCATED IN  
JEFFERSON COUNTY; AND  
ALL APPURTANCES AND IMPROVEMENTS THEREON, OR  
PROCEEDS THERE FROM

Respondents *in rem*,

STEVEN L. FAGER;  
DBVWC, INC.; AND  
LUCILLE M BROWN LIVING TRUST  
Interested Parties.

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ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON  
ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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## I. ARGUMENT

### A. THE *AMICUS CURIAE* BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS DOES NOT PROVIDE THIS COURT WITH FURTHER GUIDANCE

#### 1. The Legislative History of RCW 69.50.505(6) Does Not Support the Argument of the Washington Association of Criminal Defense Lawyers

Here, in a creative argument, the Washington Association of Criminal Defense Lawyers (WACDL) tries to cut, stretch, and shape the character of attorney fees incurred in criminal proceedings to fit under RCW 69.50.505(6).<sup>1</sup> (Amicus Brief at 7, 8, 10). The gist of WACDL's argument is this: forfeiture proceedings against property are "so closely aligned" with, "inextricably intertwined" with, and "unquestionably related" to criminal proceedings against a defendant that attorney fees incurred in criminal proceedings therefore must be recoverable under RCW 69.50.505(6). (Amicus Brief at 2, 9, 11).

But this argument relies on unreasonable and unfounded assumptions, and ignores that this Court and the United States Supreme Court have rejected such assumptions. *See State v. Catlett*, 133 Wn.2d 355, 364-67, 945 P.2d 700 (1997); *Rozner v. City of Bellevue*, 116 Wn.2d 342, 351, 804 P.2d 24 (1991); *see also United States v. Ursery*, 518 U.S. 267, 116 S. Ct. 2135, 135 L. Ed. 2d 549 (1996); *United States v. One*

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<sup>1</sup> In relevant part, RCW 69.50.505(6) states, "In any proceeding to forfeit property under this title, where the claimant substantially prevails, the claimant is entitled to reasonable attorneys' fees reasonably incurred by the claimant."

*Assortment of 89 Firearms*, 465 U.S. 354, 366, 104 S. Ct. 1099, 79 L. Ed. 2d 361 (1984) (“the forfeiture remedy cannot be said to be co-extensive with the criminal penalty”); *Various Items of Pers. Prop. v. United States*, 282 U.S. 577, 581-82, 51 S. Ct. 282, 75 L. Ed. 558 (1931).

WACDL does not address anywhere in its *amicus curiae* brief that the United States Supreme Court has explained that criminal proceedings are *in personam*, while forfeiture proceedings against property are *in rem*. *Ursery*, 518 U.S. at 289. ““In a criminal prosecution it is the wrongdoer in person who is proceeded against, convicted and punished.”” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581).<sup>2</sup> In a forfeiture proceeding, “[i]t is the property which is proceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.” *Ursery*, 518 U.S. at 293 (Kennedy, J., concurring) (quoting *Various Items*, 282 U.S. at 581).

In other words, *in personam* criminal proceedings are distinct from *in rem* forfeiture proceedings. *Ursery*, 518 U.S. at 288-89. And the United States Supreme Court has had little trouble in ruling that *in rem* forfeiture proceedings, like those under RCW 69.50.505, are civil—not criminal—in nature. See *Ursery*, 518 U.S. at 288-89; *89 Firearms*, 465

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<sup>2</sup> See also *United States v. Certain Real Property, Located at 317 Nick Fitchard Road, N.W., Huntsville, AL*, 579 F.3d 1315, 1323 (2009) (“The purpose of defending a criminal prosecution is not to recover property, but to defend the accused’s freedom.”).

U.S. at 366 (“the forfeiture mechanism ... is not an additional penalty for the commission of a criminal act, but rather a separate civil sanction, remedial in nature”).<sup>3</sup>

WACDL does not address anywhere in its *amicus curiae* brief that this Court has ruled that the plain language of RCW 69.50.505 and its legislative history attest to its civil nature. *Catlett*, 133 Wn.2d at 366. In 1989, among other things, the Legislature added real property to the types of property that could be seized and forfeited under the Uniform Controlled Substance Act (chapter 69.50 RCW). See Final Bill Report, 2SHB 1793 (1989). In amending the statute, the Legislature clearly announced, “*Seizure and forfeiture are civil processes and are independent of the outcome of any criminal charges that might be brought against the owner of the property.*” See Final Bill Report, 2SHB 1793 (1989) (emphasis added).<sup>4</sup> In fact, this Court has stated, “With respect to the property itself, *forfeiture is strictly a civil proceeding in rem.*” *Rozner*, 116 Wn.2d at 351 (emphasis added).

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<sup>3</sup> Washington courts frequently look to federal civil forfeiture law to interpret state civil forfeiture law. *Guillen*, 169 Wn.2d at 778 n.5; *City of Bellevue v. Cashier’s Check for \$51,000.00 & \$1,130.00 in U.S. Currency*, 70 Wn. App. 697, 701, 855 P.2d 330 (1993) (citing *Rozner*, 116 Wn.2d at 351).

<sup>4</sup> The Legislature’s statement reflects the United States Supreme Court’s long-held understanding that civil *in rem* forfeitures are independent of criminal *in personam* punishments. See *Ursery*, 518 U.S. at 293-96 (Kennedy, J., concurring).

WACDL does not address anywhere in its *amicus curiae* brief that the attorney fee provision at issue in RCW 69.50.505(6) was not enacted until 2001,<sup>5</sup> or almost 12 years after the Legislature announced that “[s]eizure and forfeiture are civil processes,” *see* Final Bill Report, 2SHB 1793 (1989), or almost 10 years after this Court stated that “forfeiture is strictly a civil proceeding in rem,” *Rozner*, 116 Wn.2d at 351, or almost four years after this Court ruled that “the plain language of RCW 69.50.505 and its legislative history attest to its civil nature.” *Catlett*, 133 Wn.2d at 366.

WACDL does not address anywhere in its *amicus curiae* brief that this Court has stated, “[T]he Legislature is presumed to know the existing state of the case law in those areas in which it is legislating and a statute will not be construed in derogation of the common law unless the Legislature has *clearly expressed* its intention to vary it.” *Price v. Kitsap Transit*, 125 Wn. 2d 456, 463-64, 886 P.2d 556 (1994) (emphasis added). Here, the language of RCW 69.50.505(6) contains no expression of intent to override the Legislature’s own view from 1989 that “[s]eizure and forfeiture are civil processes.” *Compare* Final Bill Report, 2SHB 1793 (1989) *with* Final Bill Report, ESHB 1995 (2001).

But even more importantly, and contrary to what WACDL argues, without any citation to compelling authority or meaningful legal analysis,

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<sup>5</sup> Laws of 2001, chapter 168, § 1(f); *see also Guillen v. Contreras*, 169 Wn.2d 769, 775, 238 P.3d 1168 (2010).

(Amicus Brief at 9-11), the language of RCW 69.50.505(6) contains no expression of intent to replace the “American Rule”<sup>6</sup> as it pertains to attorney fees incurred in criminal proceedings. See Final Bill Report, ESHB 1995 (2001). Had the Legislature intended to replace the “American Rule” as it pertains to attorney fees incurred in criminal proceedings, it could have done so explicitly. But without clear expression of intent from the Legislature, there is no basis for this Court to interpret RCW 69.50.505(6) as replacing the “American Rule” as it pertains to attorney fees incurred in criminal proceedings. See *Cosmopolitan Eng’g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 303, 149 P.3d 666 (2006); *Sherman v. Kissinger*, 146 Wn. App. 855, 869, 195 P.3d 539 (2008) (“We also do not assume that the legislature intended to significantly change the law by implication.”); *Schumacher v. Williams*, 107 Wn. App. 793, 28 P.3d 792, 796 (2001) (“we will not assume that the Legislature intended to effect a significant change in the law by implication”), *review denied*, 145 Wn.2d 1025 (2002); see also *State v. Strauss*, 119 Wn.2d 401, 418, 832 P.2d 78 (1992) (“The court will not assume that the Legislature would attempt to effect a significant

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<sup>6</sup> Under the “American Rule,” attorney fees are not recoverable by the prevailing party as costs of litigation unless permitted by contract, statute, or some recognized ground in equity. *Panorama Vill. Condo. Owners Ass’n Bd. v. Allstate Ins. Co.*, 144 Wn.2d 130, 143, 26 P.3d 910 (2001); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 191, 692 P.2d 867 (1984).

change in the law by mere implication.”); *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984).<sup>7</sup>

For all its rhetoric, WACDL fails to acknowledge anywhere in its *amicus curiae* brief that the legislative history of RCW 69.50.505(6) contains no expression of intent to expand the applicability of RCW 69.50.505(6) to criminal *in personam* proceedings—regardless of how “closely aligned,” “inextricably intertwined,” and “unquestionably related,” (Amicus Brief at 2, 9, 11) they may be to civil *in rem* forfeiture proceedings.

**2. The Argument of the Washington Association of Criminal Defense Lawyers is Contrary to the Principles of Statutory Construction**

In order to support its argument, WACDL takes the untenable position that “[t]he introductory language” of RCW 69.50.505(6)—“[i]n any proceeding to forfeit property”—“does not, and could not, limit the fees reasonably incurred by the claimant to only those fees actually incurred in the forfeiture proceeding.” (Amicus Brief at 7). According to WACDL, “[t]he introductory language” of RCW 69.50.505(6) simply “defines the court or administrative proceeding in which the fee

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<sup>7</sup> Also, it is disingenuous for WACDL to argue that the Court of Appeals, in its opinion, somehow agreed that a claimant under RCW 69.50.505(6) could be entitled to reasonable attorney fees incurred in criminal proceedings. (Amicus Brief at 2-3, 6). It begs the questions: if the Court of Appeals agreed with Steven and Timothy Fager, then why did it remand the case? Could not the Court of Appeals simply have affirmed?

application is to be made.” (Amicus Brief at 7). But WACDL’s approach is utterly contrary to the principles of statutory construction.

First, this Court should assume that the Legislature meant exactly what it said. *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). Contrary to what WACDL argues, (Amicus Brief at 7), the plain language of RCW 69.50.505(6) contains no limitation from the Legislature that “[t]he introductory language” of RCW 69.50.505(6) is somehow merely definitional. Had the Legislature intended to include instructions on where “the fee application is to be made,” as suggested by WACDL, (Amicus Brief at 7), it could have done so explicitly. But the Legislature chose not to do so, and “plain words do not require construction.” *Keller*, 143 Wn.2d at 276.<sup>8</sup>

Second, contrary to what WACDL argues, (Amicus Brief at 7), this Court “must not add words where the legislature has chosen not to include them.” *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)). In fact, this Court may not read into the statute matters that are not in it. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

Third, this Court “must also avoid constructions that yield unlikely, absurd or strained consequences.” *Kilian v. Atkinson*, 147

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<sup>8</sup> In fact, RCW 69.50.505(5) already provides that hearings to forfeit property shall be before the chief law enforcement officer, its designee, an administrative law judge, or a court of competent jurisdiction.

Wn.2d 16, 21, 50 P.3d 638 (2002). Under WACDL's unreasonable interpretation of RCW 69.50.505(6), there is no limit to where or when a claimant's attorney fees could be incurred. Under WACDL's unreasonable interpretation of RCW 69.50.505(6), there is no limit to where or when a claimant substantially prevails. And contrary to what WACDL argues, (Amicus Brief at 7-8), a statute is not ambiguous simply because different interpretations are conceivable. *Keller*, 143 Wn.2d at 277. In fact, this Court is not obliged to discern an ambiguity by imaging a variety of alternative interpretations, as argued by WACDL. *Keller*, 143 Wn.2d at 276-77.

Finally, and most importantly, this Court must construe RCW 69.50.505(6) so that all its language is given effect, with no portion rendered meaningless or superfluous. *Keller*, 143 Wn.2d at 277. Each provision must be viewed in relation to other provisions, and the statute should be considered as a whole. *State v. Sommerville*, 111 Wn.2d 524, 531, 760 P.2d 932 (1988). RCW 69.50.505(6) unambiguously provides that "the *claimant* is entitled to reasonable attorney fees incurred by the *claimant*." (Emphasis added.)<sup>9</sup> A claimant is a person who notifies the seizing law enforcement agency of the person's claim of ownership or right to possession of personal and/or real property. See RCW 69.50.505(5). And RCW 69.50.505(6) only refers to a claimant, not a defendant.

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<sup>9</sup> Apparently, WACDL agrees that these words, in part, are "[t]he operative words of the statute." (Amicus Br. at 13).

Again, had the Legislature intended for RCW 69.50.505(6) to apply to defendants (criminal) as well as claimants (civil), it could have done so explicitly. The Legislature could have used any number of phrases to indicate that RCW 69.50.505(6) applies to both defendants (criminal) as well as claimants (civil). But the Legislature chose not to do so. The Legislature intentionally chose to use the term “claimant” throughout RCW 69.50.505(5) and (6). Thus, to accept WACDL’s argument would make the Legislature’s choice of words meaningless or superfluous, something this Court should be unwilling to do. *See Keller*, 143 Wn.2d at 277.

**3. The Washington Association of Criminal Defense Lawyers Impermissibly Urges this Court to Create Legislation Under the Guise of Interpreting a Statute**

WACDL nevertheless argues that, without liability under RCW 69.50.505(6) for attorney fees incurred in criminal proceedings, seizing law enforcement agencies may act without fear. (Amicus Brief at 13). But this argument ignores the fact that seizing law enforcement agencies nevertheless are subject to suit for their actions under both state and federal law. This argument also ignores the fact that the seizing law enforcement agencies in this case *were* subject to suit for their actions under both state and federal law.

Here, in December 2014, Steven and Timothy Fager (“the Fagers”) filed and served a “Complaint for Violation of Civil Rights and Personal Injury” in the United States District Court for the Western District of

Washington. Clerk's Papers (CP) at 401-35. The Fagers included 15 federal and state causes of action in their Complaint, including a state claim for malicious prosecution. CP at 430-31. Among other things, the Fagers sought general damages, nominal damages, and punitive damages. CP at 434. They also sought "reasonable costs, expenses and attorney fees." CP at 434.

But in January 2015, after a motion to dismiss was filed, the federal court concluded, "Plaintiffs' federal claims are barred by the applicable statute of limitations, and/or fail to state a claim for relief." CP at 455. The federal court then declined to exercise pendent jurisdiction over the remaining state law claims—false imprisonment, conversion, malicious prosecution, invasion of privacy, negligence, and intentional infliction of emotional distress. CP at 455. Thereafter, the federal court dismissed the federal claims with prejudice and dismissed the state claims without prejudice. CP at 455. (Subsequently, the Ninth Circuit Court of Appeals affirmed the dismissal and the United States Supreme Court denied a petition for writ of certiorari. *Fager v. Olympic Peninsula Narcotics Enforcement Team*, 700 Fed. App. 569 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 740 (2018).)

Rather than refile their state law claims in state court (presumably because their state law claims also would be barred by the applicable statute of limitations), the Fagers simply waited six months and filed their motion for attorney fees under RCW 69.50.505(6). CP at 286-303. But RCW 69.50.505(6) does not serve as an end-run around the burden of

proof regarding malicious prosecutions or an end-run around the applicable statute of limitations.<sup>10</sup> And as discussed above, RCW 69.50.505(6) does not serve as an end-run around the “American Rule” as it pertains to attorney fees incurred in criminal proceedings.<sup>11</sup>

**4. A Departure from the Plain Meaning of a Statute is Not Justified by A Consideration of Public Policy**

Of course, WACDL argues that this Court should ignore what the Legislature unambiguously said in RCW 69.50.505(6) and side with them because RCW 69.50.505(6) should “be read liberally,” *Guillen v. Contreras*, 169 Wn.2d 769, 238 P.3d 1168 (2010), and “forfeitures are not favored,” *Snohomish Regional Drug Task Force v. Real Property Known as 20803 Poplar Way*, 150 Wn. App. 387, 392, 208 P.3d 1189 (2009). (Amicus Brief at 12-13). Essentially, WACDL invites this Court to read into RCW 69.50.505(6) an entitlement for attorney fees incurred in criminal proceedings that precede the civil forfeiture proceedings. (Amicus Brief at 9-10).

“But it is fundamental that, when the intent of the legislature is clear from a reading of a statute, there is no room for construction.”

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<sup>10</sup> Malicious prosecution and abuse of process claims fall within the personal injury statute of limitations, meaning the limitations period is three years. *Nave v. City of Seattle*, 68 Wn.2d 721, 724, 415 P.2d 93 (1966).

<sup>11</sup> Were this Court to agree with WACDL’s statutory interpretation of RCW 69.50.505(6), it would create a new right of recovery only for claimants/defendants who were charged with drug crimes.

*Elliott v. Dep't of Labor & Indus.*, 151 Wn. App. 442, 450, 213 P.3d 44 (2009) (quoting *Johnson v. Dep't of Labor & Indus.*, 33 Wn.2d 399, 402, 205 P.2d 896 (1949)). Furthermore, and contrary to the various arguments advanced by WACDL, (Amicus Brief at 7-10), liberal construction of a statute does not mean that this Court may read into the statute language that is not there. See *Klossner v. San Juan County*, 93 Wn.2d 42, 47, 605 P.2d 330 (1980) (“this court’s several decisions that the wrongful death statute is to be liberally construed do not mean we may read into the statute matters which are not there”); *King County v. City of Seattle*, 70 Wn.2d 968, 991, 425 P.2d 887 (1967); *Lowry v. Dep't of Labor & Indus.*, 21 Wn.2d 538, 542, 151 P.2d 822 (1944) (“We are not unmindful of the rule that the workmen’s compensation act shall be liberally construed in favor of its beneficiaries, but, where the language of the act is not ambiguous and exhibits a clear and reasonable meaning, there is no room for construction.”); see also *State v. Reis*, 183 Wn.2d 197, 214, 351 P.3d 127 (2015) (“It is not this court’s job to remove words from statutes or to create judicial fixes, even if we think the legislature would approve.”); *State v. Moses*, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (“Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.”); *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980) (“As attractive as the State’s proposed solution may be, we do not have the power to read into a statute that which we may believe the legislature has omitted, be it an intentional or an inadvertent omission.”).

Clearly, WACDL questions the public policy of RCW 69.50.505(6). (Amicus Brief at 9-13). But this Court cannot, under the guise of construction, substitute its view or WACDL's view for that of the Legislature. *Courtright v. Sahlberg Equip., Inc.*, 88 Wn.2d 541, 545, 563 P.2d 1257 (1977); *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 421, 832 P.2d 489 (1992); *see also Kilian*, 147 Wn.2d at 21.

After all, this Court is "not a super legislature." *Courtright*, 88 Wn.2d at 545. "This court should resist the temptation to rewrite an unambiguous statute to suit [its] notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a judicial, function.'" *Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001) (quoting *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999) (quotations and citations omitted)). Therefore, departure from the unambiguous statutory language of RCW 69.50.505(6) is improper. *See Jackson*, 137 Wn.2d at 725.<sup>12</sup> And WACDL's statutory interpretation of RCW 69.50.505(6) must fail.

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<sup>12</sup> In fact, as Division Two of the Court of Appeals recently stated, "We do not rewrite unambiguous statutory language under the guise of interpretation .... And we do not add language to an unambiguous statute even if we believe the legislature 'intended something else but did not adequately express it.'" *Protect the Peninsula's Future v. Growth Mgmt. Hearings Bd.*, 185 Wn. App. 959, 970, 344 P.3d 705 (2015 (citations omitted)).

## II. CONCLUSION

WACDL's argument, even assuming *arguendo* that it is sound from a policy standpoint, does not reflect the current status of the law in Washington. Essentially, WACDL invites this Court to engage in a type of judicial activism that this Court has rejected. See *Sedlacek*, 145 Wn.2d at 390; *Jackson*, 137 Wn.2d at 725. "An argument for the adoption of a previously unrecognized public policy under Washington law is better addressed to the Legislature." *Sedlacek*, 145 Wn.2d at 390; see also *Roberts v. Dudley*, 140 Wn.2d 58, 79, 993 P.2d 901 (2000) (Talmadge, J., concurring) ("The specter of judicial activism is unloosed and roams free when a court declares, 'This is what the Legislature meant to do or should have done.'").

Contrary to what WACDL argues, this Court is obliged to give the plain language of a statute its full effect, even when its results may seem unduly harsh. *Geschwind v. Flanagan*, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993).

For the foregoing reasons, the WACDL's arguments in its *amicus brief* must fail. This Court should disregard the WACDL's *amicus brief*, as it fails to provide this Court with guidance on the issues presented for review in this matter. Finally, this Court should affirm the opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of May, 2018.

  
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**CERTIFICATE OF SERVICE**

I, Christopher Moore, hereby certify that I served the foregoing ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS on the following individual(s):

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I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

DATED this 29<sup>th</sup> day of May, 2018 at Seattle, Washington.



Christopher Moore, Legal Assistant

**PATTERSON BUCHANAN FOBES & LEITCH**

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