Honorable Suzanne Parisien
Noted for Hearing: September 30, 2016
ORAL ARGUMENT REQUESTED

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, and LYNDA JONES

Plaintiffs,

vs.

SEATTLE PUBLIC UTILITIES, a department of the CITY OF SEATTLE, a municipality,

Defendants.

Case No.: 15-2-03013-2 SEA

PLAINTIFFS' MOTION FOR NEW TRIAL

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I. INTRODUCTION AND REQUEST FOR RELIEF

This case involved some novel and some routine legal issues, and the errors made regarding those legal issues justify a new trial. First, the jury contained no African Americans, and was thus not representative of the plaintiffs, but the Court denied plaintiffs' request to reconstitute the jury pool with a more diverse venire. Second, the jury was composed of an elite cross section of the citizenry because the Court struck all workers who would not be paid if they sat on the jury rather than creating a trial schedule that would permit more diverse participation. Third, the Court excluded potential jurors number 11, 8, and 53 for cause without sufficient basis. Fourth, having created an environment that lacked diversity, the Court excluded the testimony of expert witness Dr. Greenwald, who would have injected an understanding of implicit bias into the trial—much needed given the jury composition, which contained no African Americans. Fifth, the Court excluded two jury instructions, which would have provoked juror introspection regarding implicit bias, and a third, which is given in the 8th Circuit, which would have explained that false testimony can be used to prove discrimination; all three critical instructions, especially in light of the absence of African American jurors on the panel. Sixth, the first two plaintiffs called to testify by the defendant, Ms. Johnson and Ms. Muskelly, were "impeached" with misleading portions of their depositions, but the Court wrongly refused to allow the plaintiffs to offer other portions of their testimony pursuant to CR 32. This set the stage for improper attacks on the plaintiffs' credibility, which affected the outcome. Also, during the testimony of Elaine Seay-Davis, plaintiff sought to use deposition testimony to show "prior consistent testimony," but the Court improperly excluded that evidence. Seventh, the Court improperly permitted the defendant to cross examine the plaintiffs on their knowledge of the legal theories in the case—whether they understood and could state that the December petition was the basis for their retaliation claims—this was also an improper character attack

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that hurt plaintiffs' credibility. Eighth, the Court excluded Debra Russell's explanation of her own ethics violations, which minimized the significance of her unethical acts, and Hoffman's treatment of those acts. Ninth, the Court excluded testimony of comparators actually stealing money in the housing bonus program, which was investigated by Regan, and included in her final report, and which would have dramatically shown the City's wrongful focus on plaintiffs. Tenth, the Court permitted the testimony of a late-disclosed "expert" on call centers without requiring the defendant to comply with the local rule in terms of opinion disclosure or to permit plaintiff to obtain related documents and to depose the expert. Eleventh, the Court improperly admitted summaries created by the defendants without foundation. All of these errors combined to deny the plaintiffs a fair trial.

II. STATEMENT OF FACTS

Plaintiffs presented strong evidence of age and race discrimination including a summary, Exhibit 496, which showed that every person who was terminated in 2011 was over age 40, and every person who was terminated in 2013 was a person of color. In addition, plaintiffs presented direct evidence of discrimination in Director Hoffman's recorded statement in September 2011 that, "It appears that many of the longest-term employees do not have the **enthusiasm and commitment necessary** to provide the desired response to customers." Exhibit 641. This statement stereotypes older workers, and is direct evidence of his discriminatory intent. Director Regan's recorded statement that, "there are groups of employees clustered by race (African American, Filipino American, White American) who exchange favors for others within their cluster," is direct evidence of her discriminatory intent. In addition, plaintiffs demonstrated that in recorded comments to the City Auditor, Regan and others repeatedly confirmed that there were no policies and procedures prohibiting the conduct of the plaintiffs. *E.g.*, Exhibits 41 and 115.

Over 100 exhibits were admitted, but the jury could not have considered them,

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because the jury deliberated only two hours before reaching verdicts in seven cases.

The jury contained no African Americans. Sheridan Dec. The venire had included 100 potential jurors, of which 2 were African American (*i.e.*, 2% African American). Sheridan Dec. According to the U.S. Census Bureau, in 2015 the population of King County was 6.8% African American. Sheridan Dec., Ex. 4.

III. ISSUE PRESENTED

Whether the errors committed before and during trial warrant a new trial? Yes.

IV. ARGUMENT AND AUTHORITY

A. Standard of Review

"An order granting or denying a new trial is not to be reversed, except for an abuse of discretion." *Lyster v. Metzger*, 68 Wn.2d 216, 220 (1966).

B. A New Trial Should Be Ordered Owing to the Jury's Lack of Diversity and Exclusion of Qualified Jurors

Six plaintiffs were African American, and one plaintiff was Filipino American. Seven plaintiffs brought state race and age discrimination claims, and five brought state retaliation claims against the City owing to the City's discipline of the plaintiffs for allegedly violating established procedures for working on their own accounts and the accounts of friends, family, and coworkers. The discipline included alleged wrongs going back ten years. The defense counsel argued in closing that unfair treatment is not the same as discrimination. The defendant could not contest that the plaintiffs were treated unfairly—being disciplined for acts having taken place as far back as 2001. Moreover, the summary showing terminations being limited to older persons of color and the discriminatory statements made by Hoffman and Regan made a defense argument that justice was done impossible. But the jury, which had no African Americans, could not connect the dots, and spent very little time trying to do so.

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The Court should order a new trial here because the jury was not representative of the population, lacking any African American jurors, in a case involving seven plaintiffs, six of whom were African American, and lacking persons whose service would be a hardship because they would not be paid during the trial. Sheridan Declaration. "If, during the trial, it should come to the attention of the judge that anything has occurred which might tend to interfere with the calm and fair judgment of any particular juror, it would be his duty to declare a mistrial. If, after trial, it should come to his attention that such had occurred, it would be his duty to order a new trial." *Coats v. Lee & Eastes, Inc.*, 51 Wn.2d 542, 552 (1958). The jury ignored the evidence and reached an unfair result.

> From a practical standpoint, studies suggest that compared to diverse juries, all-white juries tend to spend less time deliberating, make more errors, and consider fewer perspectives. In contrast, diverse juries were significantly more able to assess reliability and credibility, avoid presumptions of guilt, and fairly judge a criminally accused. By every deliberation measure, heterogeneous groups outperformed homogeneous groups. These studies confirm what seems obvious from reflection: more diverse juries result in fairer trials.

State v. Saintcalle, 178 Wn.2d 34, 50 (2013). On the presumption of guilt:

> The presumption of guilt and dangerousness assigned to African Americans has made minority communities particularly vulnerable to the unfair administration of criminal justice. Numerous studies have demonstrated that white subjects have strong unconscious associations between blackness and criminality. **Implicit biases** have been shown to affect policing—marking young men of color for disparately frequent stops, searches, and violence—and all aspects of the criminal justice system—leading to higher rates of childhood suspension, expulsion, and arrest at school; disproportionate contact with the juvenile justice system; harsher charging decisions and disadvantaged plea negotiations; a greater likelihood of being denied bail and diversion; an increased risk of wrongful convictions and unfair sentences; and higher rates of probation and parole revocation.
>
> So deeply entrenched is the presumption that people of color are dangerous and guilty that a recent study found that Americans' support for harsh criminal justice policies correlated with how many African Americans they believed were in prison: the more black people they believed were

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> incarcerated, the more they supported aggressive policing tactics and excessively punitive sentencing laws. Understanding how today's criminal justice crisis is rooted in our country's history of racial injustice requires truthfully facing that history and its legacy.

Equal Justice Initiative (www.eji.org). There are experiences unique to African Americans, which Caucasians and other minorities do not experience. For example, there is a phrase called driving while black.

> "Young African–American males frequently report being stopped and detained for reasons that are superficially pretextual. Even affluent people of color, who drive expensive or late-model cars, often report being stopped by law enforcement officers because of their race. This practice has become so prevalent that the actual justification for such detentions has become widely known as 'Driving While Black (D.W.B.).'"

State v. Valentine, 132 Wn.2d 1, 28 n.1 (1997) (Sanders dissent) (holding that in Washington, a person cannot resist an illegal arrest). Caucasians and many other minorities have not experienced the driving while black phenomenon, which is one of those life experiences that affects how one connects the dots when given certain facts, and in evaluating this case, the jury lacked the life experiences needed to give this case fair consideration—they could not connect the dots based on their life experiences. It appears, given only two hours of deliberation for seven separate plaintiffs, the jury made presumptions favoring the Caucasian witnesses, even in the face of their mendacity, and against the plaintiffs, which prevented them from being fair.

In addition, the Court systematically excluded from the jury all persons who were working in jobs that would not pay the juror for jury service, so they could not afford to miss four days each week in a trial. Plaintiffs proposed holding court two days per week in an effort to overcome that challenge, but the request was denied by the Court. The Court's ruling further limited the jury's diversity—this time by creating a jury pool that was more middle and upper class—which meant that they came to the table with certain biases that a

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more economically diverse jury pool would not have. These errors justify a new trial.

Finally, on the issue of jury selection, the Court granted three challenges for cause of jurors who made statements supportive of the plaintiffs, but agreed that they would follow the Court's instructions. "A juror is not disqualified because he holds certain preconceived ideas, provided he can put these notions aside and decide the case on the basis of the evidence given at the trial and the law as given him by the court." *State v. Bird*, 31 Wn.2d 777 (1948); *State v. White*, 60 Wn.2d 551, 569 (1962); *State v. Croney*, 31 Wash. 122 (1903). Juror No. 11 showed a willingness to be fair and to deliberate:

> MR. SHERIDAN: Let's say that the plaintiffs totally fail in their proof and don't convince you that they are really are victims of discrimination, would you render a verdict for them no matter what?
> A JUROR: No.
> MR. SHERIDAN: All right.
> If you will listen to the facts, you will listen to what the judge has to say in terms of the instructions, you will apply the facts to the law and render a verdict?
> A JUROR: Yes.

RP 8/16/16 (morning session) at 47. But the Court excluded Juror No. 11 simply because defense counsel obtained an affirmative answer to the question:

> If you were in my spot, representing SPU, would you have concerns about having yourself on a jury?
> A JUROR: I would, yes.
> THE COURT: I am going to thank and excuse juror number 11 for cause.

Id. at 48. The same process and standard was followed for Juror No. 8, even though plaintiffs' counsel objected to the improper question. *Id*. at 44-46. That juror expressed that she had life experiences that may have expanded the diverse views required to make for a fair trial:

> A JUROR: You know, I have been 40 years steeped in the racial politics and have a very strong feeling about the non-white struggle in this country. It is really hard to put aside so many close friends, so many stories that resonate in my life to put that aside to be absolutely unbiased --

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Id. at 46. The Court and defense counsel followed the same process to exclude Juror No. 53 who admitted that the defense may not want him on the case, but also stated, "I think that both sides equally need to prove their case." *Id*. at 48-51.

The legal standard for challenging a potential juror for cause is not "would you want you on the jury if you were me?" This is not the law, and given the jury composition, which was already compromised, the exclusion of these potential jurors was prejudicial and constituted error requiring a new trial, because the life experiences of these jurors may have added to the jury's understanding of discrimination, and aided them in connecting the dots.

C. A New Trial Is Required Because The Court Compounded Its Errors In Jury Selection By Excluding The Expert Testimony That Would Have Educated The Jury On Implicit Bias

Plaintiffs sought the testimony of Greenwald, a prominent expert in the area of implied bias. To ensure the admissibility of his testimony, plaintiffs modeled his potential testimony in accordance with federal case law, which approved his testimony:

> Dr. Greenwald's findings include the following, as outlined in his declaration: (1) seventy percent of Americans "hold implicit prejudiced views" based on race, color, national origin and ethnicity; (2) implicit bias is prevalent in the employment context; (3) job performance evaluations conducted by personnel using subjective criterion permit implicit biases to affect the outcome; (4) "significant majorities of Americans prefer lighter skin tone over darker and European–American relative to Arab ethnicity"; (5) awareness of potential or actual implicit biases helps diminish the effect of these biases; and (6) members of a decision-maker's in-group those people who share common demographic characteristics are more likely than those in the out-group to receive more favorable treatment. Dr. Greenwald's findings are based on his "own research as well as on [his] knowledge of published works of others who have conducted research relevant to the conditions of this case." Dr. Greenwald reviewed only Plaintiff's complaint to acquaint himself with the alleged circumstances in this matter and was not asked by Plaintiff to review any other case materials.

Samaha v. Washington State Dep't of Transp., No. CV-10-175-RMP, 2012 WL 11091843, at *1 (E.D. Wash. Jan. 3, 2012). Dr. Greenwald reviewed the complaint here, but was not

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asked to opine on the ultimate issues.

The Court erred in excluding his testimony. The rule dealing with admissibility of expert testimony "involves a two-step inquiry —whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact." Reese, 128 Wn.2d at 305-06, *citing* ER 702. Here, "SPU is not disputing that Dr. Greenwald qualifies as an expert under the *Frye* standard." See Defendant's MIL to Exclude Greenwald at 8, fn. 9.

The jury contained no African Americans, excluded lower income working people, and excluded two potential jurors whose life experiences may have been more diverse than the life experiences of other jurors. The need to explain and understand implicit bias at work was even more important in this setting than in other cases. His testimony was crucial to a fair trial, but was denied without explanation.

D. The Court Erred in Excluding Two Jury Instructions, Which Would Have Provoked Juror Introspection Regarding Implicit Bias, And A Third, Which Is Given In The 8th Circuit, Which Would Have Explained That False Testimony Can Be Used To Prove Discrimination

Plaintiffs' Proposed Instruction Number 3 provided:

> Our system of justice depends on the willingness and ability of judges like me and jurors like you to make careful and fair decisions. To reach a fair decision, it's important to put aside our automatic assumptions, called stereotypes or biases. Sometimes to do this, we all have to look at our thinking to be sure we are not unknowingly reacting to stereotypes or jumping to conclusions. Social scientists and neuroscientists studying the way our brains work have shown that, for all of us, our judgments are influenced by our backgrounds, experience, and stereotypes we've learned. Our first responses are like reflexes, and just like our knee reflexes, they are quick and automatic. Often, without our conscious awareness, these quick responses may mean that hidden biases influence how we judge people and even how we remember evidence or make judgments.
>
> It is not enough to tell ourselves or the lawyers and judge during jury selection that we are open-minded. To reach a decision in this case it's important to be more reflective.

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> Social science research has taught us some ways to be more careful in our thinking about individuals and evidence:
>
> ► Take all the time you need to test what might be reflexive unconscious responses and to think carefully and consciously about the evidence.
>
> ► Focus on individual facts, don't jump to conclusions, which may often be biased by stereotypes.
>
> ► Try putting yourself in the other person's place.
>
> ► Ask yourself whether your opinion of the parties or witnesses or of the case would be different if the people presenting looked different, if they belonged to a different group?
>
> You must each decide this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds. Working together, a fair result can be achieved.

The instruction was based on a draft of the "Achieving Impartial Jury" Instruction, Criminal Justice Section of the American Bar Association, Panel Presentation, American Bar Association Annual Meeting, San Francisco, August 9, 2013, retrieved from http://www.americanbar.org/content/dam/aba/events/criminal_justice/annual2013/Implicit_Bias_aijpanel.doc , August 23, 2013. This instruction may have sensitized the jury somewhat to offset the lack of African Americans on the panel, and to offset the exclusion of Dr. Greenwald's testimony, but it was not given over objection.

Plaintiffs also proposed Instruction Number 4, which also addressed implicit bias from Judge Mark W. Bennett's, "Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions," 4 Harv. L. & Pol'y Rev. 149-169, 169, FN 85 (2010), which proposed:

> As we discussed in jury selection, growing scientific research indicates each one of us has "implicit biases," or hidden feelings, perceptions, fears and stereotypes in our subconscious. These hidden thoughts often impact how we remember what we see and hear, and how we make important decisions. While it is difficult to control one's subconscious thoughts, being aware of these hidden biases can help counteract them. As a result, I ask you to

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> recognize that all of us may be affected by implicit biases in the decisions that we make. Because you are making very important decisions in this case, I strongly encourage you to critically evaluate the evidence and resist any urge to reach a verdict influenced by stereotypes, generalizations, or implicit biases.

The Court's errors accumulated and combined to ensure that the elite jury was segregated from ideas like implicit bias as it applied to the witnesses and to the jurors themselves. This was error requiring a new trial.

The Court also erred in failing to give plaintiffs' proposed instruction Number 13, which linked lies by managers to discrimination.

> You may find that a plaintiff's age and/or race was a substantial factor in the defendant's decision to suspend, terminate, place on administrative leave, or threaten that plaintiff with suspension or termination if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide age and/or race discrimination.

This instruction was based on 8th Circuit precedent, which recognized the difficulties in proving discrimination cases. See 8th Circuit's Model Jury Instruction 5.20. http://juryinstructions.ca8.uscourts.gov/civil_instructions.htm; *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) ("hold[ing] that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory"; and that the refusal to give an instruction identical to the 8th Circuit Court of Appeals' Model Instruction was not harmless error); *discussing with approval Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 280 (3rd Cir. 1998) ("It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext ... if the jurors are never informed that they may do so.") *and Cabrera v. Jakabovitz*, 24 F.3d 372, 382 (2nd Cir.), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994). The Supreme Court of Iowa has likewise

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held that "[i]f a plaintiff … presents evidence of pretext, failure to provide a pretext instruction will result in prejudice." *Deboom v. Raining Rose, Inc.*, 772 N.W.2d 1, 11 (Iowa 2009). The Court ignored another opportunity to somewhat offset errors made in jury selection and exclusion of implicit bias testimony and jury instructions. This was error justifying a new trial.

E. The Court's CR 32 Rulings Damaged Plaintiffs' Credibility

The first two plaintiffs called to testify by the defendant, Ms. Johnson and Ms. Muskelly, were "impeached" with misleading portions of their depositions, but the Court wrongly refused to allow the plaintiffs to offer other portions of their testimony pursuant to CR 32. This set the stage for improper attacks on the plaintiffs' credibility, which affected the outcome. Also, during the testimony of Elaine Seay Davis, plaintiff sought to use deposition testimony to show "prior consistent testimony," but the Court improperly excluded that evidence. CR 32(a)(4) provides, in relevant part:

> If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce <u>any other part</u> which ought in fairness to be considered with the part introduced, and any party may introduce <u>any other parts</u>.

Id.

> The rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony. The opposing party is entitled under the rule to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence.

Westinghouse Elec. Corp. v. Wray Equip. Corp., 286 F.2d 491, 494 (1st Cir. 1961).

Plaintiff moved for a mistrial, but the motion was denied. Yet the damage to plaintiffs' credibility had been done.

F. The Court Improperly Permitted The Defendant To Cross Examine The Plaintiffs On Their Knowledge Of The Legal Theories In The Case—Whether They Understood And Could State That The December Petition Was The Basis For Their Retaliation Claims—This Was Also An Improper Character Attack That Hurt Plaintiffs' Credibility

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The Court improperly permitted the defendant to cross examine the plaintiffs on their knowledge of the legal theories in the case—whether they understood and could state that the December petition was the basis for their retaliation claims—this was also an improper character attack that hurt plaintiffs' credibility. Whether a plaintiff knew the facts supporting a retaliation claim is not relevant, and is prejudicial. The Court repeatedly allowed the plaintiffs to be impeached for not understanding that their signing the December petition was the fact underlying the retaliation claim. This error became a character attack in violation of ER 402, 403, and 404, and was improper opinion under ER 701 and 702. This error had a cumulative effect on the fairness of the trial.

G. The Court Improperly Excluded Debra Russell's Explanation Of Her Own Ethics Violations, Which Minimized The Significance Of Her Unethical Acts, And Hoffman's Treatment Of Those Acts

Ms. Russell engaged in actual ethics violations, but was not disciplined. Yet the Court excluded from her testimony designation, the testimony in which she explained that misconduct. See Sheridan Dec., Exhibit 1. This error had a cumulative effect on the fairness of the trial.

H. The Court Excluded Evidence That Regan Investigated And Found Other Employees Who Improperly Obtained Housing Bonuses But Who Were Not Disciplined By The City

Many of the persons not disciplined or disciplined to a lesser degree included persons who improperly obtained housing bonuses for themselves or friends and family—which actually was stealing money; however, the Court excluded this testimony. The evidence was relevant and admissible under ER 402 and ER 404(b).

I. After Excluding Testimony By Dr. Greenwald, The Court Permitted The Defendant To Call An Unqualified And Late-Disclosed Expert

The Court excluded Dr. Greenwald's testimony without explanation, and allowed the

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testimony of Kathleen Jezierski. According to the defendant, "she is the individual from COPC Inc. who we identified as an expert on May 23, 2016 in [SPU's] second amended disclosure of possible additional witnesses. We informed you under "Experts" that "An individual from COPC Inc. will provide expert testimony regarding call center standards and expectations." The defendants willfully failed to provide information in accordance with LCR 26, which requires, "a summary of the expert's opinions and the basis therefore and a brief description of the expert's qualifications." LCR 26 (k)(3)(c). The disclosure was made on the last date of discovery, so no discovery could be had on her qualifications. Sheridan Dec. She provided no report. Sheridan Dec. And the defendant failed to supplement discovery. Sheridan Dec. and Sheridan Dec., Ex. 2 (RFPs 87, 88, and 89). The Court found that the defendant did nothing wrong and denied plaintiffs' requests to obtain all communications between SPU and the "expert." Record of these proceedings. At trial plaintiffs learned that the expert never testified before, and her testimony was not supported under *Frye*. Yet over objection, the Court permitted the witness to state that compared to other call centers, the pace of the SPU call center was slow, which contradicted plaintiffs' testimony. This was damaging and should have been excluded under *Frye*, and ER 402, 403, and 702.

J. The Court Improperly Admitted Hearsay Summaries In Violation Of ER 1006.

The plaintiffs incorporate by reference the arguments made in plaintiffs' objections to ER 1006 summaries. The motion is attached as Exhibit 3 to the Sheridan Dec.

V. CONCLUSION

For all of these reasons, the Court should grant Plaintiffs' motion for a new trial.

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I certify that this motion contains 4,390 words, in compliance with the Local Civil Rules.

Respectfully submitted this 22nd day of September, 2016.

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CERTIFICATE OF SERVICE

I, Melanie Kent, certify that on September 22, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECR E-Filing system, and served the following persons using the ECR E-Serve system:

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DATED this 22nd day of September, 2016, at Seattle, Washington.

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