THOMAS G. JARRARD
The Law Office of Thomas G. Jarrard, PLLC
1020 N. Washington
Spokane, WA 99201
Telephone: 425.239.7290

MATTHEW Z. CROTTY
Witherspoon Kelley
422 West Riverside, Suite 1100
Spokane, WA 99201-0300
Telephone: 509.624.5265
Facsimile: 509.458.2728

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MICHAEL SHANE THORSON

Plaintiff,

v.

COUNTY OF KLICKITAT, WASHINGTON; JOE RIGGERS, SERGEANT KLICKITAT COUNTY SHERIFF'S OFFICE; ERIK ANDERSON, KLICKITAT COUNTY UNDER-SHERIFF; AND JOHN AND JANE DOE, EMPLOYEE-AGENTS AND FORMER EMPLOYEE-AGENTS OF KLICKITAT COUNTY

Defendants.

NO. CV-10-5137 RMP

PLAINTIFF'S MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION & SUMMARY OF ARGUMENT

Michael "Shane" Thorson ("Deputy Thorson") joined the Klickitat County Sheriff's Office (the "County") in October 2007. At that time he was a member of the Oregon Army National Guard awaiting transfer to the Washington Army National Guard. In violation of Federal law, the County directed Deputy Thorson to quit the Oregon Army Guard if he wanted to continue being a sheriff's deputy. Deputy Thorson acceded to the County's demands. However, Deputy Thorson's transfer to the Washington Army Guard was never rescinded. And, in late-April 2008, and much to Deputy Thorson's surprise, he received orders from the Washington Army Guard requiring him to report to duty for deployment to Iraq.

At the time Deputy Thorson received his orders to Iraq, he was on medical leave from the County, having previously suffered a workplace injury. When Deputy Thorson informed the County that he had been ordered to war, the County responded with frustration and anger that Deputy Thorson could not work, albeit on light duty, due to his workplace injury but that he could be ordered to war despite the injury. Deputy Thorson attempted to explain that he could not control the situation. However, the County ordered him to report to work immediately or present medical evidence that he could not. Deputy Thorson immediately responded with his doctor's order that indicated that Deputy Thorson was not cleared to work due to his injury. That did not satisfy the County.

In response to the County's demand that Deputy Thorson immediately return to work before his deployment, Deputy Thorson requested to take a leave of absence. Deputy Thorson did so under a state law that entitled him to up to fifteen days' paid leave, where such leave was rendered necessary by military commitments. Deputy Thorson explained that he needed to spend that time putting his family's affairs in order before he went to war. The County refused Deputy Thorson's leave request and terminated his employment.

The County's actions violated Deputy Thorson's rights under: (1) Washington's Industrial Insurance Act when it failed to communicate the County's light duty request to Deputy Thorson's physician; (2) the Washington Law Against Discrimination ("WLAD") when it failed to give Deputy Thorson the 15 days' paid military leave he was entitled to under RCW 38.40.060; and, (3) the Uniformed Services Employment and Re-employment Rights Act ("USERRA") when it terminated Deputy Thorson's employment because of his military service and obligations.

Plaintiff seeks an Order granting summary judgment as to the Industrial Insurance Act, WLAD, and USERRA claims.

II. ARGUMENT

A. SUMMARY JUDGMENT STANDARD.

Summary judgment is proper when "the pleadings. . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party and a dispute is "material" only if it could affect the outcome of the suit under the governing law.[2] Once the moving party has done so, the burden shifts to the opposing party to set forth specific facts showing there is a genuine issue for trial.[3]

There are no triable issues of fact as to each of Deputy Thorson's claims.

B. SUMMARY JUDGMENT ADJUDICATION OF DEPUTY THORSON'S INDUSTRIAL INSURANCE ACT CLAIM IS PROPER.

Washington law provides, in part, that:

> No employer may discharge or in any manner discriminate against any employee because such employee has filed or communicated to the employer an intent to file a claim for compensation or exercises any rights provided under this title.[4]

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[1] *Fed.R.Civ.P. 56(a); Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).
[2] *Anderson, v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).
[3] *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008).
[4] RCW 51.48.025(1)(emphasis added).

The "rights provided under this title" include the right for a temporarily disabled employee to have his physician determine whether the injured employee "is physically able to perform the work" requested by his or her employer.[5] A "temporarily disabled employee" is an employee who is temporarily unable to perform work.[6] If a dispute arises about the employee's ability to perform the work that the employer wants the employee to do, then the employer must seek a final determination from the Washington State Department of Labor and Industries ("L&I").[7] A violation of RCW 51.48.025 gives rise to a wrongful discharge cause of action.[8]

Deputy Thorson was temporarily disabled. (Plaintiff's Statement of Facts ("SOF") at ¶¶30, 31, 33). Deputy Thorson's physician had declared Deputy Thorson unfit for duty. (SOF ¶¶94). The County ordered Deputy Thorson to return to work, albeit on light duty, despite Deputy Thorson not having yet been cleared for work. (SOF ¶¶61, 64). Moreover, there is no dispute that when the County did so it put the burden on Deputy Thorson to seek approval from his physician as to whether Deputy Thorson could conduct that light duty. (SOF ¶¶61,

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[5] RCW 51.32.090(4)(a).
[6] *Energy Northwest v. Hartje,* 148 Wn. App. 454, 465 (2009).
[7] RCW 51.32.090(4)(d).
[8] *Lins v. Children's Discovery Centers of America, Inc.*, 95 Wn. App. 486, 489 (1999).

64, 65). Yet Deputy Thorson was not authorized to work because Deputy Thorson's physician issued a "no-work" note that kept Deputy Thorson off of work through May 15, 2008, at the earliest. (SOF ¶¶91, 94).

Deputy Thorson, therefore, had a right under the Industrial Insurance Act to have the County seek approval from Deputy Thorson's physician as to whether he could conduct light duty, but the County admits that it did not communicate with Deputy Thorson's physician. (SOF ¶66; ECF 28, at ¶¶19-20). The County, in questioning whether Deputy Thorson could go to war but not do light duty, was required to seek a determination from L&I as to whether the light duty it wanted Deputy Thorson to conduct was proper, but the County admits that it did not seek a determination. (SOF ¶67; ECF 28, at ¶¶19-20). The County admits (twice) that a reason it terminated Deputy Thorson was for Deputy Thorson's "failure to arrange light duty." (SOF ¶188).

Plaintiff is entitled to Summary judgment on its Industrial Insurance Act claim.

C. SUMMARY JUDGMENT REGARDING DEPUTY THORSON'S WLAD CLAIM IS PROPER.

In order to prove a hostile work environment claim under the WLAD a plaintiff must establish: (1) that the plaintiff was a member of a protected class; (2) that the employer's actions affected the compensation, terms, or conditions of the

employee's employment; (3) that the employer's harassment was unwelcome; and, (4) that the harassment is imputable to the employer.[9]

As to point (1), Deputy Thorson was a member of a protected class because Deputy Thorson was both an honorably discharged veteran and was on a "military status" by virtue of his service in the Washington Army National Guard.[10] (SOF ¶¶48, 51, 177).

As to point (2), the County's actions affected a term or condition of Deputy Thorson's employment - Deputy Thorson's compensation. Deputy Thorson, as a county employee and member of the Army National Guard, was entitled to 15 days' paid leave each year.[11] Deputy Thorson requested military leave twice, once on May 1, 2008, and a second time on May 5, 2008, but the County denied both requests. (SOF ¶¶80, 81, 115). The County did not have the discretion to deny the requests but did so anyway. (SOF ¶¶82-85, 123, 124).

As to point (3), the County's actions in denying Deputy Thorson's leave were unwelcome: denying an employee 15 days' leave -- so that the employee could enjoy the benefit of preparing for deployment and spending time with

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[9] *Domingo v. Boeing Employees Credit Union*, 124 Wn. App. 71, 84 (2004); RCW 49.60.010; RCW 49.60.180(3).

[10] RCW 49.60.180(3).

[11] RCW 38.40.060.

family prior to going into harm's way for a year -- is something that no employee would welcome.

As to point (4), the harassment is imputable[12] to the County as the Sheriff's Department's second in command denied both leave requests after having corresponded with the County's acting Personnel Director. (SOF ¶¶96, 114).

Plaintiff is entitled to summary judgment on its WLAD claim.

D. SUMMARY JUDGMENT ADJUDICATION OF DEPUTY THORSON'S USERRA DISCRIMINATION CLAIM IS PROPER.

1. The USERRA prohibits military related employment discrimination and is liberally construed.

The USERRA prohibits "discrimination against persons because of their service in the uniformed services."[13] The USERRA prohibits discriminatory actions against military personnel if the employee's military status was a "motivating factor" in the employer's adverse action toward the employee.[14] The USERRA is liberally construed.[15]

2. The USERRA Plaintiff's Burden of Proof.

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[12] Admitted in the Defendants' Amended Answer ECF No. 28, at ¶¶3-4.
[13] 38 U.S.C. § 4301(a)(3).
[14] *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002).
[15] *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991); *Hill v. Michelin N. Am., Inc.*, 252 F.3d 307, 312-13 (4th Cir. 2001)(c*iting Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S. Ct. 2100, 65 L. Ed. 2d 53 (1980)); *McGuire v. United Parcel Serv., Inc.*, 152 F.3d 673, 676 (7th Cir. 1998).

In order to establish a violation of USERRA the plaintiff must prove, by a preponderance of the evidence: (1) that the plaintiff was a member of the armed services; (2) that the employer took adverse action against the plaintiff by denying the plaintiff retention in employment; and, (3) the plaintiff's military status was a motivating factor for the employer's adverse action.[16]

"Motivating factor" means "that if the employer was asked at the moment of the decision what its reasons were and if it gave a truthful response, *one* of those reasons would be the employee's military position or related obligations."[17] An employee's "military position and related obligations [are] a motivating factor in [the employer's] decision if it relied upon, took into account, considered, or conditioned its decision on [the employee's] military-related absence."[18] A USERRA plaintiff may establish the "motivating factor" element through direct evidence (i.e. an admission of an employer that it took the employee's military service into account when it made its adverse decision as is the case here) or by

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[16] *Sheehan v. Dep't of the Navy,* 240 F.3d 1009, 1012 (Fed. Cir. 2001). There is no issue of fact as to points (1) and (2) in this case.

[17] *Robinson v. Morris Moore Chevrolet-Buick, Inc.,* 974 F.Supp. 571, 576 (E.D.Tx.1997)(*citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989)); *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431, 446 (6th Cir. 2008); *Grosjean v. First Energy*, 481 F.Supp.2d, 878, 883 (N.D. Ohio 2007); *Brandsasse v. City of Suffolk, Va.*, 72 F.Supp.2d 608, 617 (E.D. Va. 1999).

[18] *Id.*

circumstantial evidence including: (1) the proximity in time between the employee's military activity and the adverse employment action; (2) inconsistencies between employer's proffered reason and other actions of the employer; (3) hostility toward the service member-employee; or, (4) the employer's failure to follow its own policies.[19]

3. Deputy Thorson's military service was a motivating factor in the County's decision to terminate his employment.

(a) Direct evidence.

First, the County admitted to the Washington State Employment Security Division that it terminated Deputy Thorson because:

> Mr. Thorson was told by a supervisor, Joe Riggers, in December 2007 that Mr. Thorson was to quit the Oregon Army National Guard because of Mr. Thorson's weekend Sheriff requirements. Mr. Thorson did not do so. Mr. Thorson was to attend a disciplinary hearing on May 15, 2008, at 1:00 p.m. and failed to show. (SOF ¶192).

Second, Sergeant Joe Riggers exhibited hostility toward Deputy Thorson's military obligations when he told Deputy Thorson to quit the Army National Guard. (SOF ¶¶22-24).

[19] *Sheehan,* 240 F.3d at 1014 (Fed. Cir. 2001); *Fryer v. ASAP Fire & Safety Corp., Inc.*, 680 F.Supp.2d 317, 321-322, 326 (D. Mass. 2010).

Third, Undersheriff Erik Anderson testified that he took Deputy Thorson's military service into account when he ordered Deputy Thorson to conduct light duty:

> Q: Did you take Mr. Thorson's military service into account when you requested that he do light duty?
>
> A: Yes … (SOF ¶90).

Fourth, Undersheriff Anderson testified that he took Deputy Thorson's military service into account when he "suggested" that Deputy Thorson call him on the telephone:

> Q: Did you take Mr. Thorson's National Guard obligations into account when you suggested that he call?
>
> A: Yeah … (SOF ¶91).

The County admits that it terminated Deputy Thorson for (a) "failure to arrange light duty" and (b) "non-communication by not returning phone calls." (SOF ¶188).

Fifth, Undersheriff Anderson took Deputy Thorson's military service into account when he wrote Deputy Thorson, on May 1, 2008, "[i]f your injury allows you to return to the military, then I would expect you to return to [the County] in the meantime for light (or full) duty." (SOF ¶63).

Sixth, on May 1, 2008, Undersheriff Anderson wrote to the County's acting personnel director that "[Deputy Thorson's request for military leave was] turning into a messy personnel issue" in which Mr. Anderson "suspect[ed that Deputy Thorson was] just stringing [the County] along and/or avoiding [the County] until [Thorson] goes back into active duty in the military. I think termination is imminent if he does not comply with my instructions." (SOF ¶95).

(b) Circumstantial evidence.

The "motivating factor" element is established by the close **proximity in time** between the employee's military related acts and the employer's adverse actions - - - temporal proximity alone is sufficient evidence of discrimination under USERRA.[20] The County did not require Mr. Thorson to conduct light duty or call until after being notified of Deputy Thorson's military obligation and then terminated Deputy Thorson 17 days post-notification. (SOF ¶¶58, 76, 77, 168, 170).

The "motivating factor" element is established by **inconsistencies** between the employer's proffered reason and other actions of the employer.[21]

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[20] *Yoder v. Louisville, Jefferson County Metro Government*, 210 W.L. 3806825, *2 (W.D. Ky. 2010); *Kelly v. Main Eyecare Associates, P.A.*, 37 F.Supp.2d 47, 55 (D. Me. 1999).

[21] *Sheehan,* 240 F.3d at 1014.

Undersheriff Erik Anderson "suggested" that Deputy Thorson call him on May 1, 2008, and asked Deputy Thorson to "Please call [Anderson] ASAP" on May 5, 2008. (SOF ¶¶86, 100). Although Deputy Thorson responded directly to those calls (via a fax on May 1, 2008, and a text message, fax, and letter on May 5, 2008) he did not respond by phone. (SOF ¶¶89, 92, 102, 103, 115). On May 7, 2008, Mr. Anderson emailed (and mailed) a letter informing Deputy Thorson of a "pre-disciplinary meeting" that Deputy Thorson was to attend at 1:00 p.m. on May 15, 2008, in Goldendale, Washington - - - a 2.5 hour drive from Deputy Thorson's house in the Tri-Cities - - - in order to address Deputy Thorson's alleged "insubordination" for failure to return the two phone calls. (SOF ¶¶131, 148, 149). Mr. Anderson set the pre-disciplinary meeting at that time even though Deputy Thorson had informed Mr. Anderson orally and in writing that Deputy Thorson had two L & I medical appointments at 9:00 a.m. and 3:00 p.m. on May 15, 2008, in the Tri-Cities. (SOF ¶¶51, 60).

Deputy Thorson requested that Mr. Anderson move the May 15, 2008, meeting to a different date after being unable to get a lawyer to attend the meeting, after being told, by the union, that his union representative was on vacation, and after being told by L&I that he may get in trouble for missing the medical appointments. (SOF ¶¶132, 153, 168). Mr. Anderson refused, claiming that moving the meeting date would not be "fair" to Yvette Lewis, Deputy Thorson's union

representative, who had "agreed" to attend the May 15, 2008, meeting. (SOF ¶¶154, 160, 161). When asked why Mr. Anderson scheduled the May 15, 2008, meeting at 1:00 p.m., he testified that "Yvette was coming from [the union office in] Yakima." (SOF ¶165). Yvette Lewis was not "coming" to the meeting from Yakima on May 15, 2008, because Ms. Lewis was in Europe on May 15th! (SOF ¶166). Indeed, at deposition, Mr. Anderson conveniently "did not know" whether a member from the union showed up at the May 15, 2008, meeting. (SOF ¶167). Deputy Thorson, for the reasons stated above, did not attend the May 15, 2008, meeting and the County fired him because of it. (SOF ¶168).

The "motivating factor" element is established by an **employer not following its policies**.[22] County policies mandate that pre-disciplinary meetings be held at a reasonable time when the employee is on duty unless an exigency exists. (SOF ¶147). Mr. Anderson required Deputy Thorson to attend the pre-disciplinary meeting even though Mr. Anderson was not on duty with the County and no exigency existed; instead Mr. Anderson misrepresented that the meeting couldn't be moved. (SOF ¶¶150, 151, 154).

County policies provide that allegations of harassment be investigated. (SOF ¶122). Deputy Thorson informed Mr. Anderson that the County had told Deputy

[22] *Fryer*, 680 F.Supp.2d at 327.

Thorson to quit the Army National Guard. (SOF ¶118). Mr. Anderson dismissed the allegation as "ridiculous" and took no steps to investigate the allegation even though it was required by policy and despite Deputy Thorson's offer to take a polygraph examination to support his allegations of harassment. (SOF ¶¶120-122).

County policies require that the County maintain specific written documentation of disciplinary activities. (SOF ¶¶138-139). The County did not follow that policy vis-à-vis Deputy Thorson. (SOF ¶140).

County regulations define "insubordination" – the charge that Deputy Thorson was allegedly fired for – as "refusal to obey orders or instruction in the line of duty." (SOF ¶134). But Deputy Thorson was not on duty when the "insubordination" allegedly occurred, and the County has produced no document showing that it ordered, instructed, or directed Deputy Thorson to return the telephone calls he was allegedly insubordinate for not returning. (SOF ¶¶136-151).

County regulations do not provide for employee termination for failure to attend a pre-disciplinary hearing. (SOF ¶¶171-175). But the County terminated Deputy Thorson for just that. (SOF ¶170).

The "motivating factor" element is established by an **employer's hostile actions** for an employer "is more likely to develop hostility towards an employee's

reserve duties after experiencing the inconvenience that those duties can cause to the business."[23]

The County hired Deputy Thorson to be the "weekend deputy." (SOF ¶13). The County saved approximately $55,000.00 in hiring Deputy Thorson as a lateral transfer versus a new hire with no law enforcement experience. (SOF ¶11). Upon learning that Deputy Thorson had weekend military duty, Mr. Riggers told Deputy Thorson to quit the Oregon Army National Guard. (SOF ¶¶22-24). Deputy Thorson quit the Oregon Guard but, months later, was involuntarily recalled to the Washington Army National Guard and received deployment orders to Iraq. (SOF ¶¶ 48-49). Mr. Anderson, upon being informed of this, expressed anger to Deputy Thorson ostensibly because Deputy Thorson failed to follow Mr. Riggers' order that he get out of the military. (SOF ¶¶59, 192).

The "motivating factor" element is established by evidence of an **employer's disparate treatment** of other employees. The County has never terminated an employee for failing to attend a pre-disciplinary meeting but terminated Deputy Thorson for doing just that. (SOF ¶¶170-171).

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[23] *Sheehan,* 240 F.3d at 1014; *Hance v. Norfolk Southern Ry. Co.,* 571 F.3d 511, 518 (6th Cir. 2009); *Warren v. International Business Machines Corp.* 358 F.Supp.2d 301, 311 (S.D. N.Y. 2005); *Gillie-Harp v. Cardinal Health, Inc.,* 249 F.Supp.2d 1113, 1120 (W.D. Wis. 2003). *Sutherland v. Sosintern, Ltd.,* 541 F.Supp.2d 787, 793 (E.D. Va. 2008).

E. THE COUNTY HAS NO AFFIRMATIVE DEFENSE.

When the employee establishes the "motivating factor" element the burden of proof shifts to the employer to show, as an affirmative defense, that the employer would have taken the same action without regard to the employee's military status.[24] The employer must prove that the "same decision [to terminate] would have been made" as opposed to that "the same decision [to terminate] would have been justified."[25] An employer cannot meet its burden by showing that at the time of the decision it was motivated only in part by a legitimate reason: it must show that it would have taken the same act with the military entirely removed from the equation.[26] To that end, the employee does not bear the burden of demonstrating that an employer's asserted justification is a pretext, "[i]nstead, the employer must show by a preponderance of the evidence that the stated reason was *not* a pretext."[27] Again, to defeat summary judgment the employer must show "that the action would have been taken in the *absence* of the employee's military service."[28]

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[24] *Sheehan,* 240 F.3d at 1013; *Gummo,* 75 F.3d at 106.
[25] *See Robinson*, 974 F. Supp. at 576.
[26] *Id.*
[27] *Velazquez-Garcia v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17 (1st Cir. P.R. 2007)(emphasis in original).
[28] *Coffman* v. *Chugach Support Servs., Inc.*, 411 F.3d 1231, 1238-39 (11th Cir. 2005); *Gagnon* v. *Sprint Corp.*, 284 F.3d 839, 853-54 (8th Cir. 2002); *Leisek*, 278 F.3d at 899; *Hill* v. *Michelin N. Am., Inc.*, 252 F.3d 307, 312 (4th Cir.

The County's sole defense is that the "actions of the Plaintiff would have led to dismissal for reasons not associated with his military service." (ECF 28, at ¶ 38).

Defendants now have the burden of coming forth with admissible evidence to prove each element of the affirmative defense required under USERRA.[29] Defendants cannot meet this burden.

Plaintiff should be granted summary judgment as to his USERRA claim.

III. CONCLUSION

Deputy Thorson's Motion for Summary Judgment should be granted.

DATED this 21st day of December, 2011.

WITHERSPOON • KELLEY

By: _____

Matthew Z. Crotty, WSBA #39284
Thomas G. Jarrard, WSBA #39774
Attorneys for Plaintiff

2001); *Sheehan*, 240 F.3d at 1014; *Gummo* v. *Vill. of Depew, N.Y.*, 75 F.3d 98, 106 (2d Cir. 1996)(emphasis added).

[29] *See Celotex,* 477 U.S. at 321 - 324.

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of December, 2011,

1. I electronically filed the foregoing MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

Brian A. Christensen
Jerry J. Moberg & Associates
451 Diamond Drive
Ephrata, WA 98823
Phone: 509-754-2027
Fax: 509-754-6307
Email: bchristensen@canfieldsolutions.com
slaughlin@canfieldsolutions.com, twiersma@canfieldsolutions.com

Matthew Z Crotty mzc@wkdtlaw.com, mariannb@wkdtlaw.com
Thomas G Jarrard tjarrard@att.net, tjarrard@lawschool.gonzaga.edu

2. I hereby certify that I have mailed by United States Postal Service the document to the following CM/ECF participants at the address listed below: **none.**

3. I hereby certify that I have hand-delivered the document to the following participants at the addresses listed below: **none**.

/s/ Matthew Z. Crotty

Matthew Z. Crotty, WSBA 39284
Witherspoon Kelley, PS
422 W. Riverside Ave., Suite 1100
Spokane, WA 99201-0300
Phone: 509-624-5265
Fax: 509-478-2728
mzc@witherspoonkelley.com