

SUPERIOR COURT FOR THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

LAWRENCE HILL, et al.,

Plaintiff,

v.

GARDA CL NORTHWEST, INC,

Defendant.

No. 09-2-07360-1  
(Consolidated with No. 15-2-26829-1)

PLAINTIFFS' MOTION FOR FINAL  
APPROVAL OF CLASS SETTLEMENT

The Plaintiffs hereby move the Court for an Order that:

1. Grants final approval of the Class Settlement and directs distribution of the proposed settlement amounts as provided in the Settlement;
2. Grants final approval of the proposed Service Awards; and
3. Awards attorney's fees, litigation costs, and class administration costs as agreed in the Settlement.

**I. EVIDENCE RELIED UPON**

In support, the Plaintiffs rely on the Declarations of Class Counsel and the exhibits attached thereto, as well as the record on file in this matter.

**II. FACTS**

**A. Summary of Case History and Class Claims**

Plaintiffs Lawrence Hill, Adam Wise, and Robert Miller ("*Hill* Plaintiffs") filed this action on February 10, 2009, alleging that Defendant Garda CL Northwest, Inc., ("*Garda*")

1 failed to provide lawful rest and meal breaks. After a failed mediation, this Court certified a  
2 class in 2010 and ordered arbitration. The parties appealed, and the Supreme Court vacated the  
3 order compelling arbitration. *Hill v. Garda CL NW*, 179 Wn.2d 47 (2013). After remand and  
4 another failed mediation, the parties filed multiple motions and the Court entered summary  
5 judgment on liability in favor of Plaintiffs. Thereafter, it held a bench trial on damages, and on  
6 November 9, 2015, the Court entered judgment for the plaintiffs.<sup>1</sup> The class included all Garda  
7 Driver/Messengers employed in Washington between February 10, 2006, and February 7, 2015.

8 Garda appealed. The Court of Appeals affirmed on all issues affecting liability, but  
9 reduced the amount of interest and double damages awarded to the class. *Hill v. Garda CL NW*,  
10 *Inc.*, 198 Wn. App. 326 (2016). Both parties petitioned for review, and the Supreme Court  
11 reversed the Court of Appeals' decision limiting damages, but remanded for further  
12 consideration on double damages. *Hill v. Garda CL NW, Inc.*, 191 Wn.2d 553 (2018). Garda  
13 moved for reconsideration and petitioned for certiorari, both of which were denied.

14 Meanwhile, Plaintiffs Michael Gayken, Rudi Greer, Jason Milam, and John Udea  
15 (“*Gayken Plaintiffs*”), all of whom had opted out of the *Hill* class in 2010, filed a second case  
16 against Garda on or about November 3, 2015. That matter was stayed pending the outcome of  
17 appeals in *Hill*, but on August 13, 2017, the *Gayken Plaintiffs* added class allegations, to cover  
18 the period following the class period in *Hill*, i.e., after February 7, 2015.

19 In December 2018, while the double damages issues remained pending in the Court of  
20 Appeals, an agency of the federal Department of Transportation (the Federal Motor Carrier  
21 Safety Administration, or FMCSA), reversed a decade-old position and held that California rest  
22 and meal break rules are preempted by federal law as applied to drivers of commercial motor  
23 vehicles. *See* 83 Fed. Reg. 67,470 (Dec. 28, 2018), [www.fmcsa.dot.gov/regulations/californias-](http://www.fmcsa.dot.gov/regulations/californias-)  
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25  
26 <sup>1</sup> The initial judgment was for \$8,406,620.89, including back pay, interest, and double damages. The  
27 Court entered supplemental judgments for attorneys’ fees and costs (\$1,187,846.99) and additional back  
pay and interest for the class (\$81,564.26), making the total amount of the judgment \$9,676,032.14.

1 [meal-and-rest-break-rules-preemption-determination](#). While that decision is on appeal, a  
2 petition for a similar ruling preempting Washington law awaits decision by the FMCSA.

3 In the summer of 2019, the parties began discussing settlement and agreed to undertake  
4 another mediation. Johnson Declaration ¶ 2. On September 5, 2019, the parties attended their  
5 third mediation in 10 years, with David A. Rotman in San Francisco. Mr. Rotman is an  
6 experienced mediator knowledgeable of both wage and hour laws and class and representative  
7 claims at issue in this Litigation. *Id.* ¶ 3. The parties reached a settlement that night, which  
8 covers both the *Hill* and *Gayken* cases, and signed a Memorandum of Understanding, which  
9 was the basis for the parties' final settlement agreement, attached to Class Counsel's declaration  
10 as **Exhibit 1**. Subsequently, the Parties asked the Court of Appeals to dismiss the pending  
11 appeal in *Hill* and remand the case to this Court for class settlement approval proceedings.  
12 After the case was remanded, the parties asked that the Court consolidate the two cases, which  
13 was granted on October 11, 2019.

14 **B. Preliminary Approval**

15 On November 6, 2019, Plaintiffs moved for preliminary approval of the settlement and  
16 to certify a settlement class, pursuant to CR 23. On November 19, 2019, the Court granted that  
17 motion and certified the class for settlement purposes. **Exhibit 2**. The Court set the final  
18 fairness hearing for February 7, 2020.

19 **C. Class Notice and Class Member Response**

20 Defendant created lists of Putative Class members for *Hill* and *Gayken*, each verified by  
21 Class Counsel, and sent to the Settlement Administrator, JND Legal Administration. Johnson  
22 Decl. ¶ 6. The *Hill* class consists of all Putative Class Members who had been employed by  
23 Garda CL Northwest or its predecessor to work on armored trucks in the state of Washington at  
24 any time from February 11, 2006 through February 7, 2015, excluding those who had previously  
25 opted out. The putative class in *Gayken* covers the period after *Hill*, up to August 5, 2018.  
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1 The Court-approved Settlement Administrator, JND, sent the Court-approved class  
2 Notice to all 640 Putative Class Members from the *Hill* and *Gayken* cases. Keough Dec. ¶ 5.  
3 Of those, 149 were returned, and JND obtained updated addresses on 141 of those and remailed  
4 them. *Id.* ¶ 6. Fifteen of those have been returned as undeliverable. *Id.* In the meantime, Class  
5 Counsel have located updated addresses for several class members and provided them to JND,  
6 including some whose original and/or second notices were not deliverable. Johnson Dec. ¶ 7.  
7 Thus, it appears that 622 class members have received Notice of the Settlement. *Id.* ¶ 8.

8 The deadline for opt-outs and objections passed on January 23, 2020. One class member  
9 opted out of the Settlement, based on religious reasons. *Id.* ¶ 13 & Ex. A. No class members  
10 have objected to the Settlement. *Id.* at ¶ 11.

#### 11 **D. Settlement Summary and Class Benefit**

12 The Settlement created a fund of \$12,500,000 for Class Member payments,  
13 administration costs, Plaintiffs' attorney's fees and litigation costs, and Service Awards. Class  
14 members who do not opt out will receive a pro rata share of the net settlement amount after all  
15 costs and fees approved by the Court. *See* Settlement ¶ 1.36. The net settlement amount is  
16 expected to be approximately \$8,600,000. This results in an average payment of over \$13,400  
17 for the 639 class members who have not opted out. The amounts paid to each class member will  
18 be based on the number of rest and meal breaks estimated to have been due to him or her during  
19 the class period. Johnson Dec. ¶ 10. These estimates are based on detailed data supplied by  
20 Garda and analyzed by the Plaintiffs' trial expert, Jeffrey Munson, whose calculations were  
21 presented to the Court at trial in *Hill*, and which the Court accepted as reasonably accurate. *See*  
22 Settlement ¶ 1.3; *see also* Findings of Fact and Conclusions of Law, filed Oct. 23, 2015, at pp.  
23 10-12.

#### 24 **E. Attorney's Fees, Litigation Expenses, and Settlement Costs**

25 The parties agreed that Class Counsel would seek up to 30% of the Settlement Amount  
26 for attorney's fees, which is \$3,750,000. Settlement ¶ 1.21. In addition, Class Counsel may  
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1 seek up to \$100,000 in litigation costs and up to \$15,000 for settlement administration costs. *Id.*  
2 The Court granted preliminary approval of these amounts on November 19, 2019, and no  
3 objections have been received to any of them.

4 **F. Service Awards**

5 The parties stipulated to allocating \$10,000 to each *Hill* Class Representative and \$2,500  
6 to each *Gayken* Class Representative as service awards, subject to Court approval. Settlement ¶  
7 2.82. The parties agree these class service awards are appropriate given the Class  
8 Representatives' contribution of effort, time, and knowledge of the subject to obtaining a  
9 successful result for the class. The Court granted preliminary approval of these amounts on  
10 November 19, 2019, and no objections have been received with regard to the Service Awards.

11 **G. Distribution of Settlement Fund and Residual**

12 If the Court grants Final Approval and its order becomes Final, the Maximum Settlement  
13 Amount (i.e., \$12,500,000) will be transferred to JND for distribution. The Settlement  
14 Administrator shall determine the Maximum Settlement Portion for Payments to Participating  
15 Claimants by subtracting from the Maximum Settlement Amount the cost of Settlement  
16 Administration and the Attorneys' Fees, Costs and Service Awards approved by the Court. *See*  
17 Settlement p. 9. The Settlement Administrator will determine the amount due to each Class  
18 Member according to the terms of the Settlement, based on calculations by Class Counsel's  
19 expert, Dr. Jeffrey Munson. Settlement ¶¶ 1.3, 1.36-37, 2.5.1. The Settlement Administrator  
20 will mail checks to participating class members on or before the 15th day after the Effective  
21 Date of the Settlement, which shall occur 30 days after this Court enters Final Approval, if there  
22 are no appeals. *Id.* ¶ 2.6.1. Garda will also separately pay the employer's portion of payroll  
23 taxes due on the back wage portions of settlement payments. *Id.* ¶ 1.21.

24 Any class members who have not cashed their checks within 60 days will receive a  
25 reminder postcard informing them that their checks will expire soon. Settlement ¶ 2.6.3. Any  
26 checks not cashed within 30 days of this reminder will be void and considered residual funds  
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1 under CR 23(f). Residual funds shall be distributed equally to the Public Citizen Foundation  
2 and the Legal Foundation of Washington. *Id.*

### 3 III. DISCUSSION

#### 4 A. Washington Courts Favor Approval of Class Settlements.

5 Washington courts strongly favor class settlements. In *Pickett v. Holland America*, the  
6 Washington Supreme Court made clear this preference. There, the trial court granted approval  
7 of a class settlement but was reversed by the Court of Appeals. The Washington Supreme Court  
8 reversed the Court of Appeals and reinstated the trial court's order approving the class  
9 settlement. The Supreme Court acknowledged that settlements in class actions benefit the  
10 judicial process particularly where, as here, the claims of the individual class members may be  
11 small. *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351 (2001).

12 This is not to say that a reviewing court should not look to the  
13 merits of the Plaintiffs' case, but that review should be limited to  
14 assessing rough probabilities of success as they existed at the time  
15 of the settlement. As Holland correctly notes, any other approach  
16 would directly stifle litigants' willingness to settle class action  
17 claims, a result contrary to the policy favoring settlements. Were  
18 the rule otherwise parties would be hesitant to explore the  
19 likelihood of settlement apprehensive as they would then be that  
20 the application for approval would necessarily result in a judicial  
21 determination that there was no escape from liability or no hope of  
22 recovery and thus no basis for a compromise.

23 *Id.* at 190-191 (internal citations omitted).

24 Here, the parties have extensively investigated, litigated, tried, and appealed the case,  
25 and finally settled it with the aid of an experienced mediator, and have diligently pursued full  
26 and fair notice to the Class regarding their rights under the proposed settlement.

#### 27 B. Final Approval Should Be Granted.

28 Civil Rule 23(e) requires court approval of any class settlement. "The primary concern  
29 of this subsection is the protection of those class members, including the named plaintiffs,  
30 whose rights may not have been given due regard by the negotiating parties." *Pickett*, 145  
31 Wn.2d at 188. (citations omitted). The protections of Rule 23 are "for the most part

1 procedural,” requiring notice, an opportunity to object, and in most cases, an opportunity to opt  
2 out. *Id.*

3 CR 23(e) contemplates a two-step approval process. The first step is preliminary  
4 approval which provides for (i) the form and means of notice to potential class members; and  
5 (ii) preliminary review of the terms of settlement, reasonable attorneys’ fees, and the class  
6 representative fee award. The notice provides class members the opportunity to object or  
7 request exclusion. The second step is final approval and entry of judgment consistent with the  
8 terms of the settlement at which time the court considers any objections filed by class members.  
9 Approval of a class action settlement is within the trial court’s discretion and should be granted  
10 when the terms are “fair, adequate and reasonable.” *Pickett*, 145 Wn.2d at 188.

11 The criteria generally used to make this determination were set forth in Plaintiffs’  
12 motion for preliminary approval and considered by the Court in its Preliminary Approval order:

- 13 • the likelihood of success by plaintiffs;
- 14 • the amount of discovery or evidence;
- 15 • the settlement terms and conditions;
- 16 • recommendation and experience of counsel;
- 17 • future expense and likely duration of litigation;
- 18 • recommendation of neutral parties, if any;
- 19 • number of objectors and nature of objections; and
- 20 • the presence of good faith and the absence of collusion.

21 *Pickett*, 145 Wn.2d. at 188-89 (citing 2 HERBERT B. NEWBERG & ALBA CONTE,  
22 NEWBERG ON CLASS ACTIONS § 11.43 "General Criteria for Settlement Approval" (3d ed.  
23 1992)).

24 The Settlement in this case provides significant cash payments to all class members, at  
25 an average payment of over \$13,400. The total wages estimated to have been due to all class  
26 members during the class periods is approximately \$6.7 million. Johnson Dec. ¶ 11. Thus, with  
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1 approximately \$8.6 million allocated proportionally to the class members, each participating  
2 class member should receive the maximum value of their missed breaks, plus a portion of the  
3 interest that accrued. Johnson Dec. ¶ 12. While the *Hill* class prevailed at trial, the appeals  
4 could continue for years to come, and the new threat of a possible preemption defense based on  
5 FMCSA action, if successful, could result in zero recovery. Given the value and immediate  
6 benefit offered by this Settlement, it is fair, adequate, and reasonable. As set out in the parties'  
7 joint motion for preliminary approval, the *Pickett* factors strongly favor final approval.

8 **C. The Reaction of Class Members Favors Final Approval.**

9 Out of 640 Class Members, none has objected to the terms of the Settlement and only  
10 one has opted out of the Settlement. Keogh Dec. ¶ 13 & Ex. A. This reaction is a strong  
11 indicator that the settlement is “fair, adequate and reasonable.” See *Pickett, supra* at 200-01;  
12 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 455-56 (2d Cir. 1974) (“Any claim by appellants that  
13 the settlement offer is grossly and unreasonably inadequate is belied by the fact that, from all  
14 appearances, the vast preponderance of the class members willingly approved the offer. Only  
15 twenty objectors appeared from the group of 14,156 claimants.”); *Brailsford v. Jackson Hewitt,*  
16 *Inc.*, 2007 U.S. Dist. LEXIS 35509, 2007 WL 1302978, at \*4 (N.D. Cal. May 3, 2007) (a “low  
17 level of opt-outs is an indication of the Class Members’ acceptance of the settlement as fair and  
18 adequate”).

19 **D. The Court Should Approve the Award of Attorneys’ Fees, Costs, Expenses, and  
20 Service Awards.**

21 Plaintiffs also request court approval of an award of attorneys’ fees and costs to Class  
22 Counsel, an award of settlement administration expenses to the Settlement Administrator, and  
23 Service Awards to each *Hill* Class Representative and each *Gayken* Class Representative.

24 In Washington, where attorneys have created a common fund for the benefit of a class,  
25 the courts use a percentage approach in awarding attorneys’ fees. *Bowles v. Department of*  
26 *Retirement Systems*, 121 Wn.2d 52, 72-73, 847 P.2d 440 (1993). Under this approach, the court  
27 awards a percentage to class counsel of the total value of the recovery obtained for the class



1 through settlement.<sup>2</sup> This Court awarded a common fund fee in *Hill* following trial. *See* Order  
2 Granting Plaintiffs’ Motion for Attorney’s Fees, Costs, and Incentive Fees, filed Dec. 10, 2015,  
3 at p. 4.

4 The typical range of attorneys’ fees awarded from common fund recoveries in class  
5 action cases is between 20% and 33%. *See Bowles*, 121 Wn.2d at 72-73 (citing *Six (6) Mexican*  
6 *Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1304 (9th Cir.1990)). The parties agreed,  
7 and the Court preliminarily approved, an award of 30% of the total settlement as reasonable  
8 attorneys’ fees in this case. The application of a 30% fee is justified here by the risk and  
9 complexity of the claims in the case, which Class Counsel took on a contingent fee basis,  
10 advancing all costs and working on the case without any pay for nearly 11 years, without any  
11 guarantee of recovery and payment.<sup>3</sup> Furthermore, the Court approved a 30% common fund  
12 attorneys’ fee after the trial in *Hill*, over four years ago. *See* Order Granting Plaintiffs’ Motion  
13 for Attorney’s Fees, Costs, and Incentive Fees, filed Dec. 10, 2015, at p. 4. The request for an  
14 award of 30% of the Settlement Amount (\$3,750,000) for Class Counsel attorney’s fees should  
15 be granted.

16 In addition to reasonable attorneys’ fees, prevailing employees are entitled to recover  
17 reasonable litigation expenses from the defendant. *See Washington State Nurses Ass’n v. Sacred*  
18 *Heart Med. Ctr.*, 175 Wn.2d 822, 836, 287 P.3d 516 (2012); RCW 49.52.070. Plaintiffs’ costs  
19 and expenses are detailed in **Exhibits 3 and 4** to Class Counsel’s declaration. As shown, Class

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20 <sup>2</sup> The common fund approach is rooted in equity. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478,  
21 100 S.Ct. 745, 62 L.Ed.2d 676 (1980). It is common in class actions because class counsel represent  
22 the class on a contingent basis, but cannot enter into a contract with class members. Common fund  
23 fee awards essentially function as “an equitable substitute for private fee agreements where a class  
benefits from an attorney's work.” *Staton v. Boeing Co.*, 327 F.3d 938, 968 (9th Cir. 2003).

24 <sup>3</sup> Federal courts also sometimes employ a “lodestar cross-check” *See Vizcaino v. Microsoft Corp.*,  
25 290 F.3d 1043, 1050 (2002). Here, Class Counsel’s lodestar is currently over \$1.318 million.  
26 Johnson Dec. ¶ 18. The requested amount is 2.84 times that, which is well within the range of  
27 acceptable attorneys’ fees under a common fund approach. *See Bowles*, 121 Wn.2d at 73 (affirming  
common fund allocation that was three times the lodestar); *Vizcaino*, 290 F.3d at 1051 & n. 6  
(approving common fund allocation that was 3.65 times lodestar, and finding most cases fell between  
one and four times lodestar).

1 Counsel’s total expenses are over \$101,000, consisting primarily of fees for court reporters,  
2 experts, and mediators, along with some travel expenses, legal research and filing, courier, and  
3 copying fees. *See* Johnson Dec. ¶¶ 13-14. The court should approve the agreed amount of  
4 \$100,000 as an award for costs.

5 The Settlement Administrator estimated the costs of administration to be less than  
6 \$8,000, and the Settlement caps this cost at \$15,000, which the parties ask the Court to approve  
7 as well. This amount is competitive for the services that JND is providing. Johnson Dec. ¶ 19.

8 Finally, Plaintiff asks that the Court approve Service Awards in the total amount of  
9 \$40,000 to the seven Class Representatives. In considering the propriety and amount of a class  
10 service award, courts look to:

11 (1) the risk to the class representative in commencing a class  
12 action, both financial and otherwise; (2) the notoriety and personal  
13 difficulties encountered by the class representative; (3) the amount  
14 of time and effort spent by the class representative; (4) the duration  
of the litigation; and (5) the personal benefit, or lack thereof,  
enjoyed by the class representative as a result of the litigation.

15 *Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wn. App. 404, 430 (2012). As recognized by  
16 the *Peterson* court, “[i]ncentive awards are intended to compensate class representatives for  
17 work done on behalf of the class, to make up for financial or reputational risk undertaken in  
18 bringing the action, and, sometimes, to recognize their willingness to act as a private attorney  
19 general.” *Id.* (citing *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009)).

20 Here, Plaintiffs initiated these matters by retaining counsel and agreeing to represent all  
21 similarly situated employees in public litigation. The three plaintiffs in *Hill* produced  
22 documents in discovery, reviewed documents and discovery received, gave depositions,  
23 participated in preparing and responding to motions, participated in mediation and subsequent  
24 negotiations, and reviewed the various proposed settlement terms. Johnson Dec. ¶ 20. The  
25 Settlement calls for each to receive \$10,000 as a service award, which is the same amount this  
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1 Court approved after the trial in 2015. *See* Order Granting Plaintiffs’ Motion for Attorney’s  
2 Fees, Costs, and Incentive Fees, filed Dec. 10, 2015, at p. 11.

3 The plaintiffs in *Gayken* brought the second case to protect and vindicate their own  
4 rights after the trial in *Hill*, and later agreed to represent all workers for the time period after the  
5 *Hill* class period. Johnson Dec. ¶ 21. While there was no meaningful litigation, they agreed to  
6 the potential burden and ignominy of being the public face of the lawsuit for all. In a small  
7 industry, Plaintiffs took personal risks by exposing themselves as employees willing to bring  
8 suit to enforce their rights. *Id.* ¶ 22. The Settlement calls for service awards of \$2,500 each for  
9 the four *Gayken* Plaintiffs. Settlement p. 21.

10 These Service Awards totaling \$40,000 are reasonable in light of the total time and effort  
11 spent by the Plaintiffs and is consistent with similar class action service awards. *See In re Mego*  
12 *Fin. Corp. Sec. Litig.*, 213 F.3d 454, 463 (9th Cir. 2000) (approving an award of \$5,000 each to  
13 the two class representatives in a settlement of \$1.725 million); *Staton v. Boeing Co.*, 327 F.3d  
14 938, 976 (9th Cir. 2003) (discussing cases approving of individual service awards up to  
15 \$30,000).

16 **E. Proposed Order Granting Final Approval**

17 The parties have agreed to a proposed order granting final approval, which includes the  
18 following:

- 19 1. Finding the Settlement is fair, adequate, and reasonable.
- 20 2. Directing distribution of the Settlement Amount in the manner set forth in the  
21 Settlement.
- 22 3. Approving \$40,000 in total service awards to the named plaintiffs, including  
23 \$10,000 to each of the class representatives in *Hill* and \$2,500 to each of the class  
24 representatives in *Gayken*.
- 25 4. Awarding reasonable attorney’s fees of \$3,750,000 to Class Counsel and  
26 \$100,000 in costs to Class Counsel.

1 5. Approving payment of class administration costs to JND not to exceed \$15,000.

2 6. Confirming the release of claims by all Class Members as set forth in the  
3 Settlement.

4 The Court has already entered preliminary approval of these sums to which there has  
5 been no objection. The final proposed order filed herewith is consistent with the Settlement  
6 Agreement and the Court's prior orders.

7 **IV. CONCLUSION**

8 For the above stated reasons, the parties request the Court enter final approval of the  
9 class settlement.

10 I certify that this memorandum contains 3698 words in compliance with the Local Civil  
11 Rules.

12 DATED: January 28, 2020.

13 SCHROETER, GOLDMARK & BENDER

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1 CERTIFICATE OF SERVICE

2 I hereby certify under penalty of perjury under the laws of the State of Washington that  
3 on this date I filed the foregoing document with the Clerk of the Court using the court's e-filing  
4 system and had it served on the following counsel of record, in the manner indicated:

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15 DATED January 28, 2020, at Seattle, Washington.

16 *s/Rachael Tamngin*  
17 Rachael Tamngin, Legal Assistant