THE HONORABLE CAROL SCHAPIRA
MOTION NOTED FOR ORAL ARGUMENT OCTOBER 19, 2012 AT 11:00 A.M.

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

GEOFF TATE and SUSAN TATE, a married couple, Plaintiffs, v. EDDIE JACKSON and TERESA GOLDEN-JACKSON, a married couple; SCOTT ROCKENFIELD and MISTY ROCKENFIELD, a married couple; MICHAEL WILTON and KERRIE LYNN WILTON, a married couple; TRI-RYCHE, CORPORATION, a Washington corporation; QUEENSRYCHE MERCHANDISING, INC., a Washington corporation; and MELODISC LTD., a Washington corporation, Defendants.	Case No. 12-2-21829-3 SEA PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs, Geoff and Susan Tate, respectfully request the Court deny Jackson, Wilton, and Rockenfield's (hereinafter the "Defendants") Motion for Partial Summary Judgment because it is severely premature as it seeks to dismiss factually-intensive issues not yet developed through discovery; is not supported by sufficient evidence pursuant to CR 56; is controverted by genuine issues of material fact; and is a "backdoor" attempt to obtain an injunction without complying

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with the statutory pleading and bonding requirements. Also, this court already opined on most of the issues in Defendants' motion. For example, regarding the alleged assault in Sao Palo Brazil, which Defendants are trying to use to justify their oppressive behavior, the Court said:

> But it is also the case that people fight. And people have lawsuits. There was discussion of being like brothers. Well, brothers sue each other, and brothers have lawsuits, but they also resolve matters.
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> ***
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> The-- the issue of the fight--again, ***I don't think that's dispositive***.

Portion of the Transcript from the July 13, 2012 Proceedings ("Transcript"), at Page 4, lines 3-8, a copy of which is attached as Exhibit 1 to the Declaration of Joshua Brower (hereinafter the "Brower Decl.")(emphasis added).

Regarding whether Mr. Tate can use the Queensryche name, marks and media assets during the pendency of this matter, the Court stated:

> Are there going to be competing Queensryche? I don't see any reason that Mr. Tate can't have the benefit, if he gets other members, with whatever name he uses of using that brand. And I think that's inherently confusing. Although, again, I'm sure the market can get these things sorted out.
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> ***
>
> We're not talking about splitting a child. We are talking about a particular brand. It seems as though all of the parties may be able to take advantage of that brand.

Transcript, Page 4, lines 18-25, Page 5, line 1, and Page 6, lines 21-24. And regarding whether Mr. Tate can earn a living, this Court said:

> ***He is not being required not to perform, not to go on benefiting from the work of 30 years***, which, again, there are royalties and other things to which he is entitled.

Id. at Page 6, lines 7-9.

II. ARGUMENT AND AUTHORITY

A. Defendants' Motion is Premature

To date, ***no*** discovery has been taken in this matter. Not a single interrogatory, request for production of documents, nor deposition. Trial in this matter is over a year away; set for November 18, 2013. The discovery deadline is not until September 30, 2013. Without question

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and as explained below, the Tates must be permitted to obtain discovery regarding the issues raised in Defendants' motion. Defendants have failed to submit any admissible evidence establishing a sense of urgency or impending harm warranting summary judgment at this time, which would only be proper as a motion for an injunction, not a motion for summary judgment. Because there are genuine issues of material fact, it must be denied.

B. <u>Defendants' Motion is Not Supported By Sufficient Evidence</u>

As the Court stated in *Guile v. Ballard Cmty. Hosp.*, 70 Wash. App. 18, 21-22, 851 P.2d 689, 691 (1993)

> A defendant can move for summary judgment in one of two ways. First, the defendant can set out its version of the facts and allege that there is no genuine issue as to the facts as set out. Alternatively, a party moving for summary judgment can meet its burden by pointing out to the trial court that the nonmoving party lacks sufficient evidence to support its case. In this latter situation, the moving party is not required to support its summary judgment motion with affidavits. However, the moving party must identify those portions of the record, together with the affidavits, if any, which he or she believes demonstrate the absence of a genuine issue of material fact.

Citations omitted*; distinguished on other grounds, Morton v. McFall*, 128 Wn.App. 245, 254, 115 P.3d. 1023 (2005). Here, Defendants failed to do adequately do either.

1. Whether or not Geoff Tate is Entitled to use the Queensryche Name, Marks, and Associated Media Assets" *is* the Central, Material Fact in this Case

Defendants rely on a single declaration—Scott Rockenfield's--for the proposition that Geoff Tate cannot use the Queensryche name, marks, or associated media assets. *See* Motion for Partial Summary Judgment, page 9, lines 14-15. In it, Mr. Jackson claims that he and the other defendants, all of whom are oppressing Mr. Tate, have never granted Mr. Tate the right to use the Queensryche name, marks or media assets and that the name is reserved to the "original band…." *See* Declaration of Scott Rockenfield, page 1, lines 22-25. Of course Mr. Rockenfield would say this because that is exactly what he and the other Defendants are trying to do: take 30-years of hard work and brand building away from Geoff Tate and keep it for themselves. At a

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minimum, before summary judgment can be granted on this issue, the Tates must be permitted to depose Messrs. Jackson, Wilton, and Rockenfield regarding these claims.

Moreover, Mr. Rockenfield is simply wrong. Geoff Tate is part of the ***original*** band and, thus, he too is entitled to use the name, mark, and media assets until this Court resolves the fundamental issue of who owns the Queensryche assets. As the Court stated in denying the Tates' request for a preliminary injunction:

> We're not talking about splitting a child. We are talking about a particular brand. ***It seems as though all of the parties may be able to take advantage of that brand***.

Transcript, Page 6, lines 21-24 (emphasis added).

Worse, both Mr. Rockenfield and Mr. Wilton are doing exactly what they ask the Court to stop Geoff Tate from doing: They are both using the Queensryche name, marks, and media assets ***to sell their individual products—without any formal approval by the companies***.

Mr. Wilton uses the Queensryche name and mark to sell beer --"Whip Ale"-- and branded clothing, coffee, glassware, mini-guitars, and banners. Examples of websites and advertising for Mr. Wilton's products using the Queensryche name and mark are attached as Exhibits A and B to the Declaration of Geoff Tate in Opposition to Defendants' Motion for Partial Summary Judgment (hereinafter, the "G. Tate SJ Decl."); *see also* http://ratpakrecordsamerica.com/whipale.cfm. Similarly, Mr. Rockenfield uses the Queensryche name and mark to sell drumming books, drums, posters, drum sticks, a drum track build computer program, a drum clinic DVD, drum loops, "rockenwraps", and "Operation: Rockenfield—the Drumming of Queensryche." Examples of Mr. Rockenfield's websites are attached as Exhibits C and D to the G. Tate SJ Decl.; see also (http://www.rockenwraps.com/home.html); *also* *http://www.bigfishaudio.com/detail.html?829* where he sells "Scott Rockenfield Queensryche Drums."

There is no ***corporate*** support for Mr. Rockenfield's assertion. The only document that discusses which company owns and controls the use of the Queensryche name, marks, and media

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assets is the 1994 Shareholder's Agreement. A copy is attached as Exhibit 2 to the Brower Decl. As Defendants' counsel admits, the Shareholder Agreement expired in 2004 and is void. *See* Defendants' Motion for Partial Summary Judgment, page 4, lines 10-11. Therefore, use and control of the name, marks, and media assets, are controlled by the remaining corporate documents (i.e., the Articles and Bylaws), all of which are silent on this issue and do not provide any guidance, limits, or restrictions. Copies of those documents are attached as Exhibit 1 to Mr. Osinski's Declaration. Therefore, resolution of who gets to use these corporate assets, and how, is the ***central*** issue in this case, is intensely factually dependent, and cannot be resolved on summary judgment.

2. Defendants Failed to Establish the Tates Lack Sufficient Evidence to Support Their Case.

The cut-and-thrust of Defendants' motion is that the alleged "assault" in Sao Palo Brazil justifies all of their "corporate" action under the Business Judgment Rule and leaves Geoff Tate with no defense. First, there is a genuine issue of material fact regarding what happened in Brazil. Before the Court can rule on that issue, the Tates must be allowed to conduct discovery, including deposing the Defendants and their witnesses to this incident.

Second, Geoff Tate disputes the facts and circumstances surrounding the incident in Brazil and does not "admit" he "assaulted"[1] anyone. In his Declaration in Support of the Tates' Motion for a Preliminary Injunction, Geoff Tate says Mr. Rockenfield taunted him, saying, "I fired your wife, I fired your daughter and your son-in-law, and you're next." A copy is attached as Exhibit 2 to the Osinski Decl., page 8, line 26 and page 9, lines 1-3. Angry, Geoff Tate "went after" Mr. Rockenfield, but never touched him. *Id*. Again, as this Court stated in July, "The issue of the fight--again, ***I don't think that's dispositive***. Transcript, at Page 4, lines 3-8.

If it were, Eddie Jackson would have been fired from Queensryche years ago for assaulting Geoff Tate. *See* G. Tate SJ Decl., ¶ ¶ 1-11. During the Metalica tour, Eddie Jackson

[1] This Court lacks criminal jurisdiction over the incident in Brazil under RCW 9A.04.030. While this Court may have civil jurisdiction, Defendants are trying to make a "mountain out of a molehill." After the incident, the band performed the show and played two more shows together. Defendants never sought any medical treatment and have, at most, *de minimus* damages.

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came onto the tour bus where Geoff Tate was sitting and, unprovoked, preceded to "Kung Fu" kick Geoff in the face. *Id.* As Geoff recounts, "It was a brutal blow that caught me completely off guard." *Id*. Two other witnesses, Messrs. Beyer and Rafeal, both of whom provided declarations, corroborate Geoff Tate's memory of this incident. As Mr. Beyer's remembers:

> Eddie seemed to calmly walk down the aisle past Geoff who was sitting and eating at the front lounge table. Suddenly, as he passed Geoff, Eddie threw a near-perfect roundhouse kick and hit Geoff squarely on the right side of his jaw. As I and other crew members pulled Eddie away, he again told Geoff, "come on and fight me, I know you've got balls!" Geoff grabbed his jaw, looked at Eddie with his eyes wide, doing everything he could to restrain himself, and snapped, "I'm not going to fight you, Eddie!" We got Eddie down on the front lounge couch, and held him there to try and get him to calm down. After some time, after he seemed to relax, we would let him up, and every time he would go after Geoff, and start swinging at him. We kept pulling him away from Geoff. We finally had to have crewmember, Alex Raphael, who was a competitive body builder physically sit on Eddie to restrain him on the couch for approximately 2 hours. When Alex finally let Eddie up, he went to his bunk and went to sleep.

Beyer Declaration at ¶¶ 5-10. If this is the litmus test to justify oppressive corporate action, as Mr. Osinski would have this Court believe, Eddie Jackson should have been fired 14 years ago.

The real issue before this Court, and for which the Tates have submitted sufficient evidence to withstand this Motion for Partial Summary Judgment, is whether Geoff Tate's role in Queensryche as its front-man, its voice, its main songwriter (117 out of 145 songs), its public face, and its brains for 30 years, entitles him to the Queensryche name, brand and assets. This, again, is an intensely factual issue that must be tried to the Court.

C. <u>Genuine Issues of Material Fact Exist Regarding Geoff Tate's Firing and His Corporate Ownership; Defendants' Motion Must Be Denied</u>

Summary judgment is appropriate ***only*** "if the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue as to any material fact and the party bringing the motion is entitled to judgment as a matter of law." *Sheehan v. Central Puget Sound Reg'l Transit. Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005) (citation omitted). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*

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Condo Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In considering a motion for summary judgment, the court views all facts and reasonable inferences in light most favorable to the nonmoving party. *Id*. The moving party bears the burden to demonstrate there are no genuine issues of material fact. *Id*. Argumentative statements are insufficient to demonstrate that there are no genuine issues of material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co*., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Atherton*, 115 Wn.2d at 516. In examining the motion for summary judgment, the court should only examine the sufficiency of the legal claims and should not assume the functions of a jury by weighing the facts presented. *Babcock v. State*, 116 Wn.2d 596, 598-99, 809 P.2d 143 (1991). Summary judgment is improper if reasonable minds can reach different conclusion. *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997). Genuine issues of material fact exist as to each claim Defendants seek to dismiss.

1. Rockenfield, Jackson, and Wilton Engaged in a Prolonged Scheme to Oppress Geoff Tate

Defendants' actions and statements belie their claim they fired Geoff Tate because of the incident in Brazil. In reality, Jackson, Wilton, and Rockenfield have been trying to get rid of Geoff Tate for at least a year and they are using the Brazil incident as a smokescreen.

Over a year ago, the Defendants began trying to recruit Jason Saunders to replace Geoff Tate as Queensryche's lead singer. *See* Declaration of Jason Ames Saunders. Mr. Saunders worked with Queensryche for years, performing on albums and during live shows. *Id*. Mr. Saunders played keyboards, rhythm guitar and sings backup and lead vocals. *Id*. Beginning on August 6, 2011, Michael Wilton approached Mr. Saunders after a show at the House of Blues in Boston and said, "If Geoff wasn't around, what would you think about doing something?" which was echoed by Scott Rockenfield who commented, "Yes, think about it!" *Id*.

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On about September 19, 2011 in Tulsa at a show at Cain's Ballroom, the three Defendants again approached Mr. Saunders. *Id*. The three of them told Mr. Saunders that Geoff Tate was leaving the band to possibly pursue a solo career and that they didn't want to stop the band. *Id*. Based on that, Defendants offer Mr. Saunders the lead vocal position in Queensryche for $600 per week touring pay plus "a cut off of a new CD." *Id*. He told then "I'm definitely interested, but let me think about it and I'll get back to you." *Id*. Scott Rockenfield asked Mr. Saunders not to speak to Geoff Tate about the offer just to keep good feelings while we were all on the road. *Id*. When Mr. Saunders discussed Defendants' offer with his girlfriend, Maureen Fisher, who also worked for Queensryche, she told him that Geoff wasn't thinking of leaving Queensryche. *Id*. As Mr. Saunders puts it:

> [Defendants' offer] left me with an uneasy feeling, seemingly fueled by an ulterior motive. They offered me one-half my normal pay and ***wanted to get rid of Geoff. It appeared and felt to me like they were trying to keep his share of the profits while paying someone next to nothing to take his place. That way they could all keep more money***.

Id. (emphasis added). On about October 1, 2011 in Los Angeles at the House of Blues, Defendants asked Mr. Saunders if he had given any further thought to the lead vocal/Geoff replacement position? *Id*. He told them, "Thank you for thinking of me, but I don't feel I'm the right guy for this project." *Id*. He said, "I wouldn't be opposed to a side project with a bluesy edge if you guys are up for that." *Id*. About two weeks later, during a month-long break from the band's tour schedule, Defendants called Mr. Saunders and told him that he and Maureen were fired from the remainder of the *Dedicated to Chaos* Tour. *Id*. Ms. Fisher corroborates all of the above in her Declaration.

2. Defendants Engaged in Oppressive Conduct Before The Incident in Brazil

In addition to plotting to fire him for over a year, Defendants began cutting Geoff Tate out of Band and company management. This occurred ***before*** the incident in Brazil on April 14, 2012.

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For example, on April 4, 2012, Geoff Tate's counsel sent Defendants a letter telling them that: 1) they had not properly noted the shareholder and Directors meetings; and 2) Geoff Tate was unavailable. *See* Exhibit 3 to Brower Decl. Undeterred, on April 5, Scott Rockenfield responded claiming the meeting was properly noted, would occur regardless of Geoff's unavailability, and would be a "private meeting" open only to the Directors and Shareholders. *See* Exhibit 4 to Brower Declaration. Even after receiving a response from Tates' counsel explaining why they were wrong and why Susan Tate and the Tates' counsel could attend any such meetings under the Washington Business Corporations Act, Title 23B RCW, Defendants went ahead without the Tates. It was at these meetings without Geoff Tate that the Defendants fired Geoff's wife Susan, and his daughter and son-in-law, which is exactly what Scott Rockenfield told Geoff Tate nine (9) days later in Brazil, thereby provoking the physical confrontation Defendants are now trying to use to justify their oppressive behavior.

3. Defendants Continued To Oppress Geoff Tate By Improperly Expelling Him And Removing Him as a Director, Thereby Creating a Genuine Issue of Material Fact Regarding Geoff Tate's Ownership in the Queensryche Companies

Defendants' corporate actions belie their claims that they respect Geoff Tate's 25% ownership in the Queensrcyhe Companies. On June 5, 2012, Defendants called a Board meeting at which they passed the following Resolutions:

> 1….Unanimous Decision to expel Geoff Tate from the Band with all ramifications that creates under the controlling agreements, including loss of any director or office position within any of the Queensryche corporations, and ***triggering mandatory transfer and repurchase of any stock***.
>
> ***
>
> 3…It was decided that an ***executive committee of eddie [sic] Jackson, Michael Wilton and Scott Rockenfield*** will be formed for Tri-Ryche, Melodisc and Queensryche Merchandising corporations which will be vested with all power and authority of the directors to carry out any and all such actions necessary for the operation of the corporations. This executive committee will last indefinitely until altered by later action of the directors.

A copy of this Resolution is attached as Exhibit 5 to the Brower Decl.

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This Resolution shows Defendants' continued pattern of oppression. Not only are they trying expelling Geoff Tate from the Band he built over 30 years, ***they also are attempting to force him to transfer and sell his stock in the Queensryche Companies***. Whether or not they can do so, and for how much (i.e., Fair Value versus Fair Market Value, etc.), is a question of fact that must be determined by the Court.

It also is questionable whether Defendants can remove Geoff Tate as an Officer and Director and whether, in these circumstances, they can form an Executive Committee and exclude Geoff Tate from the day-to-day operation of the Queensryche Companies. First, the Articles and Bylaws of the Queensryche Companies do not include provisions allowing Defendants to remove an Officer or Director. *See* Osinski Decl., Exhibit 1. Second, Geoff Tate, as a 25% shareholder has the ability to elect himself as a Director in each of the Companies, especially Tri-Ryche, which elects its Directors using cumulative voting. *Id.; see also* RCW 23B.08.080(3)("If cumulative voting is authorized, and if less than the entire board is to be removed, no director may be removed if the number of votes sufficient to elect the director under cumulative voting is voted against the director's removal.") Here, Defendants went behind Geoff Tate's back, held a meeting knowing he could not attend, and voted him out without giving him a chance to vote.

And last, forming an Executive Committee to exclude Geoff Tate, an existing Officer and Director, smacks of bad faith and oppression. *See McCormick v. Dunn & Black, P.S.*, 140 Wn.App. 873, 167 P.3d 610 (2007)(Articles and Bylaws permit removal of a Director and evidence showed other shareholders never conducted any Board meetings without expelled Director.) Because these are closely held, private companies that cannot easily be replicated or replaced, Defendants do not have unlimited power to manage the Queensryche Companies to Geoff Tate's detriment. This is not a situation where Geoff Tate is the CEO of a company that makes widgets so he could go and get another job at another widget-making company. Geoff Tate has poured 30-years of his life into making Queensryche, has written 117 of its 145

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published songs and has been its lead singer and front man for decades. As a leading law review article on shareholder oppression written by Professor Robert C. Art explains:

> ***Removing an employee-shareholder in a close corporation from a position of influence and employment is not accurately viewed as a managerial decision within the ordinary discretion of those in control. Instead, it is a breach of the basic bargain among the business' owners, depriving the minority shareholder of all present return on investment***. Moreover, because the terminated employee-shareholder has no realistic opportunity to sell the shares at a fair value to anyone else, the owner is deprived of the investment principal. No recourse is available except for the judicial action for oppression….
>
> ***
>
> ***A shareholder of a close corporation who is terminated from employment with the company may lose not only the job but all income and all return on investment***. Though the person may continue to own shares, they produce no income in the absence of employment and are not saleable at fair value. The minority's investment is locked in, producing no return to the minority, and serving only to promote the interests of the controlling shareholders.

Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations, 28 Iowa J. Corp. L 371, 383-384, 390 (2003)(emphasis added).

C. <u>The Tates Will Prevail on Their Claims Against Defendants; They Should Not Be Dismissed on Summary Judgment</u>

1. Defendants Are Oppressing Geoff Tate Warranting Corporate Dissolution

Dissolution of a corporation is appropriate if majority shareholders "have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent" toward a minority shareholder. RCW 23B.14.300(2)(b), (d). If the minority shareholder is a founder, one who committed capital and resources to starting up the venture, courts apply the "reasonable expectations" test to determine whether there is oppression. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 711, 64 P.3d 1 (2003). That test defines oppression "as a violation by the majority of the reasonable expectations of the minority." *Id.* Reasonable expectations are "those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture." *Id.*

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Once a minority shareholder has shown oppression, relief is warranted unless the majority shareholders show there were legitimate business justifications for the conduct. *Id*. at 709. Under the Business Judgment rule, the majority shareholders must establish, among other things, that "there is a reasonable basis to indicate that the transaction was made in good faith." *Id*. "Such immunity from liability is absent where a corporate director or officer is shown to have acted in bad faith and with a corrupt motive." *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1987), *rev. denied*, 107 Wn.2d 1022 (1987). The majority shareholders must also establish that they acted "with such care as an ordinarily prudent person in a like position would use under similar circumstances." *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 833-34, 786 P.2d 285 (1990).

Since Geoff Tate started the band and is an original shareholder of the Queensryche Companies, the reasonable expectations test applies. Geoff Tate's reasonable expectations as a founding member of Queensryche, and as a founding shareholder of the Queensryche Companies, was to remain a member of Queensryche until it no longer existed or he chose to retire; as Geoff said in his Declaration in Further Support of Motion for Preliminary Injunction, "Queensryche has been my life." *See* Reply Declaration of Geoff Tate, ¶ 5, another copy of which is submitted herewith to aid the Court. Performing in Queensryche is how Geoff Tate earns a living. By cutting him out of management decisions, forming an Executive Committee, and firing him, Defendants are violating Geoff Tate's reasonable expectations. *See Hayes v. Olmsted & Assoc*., Inc., 173 Or.App. 259, 21 P.3d 178 (2001); *rev denied* 36 P.3d 974 (2001). In *Hayes*, the Oregon Court of Appeals found oppression where the majority shareholders formed an executive committee, cut the plaintiff out of company management, paid themselves bonuses, and, when Mr. Hayes complained and sought information, they fired him. *Id*. at 274-276. As the court stated:

> a breach of fiduciary duty occurs when "the majority shareholders of a closely held corporation use their control over the corporation to their own advantage and exclude the minority from the benefits of participating in the corporation, [in the absence of] a

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> legitimate business purpose * * *." A breach of fiduciary duty by those who control a closely held corporation normally constitutes oppression.

Id at 265. Such is the case here.

Geoff Tate devoted his entire adult life in furtherance of Band and the Queensryche Companies. After Chris DeGarmo voluntarily left the Band 15 years ago, Geoff assumed almost sole responsibility as the creative and promotional force behind the Band. During this same period, Rockenfield, Jackson, and Wilton contributions steadily declined to the point where people working with the Band assumed that Geoff was the Band. Declaration of Jeff Albright, ¶¶ 3-12. Geoff earned his living, contributed 30 years of effort, time, intellectual property, and his professional legacy in furtherance of Queensryche and it is these facts through which his reasonable expectations must be viewed. Defendants formed an executive committee and excluded Geoff Tate. They then passed resolutions firing Geoff Tate and taking for themselves all control and benefit of the Queensryche Companies. While they attest that "Geoff Tate still owns his stock," it is essentially worthless because he cannot sell it, cannot trade it, and makes the majority of his income when he is performing under the Queensryche moniker.

2. Defendants are Not Shielded by the Business Judgment Rule Because They Acted in Bad Faith

The Business Judgment Rule does not give corporate directors *carte blanch* to oppress a minority shareholder. As the Court stated in *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash. App. 502, 508-09, 728 P.2d 597, 603 (1986):

> Directors and officers stand in a fiduciary relation to the corporation they serve and are not permitted to retain any personal profit or advantage gleaned "on the side." The "business judgment" rule immunizes management from liability in a corporate transaction undertaken within the corporation's power and management's authority where a reasonable basis exists to indicate that the transaction was made in good faith. ***Such immunity from liability is absent where a corporate director or officer is shown to have acted in bad faith and with a corrupt motive.***

(citations omitted)(emphasis added). Here, genuine issues of material fact exist regarding Defendants' motives for firing Geoff Tate and expelling him from the Queensryche Companies, including, but not limited to, their attempts over a year ago to replace Geoff with Jason Saunders. The Tates are entitled to conduct discovery before summary judgment can be granted. "Because

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many things can constitute oppressive conduct or a breach of fiduciary duties, ***what matters is not so much matching the specific facts of one case to those of another but examining the pattern and intent of the majority and the effect on the minority of those specific facts***." *Cooke v. Fresh Exp. Foods Corp., Inc*., 169 Or. App. 101, 109, 7 P.3d 717, 722 (2000). As the court continued in *Cooke*, the "court must evaluate the majority's actions, keeping in mind that, even if some actions may be individually justifiable, the actions in total may show a pattern of oppression that requires the court to provide a remedy to the minority." *Cooke* 169 Or.App. at 110. In *Cooke*, the court found oppression where the majority shareholders, a father and daughter, fired a 25% shareholder, the former son-in-law, tried to force him to sell them his shares, and ran the company to their own benefit and his detriment.

Rockenfield, Jackson, and Wilton acted and continue to act in bad faith, motivated by their desire to seize Geoff Tate's share of the Queensryche revenue. *See Bucholz*, 45 Wn. App. at 509. Their argument that the Business Judgment rule immunizes them from any liability for oppressing Geoff Tate belies the facts. Rockenfield, Jackson, and Wilton began a scheme to remove Geoff Tate from the Band more than a year ago. They approached Jason Saunders in August and September of 2011 to replace Geoff as the lead singer. Saunders Decl., ¶¶ 9-10; *also* Declaration of Maureen Fisher ("Fisher Decl."), ¶¶ 6-8. Rockenfield, Jackson, and Wilton implied to Mr. Saunders that Geoff Tate wanted to leave to pursue a solo career and asked him not to mention the offer to Geoff. Saunders Decl. at ¶¶ 11 and 14; Fisher Decl. at ¶ 9. When Mr. Saunders subsequently learned that Geoff did not intend to leave the Band, he declined the offer to become the next lead singer of Queensryche. Saunders Decl. at ¶¶ 16-19. When Rockenfield, Jackson, and Wilton offered Geoff's lead singer role to Jason Saunders, they offered him $600 per week, which was half what he was then making as a backup vocalist on the tour. Saunders Decl. ¶¶ 12 and 15-16. Offering the lead singer position and a cut in pay led Mr. Saunders to believe that Rockenfield, Jackson, and Wilton were trying to get rid of Geoff so they could keep more money. *Id*. at ¶ 16-17. Presumably, in order to cover their tracks, Rockenfield, Jackson,

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and Wilton fired Mr. Saunders and his girlfriend and Queensryche wardrobe manager, Maureen Fisher, from their positions on the tour. Saunders Decl. at ¶ 20; Fisher Decl. at ¶12.

These decisions were aimed personally at Geoff Tate. In Brazil, before the concert, Rockenfield told Geoff Tate that the Band had just fired Geoff's wife, his daughter and his son-in-law, and said "you're next." *See* Reply Declaration of Geoff Tate, ¶ 15. Having known Geoff for 30 years and realizing that they were effectively dismantling both his livelihood and legacy, Rockenfield, Jackson, and Wilton provoked Geoff into the Brazil incident, which they now say justifies all of their decisions, and which this Court opined is "not dispositive" of a corporate dispute. Again, if it were, Eddie Jackson must be fired too.

Forming an Executive Committee and excluding Geoff Tate is further evidence of improper motives and oppression. With all corporate power ostensibly vested in an executive committee, Geoff Tate has no ability to determine where payments and proceeds are going and whether Rockenfield, Jackson, and Wilton are treating him reasonably. Mr. Sussman, the Band's long-time attorney and financial manager is concerned about how Defendants are managing the Queensryche Companies' finances, stating in a September 28, 2012 email:

> Dear Gentlemen,
>
> I see from your web site that you have shows coming up on October 12, 13, 14, 19, 20 and 27, as well as November 24, and December 21 and 29. There are a number of accounting and tax issues that I want you to be aware of regarding these performances. I am bringing these matters to your attention because if they are not handled properly, then **the 4 shareholders of the corporations can have personal liability** for unpaid taxes and other bills-
>
> 1. **All band members and crew members must be treated as employees of Melodisc Ltd**. They can not be treated as independent contractors. Employer related taxes must be deducted from everyone's pay.
>
> 2. **Before all monies from a show are paid out, you must check to see that all show related expenses have been paid.** This did not happen with the Halfway Jam show in Royalton, MN on 7/28. Employer taxes were not deducted and set aside. There were $667 in excess baggage frees and hotel bills on the American Express bill closing 8/24 for which funds were not set aside.

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> 3. **Merchandise revenues must be treated as income to Queensryche Merchandising Inc., not Melodisc Ltd.**
>
> I will be glad to handle the accounting, payroll and bill paying for the upcoming shows if you want me to do that. If you do not, then I will certainly respect your decision. However, if things are not done properly, then I will take action to correct them.

A copy of Mr. Sussman's email is attached as Exhibit 6 to the Brower Decl. (emphasis in original). Defendants appear to be mishandling Queensryche Company income by paying crew members off-book; are failing to pay employment taxes, thereby creating liability for Geoff Tate as a shareholder; and are failing to properly account for merchandise revenue a portion of which goes to Geoff Tate. Again, the Court must examine ***all*** of the Defendants' motives and actions--not just the smokescreen of a provoked fight--before it can resolve the corporate oppression claims.

Defendants' reliance on *Robblee v. Robblee*, 68 Wn. App. 69, 841 P.2d 1289 (1992) is misplaced because the court found in that case that the brother/shareholders were equally to blame for the disputes and bad behavior. Here, the only thing Defendants rely upon is the Brazil incident. As Jeff Albright, the Band's publicist says:

> Geoff Tate eats, sleeps and breathes Queensryche. Since my representation of the band in May, 2006, Geoff has easily done the majority of the interviews (over 90%) and often accomplished more than half-a-dozen on any given day during a campaign... this wasn't necessarily the result of presenting him as the only member available for such, but simply a result of who the media wanted to talk to and saw as the central figure. Essentially, he is the face, the voice and the most well-known entity of Queensryche. ***Geoff Tate is one of the most articulate and creative musicians I've had the chance to work with over the years. It's been my observation that he is the creative and driving force behind Queensryche.***

Albright Declaration, ¶¶ 2-7.

3. There are Genuine Issues of Material Fact Whether Defendants' Actions Constitute Breach of Contract

Without any evidentiary support except the Brazil incident and their claim that Geoff Tate still owns 25% of the shares in the Queensryche Companies, Defendants ask this Court to

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dismiss the Tates' Breach of Contract, Corporate Waste, Derivative Suit and Breach of Fiduciary Duty Claims. As explained herein, these are highly fact-sensitive claims.

For example, it is unclear whether Defendants can simply "fire" Geoff Tate. There are two exceptions to the general rule that all employment contracts are at-will: 1) where there is an express or implied agreement for termination only for cause; and 2) where the employee gives consideration in addition the contemplated services. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 223, 685 P.2d 1081 (1984). To determine whether an implied agreement exists, "[t]he courts will look at the alleged 'understanding,' the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case to ascertain the terms of the claimed agreement." *Roberts v. Atlantic Richfield Co.*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977) (*citing Perry v. Sinderman*, 408 U.S. 593, 92 S.C. 2694 (1972)). For the consideration exception, it "must be consideration in addition to the required services which results in a detriment to the employee and a benefit to the employer." *Id* at 895. "The relevant inquiry is whether, in the circumstances of the particular case, the employee's decision to buy into the company, or to loan money to the company, or to divest himself of a prior business interest, or any combination of these factors, is the type of decision which would ordinarily be made in the absence of something more than an offer of at-will employment." *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 1219 (1991) (Finding that an employee's investment of money in the company, a loan to the company, divesting of a prior business interest, and five years of contributions of the employee's expertise were sufficient to meet the additional consideration exception.)

If the employee can show either exception, then an employer can only discharge the employee for just cause. *Id*. at 894. Just cause for a discharge requires a fair and honest cause or reason, which is exercised in good faith by the party terminating the employment. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989). The discharge

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cannot be for an arbitrary, capricious, or illegal reason and it must be based upon facts that are supported by substantial evidence and reasonably believed by the employer to be true. *Id.*

Here, Geoff Tate is a founding shareholder of the closely-held Queensryche Companies. He provided thirty years of continual employment and dedication to the Band. He conducting nearly 90% of the interviews to promote Queensryche. He wrote or co-wrote almost all of the Band's songs. He was the lead singer, front man, and face of Queensryche. And, prior disagreement and incidents of physical contact did not result in termination of employment for Eddie Jackson. These facts, when viewed in a light most favorable to Geoff, demonstrate that Geoff could only be discharged from employment with Queensryche for just cause.

The pattern of oppressive conduct by Rockenfield, Jackson, and Wilton, the disputed facts surrounding the incident Brazil, and the provocation by Mr. Rockenfield all lead to the conclusion that the decision to terminate Geoff Tate was not made for a fair or honest reason, and it definitely was not made in good faith. With all inferences in their favor and facts viewed in a light most favorable to the Tates, there is a genuine issue of material fact as to whether Defendants breached the provisions of the Queensryche Companies' Article and Bylaws by improperly firing Geoff Tate.

4. There are Genuine Issues of Material Fact Whether Defendants' Actions Constitute Corporate Waste

The Tates' claims for corporate waste stem for the mismanagement of Queensryche's merchandising operations, mismanagement of Queensryche fan club and resulting damage to the fan base, the damage to Queensryche's value and brand by touring without Geoff Tate, and the lack of professionalism in interacting with the fans and the media. Again, Defendants summarily state that Geoff Tate's removal should result in a grant of summary judgment on this claim. Whether Defendants rightfully removed Geoff Tate as the lead singer and front man of the Band has little do with how they are running the Queensryche business.

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This highly fact intensive claim requires a comparison of the business operations of the pre- and post-Geoff Tate versions of Queensryche. The timing for summary judgment on this claim is far too early as the Tates have yet to conduct discovery to establish many of the facts related to this claim. Defendants do not argue that Queensryche performed better financially, have facts to support a showing that there is no genuine dispute over this claim, or even address this claim with any substance; again, they rely only upon the incident in Brazil to justify their decision. The only evidence before this Court supports the Tates' claims. As Mr. Sussman notes:

> I am bringing these matters to your attention because if they are not handled properly, then **the 4 shareholders of the corporations can have personal liability** for unpaid taxes and other bills-
>
> 1. **All band members and crew members must be treated as employees of Melodisc Ltd**. They can not be treated as independent contractors. Employer related taxes must be deducted from everyone's pay.
>
> 2. **Before all monies from a show are paid out, you must check to see that all show related expenses have been paid.** This did not happen with the Halfway Jam show in Royalton, MN on 7/28. Employer taxes were not deducted and set aside. There were $667 in excess baggage frees and hotel bills on the American Express bill closing 8/24 for which funds were not set aside.
>
> 3. **Merchandise revenues must be treated as income to Queensryche Merchandising Inc., not Melodisc Ltd.**

Brower Decl. at Exhibit 6 (emphasis in original). Viewed in the light most favorable to the Tates, Mr. Sussman's statements raise genuine issues of material fact regarding whether Defendants are mishandling, misappropriate and wasting corporate assets.

5. There are Genuine Issues of Material Fact Whether Defendants' Actions Justify a Derivative Suit

The Tates' derivative claim derives directly from their corporate waste claim and the futility of asking Defendants to address their own shortcoming in running the Queensryche Companies. It has long been the case that shareholders have the power to assert a corporation's

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rights on behalf of the corporation if the directors or officers have failed to protect the corporation. *In re F5 Networks, Inc*., 166 Wn.2d 229, 236, 207 P.3d 433 (2009). The shareholders must also demonstrate show that a demand by the shareholders to the directors or officers was either made or would be futile. *Id*. at 237 (*citing* RCW 23B.07.400(2)).

With the power of the Queensryche Companies in the hands of the executive committee comprised of Rockenfield, Jackson, and Wilton, any request by Geoff Tate for them to address the remedy of corporate waste would be futile. Rockenfield, Jackson, and Wilton essentially fail to address or demonstrate that they are entitled to summary judgment on this claim and the only evidence indicates they are mishandling, misappropriating and wasting corporate assets. *See* Sussman email. Again, viewed in the light most favorable to the Tates, Defendants request to dismiss this claim is premature and should be denied.

6. There are Genuine Issues of Material Fact Whether Defendants' Actions Constitute Breach of Fiduciary Duty.

Courts have defined the fiduciary duties as a duty of good faith, utmost care, or against retaining profits owed to the corporation and shareholder. *Id*. at 894-95 (*citing Zimmerman v. Bogoff*, 402 Mass. 650, 660, 524 N.E.2d 849 (1998). The nature of closely-held corporations, with a small group of shareholders, creates a higher standard of integrity and good faith dealing. *Saviano v. Westport Amusements, Inc*., 144 Wn. App. 72, 80, 180 P.3d 874 (2008) (*citing Wenzel v. Mathies*, 542 N.W.2d 634, 641 (Minn.App. 1996). One court noted "that oppressive conduct by majority shareholders is closely related to the fiduciary duty of good faith and fair dealing owned by them to the minority shareholders." *Scott v. Trans-System, Inc*., 148 Wn.2d 701, 711, 64 P.3d 1 (2003) (citation omitted). In *Scott*, the court quoted the Oregon Supreme Court's decision in *Baker v. Commercial Body Builders*, 265 Or. 614, 507, P.2d 387 (1973):

> [A]n abuse of corporate position for private gain at the expense of the stockholders is "oppressive" conduct. Or the plundering of a "close" corporation by the siphoning off of profits by excessive salaries or bonus payments and the operation of the business for the sole benefit of the majority of the stockholders, to the detriment of the minority

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> stockholders, would constitute such "oppressive" conduct as to authorize a dissolution of the corporation....

Scott v. Trans-Sys., Inc., 148 Wash. at 713-14. Here, Rockenfield, Jackson, and Wilton, as directors and shareholders in the Queensryche Companies, owe a fiduciary duty to Geoff Tate as a shareholder. They breached this duty when they began their pattern of behavior to remove Geoff Tate from Queensryche and the Queensryche Companies. As discussed above, Rockenfield, Jackson, and Wilton engaged in a year-long scheme to remove Geoff Tate from Queensryche and to replace him with Jason Saunders, who they would pay significantly less, thereby allowing them to keep more Queensryche revenue for themselves. *See* Saunders Decl. Similarly, Mr. Sussman's email shows Defendants are siphoning off company revenue for their benefit and Geoff Tate's detriment, while failing to properly pay taxes, thereby causing more harm to Mr. Tate. Viewing all reasonable inferences and facts in a light most favorable to the Tates, there remains a genuine dispute of material fact as to whether Rockenfield, Jackson, and Wilton breached their fiduciary duties.

7. Defendants' Admission that Geoff Tate Still Owns a 25% Interest in the Queensryche Companies Does Not Render the Declaratory Judgment Claim Moot

The Tates' declaratory judgment claim asks the Court to determine that Geoff Tate retains his 25% interests in Queensryche, the Queensryche Companies, and the name Queensryche. The Board of Directors Corporate Resolution from June 5, 2012 states that Geoff Tate was expelled from Queensryche and that this triggered a ***mandatory transfer and repurchase*** of his interest. Brower Decl. Exhibit 5. On June 8, 2012 Defendants' counsel stated that Geoff Tate "is no longer a member of Queensryche." A copy is attached as Exhibit 7 to the Brower Decl. In that same letter, counsel stated that Geoff "will not be paid for any performance of which he is not a part." *Id.*

Defendants are conflating an employment interest with an ownership interest. In addition to being allowed to earn a living using the fruits of his 30-years labor, Geoff Tate also is owed 25% of all revenue, whether derived from concerts of Queensryche or revenue derived from operations of the Queensryche Companies. Defendants, however, are attempting to carve out

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payments derived by Queensryche from performances under some theory that employment is different than ownership; the only way Defendants make money is using the Queensryche name, which is owned in part by Geoff Tate. And again, Mr. Sussman's email raises significant questions regarding Defendants handling of Queensryche Company revenues and obligations. As that email shows, it appears Defendants are piling on the expenses to reduce revenue, failing to pay taxes, and are improperly accounting for merchandise revenue, all in attempt to not pay Geoff Tate his 25%.

What ownership actually entails is the heart of this claim. This is a very factual question, especially when it deals with a unique situation where someone's livelihood is so intertwined with the operation of the Companies. For nearly 30 years, Geoff Tate has been the driving force behind and the front man for a successful band. Rockenfield, Jackson, and Wilton are able to make money today due in extremely large part to Geoff Tate's efforts to keep Queensryche going and relevant. While Rockenfield, Jackson, and Wilton "maintain" Geoff Tate owns a 25% interest in the Queensryche Companies, they are not acting in accordance with these very statements. Consequently, there is a genuine issue of material fact over whether the Court should enter a judgment declaring Geoff Tate retains his 25% interest and clarifying what exactly this interest entails.

D. Defendants are Improperly Trying to Obtain an Injunction

Defendants are asking the Court to "permanently enjoin" Geoff Tate from using the Queensryche name, marks, and associated media assets. They are, essentially, trying to obtain a preliminary injunction without pleading it and without complying with the case law and statutory requirements to obtain an injunction. *See* RCW 7.40.020.

While inexpert pleadings may be acceptable, an insufficient pleading is not. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999). A pleading is insufficient if it fails to give the opposing party fair notice of the claim and grounds upon which the claim rests. *Id*. "A party who does not plead a cause of action or theory of recovery cannot finesse the

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issue by later inserting the theory into trial briefs and contending it was in the case all along." *Id*. at 26. Instead, if a party wishes to amend its pleadings to add an additional claim or theory, CR 15 sets forth the proper procedures for doing so.

Here, defendants failed to include a cause of action for permanent or preliminary injunction in their Answer and Counterclaims. Consequently, it is improperly before the court and should be denied. *See Id*. Defendants could have followed the established procedures under CR 15, but they did not.

Additionally, Defendants failed to meet the case law and statutory requirements to obtain an injunction. Since an injunction is an extraordinary equitable remedy designed to prevent serious harm, the applicant must show the purpose is not to protect it from mere inconveniences or speculative and insubstantial injury. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792-796, 639 P.2d 1213 (1982). Injunctive relief should not be granted if there is an adequate remedy at law. *Id* at 791. To obtain an injunction, the applicant must demonstrate that (1) it has a clear legal or equitable right, (2) it has a well-grounded fear of immediate invasion of that right, and (3) that the acts it complains of have or will result in actual or substantial injury. *Id*. at 792 (*citing* RCW 7.40.020). If an applicant can demonstrate the essential elements of necessity and irreparable injury, the trial court should issue an injunction along with requiring an appropriate bond. *Hollis v. Garwall, Inc*., 88 Wn. App. 10, 16, 945 P.2d 717 (1992); *see also* RCW 7.40.080 ("No injunction or restraining order shall be granted until the party asking it shall enter into a bond, in such a sum as shall be fixed by the court or judge granting the order,…").

Here, Defendants have not demonstrated any necessity or irreparable injury. Indeed, their Motion contains no discussion of whether they have a well-grounded fear of immediate invasion of their legal rights or even that Mr. Tate is doing anything which has or will result in an actual or substantial injury to that right. Even if Mr. Tate makes money using the Queensryche name and brand, like Defendants, he will be required to account for and share those funds with Defendants as articulated by Mr. Sussman. Defendants' failure to establish, much

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less discuss, these elements should result in the denial of this unplead claim. Finally, while courts should narrowly tailor a permanent injunction to prevent the specific harm, *Kitsap County v. Kev, Inc*., 106 Wn.2d 135, 143, 720 P.2d 818 (1986), Defendants ask this Court to enjoin Mr. Tate from using ***any*** reference to Queensryche, which will essential eliminate his ability to earn money for him and his family. Geoff Tate spent nearly his entire adult life being the lead singer, lead promoter, major contributor, and face of Queensryche. "Permanently" enjoining him from any use of the name Queensryche would irreparably injure his ability to promote his future ventures, sell tickets, and make a living. Moreover, as explained above, Defendants are asking this Court to stop Mr. Tate from doing exactly what they have been doing for years; namely, privately using the Queensryche name for personal benefit. Even if the Court were inclined to grant such relief, for the Court to stop Mr. Tate from using this brand "for six months, a year, or more certainly would require a considerable bond." Transcript, Page 7, lines 13-15.

III. CONCLUSION

For the reasons stated above, the Tates respectfully request the Court deny Defendant's Wilton's, Jackson's and Rockenfield's Motion for Partial Summary Judgment.

Dated this 8th day of October, 2012.

Respectfully submitted,

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