

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOB'S DAUGHTERS INTERNATIONAL,

Plaintiff,

v.

HEIDI YOAST,

Defendant.

NO. 16-cv-1573-RSL

REPLY IN SUPPORT OF  
COUNTERCLAIM DEFENDANTS  
MOTION FOR SUMMARY JUDGMENT

NOTE ON CALENDAR: March 30, 2018

HEIDI YOAST,

Counterclaim-Plaintiff,

v.

JOB'S DAUGHTERS INTERNATIONAL,  
ROD REID, an individual,

Counterclaim-Defendants.

ORAL ARGUMENT REQUESTED

BRIEF IN SUPPORT OF COUNTERCLAIM DEFENDANT SHELLY  
COLE'S MOTION TO DISMISS COUNTERCLAIM - i  
(16-cv-1573-RSL )

**Williams, Kastner & Gibbs PLLC**  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
(206) 628-6600

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## **I. INTRODUCTION**

Counterclaim Plaintiff, Heidi Yoast's response to Job's Daughters' and Rod Reid's ("Counterclaim Defendants") Motion for Summary Judgment is short on applicable law but full of inadmissible and irrelevant facts. Rather than creating issues of fact as to liability or damages, Yoast relies entirely on hearsay, sham declarations, untimely witness disclosures, and a plethora of extraneous evidence that has nothing whatsoever to do with the issues raised in Counterclaim Defendants Motion. The Court should reject Yoast's attempt to muddy the waters and focus on the applicable law and admissible evidence. Because Yoast has not shown a genuine issue of material fact, Summary judgment is therefore appropriate.

## **II. JDI'S MOTION TO STRIKE, OR IN THE ALTERNATIVE, OBJECTIONS TO DEFENDANT'S STATEMENT OF MATERIAL FACTS**

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1. Pursuant to LCR 7(e)(3), (6), (f), and (g), JDI objects and moves to strike Counterclaim Plaintiff's Opposition to the Motion for Summary Judgment of Job's Daughters International and Rod Reid (Filing No. 55) and the Separate Statement of Undisputed and Disputed Material Facts in Opposition to Motion for Summary Judgment (Filing No. 55-1) as they violate this Court's rules on page limits.

2. In addition, JDI moves to strike and/or otherwise objects to the following Paragraph's in Counterclaim Plaintiff's Separate Statement of Undisputed and Disputed Material Facts (Filing No. 55-1) as follows:

- a. Paragraph 4. Neither Hoffman or Ferlet establish that Shelly Cole mentioned Heidi Yoast by name.
- b. Paragraph 5. Hoffman claims that "Shelly Cole mentioned a Past Grand Bethel Honored Queen from Washington who she claimed was adversely and illegally impacting trademark revenue." Ferlet claims Cole said something different during the same meeting. Specifically, Ferlet recalls Cole making "references to a 'Past Grand Bethel Honored Queen in Washington' that had been sent 'several' cease and desist letters, yet who was continuing to infringe on JDI's trademarks."

1                   Importantly, neither Hoffman nor Ferlet establish that Ms. Cole ever stated “that  
2                   people should not buy product from Ms. Yoast” as Yoast alleges in Paragraph 5  
3                   and there is no support in the record for the same.

- 4                   c.       Paragraph 10. Yoast testified during her deposition that the damage analysis set  
5                   forth in her interrogatory responses were created with inaccurate profit and loss  
6                   statements and that she did not know how they were computed. *See* JDI Brief in  
7                   Support of Summary Judgment, (Filing No. 51) SOF ¶2. While Ms. Yoast now  
8                   attempts to establish that she provided updated and accurate Profit and Loss  
9                   statements, those statements are untimely, were not provided until after the close  
10                  of discovery and should be struck. Even if this Court considers the untimely  
11                  profit and loss statements, her untimely supplement or Declaration does not  
12                  change her clear deposition testimony whereby Yoast confirms that the damage  
13                  calculations provided to JDI (i) were not created by her (rather her bookkeeper),  
14                  (ii) were created with the incorrect P&L statements, and (iii) here clear admission  
15                  that she did not know how the damage figures provided to JDI had been  
16                  calculated. *Id.* Further, Yoast has not supplemented her discovery responses  
17                  (specifically the damage calculations), provided an amended/corrected damage  
18                  calculation based on the correct information, or provided any type of expert  
19                  opinion(s) to establish her damages or causation to any of her asserted claims. As  
20                  such, Yoast’s Declaration is a “sham” affidavit under applicable law. The sham  
21                  affidavit rule arises when the declarant's declaration contradicts earlier deposition  
22                  testimony. *Nelson v. City of Davis*, 571 F.3d 924, 927 (9th Cir. 2009); *see*  
23                  *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266-67 (9th Cir. 1991) (holding a  
24                  court may discount a "sham" declaration that "flatly contradicts" prior deposition  
25                  testimony, and has been provided for the sole purpose of creating a genuine issue  
26                  of material fact.)
- 27                  d.       Paragraph 12. See response to Paragraph (5) *infra*. Neither Ms. Hoffman or Ms.  
28                  Ferlet establish that Cole made any statements that “members should not purchase  
any products from her.”
- e.       Paragraphs 16-17. The basis of these statements is Defendant’s Declaration.  
However, Defendant was not at the Supreme Session meeting, relies on hearsay,  
and lacks the proper foundation for the statements.
- f.       Paragraphs 19-21. The basis of these statements is the Declaration of Patricia  
Forman, counsel for Defendant. Ms. Forman lacks foundation for the statements,  
relies on hearsay, and fails to properly authenticate the documents referenced in  
her Declaration.
- g.       Paragraphs 22-27. These statements are inadmissible hearsay.
- h.       Paragraph 28. Ms. Yoast, Leeper and Ferlet all lack the proper foundation to

1 make the statement set forth in Paragraph 28.

- 2 i. Paragraph 35. The statements as to what sentiment expressed by Ms. Reardon is  
3 inadmissible evidence and lacks foundation.
- 4 j. Paragraph 43. Ms. Ferlet lacks the foundation to describe the knowledge of  
5 others.
- 6 k. Paragraph 45. Ms. Ferlet lacks the appropriate foundation to support the  
7 statements made.
- 8 l. Paragraph 54-56. The statements allegedly made by Mr. Woodward and/or his  
9 purported knowledge constitute inadmissible hearsay.
- 10 m. Paragraphs 59-63 are all irrelevant statements.
- 11 n. Paragraphs 66-78. These statements are irrelevant, contain inadmissible hearsay  
12 and lack proper foundation.
- 13 o. Paragraphs 82-84. These statements contain inadmissible hearsay and lack  
14 foundation.
- 15 p. Paragraph 91. These statements contain inadmissible hearsay and cannot be  
16 utilized to support Defendant's claim due to the litigation privilege.
- 17 q. Paragraph 92-93. This topic was outside the scope of the 30(b)(6) Notice lacks  
18 foundation and does not accurately reflect why JDI took certain actions.
- 19 r. Paragraphs 96-97. The statements are inadmissible hearsay and because Ms.  
20 Forman does not have the proper foundation.
- 21 s. Paragraph 98. Ms. Yoast lacks the foundation to testify as to the emotional and  
22 physical symptoms allegedly caused by any statement as well any causation for  
23 the same.

24 3. JDI moves to strike the Declarations of Donna Hoffman, Angela Leeper, and  
25 Kerrie Ferlet as they were not properly disclosed by Defendant until after the close of discovery  
26 and after JDI filed the Motion for Summary Judgment.<sup>1</sup> In addition, the untimely Declarations

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27 <sup>1</sup> To the extent the Court accepts the untimely Affidavits of Hoffman, Leeper, and Ferlet, Counterclaim Defendants  
28 reserve the right to reopen discovery to depose these witnesses and other related relief.

1 contain inadmissible hearsay (Hoffman Decl. ¶ 6; Leeper Decl. ¶¶4-7, Exhibit A), lack  
 2 foundation (Leeper Decl. ¶8, Ferlet Decl. ¶11), and contain irrelevant statements (Ferlet Decl.  
 3 ¶10)

4 4. JDI moves to strike the Declaration of Patricia Forman as it contains inadmissible  
 5 hearsay (¶¶ 3-6, 11-21,24 Exhibits B-D, J-P, S; lacks proper foundation ¶¶ 3,26; contains  
 6 irrelevant statements ¶¶ 11-19; 21-22, 26; and contains inadmissible statements pursuant to  
 7 Fed.R.Evid. §408 ¶21.

8 5. JDI moves to strike the Declaration of Heidi Yoast as it contains inadmissible  
 9 hearsay ¶¶ 8-9, 15-16, 24, Exhibits A-C; lacks proper foundation ¶10; contains irrelevant  
 10 statements ¶6, 11-12, 18-21, 22, 23, 27, Exhibit D; and is inconsistent with previous deposition  
 11 testimony and therefore constitutes a sham affidavit ¶26. *See Nelson*, 571 F.3d at 927; *Kennedy*,  
 12 952 F.2d at 266-67.

### 13 III. DISCUSSION

#### 14 A. Yoast Did Not Establish the Existence of Any Tortious Statements Made by 15 JDI or Reid about Her.

16 Yoast's Counterclaim is based on statements Shelley Cole allegedly made at the Job's  
 17 Daughters International Supreme Session in July 2016. (Filing No. 17, First Am. Answer &  
 18 Counterclaims). Specifically, Yoast claims that Cole stated that Yoast was using Job's  
 19 Daughters trademarks without permission; that Job's Daughters had sent her multiple cease-and-  
 20 desist letters; and that no one should buy from Yoast. (*Id.* at ¶ 13.) Despite months of discovery,  
 21 Yoast failed to provide even a scintilla of timely or admissible evidence to show that those  
 22 statements were actually made and the present motion was filed.

23 Yoast was not present at the Supreme Session and does not have personal knowledge of  
 24 the alleged statements made by Cole. (*Id.* at ¶ 13.) In an attempt to create an issue of material  
 25 fact, Yoast relies on inadmissible hearsay and declarations from two witnesses she acknowledges  
 26

1 were not even disclosed until after the close of discovery and the present summary judgment was  
 2 filed. Yoast's attempts to create an issue of fact should be rejected.

3  
 4 **1. Kerrie Ferlet and Donna Hoffman's declarations<sup>2</sup> do not establish that the alleged statements were ever made.**

5 Kerrie Ferlet claims to have been present at the Supreme Session and states that she heard  
 6 Shelley Cole reference a "Past Grand Bethel Honored Queen in Washington" who had been sent  
 7 several cease-and-desist letters but continued to infringe on Job's Daughters' marks.

8 (Counterclaim Plaintiff's Brief in Opposition to Summary Judgment, (Filing No. 55)("Yoast  
 9 Opposition Brief") at 5.) Donna Hoffman also states that she was present at the Supreme  
 10 Session, and claims to have heard Shelley Cole "mention[] a Past Grand Bethel Honored Queen  
 11 from Washington who she claimed was adversely and illegal impacting trademark revenue." (*Id.*)

12 Importantly, neither Ferlet nor Hoffman claim that Yoast's name or business was ever  
 13 mentioned. Further, despite the representations to contrary, neither Ferlet nor Hoffman establish  
 14 that Ms. Cole instructed members that they could not purchase any product from Ms. Yoast.

15 (Compare Yoast's SOF ¶ 12 (Filing No. 55-1) and Yoast's Opposition Brief, at 5, to the  
 16 Declarations of Ferlet and Hoffman). Thus, even if Ferlet and Hoffman's statements are  
 17 admissible, they do not support Yoast's claims for defamation, intentional interference with a  
 18 business relationship, or intentional infliction of emotional distress as Yoast was never  
 19 personally identified and neither Ferlet nor Hoffman claim to have heard Cole (or anyone else  
 20 from JDI or Reid) state that no members could buy goods from Yoast.

21 In an attempt to further muddy the waters, Yoast lists a number of other individuals who  
 22 she claims also heard the alleged statements. *See* Yoast Decl. at ¶¶8-9. Yoast has not offered  
 23 any testimony from these individuals and her declaration setting forth what those individuals told  
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25 <sup>2</sup> As set forth above, Counterclaim Defendants object to the untimely Declarations of Kerrie Ferlet and Donna  
 Hoffman.

1 her Cole said is inadmissible hearsay. *Id.*; Fed. R. Evid. 802.

2           **2. Evidence of Leslie Rawls Hoglund’s alleged statement is inadmissible**  
3           **hearsay.**

4           Yoast claims that the “most detailed account” of the allegedly tortious statements was  
5 provided by Leslie Rawls Hoglund. (Yoast Opposition Brief, at 6) Yoast, however, offers no  
6 admissible testimony from Ms. Hoglund. Instead, she seeks to admit Hoglund’s statements  
7 through her own declarations, the declaration of Angela Leeper, and via a social media post.  
8 Despite Yoast’s multiple attempts, any statement allegedly made by Ms. Hoglund are textbook  
9 examples of hearsay. This Court has previously ruled on Yoast’s attempts to offer similar  
10 hearsay in the January 5, 2018 Order Dismissing the claims against Cole. *See* Filing No. 40, at  
11 3, n 2.

12           The same result is appropriate here. The Federal Rules of Civil Procedure specifically  
13 provide that a “declaration used to support or oppose a motion must be made on personal  
14 knowledge, set out facts that would be admissible in evidence, and show that the affiant or  
15 declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4). Both Yoast and  
16 Leeper’s declaration should be excluded because they lack foundation and contain inadmissible  
17 hearsay testimony – specifically, testimony regarding what *Ms. Hoglund* allegedly said *Ms. Cole*  
18 said.

19           Recognizing the clear hearsay, Cole argues that it should nonetheless be admitted as an  
20 admission of a party opponent, or under the residual exception to the hearsay rule. (Yoast  
21 Opposition Brief, at 15-19) Even if this Court elects to analyze this issue yet again, neither  
22 exception is applicable.

23           First, Hoglund’s alleged statements are not an admission by a party opponent because  
24 Hoglund is not a party to this case. Yoast claims that Hoglund is a “Grand Guide” who attended  
25 the Supreme Session as a representative of the Grand Guardian Council of Virginia. (Yoast  
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1 Opposition Brief, at 15-16)<sup>3</sup> Neither Hogleund nor the Grand Guardian Council of Virginia are  
2 parties to this case. Meanwhile, there is no admissible evidence that would even establish  
3 Hogleund as an officer, employee, or agent empowered to speak on behalf of Job’s Daughters  
4 International. Yoast deposed numerous JDI representatives and took the 30(b)(6) deposition of  
5 JDI and failed to establish Hogleund’s status as an agent of JDI. Because Hogleund is not a party  
6 to this case, her alleged statement cannot be admitted as an admission of a party opponent. Fed.  
7 R. Evid. 801(d)(2).

8         Second, Hogleund’s statement does not fall within the residual exception to the hearsay  
9 rule. That exception requires that a statement (1) the statement has equivalent circumstantial  
10 guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more  
11 probative on the point for which it is offered than any other evidence that the proponent can  
12 obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules  
13 and the interests of justice. Fed. R. Evid. 807. Here, the evidence of Hogleund’s statement via  
14 social media posts have no equivalent circumstantial guarantees of trustworthiness – rather, it is  
15 classic hearsay as previously ruled by this Court.

16         And in any event, evidence of Hogleund’s alleged statements cannot be admitted under  
17 Rule 807 because Yoast could have obtained Hogleund’s direct testimony through reasonable  
18 efforts. *See* Fed. R. Civ. P. 807(a)(3) (providing that the exception only applies where “it is more  
19 probative on the point for which it is offered than any other evidence that the proponent can  
20 obtain through reasonable efforts”). Contrary to the Yoast’s incorrect conclusion, Hogleund is not  
21 beyond the subpoena power of this Court. Rather, Yoast could have easily subpoenaed Hogleund  
22 and taken her deposition in the state where she resides. Fed. R. Civ. P. 45(c). This is especially  
23 perplexing considering Ms. Yoast seems to have based her entire Counterclaim on the testimony  
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25 <sup>3</sup> Counterclaim Defendants have objected to those statements made by counsel for Yoast as they contain hearsay and  
26 because counsel lacks the proper foundation and cannot properly authenticate the documents.



1 she hoped to obtain from Ms. Hoglund and the Court's previous finding that social media posts  
2 are hearsay. Having failed to make this reasonable effort to obtain *actual* direct evidence of  
3 what Hoglund heard Cole say, Yoast cannot rely on the residual exception to the hearsay rule.

4 **B. Rob Reid's Alleged Statements are Privileged.**

5 Likely realizing the problems she has in establishing any tortious statements made by  
6 Cole, Yoast claims in her Opposition, for the first time in this lawsuit, that Rob Reid also made  
7 defamatory statements about her during his deposition. (Yoast Opposition Brief, at 8-9.) Putting  
8 aside the late disclosure, her claim fails under the litigation privilege. "As a general rule,  
9 witnesses in judicial proceedings are absolutely immune from suit based on their testimony."  
10 *Lanuza v. Love*, 134 F.Supp.3d 1290, 1297 (W.D. Wash. 2015) (quoting *Bruce v. Byrne-Stevens*  
11 *& Assocs. Eng'rs., Inc.*, 113 Wash. 2d 123, 776 P.2d 666 (Wash. 1989)). All statements made by  
12 Reid (and/or any other witness deposed) during his deposition are covered by the litigation  
13 privilege. Because Reid has absolute immunity under the litigation privilege, his alleged  
14 statements made during his deposition cannot form the basis for any of Yoast's claims.

15 Counterclaim Defendants are entitled to Summary Judgment.

16 **C. Yoast Cannot Establish Damages or that She Was Harmed by the Allegedly**  
17 **Tortious Statements.**

18 Even if Yoast had offered any admissible evidence to show that the statements she  
19 alleges were actually made, she still has not established that those statements harmed her or her  
20 business. In other words, Yoast has failed to establish causation between any tortious statements  
21 and any damage.

22 As counterclaim plaintiff, Yoast bears the burden of proving damages to a reasonable  
23 level of certainty. *BakeryEquipment.com v. Coastal Food, Inc.*, No. C11-5615, 2012 WL 904690  
24 at \*3 (W.D. Wash. Mar. 15, 2012). A party who fails to adequately prove its damages is not  
25 entitled to recover. *Superwood Co. Ltd. v. Slam Brands, Inc.*, No. C12-1109, 2013 WL 6008489

1 at \*19 (W.D. Wash. Nov. 13, 2013). As explained in Job’s Daughters’ Brief in Support of its  
2 Motion for Summary Judgment, Yoast lacks sufficient evidence to prove her damages and has  
3 failed to take the steps necessary to produce the best available evidence of those damages.  
4 (Counterclaim Defendants Brief (Filing No. 51, at 7-8.) In response, Yoast attempts to  
5 distinguish her case from *Slam Brands* by arguing that the case should not apply because her  
6 business is significantly smaller to Slam Brands. (Yoast Opposition Brief, at 20.) Tellingly,  
7 Yoast cites no authority whatsoever to support this argument. Nothing in *Slam Brands* suggests  
8 that a smaller business is not obligated to establish its damages.

9 Relatedly, Yoast’s attempts to justify the errors in her profit and loss statements are  
10 nothing more than an attempt to muddy the waters and distract from her inability to establish  
11 damages. It is Yoast’s obligation to prove her damages to a reasonable level of certainty. *E.g.*,  
12 *BakeryEquipment.com*, 2012 WL 904690 at \*3. While Yoast claims that she has since provided  
13 corrected profit and loss statements, those statements were not disclosed until after the close of  
14 discovery. Additionally, even if the P&L statements were admissible, Yoast has never updated  
15 her damage analysis set forth in her interrogatory response that she admitted was incorrect, nor  
16 has she provided any evidence or expert testimony to establish any causation between the  
17 updated profit and loss statements and/or any damage claim to the alleged tortious statements by  
18 the Counterclaim Defendants. Because she cannot prove damages or causation, Yoast cannot  
19 recover. *See, e.g., Superwood Co. Ltd. v. Slam Brands, Inc.*, No. C12-1109, 2013 WL 6008489 at  
20 \*19 (W.D. Wash. Nov. 13, 2013).

21 With respect to her defamation claim, Yoast alleges that she is not required to prove  
22 damages because the allegedly defamatory statements are defamation per se. “A publication is  
23 defamatory per se . . . if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to  
24 deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his  
25 business, trade, profession or office.” *Life Designs Ranch, Inc. v. Sommer*, 191 Wash.App. 320,  
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1 328, 364 P.3d 129, 134 (Wash. Ct. App. 2015) (internal quotation marks omitted). Yoast relies  
2 on the second prong, claiming that the alleged statements injured her in her business. (Yoast  
3 Opposition Brief, at 22.) But Yoast has yet to offer any evidence to show that her business was  
4 actually harmed by the alleged statements made by the Counterclaim Defendants. Without that  
5 evidence, Yoast cannot show causation or that the statement(s) “injure[d] [her] in [her] business,  
6 trade, profession, or office.” *Id.* She therefore cannot rely on defamation per se to avoid her  
7 inability to prove damages. Yoast’s inability to establish causation or damages entitles  
8 Counterclaim Defendants to Summary Judgment.

9 **D. Yoast Cannot Recover Attorneys’ Fees.**

10 Finally, there is no genuine issue of material fact with respect to whether Yoast is entitled  
11 to recover attorneys’ fees. She is not.

12 In her response, Yoast admits that she has not plead any claim for attorney fees but rather  
13 claims she raised her claim “in her settlement offer of March 24, 2017, which was rejected.”  
14 (Yoast Opposition Brief, at 24). Counterclaim Defendants are entitled to defend the issues raised  
15 in the Pleadings, not settlement offers exchanged through counsel. Despite the omission in her  
16 pleadings, Yoast cites a partial quotation from a Florida state court case (with no precedent over  
17 this Court) which she claims provides an exception to the pleading requirement where a party  
18 has notice of the other party’s claim to attorneys’ fees. When taken in context, however, it is  
19 clear that *Zurro*, says no such thing. Rather the holding provides, “where a party has notice that  
20 an opponent claims entitlement to attorney's fees, *and by its conduct recognizes or acquiesces to*  
21 *that claim or otherwise fails to object to the failure to plead entitlement*, that party waives any  
22 objection to the failure to plead a claim for attorney's fees.” *Zurro v. Wells Fargo Bank, N.A.*,  
23 209 So.3d 27, 30 (Fla. Dist. Ct. App. 2016) (emphasis added) (internal quotation marks omitted).  
24 Thus, even assuming that *Zurro* applies in this Court, it does not apply here. Counterclaim  
25 Defendants have continually and expressly objected to Yoast’s failure to plead attorneys’ fees  
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1 and any claims for the same, and cannot be said to have waived that right.

2 Yoast admits that no statute allows her to recover attorneys' fees in this case, and further  
3 admits that she did not make a claim for attorneys' fees either in her Answer or in her  
4 Counterclaim. (Yoast Opposition Brief, at 25.) Job's Daughters is therefore entitled to summary  
5 judgment on her attorneys' fees claim.

6 **IV. CONCLUSION**

7  
8 Because there are no genuine issues of material fact precluding summary judgment of  
9 Yoast's counterclaims Job's Daughters' Motion for Summary Judgment should be granted.

10 DATED this 30<sup>th</sup> day of March, 2018

11  
12 s/ Rodney L. Umberger, Jr.  
13 s/ Daniel J. Velloth  
14 Rodney L. Umberger, Jr., WSBA #24948  
15 Daniel J. Velloth, WSBA #44379  
16 WILLIAMS, KASTNER & GIBBS PLLC  
17 601 Union Street, Suite 4100  
18 Seattle, WA 98101-2380  
19 Telephone: (206) 628-6600  
20 Fax: (206) 628-6611  
21 rumberger@williamskastner.com  
22 dvelloth@williamskastner.com

17 and

18 Brian T. McKernan, Admitted *Pro Hac Vice*  
19 McGrath North Mullin & Kratz, PC LLO  
20 Suite 3700 First National Tower  
21 1601 Dodge St.  
22 Omaha, Nebraska 68102  
(402) 341-3070  
(402) 952-6896 fax  
bmckernan@mcgrathnorth.com

23 Attorneys for Plaintiff/Counterclaim-Defendant  
24 Job's Daughters International

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, I electronically filed the foregoing with the Clerk of the court using the CM/ECF system which will send notification of such filing to the following:

Rodney L Umberger, Jr rumberger@williamskastner.com, ssanh@williamskastner.com

Daniel Velloth dvelloth@williamskastner.com, dlevitin@williamskastner.com, mphilomeno@williamskastner.com

Brian T. McKernan bmckernan@mcgrathnorth.com

Patricia I. Forman patriciaforman@gmail.com

Tracey v. Munger tracey@groveslawoffices.com

DATED this 30<sup>th</sup> day of March, 2018.

s/ Rodney L. Umberger, Jr.  
s/ Daniel J. Velloth  
Rodney L. Umberger, Jr., WSBA #24948  
Daniel J. Velloth, WSBA #44379  
WILLIAMS, KASTNER & GIBBS PLLC  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380  
Telephone: (206) 628-6600  
Fax: (206) 628-6611  
rumberger@williamskastner.com  
dvelloth@williamskastner.com

Attorneys for Plaintiff/Counterclaim-Defendant  
Job's Daughters International