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5 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
6 FOR YAKIMA COUNTY

7 IN THE MATTER OF THE
8 DETERMINATION OF THE RIGHTS TO
9 THE USE OF THE SURFACE WATERS OF
10 THE YAKIMA RIVER DRAINAGE BASIN,
11 IN ACCORDANCE WITH THE
12 PROVISIONS OF CHAPTER 90.03,
13 REVISED CODE OF WASHINGTON

14 STATE OF WASHINGTON DEPARTMENT
15 OF ECOLOGY,

16 Plaintiff,

17 v.

18 JAMES J. ACQUAVELLA, et al.,
19 Defendants.

No. 77-2-01484-5

**PETITION FOR ORDER
PENDENTE LITE RE: WATER
RIGHTS EXCHANGE
AGREEMENT BETWEEN
WATER RIGHTS CLAIM NO.
00648 (SWAUK CREEK
SUBBASIN NO. 4)**

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Petitioners Suncadia LLC and J.P. Roan request the Court, pursuant to Pretrial Orders Nos. 6 and 12, to authorize the temporary transfer of certain water rights in Subbasin No. 4 (Swauk Creek) according to the parties' Water Rights Exchange Agreement. In relation thereto, Petitioners state the following:

1. Identity of Petitioners

Suncadia LLC, is a Delaware limited liability company, registered to do business in Washington. Suncadia owns surface water rights on Swauk Creek under Court Claim No. 00648. Suncadia's water rights arise under Claim No. 00648, and were confirmed by the Yakima County Superior Court in the Conditional Final Order Re: Subbasin No. 4

(Swauk Creek) in Washington v. Acquavella, Yakima County Superior Court Cause No. 77-2-01484-5 (October 8, 2002). Suncadia's water rights have been recognized in the Conditional Final Order as follows:

	November 2, 1877 Priority Date	June 1, 1881 Priority Date	Total
Annual Quantity	301.5 AF	523.4 AF	824.9 AF
Instantaneous Quantity	1.447 cfs	1.873 cfs	3.32 cfs
Conveyance Loss	.761 cfs	1.873 cfs	2.634 cfs
Total Instantaneous Quantity	2.208 cfs	3.746 cfs	5.954 cfs

J.P. Roan owns rights to appropriate water from First Creek, a tributary of Swauk Creek and the Yakima River. The Roan Water Rights arise under Claim No. 00648, confirmed by the Yakima County Superior Court in the Conditional Final Order Re: Subbasin No. 4 (Swauk Creek) in Washington v. Acquavella, Yakima County Superior Court Cause No. 77-2-01484-5 (October 8, 2002). Roan's water rights have been recognized in the Conditional Final Order as follows:

	November 2, 1877 Priority Date	June 1, 1881 Priority Date	Total
Annual Quantity	208.5 a.f.	27.9 a.f.	236.4 a.f.
Instantaneous Quantity	1.0 c.f.s.	.1 c.f.s.	1.1 c.f.s.
Conveyance Loss	.527 c.f.s.	.1 c.f.s.	.627 c.f.s.
Total Instantaneous Quantity	1.527 c.f.s.	.2 c.f.s.	1.727 c.f.s.

2. Affected Subbasin

This Petition relates to Subbasin No. 4 (Swauk Creek).

3. Relief Requested

Petitioners request the Court examine this Petition, Declaration of Joe Mentor, Jr., and any additional evidence presented at a hearing before the court on Thursday, April

1 10, 2008, at 9:30 a.m., or as soon thereafter as this matter may be called. Petitioners
2 further request that the Court issue an order authorizing the exchange of water
3 pursuant to the parties' agreement.

4 Petitioners request the Court's Order to -

- 5 (1) Recognize the Water Rights Exchange Agreement between Suncadia LLC and
6 J.P. Roan.
- 7 (2) Recognize the term of the agreement as twenty years from the date of this
8 Court's approval of this Petition for Order *Pendente Lite*.
- 9 (3) Recognize the same quantities, priorities, and season for use for Suncadia and
10 J.P. Roan's water rights as confirmed in the Conditional Final Order Re:
11 Subbasin No. 4 (Swauk Creek).
- 12 (4) Designate the purpose of use of up to 1.727 cfs, not to exceed 236.4 acre feet,
13 of the Suncadia water rights as irrigation for April 1 to June 30 and the place
14 of use as follows:
15 S1/2 of the SE1/4 of the SW1/4; SW1/4 of the SW1/4; E1/2
16 of the SE1/4; and the S1/2 of the N1/2 of the SE1/4 of the
17 SW1/4 of Section 21, Twp. 19 N., Range 18 E. Willamette
18 Meridian
- 19 (5) Designate the purpose of use of the Roan Water Rights as instream flows for
20 July 1 to October 15 in First Creek.
- 21 (6) Petitioners request that the Court's Order remain in effect for the 2008 and
22 subsequent irrigation seasons during the pendency of the adjudication, or
23 until further order of the Court.

24 4. Statement of Reasons for Petition

25 Roan and Suncadia wish to exchange their water rights during the authorized
26 irrigation season. Under Pretrial Orders Nos. 6 and 12, this Court has the authority to
grant temporary transfers of surface water subject to this adjudication. Pretrial Order
No. 6 Re: Procedures Relating to Order Pendente Lite (Feb. 18, 1987); Pretrial Order No.
12 Re: Procedures Relating to Changes of Use and Transfers of Surface Water Rights

1 Subject to this Adjudication (Jan. 22, 2002). Suncadia wishes to use the Roan Water
2 Rights from July 1 to October 15 each year for instream flow purposes in First Creek.
3 Roan wishes to use the Suncadia Water Rights from April 15 to June 30 each year for
4 irrigation purposes, on land to which Suncadia's water rights were formally
5 appurtenant. Therefore the parties are seeking the Court's approval of these temporary
6 transfers.

7 Suncadia and Roan will also file an application with Ecology for the temporary
8 transfer for each water right.

9 5. Identity of Affected Parties

10 This Petition potentially affects the following parties: Claimants in Subbasin No.
11 4 (Swauk Creek), all Major Claimants, the Yakama Nation, the Washington Department
12 of Fish and Wildlife, and the Washington State Department of Ecology.

13 6. Certification of Service

14 Petitioners certify that a copy of this Petition and supporting Declaration of Joe
15 Mentor, Jr., a proposed Order *Pendente Lite*, and a Notice of Hearing of the Petition have
16 been sent by First Class mail, postage paid, to the Washington Department of Ecology.
17 Petitioners have requested that the Notice of Hearing and Petition be published in full
18 in the March 2008 Monthly Notice.

19 DATED this 22nd day of February, 2008.

20 Respectfully submitted,
21 MENTOR LAW GROUP, PLLC

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23 

24 Joe Mentor, Jr., WSBA No. 13053
25 Attorneys for Suncadia, LLC
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15 OF ECOLOGY,

16 Plaintiff,

17 v.

18 JAMES J. ACQUAVELLA, et al.,
19 Defendants.

No. 77-2-01484-5

**PROPOSED PENDENTE LITE
ORDER RE: WATER RIGHTS
EXCHANGE AGREEMENT
BETWEEN WATER RIGHTS
CLAIM NO. 00648 (SWAUK
CREEK SUBBASIN NO. 4)**

20 This matter is before the Court on the Petition from Suncadia LLC and J. P. Roan
21 for an Order *Pendente Lite*. The Court having heard from all interested parties and being
22 fully advised; now, therefore,

23 IT IS ORDERED, ADJUDGED, AND DECREED for the 2008 and subsequent
24 irrigation seasons during the pendency of the adjudication, or until further order of the
25 Court, as follows:

- 26
- (1) The Court recognizes the Water Rights Exchange Agreement between Suncadia LLC and J.P. Roan.
 - (2) The Court recognizes the term of the agreement as twenty years from the date of this Court's approval.

1 (3) The Court recognizes the same quantities, priorities, and season for use for
2 Suncadia and J.P. Roan's water rights as confirmed in the Conditional Final
3 Order Re: Subbasin No. 4 (Swauk Creek).

4 (4) The Court designates the purpose of use of up to 1.727 cfs, not to exceed 236.4
5 acre feet, of the Suncadia water rights as irrigation for April 1 to June 30 and
6 the place of use as follows:

7 S1/2 of the SE1/4 of the SW1/4; SW1/4 of the SW1/4; E1/2 of the
8 SE1/4; and the S1/2 of the N1/2 of the SE1/4 of the SW1/4 of
9 Section 21, Twp. 19 N., Range 18 E. Willamette Meridian.

10 (5) The Court designates the purpose of use of the Roan Water Rights as instream
11 flows for July 1 to October 15 in First Creek.

12 (6) The Court recognizes that its Order will remain in effect for the 2008 and
13 subsequent irrigation seasons during the pendency of the adjudication, or
14 until further Order of this Court.

15 DATED this ____ day of April, 2008.

16
17
18 _____
19 Hon. Sidney Ottem

20
21 Respectfully submitted,

22 MENTOR LAW GROUP, PLLC

23
24 

25 _____
26 Joe Mentor, Jr., WSBA No. 13053
Attorney for Suncadia, LLC

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15 STATE OF WASHINGTON DEPARTMENT
16 OF ECOLOGY,

17 Plaintiff,

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19 JAMES J. ACQUAVELLA, et al.,
20 Defendants.

No. 77-2-01484-5

**DECLARATION OF
JOE MENTOR, JR.
IN SUPPORT OF PETITION
FOR ORDER *PENDENTE LITE*
RE: WATER RIGHTS CLAIM
NO. 00648 (SWAUK CREEK)**

21 I, JOE MENTOR, JR., hereby declare and state as follows:

22 1. I am over the age of 18. I am an attorney licensed to practice law in the
23 State of Washington and I testify herein based upon my own personal knowledge.

24 2. I am an attorney of record for Petitioner, Suncadia LLC.

25 3. The purpose of this declaration is to provide testimony as to issues that
26 are uncontested, and so is appropriate under Rule 3.7 of the Rules of Professional
Conduct.

1 4. Suncadia acquired water rights to the Yakima River, Subbasin No. 4
2 (Swauk Creek) under Court Claim No. 00648 (First Creek Water Users).

3 5. J.P. Roan acquired water rights to the Yakima River, Subbasin No. 4
4 (Swauk Creek) under Court Claim No. 00648 (First Creek Water Users).

5 6. On February 22, 2008 Suncadia and J.P. Roan entered into a Water Rights
6 Exchange Agreement, attached hereto. The Agreement specifies that Roan and Suncadia
7 wish to exchange their water rights for a period of the authorized irrigation season for
8 such water rights. Suncadia wishes to use the Roan Water Rights from July 1 to October
9 15 each year, and to use the Roan Water Rights for instream flow purposes in First
10 Creek. Roan wishes to use up to 1.727 cfs of the Suncadia Water Rights not to exceed
11 236.4 acre feet from April 15 to June 30 each year, and to use the Suncadia Water Rights
12 for irrigation purposes, on land to which Suncadia's water rights were formerly
13 appurtenant.

14 7. On or around February 22, 2008 Suncadia and J.P. Roan filed an
15 application with the Department of Ecology for a temporary change of place of use and
16 temporary change of purpose of use for their respective water rights.

17 8. On or around February 22, 2008 Suncadia and J.P. Roan provided notice of
18 this Agreement to the Water Transfer Working Group.

19 I declare under penalty of perjury under the laws of the State of Washington that
20 the foregoing is true and correct to the best of my knowledge.

21 DATED this 22nd day of February, 2008.

22 Respectfully submitted,
23 MENTOR LAW GROUP, PLLC

24 

25 Joe Mentor, Jr., WSBA No. 13053
26 Attorney for Suncadia, LLC

WATER RIGHTS EXCHANGE AGREEMENT

THIS AGREEMENT is made and entered into this 22nd day of February, 2008, between J.P. Roan (Roan) and Suncadia LLC (Suncadia).

PART I -- RECITALS

1.1 Suncadia owns rights to appropriate water from First Creek, a tributary of Swauk Creek and the Yakima River (hereafter referred to as the Suncadia Water Rights). The Suncadia Water Rights formerly were appurtenant to approximately 150 acres of real property located in Kittitas County, Washington, and legally described as follows:

S. 1/2 of the SE 1/4 of the SW 1/4; S.W. 1/4 of the S.W. 1/4; E. 1/2 of the S.E. 1/4; and the S. 1/2 of the N. 1/2 of the S.E. 1/4 of the S.W. 1/4 of Section 21, Twp. 19 N., Range 18 E. Willamette Meridian.

1.2 Suncadia's water rights arise under Claim No. 00648, confirmed by the Yakima County Superior Court in the Conditional Final Order Re: Subbasin No. 4 (Swauk Creek) in Washington v. Acquavella, Yakima County Superior Court Cause No. 77-2-01484-5 (October 8, 2002). Suncadia's water rights have been recognized in the Conditional Final Order as follows:

	November 2, 1877 Priority Date	June 1, 1881 Priority Date	Total
Annual Quantity	301.5 a.f.	523.4 a.f.	824.9 a.f.
Instantaneous Quantity	1.447 c.f.s.	1.873 c.f.s.	3.32 c.f.s.
Conveyance Loss	.761 c.f.s.	1.873 c.f.s.	2.634 c.f.s.
Total Instantaneous Quantity	2.208 c.f.s.	3.746 c.f.s.	5.954 c.f.s.

1.3 Roan owns rights to appropriate water from First Creek, a tributary of Swauk Creek and the Yakima River (hereafter referred to as the Roan Water Rights). The Roan Water Rights are appurtenant to approximately 43 acres of real property located in Kittitas County, Washington, within an area of land legally described as follows:

The W $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SW $\frac{1}{4}$ SW $\frac{1}{4}$ and that portion of the N $\frac{1}{2}$ of Section 21, which is described as follows: A tract of land bounded by a line beginning at a point on the west boundary line of the NE $\frac{1}{4}$ of said Section, 66 feet north of the southwest corner of said quarter section, and running thence east 66 feet; thence

north on a line parallel with the west boundary line of said quarter section 1650 feet; thence west 66 feet to the west boundary line of said quarter section; thence north to the north boundary line of said quarter section; thence west to the northwest corner of said section; thence south on the west boundary line of said section to the southwest corner of the NW¼ of said section; thence east on the south boundary line of said NW¼ of said section 990 feet; thence north 66 feet; and thence east on a line parallel with the south boundary line of said quarter section 1650 feet to the point of beginning; all in T. 19N., R. 18 E.W.M.

1.4 The Roan Water Rights arise under Claim No. 00648, confirmed by the Yakima County Superior Court in the Conditional Final Order Re: Subbasin No. 4 (Swauk Creek) in Washington v. Acquavella, Yakima County Superior Court Cause No. 77-2-01484-5 (October 8, 2002). Roan's water rights have been recognized in the Conditional Final Order as follows:

	November 2, 1877 Priority Date	June 1, 1881 Priority Date	Total
Annual Quantity	208.5 a.f.	27.9 a.f.	236.4 a.f.
Instantaneous Quantity	1.0 c.f.s.	.1 c.f.s.	1.1 c.f.s.
Conveyance Loss	.527 c.f.s.	.1 c.f.s.	.627 c.f.s.
Total Instantaneous Quantity	1.527 c.f.s.	.2 c.f.s.	1.727 c.f.s.

1.5 The Roan and Suncadia water rights were authorized by the Court for use during the irrigation season, from April 1 to October 15 each year.

1.6 Roan and Suncadia wish to exchange their water rights for a period of the authorized irrigation season for such water rights. Suncadia wishes to acquire the Roan Water Rights from July 1 to October 15 each year, and to use the Roan Water Rights for instream flow purposes in First Creek. Roan wishes to acquire the Suncadia Water Rights from April 15 to June 30 each year, and to use the Suncadia Water Rights for irrigation purposes, on land to which Suncadia's water rights were formerly appurtenant.

1.7 Roan and Suncadia wish to bring about a change in the use of the Water Rights, and are willing to cooperate with each other as set forth in this Agreement to effect such change in use.

PART II – WATER EXCHANGE AGREEMENT

In consideration of the foregoing and the performance of the mutual covenants herein contained, the parties agree as follows:

2.1 Transfer of the Suncadia Water Rights. -- For a period of 20 years from the date of this Agreement, Suncadia agrees to transfer to Roan, for use by Roan from April 1 to June 30 each year, the right to use up to 1.727 cfs of the Suncadia Water Rights, not to exceed 236.4 acre-feet each year.

2.2 Transfer of the Roan Water Rights. -- For a period of 20 years from the date of this Agreement, Roan agrees to transfer to Suncadia the right to use the Roan Water Rights and, unless Suncadia provides written consent to the contrary, Roan agrees to forego diversion and use of the Roan Water Rights from July 1 to October 15 of each year: *Provided, however,* that nothing in this Agreement shall be construed to limit or modify Roan's right after June 30 to use previously-stored water under the Roan Water Rights that is diverted prior to June 30 of each year.

2.3 Water Rights Change of Use. -- No later than 90 days following execution of this Agreement, Suncadia shall, at its sole cost and expense, apply to the Washington Department of Ecology for authorization to change the use of the Water Rights as provided under this Agreement. In addition, Suncadia and Roan agree to jointly seek an Order *Pendente Lite* from the Yakima County Superior Court to change the use of the Water Rights as provided under this Agreement, during the pendency of the Acquavella litigation. Roan shall cooperate with Suncadia in good faith and in every proper and legal way in Suncadia's efforts to change the use of the Water Rights. Either party may terminate this Agreement if the joint Motion for Order *Pendente Lite* to change the use of the Water Rights is denied or if the Motion is not acted on within 180 days following execution of this Agreement, in which case any and all rights or obligations of Roan and Suncadia under this Agreement shall terminate and be of no further force or effect.

2.4 Property Management. -- Roan shall take full responsibility to manage the property to which the Suncadia Water Rights formerly were appurtenant in a manner consistent with Suncadia's ownership of the Suncadia Water Rights, to fully utilize the Suncadia Water Rights during the period of exchange to put the Suncadia Water Rights to full beneficial use and to avoid waste, and to protect the Suncadia Water Rights from relinquishment or forfeiture.

2.5 Right to Inspect the Property. -- During the term of this Agreement, Suncadia and its employees, representatives, and agents shall have the right to enter upon the property to which the Water Rights currently are appurtenant to monitor the quantity of water diverted for use and the cropping patterns on the property.

2.6 Utilization of Roan Water Rights. -- Suncadia shall take full responsibility to fully utilize the Roan Water Rights during the period of exchange in a manner consistent with

Roan's ownership of the Roan Water Rights, to put the Roan Water Rights to full beneficial use and to avoid waste, and to protect the Roan Water Rights from relinquishment or forfeiture.

2.7. Feasibility Determination. -- Suncadia's obligation to close the transaction described in this Agreement shall be contingent upon Suncadia's reasonable satisfaction of the feasibility the change of use of the Water Rights as provided under this Agreement. Suncadia shall satisfy or waive the foregoing contingency by written notice delivered to Roan no later than 180 days following execution of this Agreement.

2.8. Cancellation. -- Either party may cancel this Agreement by giving the other party written notice at least one year prior to the effective date of cancellation.

PART III – GENERAL PROVISIONS

3.1 Specific Performance. -- If any party defaults in its obligations under this Agreement, the parties each acknowledge that it would be extremely difficult to measure the resulting damages. Accordingly, any nondefaulting party, in addition to any other rights or remedies, shall be entitled to restraint by injunction of a violation, or attempted or threatened violation, of any obligation or provision of this Agreement, or to a decree specifically compelling performance of any such obligation or provision. In such event, the parties hereto each expressly waive any defense that a remedy in damages or at law would be adequate.

3.2 Assignment and Succession. -- This Agreement may be assigned by either Party and is binding upon and inures to the benefit of the Parties to this Agreement as well as upon and to the benefit of their respective assigns and other successors in interest.

3.3 Notices. -- Any notice or communication required by this Agreement between the Parties may be by way of regular or certified mail, facsimile, electronic or data transmission, personal delivery, or any other reasonable means that provides actual notice to the recipient and shall be considered completed upon reasonably documented transmission and receipt or three (3) days after mailing, whichever shall be earlier. Any notice or communication required by this Agreement shall be given to the Parties at the addresses set forth below:

If to Roan:

J.P. Roan
13991 Reecer Creek Road
Ellensburg, WA 98926

With copies to:

If to Suncadia:

With copies to:

Suncadia LLC
4244 Bullfrog Rd., Ste 1
Cle Elum, WA 98922

Joe Mentor, Jr.
Mentor Law Group, PLLC
315 Fifth Avenue South
Suite 1000
Seattle, Washington 98104

3.4 Amendment. -- Amendments to this Agreement must be in writing and signed by authorized representatives of each of the Parties.

3.5 Severability. -- No provision of this Agreement is severable from any and all other provisions of this Agreement. Should any provision or provisions of this Agreement be unenforceable for any reason, the party finding itself unable to enforce said provision(s) may, at its sole discretion, declare this entire Agreement to be null and void.

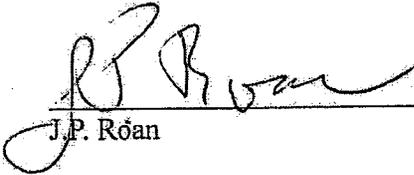
3.6 Waiver. -- If either party fails to exercise its rights under this Agreement, it shall not be precluded from subsequent exercise of its rights. A failure to exercise rights shall not constitute a waiver of any other rights under this Agreement, unless stated in a letter signed by an authorized representative of the Party and attached to the original agreement.

3.7 Entire Agreement. -- This document contains the entire agreement between Roan and Suncadia with respect to the subject matter contained herein. There are no agreements, promises, assurances, representations, warranties, undertakings or understandings, either written or oral, between Roan and Suncadia concerning the Water Rights other than those set forth in this document.

3.8 Independent Counsel. -- This agreement has been prepared by the Firm of Mentor Law Group, PLLC, on behalf of Suncadia. Roan hereby acknowledges that he has been advised by Suncadia's attorney to obtain independent legal counsel and that he has had sufficient opportunity to do so prior to the execution of this Agreement.

3.9 **Governing Law.** -- This Agreement shall be governed and enforced under the laws of the State of Washington, without giving effect to principles and provisions thereof relating to conflict or choice of laws and irrespective of the fact that any one of the parties is now or may become a resident of a different state. Venue for any action under this Agreement shall lie in Kittitas County, Washington.

In witness of the foregoing provisions, the parties have signed this Agreement below:



J.P. Roan



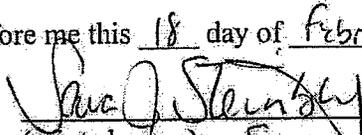
Suncadia, LLC
By:
Its:

STATE OF WASHINGTON)
)ss.
COUNTY OF Kittitas)

I certify that I know or have satisfactory evidence that **J.P. Roan** is the person who appeared before me, and that person acknowledged signing this instrument as a free and voluntary act for the uses and purposes mentioned in the instrument.

SUBSCRIBED and SWORN to before me this 18 day of February, 2008.





(printed name): Sara J. Steinberg
NOTARY PUBLIC in and for the State of
Washington, residing at Ellensburg.
My Commission expires: Nov 6, 2011

STATE OF WASHINGTON)

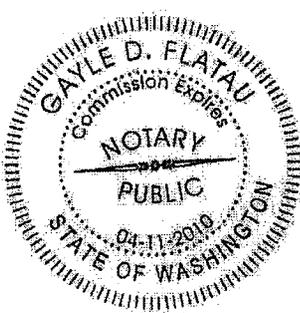
)ss.

COUNTY OF KING)

Kittitas

I certify that I know or have satisfactory evidence that Paul Eisenberg is the person who appeared before me, and that person acknowledged signing this instrument, on oath stated their authority to execute the instrument and acknowledged it as the authorized agent of the party on behalf of whom instrument was executed to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

SUBSCRIBED and SWORN to before me this 22 day of February, 2008.



Gayle D. Flatau - Gayle D. Flatau

(printed name):

NOTARY PUBLIC in and for the State of Washington, residing at Cle Elum, WA

My Commission expires: 4-11-2010

**WATER RIGHTS
EXCHANGE AGREEMENT**

Page 7

Mentor Law Group, PLLC

315 Fifth Avenue South

Suite 1000

Seattle, Washington 98104

TEL 206-838-7650 FAX 206-838-7655