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IN THE KING COUNTY SUPERIOR COURT  
FOR THE STATE OF WASHINGTON

SWINOMISH INDIAN TRIBAL  
COMMUNITY, a federally recognized  
Indian tribe, on its own behalf and as  
*parens patriae* on behalf of all enrolled  
members of the Tribe; and LARRY  
CAMPBELL, CHESTER CAYOU JR.,  
M. BRIAN CLADOOSBY, DEBBIE  
FERNANDO, and LORRAINE  
LOOMIS, individually and on behalf of  
all enrolled members of the Tribe  
similarly situated,

Plaintiffs,

v.

CITY OF OAK HARBOR, a  
Noncharter Code City and political  
subdivision of the State of Washington;  
STRIDER CONSTRUCTION CO.,  
INC.; PERTEET, INC.; and KBA,  
INC.,

Defendants.

No.

**CLASS ACTION COMPLAINT**

**JURY TRIAL DEMANDED**

(Clerk's Action Required)

“This case comes to us shrouded in the history of an ancient Indian people whose  
remains, bulldozed from their resting place, stir the anguish of their descendants.” *Wana  
The Bear v. Community Const., Inc.*, 128 Cal.App.3d 536, 180 Cal.Rptr. 423 (1982).

1 "To us the ashes of our ancestors are sacred and their resting place is hallowed  
2 ground." Chief Seattle, quoted in *Battlefields and Burial Grounds*, by Roger C. Echo-  
3 Hawk and Walter R. Echo-Hawk.

4 Plaintiffs Swinomish Indian Tribal Community ("Tribe"), on its own behalf and  
5 as *parens patriae* on behalf of all enrolled members of the Tribe, and Larry Campbell,  
6 Chester Cayou Jr., M. Brian Cladoosby, Debbie Fernando, and Lorraine Loomis,  
7 individually and on behalf of all enrolled members of the Tribe similarly situated  
8 (collectively, "Plaintiffs"), by and through their undersigned attorneys, for their class  
9 action complaint against Defendants City of Oak Harbor, a Noncharter Code City and  
10 political subdivision of the State of Washington, and the current or former officials,  
11 employees and/or agents of the City of Oak Harbor responsible for the SE Pioneer Way  
12 Improvements Project in their official capacities (collectively, the "City"), Strider  
13 Construction Co., Inc. ("Strider"), Perteet, Inc., ("Perteet"), and KBA, Inc., ("KBA")  
14 (collectively, "Defendants"), allege as follows:

15 **I. INTRODUCTION**

16 1.1 Nature of Action. The City's SE Pioneer Way Improvements Project  
17 disturbed and destroyed a significant Lower Skagit and Swinomish village and burial  
18 ground and desecrated the graves of dozens of the Tribe's ancestors. This has caused the  
19 Tribe and its members to suffer severe stress, anguish, and spiritual and emotional  
20 distress and to sustain significant economic losses. Plaintiffs bring this action against the  
21 City, Strider, Perteet, and KBA for violating at least the following statutory and common  
22 law duties:

23 1.1.1 Defendants breached contractual obligations for which the  
24 Plaintiffs herein are Third Party Beneficiaries;

1 1.1.2 Defendants violated the provisions of the Indian Graves and  
2 Records Act ("IGRA"), RCW 27.44.010 *et seq.*;

3 1.1.3 Defendants violated the provisions of the Shoreline Management  
4 Act, RCW 90.58.010 *et seq.*;

5 1.1.4 Defendants committed the tort of intentional infliction of  
6 emotional distress, including the tort of outrage;

7 1.1.5 Defendants committed the tort of interference with a dead body;

8 1.1.6 Defendants committed the tort of negligent infliction of emotional  
9 distress; and

10 1.1.7 Defendants breached their duties to the Plaintiffs by falling below  
11 the standard of care necessary to conduct the work described in this Complaint.

12 1.1.8 The breaches of the duty of care and contractual obligations  
13 alleged herein were each a proximate cause of the harm, damages, losses and suffering  
14 sustained by Plaintiffs.

15 1.2 The Tribe, on its own behalf and as *parens patriae* on behalf of all  
16 enrolled members of the Tribe, and named Plaintiffs and proposed Class Representatives  
17 Larry Campbell, Chester Cayou Jr., M. Brian Cladoosby, Debbie Fernando, and Lorraine  
18 Loomis, on behalf of themselves and on behalf of a Class of all enrolled members of the  
19 Tribe similarly situated, therefore bring this action for purposes of securing recovery for  
20 injury suffered.

## 21 II. PARTIES

22 2.1 Plaintiff Swinomish Indian Tribal Community. The Tribe is a federally  
23 recognized Indian tribe that occupies the Swinomish Indian Reservation in Skagit  
24 County, Washington. The Tribe is the legal and political successor in interest to certain

1 tribes and bands of Indians that entered into the Treaty with the Duwamish, Suquamish,  
2 Etc. ("Treaty of Point Elliott" or "Treaty") with the United States in 1855. The United  
3 States consolidated several tribes, bands, and related subgroups of Indians under the  
4 names "Skagit" and "Swinamish" for purposes of the Treaty. Prior to the Treaty, the  
5 tribes, bands, and subgroups of Indians that came to be located on the Swinomish Indian  
6 Reservation, including the Kikiallus, Lower Skagit (also known as the Skagit or Whidbey  
7 Island Skagit), aboriginal Samish, and aboriginal Swinomish, exclusively used and  
8 occupied certain lands and waters in the northern Puget Sound region. These lands and  
9 waters included most of Whidbey Island and all of the shorelines of Dugualla Bay,  
10 Crescent Harbor, Oak Harbor, and Penn Cove. The Tribe brings this action on its own  
11 behalf and as *parens patriae* on behalf of all enrolled members of the Tribe.

12       2.2    Plaintiff Larry Campbell. Plaintiff Campbell is an enrolled member of the  
13 Tribe, domiciled in the State of Washington, and a resident of Skagit County. Plaintiff  
14 Campbell brings this action on his own behalf and on behalf of all enrolled members of  
15 the Tribe similarly situated, and is typical of enrolled members of the Tribe who were  
16 harmed by Defendants' wrongful actions.

17       2.3    Plaintiff Chester Cayou Jr. Plaintiff Cayou is an enrolled member of the  
18 Tribe, domiciled in the State of Washington, and a resident of Skagit County. Plaintiff  
19 Cayou brings this action on his own behalf and on behalf of all enrolled members of the  
20 Tribe similarly situated, and is typical of enrolled members of the Tribe who were  
21 harmed by Defendants' wrongful actions.

22       2.4    Plaintiff M. Brian Cladoosby. Plaintiff Cladoosby is an enrolled member  
23 of the Tribe, domiciled in the State of Washington, and a resident of Skagit County.  
24 Plaintiff Cladoosby brings this action on his own behalf and on behalf of all enrolled

1 members of the Tribe similarly situated, and is typical of enrolled members of the Tribe  
2 who were harmed by Defendants' wrongful actions.

3       2.5     Plaintiff Debbie Fernando. Plaintiff Fernando is an enrolled member of  
4 the Tribe, domiciled in the State of Washington, and a resident of Skagit County.  
5 Plaintiff Fernando brings this action on her own behalf and on behalf of all enrolled  
6 members of the Tribe similarly situated, and is typical of enrolled members of the Tribe  
7 who were harmed by Defendants' wrongful actions.

8       2.6     Plaintiff Lorraine Loomis. Plaintiff Loomis is an enrolled member of the  
9 Tribe, domiciled in the State of Washington, and a resident of Skagit County. Plaintiff  
10 Loomis brings this action on her own behalf and on behalf of all enrolled members of the  
11 Tribe similarly situated, and is typical of enrolled members of the Tribe who were  
12 harmed by Defendants' wrongful actions.

13       2.7     Defendant City of Oak Harbor. Defendant City of Oak Harbor, including  
14 the current or former officials, employees and/or agents of the City of Oak Harbor  
15 responsible for the SE Pioneer Way Improvements Project in their official capacities  
16 (collectively, the "City"), is a Noncharter Code City and political subdivision of the State  
17 of Washington. The City is located in Island County, Washington.

18       2.8     Defendant Strider Construction Co., Inc. Defendant Strider Construction  
19 Co., Inc. ("Strider") is a Washington corporation. Upon information and belief, Strider  
20 transacts business in King County, Washington.

21       2.9     Defendant Perteet, Inc. Defendant Perteet, Inc. ("Perteet") is a Washington  
22 corporation. Upon information and belief, Perteet maintains an office and transacts  
23 business in King County, Washington.



1 Təqucid were required to leave the village located there and relocate to the Swinomish  
2 Indian Reservation, leaving behind generations of their ancestors who were buried there.  
3 In accordance with the terms of the Treaty, the Skagit, Swinomish, and related subgroups  
4 left Whibey Island and Təqucid, although they continued to frequent the area to exercise  
5 fishing and other rights guaranteed by the Treaty.

6 The location and nature of Təqucid is well known and well documented.  
7 Archaeologists or anthropologists documented the village and burial ground in the 1920s,  
8 1950s, and 1980s. In 1953, the site was formally registered as a state archaeological site.  
9 In 1988, an updated state archaeological site form was prepared. First hand or press  
10 accounts of the presence of Indian burials at the site were made in the 1850s, 1910s,  
11 1920s, 1940s, 1960s, and 1980s. In 1983, the Whidbey News Times published pictures  
12 of Indian burials being removed from the site after construction work along SE Pioneer  
13 Way had disturbed them.

14 4.2 Multiple previous ground disturbing activities at and near Pioneer Way  
15 have uncovered Indian burials, as documented in 1913, 1962, and 1983, among other  
16 years. City and Island County officials were involved in these excavations, which  
17 attracted press attention. The existence of native burials along SE Pioneer Way was a  
18 matter of public record and was specifically known to the City at least 50 years ago.

19 4.3 The Island County Times in Coupeville confirmed in an article published  
20 on December 19, 1913 that Billy Barlow, brother of Chief Squi-Squi, “was buried near  
21 the old Potlach building across the bay” and exhorted readers not to “despoil the last  
22 resting place of the Indians buried in this vicinity.”

23 4.4 On March 29, 1962, the Whidbey News Times reported that workmen  
24 uncovered Indian remains while digging water lines for a new bathhouse at City Beach.

1 According to the paper, the workmen said "other Indian bones" were "found while  
2 putting in a boat ramp at the beach and old graves were opened when cutting the end of  
3 Maylor's Spit." The article also quotes City Engineer Jess Buckner as saying that "the  
4 remains of a family of five were uncovered along Pioneer Way in downtown Oak Harbor  
5 some years ago when laying sewer lines."

6 4.5 On February 23, 1983, the Whidbey News Times again reported that  
7 Indian remains had been unearthed "under Pioneer Way" during construction for a gas  
8 main. The City's Assistant Police Chief Pete Gaalema noted that the discovery of shell  
9 midden was a sign of a native burial, and that these remains had been found in just such a  
10 layer of midden. "Burial sites are common enough in this area for [Western Washington  
11 University] not to take much interest." Island County Coroner Mike Regan noted, "[t]his  
12 area was heavily populated with Indians some time ago."

13 4.6 Beginning at least as early as 2008, the Defendants, acting in concert,  
14 planned for and undertook a significant road reconstruction project on SE Pioneer Way  
15 between SE City Beach Street and SE Midway Boulevard adjacent to a modified  
16 shoreline along Oak Harbor (the "SE Pioneer Way Improvements Project" or "Project").  
17 Among other things, the Project involved the removal, reconfiguration, and replacement  
18 of the road and adjacent sidewalks, the removal and replacement of the underground  
19 sanitary sewer system, the removal and replacement of the underground stormwater  
20 conveyance system, and the undergrounding of various utility lines. The Project reached  
21 "substantial completion" on or about October 6, 2011.

22 4.7 Prior to construction, the City consulted with the Washington Department  
23 of Archaeology and Historic Preservation ("DAHP") regarding the Project's potential  
24



1 effects on historic and cultural resources located in the area where the Project was  
2 planned. In a project review sheet submitted to DAHP, the City stated:

3  
4 Initial research conducted at [DAHP] on March 5, 2009, indicates there is  
5 one recorded archaeological site adjacent to the [P]roject area. Site 45IS45  
6 is believed to be the location of an early Skwadbsh settlement.<sup>1</sup> The  
7 DAHP site inventory form indicates there were traces of reworked/re-  
8 deposited shell and charcoal reported throughout much of the site,  
9 although the area has been fully developed since the first documented  
10 discovery .... The entire site is located south of the [P]roject area, *however*  
11 *the site's buffer (as defined in DAHP's archaeology site inventory*  
12 *database) encompasses an approximately 500-foot radius, which overlays*  
13 *SE Pioneer Way.*"

14 City of Oak Harbor, Project Review Sheet-EZ 1 at 1-2, May 12, 2009 (emphasis added).

15 This statement was known to all Defendants and believed to be true.

16 4.8 On April 22, 2009, Defendant Perteet sent a memo to Washington  
17 Department of Transportation archaeologist Trent deBoer referring to the same March 5,  
18 2009 DAHP research indicating that the buffer for site 45IS45 overlaid the Project area.  
19 Perteet requested that deBoer assist the City in consulting with the potentially affected  
20 tribe and correctly identified the Swinomish Indian Tribal Community as the tribe with  
21 the nearest tribal lands to the Project. Perteet asked for help in getting DAHP to concur  
22 that site 45IS45 was a "previously disturbed area," that excavation would not exceed 8',  
23 and that the Project "[would] occur within the limits of the existing infrastructure."

24 <sup>1</sup> The Skwadbsh were a subgroup of Indians created by intermarriage between Lower Skagit and Swinomish Indians.

1 | Perteeet therefore had specific knowledge of the likelihood that the Project would disturb a  
2 | known archaeological site and uncover human remains and artifacts.

3 |           4.9     After reviewing the City's submission, DAHP notified the City that its  
4 | Project was in "close proximity" to a known archaeological site, 45IS45, and specifically  
5 | warned the City that it "may encounter additional archaeological deposits during  
6 | construction." It "strongly recommend[ed that the City] retain the services of a  
7 | professional archaeologist to monitor and report on ground disturbing activities along SE  
8 | Pioneer Way between SE Dock Street and SE Midway Boulevard, and help [the City]  
9 | develop and implement an Inadvertent Discovery Plan for cultural materials." It also  
10 | recommended that the City engage in "consultation with the concerned Tribes' cultural  
11 | committees and staff regarding cultural resource issues." Letter from DAHP to City of  
12 | Oak Harbor (May 26, 2009).

13 |           4.10    The City also prepared a checklist analyzing the Project's potential  
14 | environmental effects under the provisions of the State Environmental Policy Act, Ch.  
15 | 43.21C RCW ("SEPA"). In response to a question asking the City to "generally describe  
16 | ... evidence of historic, archaeological, scientific, or cultural importance known to be on  
17 | or next to the [Project] site," the City responded as follows:

18 |           Research conducted at [DAHP] indicates there is one recorded  
19 | archaeology site adjacent to the [P]roject area. The site is believed to be  
20 | the location of an early Skwadbsh settlement. The DAHP site inventory  
21 | form indicates that there were traces of reworked/re-deposited shell and  
22 | charcoal throughout much of the site, although the area has been fully  
23 | developed since the first documented discovery.  
24 |

1 City of Oak Harbor, Environmental Checklist at 20 (May 28, 2009). This statement was  
2 known by all Defendants and believed to be true.  
3

4 4.11 In response to a question asking the City to describe proposed measures it  
5 would employ to reduce or control impacts to such resources, the City acknowledged that  
6 "[c]onsultation with [DAHP] has resulted in a recommendation that an archaeologist be  
7 on-site to report on monitoring and ground disturbance, with further consultation." *Id.* at  
8 21. The City therefore promised to comply with this condition, which promise formed a  
9 contractually binding obligation which provided benefits to the Plaintiffs.  
10

11 4.12 An earlier version of the SEPA checklist stated that "...[c]onsultation with  
12 Tribes is also recommended. In addition, this SEPA checklist is sent to related tribes for  
13 comment." However, on information and belief, the City apparently made a decision, in  
14 consultation with and with the knowledge and approval of the other Defendants, not to  
15 notify or consult with the Tribe, as this recommendation was removed and the SEPA  
16 checklist was submitted without it.  
17

18 4.13 The Defendants therefore knew that the Project site was the location of the  
19 recorded archaeological site 45IS45 and knew or had reason to know that the Project site  
20 was the location of a large Native American village and burial ground. The Defendants  
21 knew or had reason to know that construction work at or near the site in the 1980s,  
22 among other time periods, had destroyed the graves of a substantial number of Native  
23 people who had been buried at the site over time, and that additional excavation at the  
24

1 site would likely encounter additional Indian burials. The Defendants knew or had reason  
2 to know that their work at the site would likely encounter, remove, mutilate, deface,  
3 desecrate or destroy the ancestral remains and burials in the process of construction. The  
4 Defendants knew or had reason to know that the failure to employ an archeologist and to  
5 develop an Inadvertent Discovery Plan would mean that their activities on the site would  
6 likely result in the removal, mutilation, defacement, desecration and/or destruction of the  
7 human remains, cultural artifacts and burials that they would encounter at that location.  
8

9 4.14 The Defendants failed to heed DAHP's warnings, failed to follow DAHP's  
10 recommendations, and failed to implement the proposed measures, promises and  
11 contractual obligations described in the City's SEPA checklist to reduce or control  
12 impacts to cultural resources. The Defendants did not retain a professional archaeologist  
13 to develop and implement an inadvertent discovery plan and to monitor ground disturbing  
14 construction activities, as they had promised to do. The Defendants did not consult with  
15 the Tribe or its members regarding the Project, the site, the likelihood of encountering  
16 Indian burials or archaeological resources at the site, or the Tribe's preferences regarding  
17 the treatment of Indian burials or archaeological resources if construction activities  
18 disturbed them, as they had promised to do.  
19

20 4.15 To the best of the Plaintiffs' knowledge, the Defendants, acting in concert,  
21 commenced major demolition associated with the Project on or about March 7, 2011. As  
22 was expected and predictable, the Project uncovered, disturbed, and desecrated human  
23 remains, artifacts, and other sacred cultural resources associated with Plaintiffs' ancestral  
24

1 burials. Almost immediately, on or about March 8, 2011, the City Engineer indicated in  
2 an email to other City employees and employees of Defendant KBA, the City's  
3 construction management firm, that the Project had encountered "unforeseen conditions,"  
4 (sic) namely, underground storage tanks and a "native burial ground." *See* Email from  
5 Larry Cort to Eric Johnston (March 9, 2011); Email from Joe Stowell to Eric Johnston  
6 (March 9, 2011).  
7

8 4.16 Between those dates and on or about June 16, 2011, and contrary to its  
9 contractual and legal obligations, the Defendants:

10 4.16.1 Continued to uncover, remove, and desecrate human remains,  
11 artifacts, and other sacred cultural resources associated with Plaintiffs' ancestral burials;  
12

13 4.16.2 Did not halt construction of the Project;

14 4.16.3 Did not notify the coroner, local law enforcement, DAHP, or the  
15 Tribe that the Project had encountered human remains;

16 4.16.4 Did not notify DAHP or the Tribe that the Project had encountered  
17 Indian burials and archaeological resources;

18 4.16.5 Did not attempt to consult with DAHP or the Tribe regarding the  
19 Project or proper treatment of the Indian burials and archaeological resources;  
20

21 4.16.6 Did not obtain (or attempt to obtain) an archaeological excavation  
22 permit before continuing to excavate 45IS45, Indian burials, and archaeological  
23 resources; and  
24

1           4.16.7     Did not treat the native burial ground, Indian burials, and  
2 archaeological resources in a culturally appropriate, sensitive, and respectful manner, all  
3 in violation of the Defendants' contractual obligations and Washington State statutes and  
4 common law duties.

5           4.17     Instead, the Defendants continued to excavate 45IS45 and to move  
6 forward with Project construction. Eventually, the Defendants, acting in concert, removed  
7 approximately 3,000 cubic yards of material from 45IS45 to the Concrete Nor'west dump  
8 site on Pit Road in Oak Harbor, removed approximately 800 cubic yards of material from  
9 45IS45 to a private residence on Waterloo Road in Oak Harbor, removed approximately  
10 740 cubic yards of material from 45IS45 to two separate private residences on Burroughs  
11 Avenue in Oak Harbor, and removed approximately 180 cubic yards of material from  
12 45IS45 to an environmental clean-up site in Everett, WA. The Defendants, acting in  
13 concert, also removed approximately 1,600 cubic yards of material from 45IS45 to the  
14 Old City Shop site (and Project staging area) near Dock Street in Oak Harbor. These  
15 excavated and removed materials contained numerous Indian burials, thousands of  
16 prehistoric and historic artifacts and fragments, and other archaeological resources.

17           4.18     Finally, on or about June 16, 2011, the Defendants first informed the  
18 coroner, local law enforcement, and/or DAHP that the Project had encountered human  
19 remains. As soon as Island County Coroner Dr. Robert Bishop visited the Concrete  
20 Nor'west dump site, he identified at least nine piles of excavated material that held  
21 human remains.

1           4.19    On or about June 18, 2011, the Defendants informed DAHP that Project  
2 construction activities had once again disturbed Indian burials. DAHP halted Project  
3 construction and initiated the consultation and permitting processes required under  
4 Washington State law regarding Indian burials and archaeological resources.  
5

6           4.20    When State Physical Anthropologist Dr. Guy Tasa and Assistant State  
7 Archaeologist Gretchen Kaehler of DAHP visited the Project and Concrete Nor'west  
8 sites on or about June 18, 2011, they found several partially intact Indian burials at the  
9 Project site, and noted that "much more soil" than the nine Concrete Nor'west piles  
10 identified by Dr. Bishop contained archaeological material. Letter from DAHP to Eric  
11 Johnston (June 20, 2011).  
12

13           4.21    Following the June 18, 2011 site visits, DAHP's Lance Wollwage  
14 reminded the City of DAHP's May 26, 2009 warnings and recommendations: "Given  
15 your clear and advanced warning of the Project's archaeological hazards, we do not  
16 understand why our expertise and recommendations were ignored." *Id.*

17           4.22    On June 23, 2011, DAHP wrote to the City to confirm DAHP's stop work  
18 order. "We have also been made aware of the possibility that human remains and cultural  
19 materials were discovered during utility projects in the 1950s," noted Wollwage. "We  
20 urge you to identify former employees and other knowledgeable people who may be able  
21 to provide information regarding such projects and the project area." Letter from DAHP  
22 to Eric Johnston (June 23, 2011).  
23  
24

1           4.23   After consultation with DAHP, the Tribe, and others, the City eventually  
2 obtained two archaeological excavation permits, one for archaeological activities  
3 associated with completion of the Project and one for archaeological activities associated  
4 with the recovery of human remains and archaeological resources at other sites to which  
5 excavated materials had been removed. Archaeological work under the permits is  
6 ongoing and will likely not be completed until mid- to late-2013.  
7

8           4.24   The Defendants' actions violated their contractual obligations and  
9 Washington State statutes and common law duties and have caused and will continue to  
10 cause the Tribe, Larry Campbell, Chester Cayou Jr., M. Brian Cladoosby, Debbie  
11 Fernando, Lorraine Loomis, and other proposed Class members harm, damages, injuries,  
12 losses and expenses as well as severe stress, anguish, and spiritual and emotional distress.  
13 As a result of Defendants' actions, one of the Tribe's ancient villages and burial grounds  
14 has been partially destroyed and permanently desecrated. Many of the Tribe's ancestors  
15 have been dug up from their final resting places (often by backhoes or other heavy  
16 machinery), broken apart, separated from the family members and precious grave goods  
17 with which they were laid to rest in sacred ceremonies, and scattered among hundreds of  
18 piles of "dirt" the City took to its "disposal sites," which are or were unsecured and  
19 exposed to the elements. Some of the "dirt" was advertised by the City as "free dirt" and  
20 delivered to private landowners for use in landscaping projects. Other ancestors laid  
21 exposed in the middle of a road in downtown Oak Harbor for weeks, next to passing  
22 traffic during the day and directly in front of a busy tavern at night.  
23  
24



1           4.25 Also as a result of Defendants' actions, the Tribe, Larry Campbell, Chester  
2 Cayou Jr., M. Brian Cladoosby, Debbie Fernando, Lorraine Loomis, and other proposed  
3 Class members have had to hire and maintain for nearly two years a crew of  
4 approximately 20 Tribal spiritual leaders and handlers to work daily with the broken  
5 remains of their ancestors, have had to hire a coffinmaker to make new cedar boxes in  
6 which to reinter their ancestors, and have had to consider acquiring land suitable for  
7 reburial.<sup>2</sup>  
8

9           4.26 Also as a result of Defendants' actions, the Tribe, Larry Campbell, Chester  
10 Cayou Jr., M. Brian Cladoosby, Debbie Fernando, Lorraine Loomis, and other proposed  
11 Class members have witnessed Defendants' knowing, willful, and/or intentional violation  
12 or reckless disregard of Washington State laws specifically intended to prevent this type  
13 of tragedy from occurring and have witnessed the callous disrespect with which at least  
14 some of Defendants' officials, employees, and/or agents have treated their ancestors, their  
15 sacred burial grounds, and their most deeply held spiritual and cultural beliefs.  
16  
17

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18           <sup>2</sup> Under the terms of the City's archaeological permits, certain activities associated with the  
19 recovery of human remains and archaeological resources must be performed by the Tribe. The Tribe  
20 entered into two reimbursement for services agreements with the City which obligate the Tribe to perform  
21 certain activities in accordance with the permits and which obligate the City to reimburse the Tribe for  
22 certain out-of-pocket expenses associated with those activities. As of April 2013, the City had paid the  
23 Tribe approximately \$611,000 under the reimbursement for services agreements. However, the  
24 archaeological work is ongoing and the Tribe and its members have sustained significant additional  
25 damages for which the City has not reimbursed or compensated the Tribe and for which the City is not  
26 legally obligated to reimburse the Tribe under either of the reimbursement for services agreements. The  
Tribe has had preliminary conversations with the City about the possibility of the City conveying the Old  
City Shop site to the Tribe for the purposes of reburial. However, the Tribe and the City have no agreement  
regarding the conveyance of land or reburial.



1           5.3.2       Whether the Defendants breached contractual obligations for  
2 which the Plaintiffs herein are Third Party Beneficiaries;

3           5.3.3       Whether the Defendants violated the provisions of IGRA, Ch.  
4 27.44 RCW;

5           5.3.4       Whether the Defendants violated the provisions of the Shoreline  
6 Management Act, RCW 90.58.010 et seq.;

7           5.3.5       Whether the Defendants committed the tort of intentional infliction  
8 of emotional distress, including the tort of outrage;

9           5.3.6       Whether the Defendants committed the tort of interference with a  
10 dead body;

11          5.3.7       Whether the Defendants committed the tort of negligent infliction  
12 of emotional distress;

13          5.3.8       Whether the Defendants breached their duties to the Plaintiffs by  
14 falling below the standard of care necessary to conduct the work described in this  
15 Complaint;

16          5.3.9       Whether the Plaintiffs suffered compensable injuries and are owed  
17 damages as a proximate result of the Defendants' breach of contract and breach of  
18 statutory and common law duties as described herein;

19          5.3.10      What is the nature and extent of individual and Class-wide injuries  
20 and the measure of compensation for such injuries; and

21          5.3.11      Whether the defendants are liable to Plaintiffs for punitive  
22 damages under IGRA.

23 The common questions of fact include:  
24

1           5.3.12     Whether Defendants knowingly removed, mutilated, defaced,  
2 injured, or destroyed any cairn or grave of any native Indian, or any glyptic or painted  
3 record of any tribe or peoples;

4           5.3.13     Whether Defendants knew or should have known the high  
5 likelihood of encountering Indian burials in the course of Project construction;

6           5.3.14     Whether Defendants disturbed Indian burials through accident or  
7 inadvertence;

8           5.3.15     Whether Defendants' acts were willful or intentional;

9           5.3.16     Whether Defendants made reasonable efforts to preserve the  
10 remains, glyptic, or painted records, or artifacts if such remains, glyptic, or painted  
11 records, or artifacts were accidentally disturbed or discovered;

12          5.3.17     Whether Defendants properly reported the discovery or  
13 disturbance;

14          5.3.18     Whether Defendants notified the coroner and local law  
15 enforcement in the most expeditious manner possible upon discovery of skeletal human  
16 remains;

17          5.3.19     Whether defendants reported the presence and location of the  
18 remains to the coroner and local law enforcement in the most expeditious manner  
19 possible;

20          5.3.20     Whether Defendants timely notified the Tribe of the remains;

21          5.3.21     Whether defendants immediately ceased ground disturbing  
22 activities upon discovery of skeletal human remains;

23          5.3.22     Whether defendants made a reasonable effort to protect the area  
24 from further disturbance;

1           5.3.23     Why Defendants failed to consult with the Tribe during the  
2 planning and excavation process;

3           5.3.24     Why Defendants decided not to hire an archaeologist as promised  
4 to the State of Washington; and

5           5.3.25     Whether the Defendants' decision to not hire an archaeologist as  
6 promised to the State of Washington was a proximate cause of the harm, losses, damages,  
7 and suffering sustained by Plaintiffs.

8           5.4     Typicality. The claims of the representative Plaintiffs are typical of the  
9 claims of the Class. The representative Plaintiffs' claims, like the claims of the Class,  
10 arise out of the same common course of conduct by Defendants and are based on the  
11 same legal and remedial theories.

12          5.5     Adequacy. The representative Plaintiffs will fairly and adequately protect  
13 the interests of the Class. The Tribe and representative Plaintiffs have retained competent  
14 and capable attorneys who are experienced trial lawyers with significant experience in  
15 complex and class action litigation. The Tribe and representative Plaintiffs and their  
16 counsel are committed to prosecuting this action vigorously on behalf of the Class and  
17 have the financial resources to do so. Neither the Tribe nor the representative Plaintiffs  
18 nor their counsel have interests that are contrary to or that conflict with those of the  
19 proposed Class.

20          5.6     Predominance. The common issues arising from Defendants' conduct  
21 that affected the Tribe, the representative Plaintiffs, and proposed Class members  
22 predominate over any individualized issues. Adjudication of these common issues in a  
23 single action has important and desirable advantages of judicial economy.



1 graves was not “unexpected” in the least. It was well known or should have been well  
2 known to the Defendants that:

3 6.4.1 They were conducting earth removal operations in an area  
4 designated as an archeological site;

5 6.4.2 Where a former historical village of the Lower Skagit and  
6 Swinomish people was located;

7 6.4.3 Where Indian burials and cultural and archeological resources had  
8 been uncovered on a number of prior occasions;

9 6.4.4 Where construction activities would dig to a substantial depth;

10 6.4.5 Where Defendants willfully chose to proceed with ground breaking  
11 activities without implementing the procedures recommended by DAHP and one or more  
12 of the Defendants themselves in order to avoid or mitigate harm to Indian burials and  
13 cultural and archaeological resources;

14 6.4.6 Where Defendants knew that the discovery of human remains and  
15 cultural and archaeological resources and their removal or destruction would likely occur;  
16 and

17 6.4.7 Where Defendants knew that if human remains or cultural or  
18 archaeological resources were discovered, the Project would likely be shut down at a  
19 considerable financial loss to the Defendants. This knowledge gave the Defendants a  
20 financial incentive not to employ an archeologist at the site to ascertain the presence of  
21 shell midden, burial artifacts and human remains there prior to large scale construction  
22 and digging activities.

23 6.5 City Engineer Eric Johnston admitted on June 16, 2011 “that Island  
24 County has a pretty extensive history of tribal interactions .... I've heard that it's one of

1 the highest concentrations of Native American sites in the state of Washington.” This  
2 information was known or should have been known to the Defendants prior to the onset  
3 of Project construction activities.

4 6.6 Defendants failed to properly and timely notify the coroner, local law  
5 enforcement, DAHP, and the Tribe that Project activities had unearthed Indian graves and  
6 failed to halt Project construction upon discovery that Indian graves were present and had  
7 been removed, mutilated, defaced, injured, or destroyed.

8 6.7 The wrongful acts of each of the Defendants, and the Defendants acting in  
9 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
10 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
11 for which Defendants are jointly and severally liable.

12 6.8 The Defendants’ actions as alleged were willful, subjecting Defendants to  
13 punitive damages under IGRA.

14 **VII. SECOND CLAIM FOR RELIEF**  
15 **(Breach of Contract)**

16 7.1 Plaintiffs re-allege and incorporate by reference each and every allegation  
17 set forth in the preceding paragraphs.

18 7.2 Defendants breached contractual obligations for which the Plaintiffs  
19 herein are Third Party Beneficiaries.

20 7.3 Among other things, the City promised to hire an archeologist to conduct  
21 testing, prepare an Inadvertent Discovery Plan, and monitor Project construction  
22 activities. Its failure to do so was a breach of contract that caused damage and harm to  
23 the Plaintiffs.



1 7.4 Plaintiffs are third party beneficiaries to contracts between the City and its  
2 contractors, including Defendants Strider, Perteet, and KBA. Performance of the  
3 contracts, including having an archaeologist on-site as promised, necessarily and directly  
4 benefits and was designed to benefit the Plaintiffs. Recognizing that Plaintiffs have a  
5 cultural, historical, and familial interest in any Indian burials at site 45IS45, compliance  
6 with the Defendants' contractual obligations would have provided that Plaintiffs be  
7 notified of any discoveries of Indian burials in a timely manner. Having an archaeologist  
8 on-site and an Inadvertent Discovery Plan in place would have protected Indian burials  
9 and archaeological artifacts that were of interest to Plaintiffs and would have prevented  
10 the removal, defacement, desecration and destruction of the Plaintiffs' ancestral burials.

11 7.5 The wrongful acts of each of the Defendants, and the Defendants acting in  
12 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
13 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
14 for which Defendants are jointly and severally liable.

15 **VIII. THIRD CLAIM FOR RELIEF**  
16 **(Violations of Shoreline Management Act – RCW 90.58.101 et seq.)**

17 8.1 Plaintiffs re-allege and incorporate by reference each and every allegation  
18 set forth in the preceding paragraphs.

19 8.2 Defendants violated the provisions of the Shoreline Management Act,  
20 RCW 90.58.010 et seq.

21 8.3 The wrongful acts of each of the Defendants, and the Defendants acting in  
22 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
23 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
24 for which Defendants are jointly and severally liable.

1                                   **IX. FOURTH CLAIM FOR RELIEF**  
2                                   **(Intentional Infliction of Emotional Distress and Outrage)**

3           9.1    Plaintiffs re-allege and incorporate by reference each and every allegation  
4 set forth in the preceding paragraphs.

5           9.2    Defendants committed the tort of intentional infliction of emotional  
6 distress, including the tort of outrage. Defendants' actions and conduct was so extreme  
7 as to offend basic notions of human dignity and cultural sensitivity.

8           9.3    The wrongful acts of each of the Defendants, and the Defendants acting in  
9 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
10 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
11 for which Defendants are jointly and severally liable.

12                                   **X. FIFTH CLAIM FOR RELIEF**  
13                                   **(Negligent Infliction of Emotional Distress)**

14           10.1   Plaintiffs re-allege and incorporate by reference each and every allegation  
15 set forth in the preceding paragraphs.

16           10.2   Defendants committed the tort of negligent infliction of emotional distress.

17           10.3   The wrongful acts of each of the Defendants, and the Defendants acting in  
18 concert, were a proximate cause of significant emotional distress, depression, sadness,  
19 anxiety, loss or injury the Tribe, representative Plaintiffs, and proposed Class members  
20 have suffered as alleged herein, for which Defendants are jointly and severally liable.

21                                   **XI. SIXTH CLAIM FOR RELIEF**  
22                                   **(Negligence)**

23           11.1   Plaintiffs re-allege and incorporate by reference each and every allegation  
24 set forth in the preceding paragraphs.

1 11.2 Defendants breached their duties to the Plaintiffs by falling below the  
2 standard of care necessary to plan, manage and conduct the work described of this Project  
3 as described in this Complaint.

4 11.3 The wrongful acts of each of the Defendants, and the Defendants acting in  
5 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
6 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
7 for which Defendants are jointly and severally liable.

8 **XII. SEVENTH CLAIM FOR RELIEF**  
9 **(Tortious Interference with a Dead Body)**

10 12.1 Plaintiffs re-allege and incorporate by reference each and every allegation  
11 set forth in the preceding paragraphs.

12 12.2 Defendants committed tortious interference with dead bodies.

13 12.3 The wrongful acts of each of the Defendants, and the Defendants acting in  
14 concert, were a proximate cause of injuries, harm, loss and damages the Tribe,  
15 representative Plaintiffs, and proposed Class members have suffered as alleged herein,  
16 for which Defendants are jointly and severally liable.

17 **XIII. EIGHTH CLAIM FOR RELIEF**

18 **(Violation of RCW 70.58.230 – Permits for burial removal)**

19 13.1 Plaintiffs re-allege and incorporate by reference each and every allegation  
20 set forth in the preceding paragraphs.

21 13.2 Each of the Defendants, and the Defendants acting in concert, disposed of,  
22 or disinterred or removed from one registration district to another, the human remains of  
23 persons whose death occurred in this state or human remains found in this state, without  
24 obtaining, from the local registrar of the district in which the death occurred or in which

1 the human remains were found, a permit for the burial, disinterment, or removal of the  
2 human remains. As such the each of the Defendants, and the Defendants acting in  
3 concert, violated RCW 70.58.230 which violation constitutes a breach of the standard of  
4 care Defendants owed to Plaintiffs.

5 13.3 The violation of this statute and the breach of this standard of care by each  
6 of the Defendants, and the Defendants acting in concert, were a proximate cause of  
7 injuries, harm, loss and damages that the Tribe, representative Plaintiffs, and proposed  
8 Class members have suffered as alleged herein, for which Defendants are jointly and  
9 severally liable.

#### 10 XIV. PRAYER FOR RELIEF

11 WHEREFORE, the Tribe, on its own behalf and as *parens patriae* on behalf of all  
12 enrolled members of the Tribe, and Larry Campbell, Chester Cayou Jr., M. Brian  
13 Cladoosby, Debbie Fernando, and Lorraine Loomis, individually and on behalf of a  
14 proposed Class of all enrolled members of the Tribe similarly situated, pray for judgment  
15 against Defendants as follows:

16 14.1 Certification of the proposed Class;

17 14.2 A declaration that Defendants are financially responsible for noticing all  
18 members of the proposed Class;

19 14.3 Appointment of Plaintiffs Campbell, Cayou, Cladoosby, Fernando, and  
20 Loomis as representatives of the Class;

21 14.4 Appointment of Michael Withey and Law Offices of Michael Withey as  
22 counsel for the Class;

23 14.5 A declaration that Defendants' actions complained of herein violated  
24 IGRA, RCW 27.44.010 *et seq.*;

1 14.6 A declaration that Defendants' actions complained of herein violated the  
2 Shoreline Management Act, RCW 90.58.010 *et seq.*;

3 14.7 A declaration that by their actions complained of herein, Defendants  
4 committed the torts of intentional infliction of emotional distress, including the tort of  
5 outrage, negligent infliction of emotional distress, tortious interference with a dead body,  
6 and negligence;

7 14.8 A declaration that Defendants' actions complained of herein violated  
8 RCW 70.58.230;

9 14.9 An award of compensatory, exemplary, and punitive damages in an  
10 amount to be proven at trial;

11 14.10 An award of attorneys' fees and costs, as allowed by law;

12 14.11 An award of prejudgment and post-judgment interest, as allowed by law;

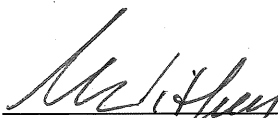
13 14.12 Leave for Plaintiffs to amend the Complaint to conform to the evidence  
14 presented at trial; and

15 14.13 Such other and further relief as the Court deems necessary, just, and  
16 proper.

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19

DATED this 10th day of June, 2013.

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MICHAEL E. WITHEY, WSBA # 4787  
LAW OFFICES OF MICHAEL WITHEY, PLLC  
Counsel for Plaintiffs

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/s/ Emily Hutchinson Haley  
EMILY HALEY, WSBA #38284  
SWINOMISH INDIAN TRIBAL COMMUNITY  
Counsel for Plaintiff Swinomish Indian Tribal  
Community

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**CERTIFICATE OF SERVICE**

I certify under the laws of the State of Washington that on this 10th day of June, 2013, I caused to be served a copy of CLASS ACTION COMPLAINT upon the below-listed party by the method indicated:

Perteet, Inc.  
Crystal Donner, Registered Agent  
2707 Colby Ave, Suite 900  
Everett, WA 98201-3565  
T: (206) 436-0515

- Via Washington Legal Messengers
- Via U.S. Mail
- Via Email
- Personal service**

Strider Construction Co., Inc.  
Mark A. Lackey, Registered Agent  
900 Dupont St.  
Bellingham, WA 98225  
T: (360) 380-1234

- Via Washington Legal Messengers
- Via U.S. Mail
- Via Email
- Personal service**

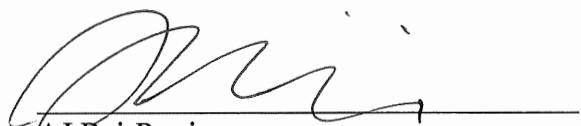
KBA, Inc.  
Kristen A. Betty, Registered Agent  
11000 Main St.  
Bellevue, WA 98004  
T: (425) 455-9720

- Via Washington Legal Messengers
- Via U.S. Mail
- Via Email
- Personal service**

City of Oak Harbor  
Larry Cort, City Administrator  
865 SE Barrington Drive  
Oak Harbor, Washington 98277  
T: (360) 279-4501

- Via Washington Legal Messengers
- Via U.S. Mail
- Via Email
- Personal service**

DATED this 10th day of June, 2013.

  
AJ Rei-Perrine