Michael J. Gearin, WSBA # 20982
David C. Neu, WSBA # 33143
Brian T. Peterson, WSBA # 42088
K&L GATES LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
(206) 623-7580

Honorable Christopher M. Alston
Chapter 11
Hearing Location: Seattle, Rm. 7206
Hearing Date: Friday, November 22, 2019
Hearing Time: 9:30 a.m.
Response Date: November 15, 2019

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: NORTHWEST TERRITORIAL MINT, LLC, Debtor.	Case No. 16-11767-CMA TRUSTEE COUNSEL'S MOTION TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ORDER ON FEE APPLICATIONS

I. INTRODUCTION

K&L Gates LLP ("K&L Gates" or "Trustee Counsel"), counsel for the Chapter 11 Trustee for Northwest Territorial Mint, LLC (the "Trustee"), respectively moves this Court pursuant to Rule 7052 and Rule 9023 of the Federal Rules of Bankruptcy Procedure to alter or amend its findings of fact and conclusions of law, set forth in its *Order on Fee Applications of Trustee, Cascade Capital Group, LLC, K&L Gates, and Miller Nash Graham & Dunn* (the "Fee Order") (Dkt. No. 2118). The Court appears to have misapprehended and\or overlooked factual matters that were before it in connection with the Fee Order. In addition, the Court disallowed significant fees earned by Trustee Counsel and sought in K&L Gates's First Application for Compensation ("KLG Fee Application") *sua sponte*, without permitting Trustee Counsel an opportunity to submit evidence to address the Court's concerns that formed the basis of such disallowance.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

II. ARGUMENT

A. FRBP 7052 and 9023 Authorize the Court to Alter its Findings and Amend its Fee Order

Rule 59(e), made applicable to these proceedings by Fed. R. Bankr. P. 9023, permits the filing of a motion to alter or amend judgment. Such motion may be granted "(1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence; (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law." *Allstate Ins. Co. v. Herron*, 634 F.3d 1101, 1111 (9th Cir. 2011). A prior decision by a court should be reconsidered "where it appears [the Court] has overlooked or misapprehended some factual matter that might reasonably have altered the result reached by the Court." *Official Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.)*, 437 B.R. 488, 490 (Bankr. D. Del. 2010).

Rule 52(b) of the Federal Rules of Civil Procedure, applicable here pursuant to Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure, provides that "[o]n a party's motion . . . , the court may amend its findings -- or make additional findings -- and may amend the judgment accordingly." Amendment under Rule 52(b) is proper for the same reasons that justify relief pursuant to Rule 59(e). *Houston General Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 2013 WL 4809274, at *1 (W.D. Wash. Sept. 9, 2013). Relief is also appropriate where a court fails to "make findings of fact germane to" an issue raised by the parties. *In re Perotti*, 07-bk-01889, 2008 WL 5158275, at *1 (Bankr. M.D. Pa. Oct. 22, 2008), and otherwise to "correct . . . an obvious oversight." *In re Kora & Williams Corp.*, No. 88-41402, 2007 WL 1073994, at *1 (Bankr. D. Md. Feb. 2, 2007).

As discussed below, the Court appears to have overlooked material evidence and authority that supports Trustee Counsel's request for fees that were disallowed by the Court. Accordingly, Fed. R. Bank. P. 7052 and Fed. R. Bankr. P. 9023 authorize the Court to revisit Trustee Counsel's

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

fee request and alter or amend the Fee Order.

B. Complexity of and Value to the Estate

The Trustee and his professionals have administered an extraordinarily complicated estate.[1] Yet while this bankruptcy had its challenges, the Trustee succeeded in distributing more than $29.7 million in operating expenses and payments on secured and administrative claims for the benefit of creditors during the case through August, 2019. *See* Dkt. No. 1927 at ¶ 6, Monthly Operating Reports for November 2018 through August 2019.

C. Fees Disallowed: Identification of Timekeepers

In the Fee Order the Court disallowed all fees requested for timekeepers who the Court stated were not identified by Trustee Counsel, with the exception of time rendered by Mr. Wyant. *See* Fee Order, p. 65, n.12. This was the sole basis for the Court disallowing $193,739 in attorneys' fees[2] for services provided by Trustee Counsel. The Court also disallowed an additional $269,937.01 in electronic discovery fees and costs based, in part, on the timekeeper issue, and in part on the view that Trustee Counsel did not divide "legal services into categories as required by the Local Rules." Fee Order, p. 73.

Local Bankruptcy Rule 2016-1, provides that a fee application for chapter 11 estate professionals shall be accompanied by an affidavit or declaration containing, among other things, "an itemized time record of services for which an award of compensation is sought, including (A) the date the service was rendered; (B) the identity of the person who performed the service and the hourly rate of such individual . . ." LBR 2016-1(6). The KLG Fee Application was supported by

[1] The estate held assets that were inherently difficult to administer: precious metals that require extraordinary security and recordkeeping measures, customer records, artwork, and thousands of custom dies. The business operations of the Debtor initially included more than 240 employees in seven locations across the country. There were competing claims to ownership of significant aspects of the estate's assets. There were precious metals owned by customers that were in the possession of the Debtor, which required extensive research to identify and return. There is a large and active creditor body. There are over 2100 docket entries, K&L Gates filed over 580 pleadings, and there were five adversary proceedings and 15 litigation matters which were active when the case was filed.

[2] The Court held multiple hearings on the KLG Fee Application. No objection was ever made by a party-in-interest to Trustee Counsel's specificity (or lack thereof) of timekeepers.

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SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

the Declaration of Michael J. Gearin. *See* Dkt. No. 1929 ("Gearin Decl."). Exhibit B of the Gearin Decl. includes itemized time records supporting the attorneys' fees requested. At the end of each invoice, there is a "Timekeeper Summary," which contains a list of the professionals and their respective hourly rates charged during the relevant period. As such, the KLG Fee Application[3] *did* identify relevant timekeepers and their respective hourly rates, and met all requirements of the relevant local rule.

We now understand that the Court prefers that Trustee Counsel identify all timekeepers in the body of the KLG Fee Application/Declaration, as opposed to in the invoice summaries. As Trustee Counsel was unaware of this preference before entry of the Fee Order, it is unduly harsh for the Court to disallow hundreds of thousands of dollars of attorneys' fees for services provided by Trustee Counsel on that basis. To the extent that the Court believes that the information provided by Trustee Counsel initially was insufficient, Trustee Counsel respectfully submits that in fairness the Court should amend its findings of fact and conclusions of law to reflect the submission of detailed timekeeper information in the accompanying declarations of Michael J. Gearin ("Gearin Supp. Decl.") and Rachel M. Tausend ("Tausend Decl."), and should further amend the Fee Order to allow the fees of Trustee Counsel's additional timekeepers.

D. Costs Disallowed: Extraordinary Expenses

The Court denied the following expenses on the grounds that they were "extraordinary," without adequate documentation for reimbursement of these expenses (Dkt. No. 2118 at 74):

BAE Systems	$13,293.05	Gearin Supp. Decl. at 6
CD Roms	$3,275.00	Gearin Supp. Decl. at 7
Court Reporter Fees[4]	$19,990.00	Gearin Supp. Decl. at 8
Electronic Discovery	$15,600.00	Tausend Decl. at 5
Westlaw	$67,000.00	Gearin Supp. Decl. at 10

[3] As the Court noted, K&L Gates has followed different formats in submitting its fee applications in other chapter 11 cases, including providing a list in the body of the application or declaration, as well as relying on the timekeeper summary at the end of the invoices. We used the format of our previously filed application in *In re Natural Molecular Testing Corp.*, Case No. 13-19298-MLB (Bankr. W.D. Wash.), including the Declaration of Michael J. Gearin filed therein at Dkt. No. 791 as our template for the applications in this case.

[4] Category: Charge for Transcripts.

K&L GATES LLP
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SEATTLE, WASHINGTON 98104-1158
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FACSIMILE: (206) 623-7022

Total Disallowed $119,159.00 (actual amount $119,158.05)

As set out in detail in the Gearin Supp. Decl. and the Tausend Decl., these costs were reasonable and necessary to the administration of the estate and the Court in fairness should amend its findings of fact and conclusions of law to reflect the submission of this information, and amend the Fee Order to allow these costs.

E. Reductions to Fees and Costs related to Preservation of Dayton Lease

The Court disallowed significant fees related to Trustee Counsel's efforts to preserve, secure for the estate, assume and determine cure costs for the Dayton Lease. The disallowed fees in this category total $192,367.50. The Court disallowed these fees and costs because the Court believed that the Trustee was seeking to assume a "bad lease." As more fully described below, the Dayton Lease was essential to the Trustee's efforts to preserve value for the bankruptcy estate. The business operations of the estate were consolidated in Dayton, and any reorganization was premised upon operations at that facility. The Dayton Lease was necessary even in liquidation, as the majority of the valuable manufacturing equipment, dies and other hard assets were located there and the costs of removing those tangible assets from the facility would have been enormous. As the fees incurred in preserving this lease were necessary, Trustee Counsel requests that the Court amend the Fee Order to allow these fees.

F. Additional Reductions Based on What the Court Deemed "False Narratives"

In the Fee Order, the Court, after reviewing and applying reductions to each category for allowed fees, reduced by an additional 50% the total amount of Trustee Counsel's request for compensation that it determined was "otherwise allowable." The Court did so on the basis that Trustee Counsel advanced what it termed were "false narratives." To be clear, at no time did any lawyer from K&L Gates ever intend to present "false narratives" to, or otherwise mislead, the Court.[5] Trustee Counsel is deeply troubled by the view expressed by the Court that it intentionally

[5] As was specifically noted by the Court. (Dkt. No. 2118 at 84) Trustee Counsel has an impeccable reputation before the Court. Attorney Michael Gearin, has practiced before this Bankruptcy Court for 28 years, without suggestion of any

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

furthered false narratives, and respectfully requests that Court take notice of the following facts from the record that the Court may have overlooked or did not initially consider, which warrant amendment of the Fee Order.

1. The "Break-Up" Fees

The Court determined that it was improper for Trustee Counsel to "fil[e] a strident objection to a break-up fee request knowing that the Trustee had encouraged the request." The Court's findings and conclusions that the Trustee and Trustee Counsel acted improperly with respect to the break-up fee request are not supported by the record, but rather are contradicted by overwhelming evidence. The Court seems to rely entirely on its reading of the Trustee's June 20, 2016 email to Tom Tucker, subscribing a nefarious intent to the Trustee's statement in that email indicating he could compromise Tucker and Larry Cook's claim in the event that they filed support for their break-up fee request with the Court. This email must be considered in its context. The claim that the Trustee referenced in the email had previously been asserted by Tucker/Cook and they had retained counsel to pursue such claim. Trustee Counsel did not violate any duty, or otherwise act improperly by filing a brief opposing the break-up fee request of more than $25,000 when no compromise was consummated between the Trustee and Tucker/Cook.

The Trustee never encouraged break-up claimants Tucker/ Cook to file an inflated or "phony" claim. While the June 20, 2016 email may not be a model of clarity (as is often the case with email), a review of the complete record demonstrates the actual context of the email – that it was part of the negotiation with Tucker/Cook to reach a compromise on the break-up fee claim they had previously asserted. The evidence in the record demonstrates the following:

- On May 6, 2016, the Trustee sought approval of a $25,000 break-up fee for Tucker/Cook in connection with the Trustee's Motion to Approve Sale of Graco Related Assets. Dkt. No. 200 (the "Sale Motion").
- On May 27, 2016, during negotiations of the Graco sale, Cook stated in an email that

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ethical impropriety or sanction by any court. Other members of the firm have similarly practiced before this Court with consistent ethical probity for many years.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

the Trustee's evaluation of the Tucker/Cook stalking-horse bid should include consideration of $53,333 for the break-up fee "that would be applicable" if Tucker/Cook were selected as the successful bidder". Dkt. No. 1922, Ex. A.

- On June 2, 2016, the Court approved the sale of the Graco assets to a competing bidder, Ira Green. Dkt. No. 374.
- On June 2, 2016, Trustee Counsel wrote an email to Tucker stating that the Court indicated during the sale hearing that it would need evidence of actual expenses incurred before approving the break-up fee. Trustee Counsel told Tucker that the Trustee would only support a request for the $25,000 fee described in the Sale Motion. Trustee Counsel stated that if Tucker/Cook wanted to seek approval of a higher amount, they would need to retain counsel. Tucker and Cook both responded. They were upset and indicated that they had a different understanding of the amount to which they were entitled based on conversations with the Trustee. Dkt. No. 1922, Ex. B.
- On June 9, 2016, Cook emailed the Trustee and informed him that he had retained counsel to represent Tucker/Cook in connection with the "break-up fee, among other matters." Dkt. No. 1922, Ex. C.
- On June 10, 2016, Trustee Counsel had a conversation with counsel for Tucker/Cook, Mr. Pharris, in which Mr. Pharris informed Trustee Counsel that his clients were seeking $52,000 – $53,000 for a break-up fee. Dkt. No. 1922, ¶ 5.
- On June 20, 2016, the Trustee told Tucker/Cook that their attorney needed to file a request for $56,000 with a supporting affidavit, in which case he would agree to support a request of $30,000. Dkt. No. 495, Ex. B. As the Trustee later explained, his email was a suggestion as a means to compromise a claim that Tucker/Cook had asserted since at least the end of May, 2016. Dkt. No. 1921, ¶ 19. The compromise on the break-up fee was not consummated. *Id.* at ¶ 21.
- On June 23, 2016, RETT, LP, an entity controlled by Tucker and the landlord for the Debtor at the Graco facility, moved for relief from the automatic stay and sought allowance of an administrative expense in the total amount of $75,426.77. Dkt. No. 439.
- On July 1, 2016, counsel for Tucker/Cook filed a memorandum in support of its request for a break-up fee, asking this Court for $52,111.14, plus costs and attorney's fees in an amount not to exceed $6,000. Dkt. No. 479.
- On July 5, 2016, Trustee Counsel filed a brief on behalf of the Trustee objecting to a break-up fee award in any amount over $25,000. In that brief, the Trustee Counsel stated on behalf of the Trustee that "[t]he Trustee continues to support an award of $25,000 to Tucker/Cook in fulfillment of his commitment, but does not support any additional amounts." Dkt. No. 488, p. 3.

The Court declined to rule on the break-up fee request and scheduled an evidentiary hearing

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

to resolve the break-up fee issue and RETT, LP's request for allowance of administrative expenses. The Trustee attempted to compromise, in advance of the scheduled evidentiary hearing, the issue of the break-up fee and all other issues between Tucker/Cook, RETT, LP, and the Trustee which included the administrative claims asserted by RETT, and moved the Court to approve the terms of a global settlement agreement. *See* Dkt. No. 799. In its Fee Order, the Court described viewing the Trustee's settlement motion "as a thinly-veiled attempt by the Trustee to deliver the break-up fee he had promised." Fee Order, p. 7. In fact, the Trustee's declaration in support of the settlement motion made it clear that he viewed the estate's exposure with respect to claims asserted by RETT, LP, and Tucker/Cook as exceeding $80,000. The Trustee stated "[o]f the total amount of the estate's exposure, $25,000 represents the amount of the break-up fee that I committed to supporting in connection with the Graco Sale Motion." Dkt. No. 801, ¶ 11. This had been the Trustee's position all along.

The Trustee's failed attempt to compromise the claim at one point for $30,000 does not rise to a breach of any duty by the Trustee, and Trustee Counsel's objection to the claim certainly did not violate any duty to the estate. The foregoing chronology is entirely consistent with the Trustee's explanation of the June 20, 2016 email as set forth in Paragraphs 18 through 22 of his declaration filed at Docket No. 1921.

Trustee Counsel has consistently and genuinely argued to this Court that any break-up fee to which Tucker/Cook were entitled should not be more than the $25,000 that the Trustee committed to supporting in the Sale Motion. Trustee Counsel specifically told Tucker/Cook to engage their own counsel to the extent they sought more, objected to an allowance of amounts in excess of $25,000, and filed a motion seeking approval of the Trustee's proposed settlement on the same basis. In view of the foregoing uncontested facts, the Court should alter or amend its findings of fact and conclusions of law to reflect that Trustee Counsel did not advance a "false narrative" with respect to the break-up fee.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

2. Administrative Insolvency Statements

In the Fee Order, the Court suggests that because the Trustee and Trustee Counsel presented what it characterized as "inconsistent" statements regarding the administrative insolvency of the estate, Trustee Counsel had advanced false narratives to the Court regarding the administrative solvency of the estate. The Court pointed to the statements made by Trustee Counsel at the February 3, 2017 hearing on the motion to appoint Chief Executive Officer Bill Atalla as compared to statements made by Trustee Counsel at the December 7, 2018 hearing on the motions to approve fee applications. Trustee Counsel did not and would not misrepresent facts to the Court and submits that the record does not support any such finding of a false narrative regarding administrative solvency of the estate.

3. The Reductions to Fees and Costs related to Preservation of Dayton Lease

Trustee Counsel never advanced a false narrative with respect to the Dayton Lease. The Court states in the Fee Order that "after repeatedly asserting that acquiring the Dayton Lease was critical to the success of the case, [Trustee Counsel] later argued that the Dayton Lease was 'bad' and the Trustee had a better option." Fee Order, p. 83. The facts do not support the conclusion that Trustee Counsel made such a misrepresentation.

The Court's determination appears to be based on a false premise: that a Trustee cannot determine that it is necessary to assume a "bad" lease. A Trustee can, as was true in this case: the Dayton Lease was both be "bad" because it does not have ideal characteristics (e.g., its rental rate is "above market" or the lease is for more space than necessary) *and* be necessary and critical to success of the case because the Trustee cannot afford to move and would otherwise have to shut the business down if he did not assume the lease. The Trustee sought and obtained this Court's approval for assumption of the Dayton Lease, because, although it was "bad," the facility was home to the principal manufacturing operations of the business, he did not have the working capital to move elsewhere, and the facility was necessary to any hope of reorganization.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

The Trustee Counsel consistently maintained the view that it was necessary for the Trustee to assume the Dayton Lease. Trustee Counsel has reviewed the tape of the evidentiary hearing on the Dayton Lease cure costs. Trustee Counsel never argued during the evidentiary hearing on cure costs, as the Fee Order states, that the Trustee "had a better option" and would have moved to an alternative space if not for the Hoff agreement. What Trustee Counsel *did* say was that before the Trustee moved to assume the Dayton Lease, the Trustee considered whether to move out, and that in order to make his decision to assume the Dayton Lease, the Trustee needed certainty with respect to the cure costs associated with the Dayton Lease. *This is consistent with the ultimate conclusion that the Trustee reached: that it was necessary to assume the Dayton Lease and that it was too expensive to move to an alternative location.*

The Court cites to statements purportedly made during the evidentiary hearing on the issue of the amount of cure costs that were owed.[6] Trustee Counsel did not state that the Trustee had an alternative space he could lease that was a better option than the existing Dayton Lease. In fact, Trustee Counsel specifically stated the following with respect to why the Trustee reached an agreement with the Hoffs regarding cure items under the Dayton Lease:

> The reason the Trustee made that agreement was because he had a very difficult decision to make: On the one hand, this was a bad lease. It's overvalued. He didn't need the space, as much space as they had, and he was strongly considering moving out. ***On the other hand, he's got the issue of the move-out cost being very significant and virtually impossible with the amount of money he had at the time***.
> So he needed to get certainty on the list of defaults for the assumption of the motion and what those were.

Gearin Supp. Decl., Ex. A-17-18, Draft Partial Tr., June 30, 2017 at p. 16 ln. 24 - p. 17 ln. 9. (emphasis added). [7]

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[6] Assumption of the Dayton Lease had already been approved by this Court well before the trial commenced. In approving the assumption of the Dayton Lease, the Court specifically found that such assumption was in the best interests of the estate and its creditors. *See* Order Granting Trustee's Motion to Assume Lease for Dayton Facility, Dkt. No. 1018. What *was* at issue during the trial was the amount of cure costs owed in connection with the assumption that the Court had previously authorized.

[7] See also Draft Partial Tr. July 26, 2017 at p. 57-8 "the Trustee knew he had to assume this lease. He was committed to doing that. It was going to cost him an enormous amount of money to move."

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
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Trustee Counsel did not advance an argument that the Trustee had an alternative to the Dayton Lease or that the Trustee would have moved to another location but for the Hoff agreement.[8] Moreover, the Trustee and Trustee Counsel did not, as the Court suggests in the Fee Order, advance an "estoppel argument." Nowhere in the briefing does Trustee Counsel argue "estoppel." *See* Dkt. Nos. 1115, 1117. The Court, *sua sponte*, asked whether there was an estoppel argument multiple times during the trial. *See, e.g.*, Gearin Supp. Decl., Ex. A-19-20 (the Court stating "that sounds like more of an estoppel . . . which you're free to argue" and Trustee Counsel in response stating "I mean, I think we have the agreement. Right. And we know what the agreement is."). The transcript from the trial reflects that Trustee Counsel was not relying on any estoppel theory. Gearin Supp. Decl., Ex. A-137-38 (Trustee Counsel stating that while there could be an estoppel argument, "I don't think it's an estoppel argument at all" and further stating "I mean, this is a [C]ode issue. This is not a reliance or an estoppel issue.").

In summary, Trustee Counsel's statement that the lease was "bad" was not a misrepresentation of fact to the Court. The statement was true. The Trustee viewed the lease as bad, but he also concluded that he could not afford to move into an alternative space. Thus, the Dayton Lease was critical to achieve a turn-around of the underlying business and to the overall success of the case. The Court should alter its findings of fact and amend its conclusions of law to reflect that Trustee Counsel did not advance a "false narrative" with respect to the Dayton Lease.

Because Trustee Counsel did not advance "false narratives", the Court should set aside its 50% reduction in allowed fees.

[8] Trustee Counsel's arguments during the trial were twofold: (i) an agreement had been reached between the Trustee and the Hoffs as to the cure amounts owed and the Hoffs' breached that agreement; and (ii) the Bankruptcy Code required the Hoffs to assert cure amounts prior to assumption of the Dayton Lease.

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

III. CONCLUSION

For the foregoing reasons, Trustee Counsel requests that the Court amend its findings as contained in the Fee Order and allow additional fees and costs.

Respectfully submitted this 25th day of October, 2019.

K&L GATES LLP

By */s/Michael J. Gearin*
Michael J. Gearin, WSBA #20982
David C. Neu, WSBA #33143
Brian T. Peterson, WSBA #42088
Attorneys for Mark Calvert, Chapter 11 Trustee

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

CERTIFICATE OF SERVICE

The undersigned declares as follows:

That she is a paralegal in the law firm of K&L Gates LLP, and on October 25, 2019, she caused the foregoing document to be filed electronically through the CM/ECF system which caused Registered Participants to be served by electronic means, as fully reflected on the Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed on the 25th day of October, 2019 at Seattle, Washington.

/s/ Denise A. Lentz
Denise A. Lentz

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re: NORTHWEST TERRITORIAL MINT, LLC, Debtor.	Case No. 16-11767-CMA ORDER ON TRUSTEE COUNSEL'S MOTION TO ALTER OR AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW IN ORDER ON FEE APPLICATIONS

THIS MATTER came on before the Court upon the Trustee Counsel's Motion to Alter or Amend Findings of Fact and Conclusions of Law in Order on Fee Applications (the "Motion"). The Court having considered the Motion, the accompanying declarations, any objections and replies thereto, and having heard the argument of counsel:

1. The Court hereby amends its findings and conclusions in the following fashion:

_____

_____

_____

2. The Court hereby awards the following additional fees and costs:

_____

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022

///END OF ORDER///

Presented by:

K&L GATES LLP

/s/ Michael J. Gearin
Michael J. Gearin, WSBA #20982
David C. Neu, WSBA #33143
Brian T. Peterson, WSBA #42088
Attorneys for Mark Calvert, Chapter 11 Trustee

K&L GATES LLP
925 FOURTH AVENUE
SUITE 2900
SEATTLE, WASHINGTON 98104-1158
TELEPHONE: (206) 623-7580
FACSIMILE: (206) 623-7022