FILED
SUPREME COURT
STATE OF WASHINGTON
4/22/2020 4:42 PM
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98450-6

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 79152-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JENNIFER L. HABU and RICHARD Y. CHINN, husband and wife,

Plaintiffs/Appellants,

v.

CONRAD A. TOPACIO, individually, et al.,

Defendants/Respondents.

RESPONDENTS' PETITION FOR REVIEW

CORR CRONIN LLP

Blake Marks-Dias, WSBA No. 28169
Kelly H. Sheridan, WSBA No. 44746
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel: (206) 625-8600
Email: bmarksdias@corrcronin.com
ksheridan@corrcronin.com
Attorneys for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I. IDENTITY OF PETITIONER 1

II. COURT OF APPEALS DECISION 1

III. ISSUE PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 2

V. ARGUMENT 7

A. The Court of Appeals' Decision Disregards Prior Precedent of this Court and the Court of Appeals, and Review is Therefore Warranted under RAP 13.4(b)(1) and (2) 7

i. The CR 2A Agreement is binding and enforceable notwithstanding the fact that it contemplates the subsequent execution of a more formal written agreement 8

ii. The CR 2A Agreement is binding and enforceable notwithstanding the fact that it contains agreements to negotiate certain additional terms 10

B. If permitted to stand, the Court of Appeals' Decision Would Undermine Washington's Strong Public Policy Favoring the Enforcement of Settlements, and Review is Therefore Warranted under RAP 13.4(b)(4) 15

VI. CONCLUSION 18

TABLE OF AUTHORITIES

Washington Cases

Baird v. Baird, 6 Wn. App. 587, 494 P.2d 1387 (1972)…………………..17

Bryant v. Palmer Coking Coal Co., 67 Wn. App. 176,
858 P.2d 1110 (1993)…………………………………………………….11

City of Seattle v. Blume, 134 Wn.2d 243, 947 P.2d 223 (1997)………..….16

Eddleman v. McGhan, 45 Wn.2d 430, 275 P.2d 729 (1954) ……………..11

Howard v. Dimaggio, 70 Wn. App. 734, 855 P.2d 335 (1993)……….16-17

In re Marriage of Ferree, 71 Wn. App. 35, 856 P.2d 706 (1993)…………..8

Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171,
94 P.3d 945 (2004).…………………………….............................12-14

Kirk v. Moe, 114 Wn.2d 550, 789 P.2d 84 (1990)………………………...16

Loewi v. Long, 76 Wash. 480, 136 P. 673 (1913)……………………….8-9

Morris v. Maks, 69 Wn. App. 865, 850 P.2d 1357 (1993).…………...10-11

Naumes, Inc. v. City of Chelan, 184 Wn. App. 927,
339 P.3d 504 (2014)…………………………………………………...16

Seafirst Ctr. Ltd. P'ship v. Erickson, 127 Wn.2d 355,
898 P.2d 299 (1995)…………………………………………………...16

Steele v. Lundgren, 85 Wn. App. 845, 935 P.2d 671 (1997)…………...….16

Stottlemyre v. Reed, 35 Wn. App. 169, 665 P.2d 1383 (1983)…………9-10

Veith v. Xterra Wetsuits, L.L.C., 144 Wn. App. 362,
183 P.3d 334 (2008)…………………………………………...……….11

Statutes and Court Rules

RCW 2.44.010…………………………………..……..……………8, 10

CR 2A……………………………………………………………*Passim*

RAP 13.4…………………………………………………………… *Passim*

I. IDENTITY OF PETITIONER

Respondents CHJ Properties LLC, Conrad Topacio, Hank Jacky, and Jim Koory, and their respective marital communities (collectively, "Petitioners") respectfully petition for review of the Court of Appeals decision identified in Section II.

II. COURT OF APPEALS DECISION

Petitioners seek review of the unpublished decision issued by Division I of the Court of Appeals in *Habu et ux. v. CHJ Properties LLC, et al.* on February 3, 2020 (the "Decision") (attached hereto as Appendix A). On March 23, 2020, Division I of the Court of Appeals denied Petitioners' motion for reconsideration (attached hereto as Appendix B).

III. ISSUE PRESENTED FOR REVIEW

Petitioners respectfully request that the Court grant review of the following issue:

> Is a written settlement agreement negotiated by counsel and personally signed by all parties pursuant to CR 2A binding and enforceable upon all parties, where the agreement sets forth all material terms of the parties' agreement, notwithstanding the fact that it contemplates the subsequent execution of a long-form settlement agreement or that it sets forth the parties' agreement to negotiate on certain additional terms?

IV. STATEMENT OF THE CASE

This dispute arises out of the 2014 purchase and sale of a piece of commercial real estate previously owned by Appellants Jennifer Habu and Richard Chinn. Among other things, Appellants alleged that Petitioners Conrad Topacio, Hank Jacky, and Jim Koory defrauded them in connection with Appellants' 2014 sale of a commercial property in Everett, Washington by hiding the fact that Mr. Jacky and Mr. Koory were involved with Mr. Topacio, who was Appellants' real estate broker, thereby causing Appellants to accept less than the fair market value for the property. *See generally* CP 79-169.

In an attempt to amicably resolve the dispute, the parties engaged in a two-day mediation with retired King County Superior Court Judge Paris Kallas on February 21 and 22 of 2018. CP 658. The negotiations took an extraordinary amount of work by the parties, their attorneys, and Judge Kallas, who collectively spent nearly 24 hours working to secure a finalized deal. After thorough and exhaustive deliberations, the parties memorialized the terms of their settlement in a formal "CR 2A Term Sheet" (the "CR 2A Agreement"). CP 662-65. The CR 2A Agreement was drafted by Appellants' counsel with the understanding that it reflected the key terms and conditions that the parties agreed upon to effectuate their compromise. CP 658, 667-71. The key terms of that compromise are as follows:

- Petitioners will make an initial settlement payment totaling $200,000 to Appellants;
- Upon receipt of that initial settlement payment, Appellants will dismiss all of their claims with prejudice, other than their claims under the Model Toxics Control Act, RCW 70.105D *et seq.* ("MTCA");
- Petitioners and Appellants will then work to market and sell the subject property. Appellants will have direct access to Petitioners' real estate broker, will exercise control over the sale negotiations, and will have the ability to approve "all purchase and sale terms";
- Upon sale of the property, Appellants will receive the first $350,000 of the net sale proceeds after satisfaction of the outstanding debt on the property;
- The remainder of the net sale proceeds, if any, will be disbursed to Petitioners; and
- If the parties are not successful in selling the property after two years, the agreement will effectively terminate and the parties will be free to litigate their respective MTCA claims (all other claims having been dismissed following the initial $200,000 settlement payment).

CP 662-65.

The CR 2A Agreement provides that the parties will "agree to memorialize and use their best efforts to fully execute a final Settlement Agreement within thirty (30) days of the mediation." CP 662. The CR 2A Agreement also sets forth the parties' agreement to negotiate on certain additional terms, including "a reasonable, mutual nondisparagement provision as part of the Settlement Agreement," and provides that in the event a dispute arises regarding the terms of the final settlement agreement, "the parties agree to return to mediation with Judge Kallas to make a good

faith effort to mediate and resolve those disagreements or disputes." CP 664.

When it appeared that the parties would be able to reach a deal on the evening of the second day of mediation, Appellants' counsel prepared and circulated a draft of the CR 2A Agreement to Judge Kallas and counsel for Petitioners. CP 667-71. After additional negotiations, Appellants personally signed the CR 2A Agreement on February 22, 2018 in the presence of their attorney. CP 664. With the exception of the specific amount of the post-sale payment (which was negotiated from $375,000 to $350,000), the framework set forth above remained constant through the parties' final agreement and the provision describing the nature of Petitioners' post-sale payment was carried over verbatim into the signed CR 2A Agreement. *Compare* CP 662-65 at ¶ 17 *with* CP 668-71 at ¶ 17.

The CR 2A Agreement favorably addresses Appellants' claim that they received less than fair market value for the subject property by tying Appellants' recovery directly to the property's sale price. If Petitioners had indeed underpaid for the property in 2014, and the property sells at a windfall, Appellants will receive the first $350,000 of any such windfall. If the property does not sell at a windfall (suggesting that Petitioners did not underpay for it in 2014), Appellants will still have received the initial $200,000 payment in compromise of their claims.

Appellants' counsel agreed to draft and circulate the long-form settlement agreement envisioned by the CR 2A Agreement. After the parties exchanged drafts for nearly two months, and appeared close to reaching a final agreement on the long-form agreement, Appellants' counsel circulated a redline draft of the agreement on June 3, 2018 that contained two significant deviations from the CR 2A Agreement that were not included in the CR 2A Agreement and did not reflect the agreement actually reached by the parties at mediation. CP 658, 673-701. Specifically, Appellants' draft described the post-sale payment of up to $350,000 of the sale proceeds as an unconditional obligation, directly contradicting the CR 2A Agreement's description of such payment. CP 676-77. Appellants' draft also provided that Petitioners would personally guarantee that purported unconditional obligation. *Id.*

Petitioners immediately disputed Appellants' proposed revisions and explained in detail why they deviated from the terms of the CR 2A Agreement. CP 703-07. Despite having personally signed the CR 2A Agreement, Appellants effectively doubled down, claiming that there was "no meeting of the minds" at mediation and that the parties had not reached a binding agreement. CP 703.

Petitioners moved to enforce the CR 2A Agreement, which the trial court granted on September 28, 2018 after an evidentiary hearing. CP 644-

56, 1046-48. The trial court found that the parties entered into a "binding CR 2A settlement agreement" that "does not impose an unconditional obligation on [Petitioners] to pay [Appellants] $350,000" and ordered Appellants to enter into a long-form settlement agreement consistent with the CR 2A Agreement no later than October 18, 2018. CP 1046-48. Appellants moved for reconsideration, which the trial court denied on October 31, 2018. CP 1051-64, 1341-45.

Appellants appealed to the Court of Appeals for Division I on November 1, 2018. CP 1346-48. Reviewing the trial court's decision *de novo*, the Court of Appeals reversed the trial court's finding that the CR 2A Agreement was binding and enforceable on two grounds. First, the Court of Appeals concluded that the February 22, 2018 CR 2A Agreement signed by all parties is an "unenforceable agreement to agree." Appendix A at 12. Second, the Court of Appeals found that the CR 2A Agreement is not enforceable because it leaves several terms open to future negotiation, in essence finding that those terms are material to any agreement between the parties. *See* Appendix A at 11-12.[1] As a result, the Court of Appeals held

[1] "Also, although the term sheet contains many specific provisions that are to be included in the final settlement agreement, it is silent on a number of important issues. The term sheet does not explicitly state which defendants would be responsible for the $200,000 initial payment to Habu and Chinn or what would happen if the sale proceeds were insufficient to provide for the $350,000 payment to Habu and Chinn. It also does not address the disposition of the property if it is not sold within two years of listing or whether the $350,000 would still be owed."

that the trial court "erred in finding the term sheet to be a binding and enforceable settlement agreement and granting the motion to enforce the CR 2A term sheet." *Id.*

Petitioners timely moved for reconsideration on February 24, 2020. After requesting responsive briefings from Appellants, the Court of Appeals denied Petitioners' motion for reconsideration on March 23, 2020. Appendix B.

V. ARGUMENT

A. The Court of Appeals' Decision Disregards Prior Precedent of this Court and the Court of Appeals, and Review is Therefore Warranted under RAP 13.4(b)(1) and (2).

Washington Rule of Appellate Procedure 13.4 provides that the Court will accept discretionary review of a decision of the Court of Appeals terminating review if the decision "is in conflict with a decision of the Supreme Court" or if the decision "is in conflict with a published decision of the Court of Appeals." RAP 13.4(b)(1), (2). Here, the Court of Appeals' Decision reversing the trial court conflicts both with decisions of this Court and the Court of Appeals, and the Court should accept review to reverse the Decision on these bases.

CR 2A mandates that stipulations and agreements will be enforced when they are reduced to writing and signed by the party against whom they are to be enforced:

> No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record, or entered in the minutes, or unless the evidence thereof shall be in writing and subscribed by the attorneys denying the same.

CR 2A; *see also* RCW 2.44.010 (preexisting statute providing for enforcement of written stipulations among parties). Numerous decisions of this Court and the Court of Appeals have applied the plain language of CR 2A to hold that agreements entered into pursuant to CR 2A are enforceable despite the fact that they either contemplated the subsequent execution of a more formal written agreement, or that they contained forward-looking agreements to negotiate additional terms.

i. The CR 2A Agreement is binding and enforceable notwithstanding the fact that it contemplates the subsequent execution of a more formal written agreement.

This Court has expressly held for more than 100 years that contracts like CR 2A agreements can be binding and enforceable despite the fact that they contemplate the subsequent execution of a more formal writing.[2] In the Court's 1913 decision in *Loewi v. Long*, for example, the Court upheld an informal contract for the sale of hops from the Yakima Valley that had

[2] Washington courts view CR 2A agreements as contracts and apply the summary judgment standard in determining whether a disputed agreement is enforceable. *In re Marriage of Ferree*, 71 Wn. App. 35, 39-40, 856 P.2d 706 (1993).

been formed by telegram despite the fact that the purchasing party's final correspondence indicated they would send a more formal contract—which was never signed—the following day. 76 Wash. 480, 483, 136 P. 673 (1913). This Court affirmed the trial court's ruling that a contract had been formed nonetheless, finding that a contract had been formed because the parties had reached an agreement upon all material terms:

> If the subject matter is not in dispute, the terms are agreed upon, and the intention of the parties plain, then a contract exists between them by virtue of the informal writings, *even though they may contemplate that a more formal contract shall be subsequently executed and delivered.*

Id. at 484, 136 P. 673 (emphasis added).

Decisions of the Court of Appeals have also uniformly held that settlement agreements may be enforced, despite the fact that they contemplate the later execution of a more formal written agreement, so long as they set forth the parties' agreement on all material terms. In *Stottlemyre v. Reed*, for example, the plaintiffs in a personal injury action orally accepted a settlement offer from the defendant, but the parties did not reduce their agreement to writing. 35 Wn. App. 169, 171, 665 P.2d 1383 (1983). When the plaintiffs attempted to avoid the settlement, the trial court granted the defendant's motion to enforce the oral agreement. *Id.* Division III of the Court of Appeals affirmed, finding that the agreement's terms were clear and were enforceable despite the parties' contemplation of a subsequent,

formal written agreement:

> *If the intention of the parties is plain and the terms of a contract are agreed upon, then a contract exists, even though one or both of the parties may have contemplated later execution of a writing.* Here the intent of the parties and the terms of the oral settlement agreement were clear. There is no evidence this oral agreement was specifically conditioned on the execution of various written documents. We hold under these facts the court did not err by enforcing the oral agreement between the parties.

Id. at 171-72, 665 P.2d 1383 (emphasis added, internal citation omitted). The Court of Appeals went on to note that "strict compliance" with the predecessor statute to CR 2A, RCW 2.44.010, was not required and that enforcing the agreement was consistent with the public policy of fostering settlements. *Id.* at 173, 665 P.2d 1383 ("[T]he law favors the private settlement of disputes and is inclined to view them with finality." (citation omitted)).

Similarly, in *Morris v. Maks*, Division I of the Court of Appeals upheld an informal settlement effectuated by letters exchanged among counsel despite the fact that the final correspondence from the defendant's attorney contained several additional "clarifying or supplemental points" that the plaintiff argued conflicted with the plaintiff's final correspondence. 69 Wn. App. 865, 867-68, 850 P.2d 1357 (1993). The Court of Appeals rejected the argument that the settlement was not binding, noting that "the fact that the parties contemplated drafting a formal settlement agreement

does not necessarily mean that they intended to be bound only upon execution of that document" and finding that the settlement was binding because "(1) the subject matter was agreement on, (2) the material terms were stated in the letters, and (3) the evidence supports the finding that the parties intended to be bound by the letters." *Id.* at 871-72, 850 P.2d 1357. The only contrary decisions cited by Appellants below all involved oral agreements or purported settlements that did not include express agreement on all material terms.[3]

The Court of Appeals misapplied this precedent and erred in concluding that the CR 2A Agreement was not enforceable because it contemplated the subsequent execution of a more formal, long-form settlement agreement. The CR 2A Agreement expressly sets forth, in mandatory terms, ***all*** of the material obligations to which the parties agreed, including (1) the amount of Petitioners' settlement payment; (2) the timing and nature of Appellants' dismissal of their underlying claims against Petitioners; (3) the terms of the parties' mutual releases; and (4) detailed

---

[3] *See, e.g.*, *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1993) (refusing to enforce oral settlement agreement where material terms were in dispute and agreement was not signed by all parties); *Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 364, 183 P.3d 334 (2008) (no settlement agreement existed where only one party had verbally expressed acceptance; since acceptance was not mutual, acceptance was not valid); *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954) (finding genuine dispute over settlement agreement's formation where the parties had not returned final draft of agreement and it was not signed by the bound party).

provisions governing the sale of the subject property and the distributions of the receipts therefrom. *See* CP 662-65.[4] The CR 2A Agreement is thus binding and enforceable despite the fact that it contemplated the execution of a more formal agreement, and the Court should accept review to reverse the Court of Appeals' Decision on this basis.

ii. The CR 2A Agreement is binding and enforceable notwithstanding the fact that it contains agreements to negotiate certain additional terms.

With regard to the "additional terms" set forth in the CR 2A Agreement, this Court has expressly held that contracts may be binding despite the fact that they contain agreements to negotiate additional terms in the future based on subsequent negotiation between the parties.

The authoritative Washington decision on this issue is the Court's 2004 opinion in *Keystone Land & Development Company v. Xerox Corporation*, 152 Wn.2d 171, 94 P.3d 945 (2004). *Keystone* came before the Court on a straightforward certified question from the Ninth Circuit: Whether a contract that includes an agreement to negotiate future terms is enforceable under Washington law.[5] The Court began its analysis by

[4] The Court of Appeals appears to have recognized these facts, yet somehow reached a conclusion that does not follow from this premise. *See* Appendix A at 3 ("The term sheet listed the following provisions that the settlement agreement 'shall contain.'").

[5] The specific question certified by the Ninth Circuit in *Keystone* was "Will Washington contract law recognize and enforce an agreement, whether implicit or

identifying three types of forward-looking agreements: (1) agreements to agree, which are "agreement[s] to do something which requires a further meeting of the minds of the parties and without which it would not be complete" and which are unenforceable under Washington law; (2) agreements with open terms, which exist where "the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source, such as the Uniform Commercial Code"; and (3) contracts to negotiate, which exist where "the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time." *Id.* at 175-77, 94 P.3d 945 (citation omitted).

The specific circumstances implicated in *Keystone* involved the third type of forward-looking agreement—a contract to negotiate. While the Court held that no such agreement was formed under the facts of that case, the Court held that contracts to negotiate ***are*** enforceable where they set forth one of the specific courses of conduct identified above. *See id.* at

---

explicit, between two or more parties to negotiate a future contract under the circumstances presented in this case?" *Id.* at 173-74, 94 P.3d 945. The Ninth Circuit also certified a second question, relating to the measure of damages for breach of such an agreement, which is not implicated by the present appeal. *See id.* at 174, 94 P.3d 945 ("If such a contract can exist, what is the proper measure of damages for the breach of a contract to negotiate.").

179, 94 P.3d 945 (finding no contract to negotiate on the ground that "[t]he parties did not exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time").

Here, the Court of Appeals recognized that *Keystone* was binding authority regarding the enforceability of forward-looking contracts in Washington, and expressly found that the CR 2A Agreement's forward-looking terms were contracts to negotiate. *See* Appendix A at 9-11; *see also id.* at 3 ("Here, unlike *Keystone*, the term sheet did contain explicit agreements to 'use . . . best efforts to fully execute a final Settlement Agreement within thirty (30) days of the mediation' and 'negotiate in good faith.' This language arguably created an enforceable contract to negotiate on those terms."). Despite this finding, the Court of Appeals went on to hold that those ***same provisions*** were "agreements to agree" that rendered the entire CR 2A Agreement unenforceable as a matter of law. *See* Appendix A at 11 ("However, like *Keystone*, the document expressly references the need for further negotiations on certain terms, such as "a reasonable, mutual nondisparagement provision."). Moreover, even if the CR 2A Agreement's forward-looking terms were merely agreements to agree (and they are clearly not under the definition articulated in *Keystone*), the appropriate remedy would be to sever those terms and deem them

unenforceable—not to void the CR 2A Agreement in its entirety.[6] The Court of Appeals' ruling ignores the plain language of the CR 2A Agreement and is directly contrary to the Court's binding precedent set forth in *Keystone*. The Court should accept review and reverse the Court of Appeals' Decision on this basis as well.

B. If Permitted to Stand, the Court of Appeals' Decision Would Undermine Washington's Strong Public Policy Favoring the Enforcement of Settlements, and Review is Therefore Warranted under RAP 13.4(b)(4).

Washington Rule of Appellate Procedure provides that the Court may also grant review of any Court of Appeals decision that "involves an issue of substantial public interest that should be decided by the Supreme Court." RAP 13.4(b)(4). The Court should accept review to protect the state's strong public policy favoring the enforcement of settlement agreements and to rectify the Court of Appeals' ruling that, if permitted to stand, would significantly undermine that public policy.

This Court has repeatedly held that "the express public policy of this

---

[6] The Decision's discussion of this point is somewhat puzzling, as it indicates that the Court of Appeals analyzed the trial court's ruling as if the trial court found that Appellants had *breached* the CR 2A Agreement. *See* Appendix A at 10 ("[A]s *Keystone* makes clear, a contract to negotiate is not breached by failure to agree on substantive provisions."). This is not the procedural posture in which this matter came before the Court of Appeals, and Petitioners have no burden of showing that Appellants breached the CR 2A Agreement; much to the contrary, Appellants bore the burden of demonstrating that the CR 2A Agreement they negotiated, drafted, and signed was not in fact a binding settlement.

state . . . strongly encourages settlement." *City of Seattle v. Blume,* 134 Wn.2d 243, 258, 947 P.2d 223 (1997); *see also Seafirst Ctr. Ltd. P'ship v. Erickson*, 127 Wn.2d 355, 365, 898 P.2d 299 (1995) (Washington law "strongly favors" settlement (quotation omitted)); *Kirk v. Moe*, 114 Wn.2d 550, 554-55, 789 P.2d 84 (1990) ("The settlement of a claimant's entire claim should be strongly encouraged." (citation omitted)). Washington also recognizes a strong public policy of favoring alternative dispute resolution mechanisms like mediation and arbitration, which reduce the burden on the courts and permit parties to resolve disputes informally and amicably. *See, e.g.*, *Steele v. Lundgren*, 85 Wn. App. 845, 854, 935 P.2d 671 (1997) ("[M]ediation, because it is not binding, is more a tool to facilitate settlement than an alternative to trial. Settlement is favored in public policy."); *see also Naumes, Inc. v. City of Chelan*, 184 Wn. App. 927, 932, 339 P.3d 504 (2014) ("Washington has a strong public policy favoring arbitration.").

CR 2A serves an important function in promoting these policy interests because its express purpose "is to avoid such disputes and to give certainty and finality to settlements and compromises, if they are made." *Howard v. Dimaggio*, 70 Wn. App. 734, 738, 855 P.2d 335 (1993) (quotation omitted). As a result, Washington courts routinely uphold settlement agreements entered into pursuant to CR 2A absent definitive

evidence of fraud or mutual mistake. *See, e.g.*, *Baird v. Baird*, 6 Wn. App. 587, 589, 494 P.2d 1387 (1972) ("A stipulation arrived at in this manner is binding on the parties.").

If permitted to stand, the Court of Appeals' decision would not only permit Appellants to renege on the terms of their CR 2A Agreement with Petitioners. It would also significantly undermine the efficacy of CR 2A, and would give litigants throughout the state broad license to nullify settlements simply by manufacturing after-the-fact disputes over the terms of any settlement agreement. As the Court is well-aware, CR 2A provides an important tool for litigants to memorialize the terms of agreements reached at mediation, which frequently conclude at the end of a long day—or, as in this case, multiple days—and appellate precedent requiring parties to draft formal settlement agreements memorializing every single term of their agreement before concluding a mediation would frustrate the state's public policy favoring settlements. Petitioners respectfully submit that the Court should grant review on this matter of substantial public interest, reverse the decision of the Court of Appeals, and hold Appellants to the bargain they struck more than two full years ago by affirming the trial court's order requiring Appellants to enter into the long-form settlement agreement envisioned by the CR 2A Agreement.

VI. CONCLUSION

The Court of Appeals' Decision misapprehends the prior precedent of this Court and other published decisions of the Court of Appeals holding that CR 2A agreements are enforceable notwithstanding the fact that they may contemplate the subsequent execution of a more formal written agreement or that they leave certain terms open for negotiation between the parties. Furthermore, if permitted to stand, the Court of Appeals' Decision would cast serious doubt over the efficacy of CR 2A, a nearly-ubiquitous mechanism by which litigants in the state of Washington memorialize settlement agreements reached at mediation, thus undermining the state's strong public policy favoring settlements. Review is thus warranted under RAP 13.4(b)(1), (2), and (4), and Petitioners respectfully request that the Court grant the petition, accept review, and reinstate the trial court's ruling granting Petitioners' motion to enforce the CR 2A Agreement.

RESPECTFULLY SUBMITTED this 22nd day of April, 2020.

CORR CRONIN LLP

s/ Kelly H. Sheridan
Blake Marks-Dias, WSBA No. 28169
Kelly H. Sheridan, WSBA No. 44746
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel: (206) 625-8600
Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby declares as follows:

1. I am employed at Corr Cronin LLP, attorneys for record for Respondents herein.

2. On this date, I electronically filed the foregoing with the Court of Appeals, Division I, who will electronically serve the following:

Kim M. Johannessen
Johannessen & Associates PS
5413 Meridian Ave N, Ste B
Seattle, WA 98103
Phone: (206) 632-2000
Email: kmj@johanassocs.com
Attorneys for Plaintiffs/Appellants

Philip A. Talmadge
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue S.W.
Third Floor, Suite C
Seattle, WA 98126-2138
Phone: (206) 574-6661
Email: phil@tal-fitzlaw.com
Attorneys for Plaintiffs/Appellants

Dennis Jordan
4202 Hoyt Avenue
Everett, WA 98203
Phone: (425) 252-5554
Email: attyjord1@gmail.com
Attorneys for Green Sky NW LLC and
Jessica Elizabeth-Ann Jordan

Shannon M. Benbow
Wood, Smith, Henning & Berman LLP
520 Pike Street, Suite 1525
Seattle, WA 98101-4001
Phone: (206) 204-6800
Email: sbenbow@wshblaw.com
Attorneys for Merchants Bonding Company

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

DATED: April 22, 2020, at Seattle, Washington.

s/ Christy A. Nelson
Christy A. Nelson

EXHIBIT A

FILED
2/3/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JENNIFER L. HABU and RICHARD Y. CHINN, husband and wife, Appellants, v. CONRADO A. TOPACIO (also known as Conrad A. Topacio and Conrado Jesus Topacio), individually; CARRIE L. TOPACIO (also known as CARRIE LYNN FIELD), individually; the marital community of CONRADO A. TOPACIO and CARRIE L. TOPACIO; HENRY L. JACKY, individually; JENNIFER E. JACKY, individually; the marital community of HENRY L. JACKY and JENNIFER E. JACKY; JAMES P. KOORY, individually, and the marital community of JAMES P. KOORY and CRYSTAL B. KOORY; SANDRA E. TUREK, individually; CHJ PROPERTIES LLC, a Washington limited liability company; CHJ FOOD SERVICES LLC, a dissolved Washington limited liability company; DALAWA LLC, a Washington limited liability company doing business as Vantage Commercial Partners; GREEN SKY NW LLC, a Washington limited liability company doing business as Mari J's Highway Pot Shop; JESSICA ELIZABETH-ANN JORDAN, individually; MERCHANTS BONDING COMPANY (MUTUAL), a surety bond company registered in the State of Washington;	No. 79152-4-I DIVISION ONE UNPUBLISHED OPINION

GEORGINA GAIL LUKE (also known Ginger Luke), individually and the marital community comprised of her and HANS JAKOB LUECK,

Respondents.

FILED: February 3, 2020

HAZELRIGG-HERNANDEZ, J. — Jennifer Habu and Richard Chinn seek reversal of an order enforcing a CR 2A term sheet drafted after a two-day mediation. They contend that the term sheet was not a final expression of all material terms of the settlement and therefore they are not bound by the document. Because the term sheet does not fix all of the material obligations of all parties, we reverse.

FACTS

The underlying dispute in this case arose from the purchase and sale of a commercial property in Everett, Washington. In 2014, Jennifer Habu and Richard Chinn sold the property to CHJ Properties, a limited liability company owned by Conrad Topacio, Henry Jacky, and James Koory. Habu and Chinn alleged that the defendants defrauded them during the sale of the property, thereby discouraging other buyers and causing Habu and Chinn to accept less than the fair market value of the property as a purchase price.

In late 2017, Habu and Chinn brought suit against Conrad Topacio, Carrie Topacio, Henry Jacky, Jennifer Jacky, James Koory, Crystal Koory, CHJ Properties LLC, CHJ Food Services LLC, and Dalawa LLC (collectively, CHJ); Sandra Turek and Merchants Bonding Company (collectively, Merchants); and Green Sky NW LLC and Jessica Jordan (collectively, Green Sky). The complaint

detailed claims for fraud, negligence, negligent misrepresentation, violations of the Consumer Protection Act[1] and Criminal Profiteering Act,[2] breach of contract, unjust enrichment, equitable indemnification, recovery of remedial action costs under the Model Toxics Control Act (MTCA),[3] and a request for declaratory relief.

The parties engaged in a two-day mediation in February 2018. The negotiation resulted in the drafting of a document entitled "CR 2A Term Sheet" by Habu and Chinn's counsel. The document provided that the defendants would immediately withdraw their pending motions for summary judgment, for more definite statement, and to dismiss under CR 12(b)(6), and that "[t]he parties agree to memorialize and use their best efforts to fully execute a final Settlement Agreement within thirty (30) days of the mediation."

The term sheet listed the following provisions that the settlement agreement "shall contain." Habu and Chinn would receive a "$200,000 initial settlement payment" within 60 days of the effective date of the agreement. On receipt of the "$200,000 portion of the settlement funds," Habu and Chinn would dismiss all of their claims against all parties with prejudice, except the claims against CHJ under the MTCA, which would be dismissed without prejudice.

After CHJ obtained an appraisal of the property and Habu and Chinn compiled environmental reports for the property, "the property shall be listed with a mutually agreeable listing agent." Habu and Chinn were to be kept informed of any inquiries or offers to purchase the property, and "[a]ll purchase and sale terms

---

[1] Chapter 19.86 RCW.
[2] Chapter 9A.82 RCW.
[3] Chapter 70.105D, 82.21 RCW.

shall be subject to the Plaintiffs' approval, including but not limited to the sales price. In the course of the negotiations, the parties will act in good faith." The term sheet also stated that:

> 17. Upon closing, any debt owed to 9506 LLC [4] (and for which 9506 LLC is not requested to carry the note) shall be paid in full, and the first $350,000 of the sale proceeds over and above the debt repayment shall be paid to Plaintiffs. The balance of any net sale proceeds shall be disbursed to CHJ Properties LLC.

Habu and Chinn were not to be responsible for any sale commissions. If the property did not sell within two years of listing, the remaining parties would be free to assert their MTCA claims against each other.

The parties agreed to return to mediation in the event that a dispute arose while negotiating the final settlement agreement and "to make a good faith effort to mediate and resolve those disagreements or disputes." Additionally, the term sheet stated that "[a]ll parties executing this Term Sheet represent and warrant that they have authority to sign on behalf of the person or entity upon whose behalf they are signing." It also contained a provision that "[t]he final Settlement Agreement shall be signed by each of the parties before an independent notary public unaffiliated with any of the parties." The term sheet was signed by all parties except Green Sky NW LLC and Jessica Jordan, with Henry Jacky signing on behalf of his wife, Jennifer Jacky, and James Koory signing on behalf of his wife, Crystal Koory.

Over the next six months, the parties exchanged drafts of a final settlement agreement based on this term sheet but were unable to agree on terms related to

[4] In September 2016, 9506 LLC purchased CHJ's loan from Coastal Community Bank. 9506 LLC is owned by Habu and Chinn but is not a party to the case.

paragraph 17 of the term sheet. CHJ contended that the $350,000 post-sale payment was contingent on the property selling for a sufficient price, while Habu and Chinn wanted to write the payment into the final agreement as an unconditional obligation.

CHJ filed a motion to enforce the CR 2A term sheet, which Merchants and Green Sky joined. Habu and Chinn submitted declarations in opposition to the motion to enforce the term sheet asserting that they did not intend the term sheet to be binding when they signed it and did not understand the $350,000 payment to be conditioned on the proceeds of the sale being sufficient to cover the sum. In an order setting an evidentiary hearing on the motion, the court indicated that it would "apply summary judgment procedures to determine whether there is a genuine dispute regarding the existence and/or material terms of the CR 2A agreement." It also ruled that "[n]o party may file or serve additional briefing or materials in support of or in opposition to the Motion to Enforce prior to the evidentiary hearing without leave of Court." The court clarified that the parties would be permitted to present material facts through live testimony at the hearing if they desired but noted "that it is unlikely that the Court would allow the parties to try to introduce into evidence through live witnesses any documents or other materials that have not already been filed and served in connection with the motion to enforce."

At the hearing, Habu and Chinn attempted to introduce a statement of facts to which they and Merchants had stipulated concerning other negotiated documents that had been signed at the mediation with the documents attached as

exhibits. They noted that the stipulation had been prepared as a substitute for Merchants' live testimony because those defendants were not present at the hearing. CHJ objected, and the court ruled that it would not consider the stipulation because all parties had not agreed to permit it to be filed and the court had not granted leave to consider the additional documents.

The court granted the motion to enforce the CR 2A term sheet. The court found that the parties had entered into a binding CR 2A settlement agreement that did not impose an unconditional obligation on CHJ to pay Habu and Chinn $350,000. The court also ordered the parties to enter into a long-form settlement agreement consistent with the CR 2A agreement. Habu and Chinn moved for reconsideration, which was denied. Habu and Chinn appealed. Merchants and Green Sky joined in CHJ's opening brief to this court.

ANALYSIS

Habu and Chinn argue that the court erred in finding the term sheet to be binding and enforceable. They contend that the term sheet was not final as a matter of law because on its face it contemplates negotiation of additional material terms and future dispute resolution.

I. Standard of Review

When a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed, the trial court follows summary judgment procedures. Condon v. Condon, 177 Wn.2d 150, 161, 298 P.3d 86 (2013). Accordingly, the party moving to enforce an alleged agreement bears the

burden to prove that there is no genuine dispute as to its existence and material terms. Id. at 162. The court reads the parties' submissions in the light most favorable to the nonmoving party to determine whether reasonable minds could reach only one conclusion. Id. "[I]f the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact." Brinkerhoff v. Campbell, 99 Wn. App. 692, 697, 994 P.2d 911 (2000).

"Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court." Dolan v. King County, 172 Wn.2d 299, 311, 258 P.3d 20 (2011). When the trial court makes a decision based on written documents and is not required to "'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence,'" we review the decision de novo. Id. at 310 (quoting Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994)). When the court hears live testimony, we review findings of fact for substantial evidence, recognizing that the trial court is able to assess the credibility and demeanor of testifying witnesses in a manner not afforded to appellate courts reviewing the cold record. Garofalo v. Commellini, 169 Wash. 704, 705, 13 P.2d 497 (1932); Peterson v. Big Bend Ins. Agency, Inc., 150 Wn. App. 504, 514, 202 P.3d 372 (2009).

Here, the trial court ordered an evidentiary hearing after the parties submitted their initial written arguments and declarations. None of the parties presented live testimony at the evidentiary hearing. The court ultimately resolved

the issue based on the arguments of counsel and declarations submitted with the briefing. Although the court entered its findings after an evidentiary hearing, the court relied entirely on written submissions in making these findings. Because of this and because the parties do not dispute the standard of review, we review the trial court's order on the motion to enforce de novo.

II. Enforceability of CR 2A Term Sheet

The common law of contracts applies to settlement agreements. Condon, 177 Wn.2d at 161. Washington follows the objective manifestation theory of contracts. Hearst Commc'ns., Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005). For a contract to form, the parties must objectively manifest their mutual assent to be bound and the terms assented to must be sufficiently definite. Keystone Land & Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 177–78, 94 P.3d 945 (2004). "[W]e attempt to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." Hearst, 154 Wn.2d at 503. The parties' subjective intent is generally irrelevant if we can determine their intent from the reasonable meaning of the words used. Id. at 504. Whether there was mutual assent is normally a question of fact but may be determined as a matter of law where reasonable minds could reach but one conclusion. Keystone, 152 Wn.2d at 178 n.10.

An informal agreement may be "sufficient to establish a contract even though the parties contemplate signing a more formal written agreement" in certain circumstances. Morris v. Maks, 69 Wn. App. 865, 869, 850 P.2d 1357 (1993). To determine whether the informal agreement is enforceable, we "consider whether

(1) the subject matter has been agreed upon, (2) the terms are all stated in the informal writings, and (3) the parties intended a binding agreement prior to the time of the signing and delivery of a formal contract." Id. (citing Loewi v. Long, 76 Wash. 480, 484, 136 P. 673 (1913)). "[I]f a term is so 'indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,' there cannot be an enforceable agreement." Keystone, 152 Wn.2d at 178 (quoting Sandeman v. Sayres, 50 Wn.2d 539, 541, 314 P.2d 428 (1957)).

Habu and Chinn cite Keystone in support of their argument that a contract was not formed because the parties expressly left terms open to future resolution. In Keystone, the Washington Supreme Court considered whether Washington contract law would recognize and enforce an implicit or explicit agreement between two or more parties to negotiate a future contract. Id. at 173–74.

The Keystone court explained the differences between three similar types of agreements. Id. at 175. The first was an agreement to agree, which is not enforceable in Washington. Id. at 175–76. "An agreement to agree is 'an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.'" Id. (quoting Sandeman, 50 Wn.2d at 541–42). The second type was an agreement with open terms, under which "the parties intend to be bound by the key points agreed upon with the remaining terms supplied by a court or another authoritative source." Id. at 176. The third was a contract to negotiate:

> In a contract to negotiate, the parties exchange promises to conform to a specific course of conduct during negotiations, such as negotiating in good faith, exclusively with each other, or for a specific period of time. Under a contract to negotiate, the parties do not intend

> to be bound if negotiations fail to reach ultimate agreement on the substantive deal. In contrast to an agreement to agree, under a contract to negotiate, no breach occurs if the parties fail to reach agreement on the substantive deal. The contract to negotiate is breached only when one party fails to conform to the specific course of conduct agreed upon.

Id. (internal citations omitted).

Keystone contended that an exchange of letters between its broker and Xerox's broker created an enforceable contract to negotiate and commitment to prepare a purchase and sale agreement because "all of the key terms of the substantive agreement were settled." Id. at 174–75. The court found that Keystone had not identified "an offer and acceptance to be bound to specific standards of negotiating conduct" sufficient to form a contract to negotiate. Id. at 178.

Here, unlike Keystone, the term sheet did contain explicit agreements to "use . . . best efforts to fully execute a final Settlement Agreement within thirty (30) days of the mediation" and "negotiate in good faith." This language arguably created an enforceable contract to negotiate on those terms. However, as Keystone makes clear, a contract to negotiate is not breached by failure to agree on substantive provisions.

The Keystone court also determined that the statements made by Xerox's brokers did not amount to an unconditional commitment to prepare the purchase and sale agreement. Id. at 178–79. Xerox's brokers stated that "'Xerox is prepared to negotiate a Purchase and Sale Agreement with Keystone Development subject to two modifications to your Proposal,'" and, if Keystone acknowledged acceptance of the modifications to its proposal, "'[w]e can then proceed immediately to draft the Purchase and Sale Agreement for review and execution.'" Id. (emphasis

omitted). The court found that the statements did not create an unconditional commitment:

> At most, the statement is a manifestation of Xerox's intention to negotiate with Keystone. There is no objective manifestation by Xerox of an intent to be bound if Keystone accepts the modifications. See Pac. Cascade Corp. v. Nimmer, 25 Wn. App. 552, 556, 608 P.2d 266 (1980) (holding an intention to do something "is evidence of a future contractual intent, not the present contractual intent essential to an operative offer"). On the contrary, the statement evidences an intent not to be bound by expressly referencing the need for further negotiations. See Arcadian Phosphates, Inc. v. Arcadian Corp., 884 F.2d 69, 72 (2d Cir. 1989) (holding "reference to a binding sales agreement to be completed at some future date" is evidence of a present intent not to be bound).
>
> . . . .
>
> Keystone asks us to imply a duty to continue negotiations until a final agreement is reached. In fact, Keystone argues that the question before us is not whether the parties agreed to an enforceable duty to negotiate. Instead, it argues the question is "whether the negotiations between Keystone and Xerox had advanced to the point where the law should impose on the parties a 'duty to go forward [.]'" We decline to create and impose a duty to go forward in the absence of an enforceable contract. No contract was formed between Keystone and Xerox. At best, the circumstances of this case present an implied agreement to agree.

Id. at 179–80 (emphasis omitted).

Keystone is not precisely analogous to the factual situation in this case. Unlike the more informal exchange of letters in Keystone, here, the parties signed a term sheet drafted after two days of settlement negotiations. However, like Keystone, the document expressly references the need for further negotiations on certain terms, such as "a reasonable, mutual nondisparagement provision."

Also, although the term sheet contains many specific provisions that are to be included in the final settlement agreement, it is silent on a number of important issues. The term sheet does not explicitly state which defendants would be

responsible for the $200,000 initial payment to Habu and Chinn or what would happen if the sale proceeds were insufficient to provide for the $350,000 payment to Habu and Chinn. It also does not address the disposition of the property if it is not sold within two years of listing or whether the $350,000 would still be owed. All of the timelines within which the parties must act run from the effective date of the final settlement agreement. It is also notable that the order enforcing the term sheet simply directs the parties to enter into a long-form settlement agreement. This seems to indicate that the term sheet obligated the parties only to engage in further negotiation.

Viewed in the light most favorable to Habu and Chinn as the nonmoving parties, the term sheet appears to be an unenforceable agreement to agree. The court erred in finding the term sheet to be a binding and enforceable settlement agreement and granting the motion to enforce the CR 2A term sheet.

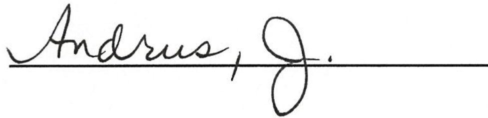
Because we find the term sheet to be unenforceable, we need not consider Habu and Chinn's other assignments of error regarding the court's refusal to consider extrinsic evidence, the interpretation of paragraph 17 of the term sheet, and whether CR 2A prevented enforcement of the agreement. Habu and Chinn also request an award of costs on appeal. "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. We will leave this issue in the capable hands of our commissioner or clerk.[5]

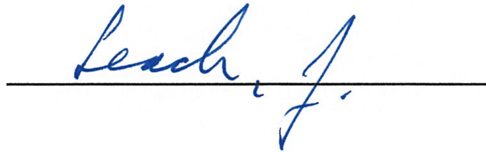
---

[5] Habu and Chinn filed a statement of additional authority containing a citation to an online news article from the Everett Herald describing the outcome of a criminal case involving

Reversed.

WE CONCUR:





some of the parties. CHJ moved to strike the statement of additional authority. Habu and Chinn filed a response to the motion to strike and CHJ filed a reply. After considering the briefing of both parties, the motion to strike is granted.

EXHIBIT B

FILED
3/23/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JENNIFER L. HABU and RICHARD Y. CHINN, husband and wife, Appellants, v. CONRADO A. TOPACIO (also known as Conrad A. Topacio and Conrado Jesus Topacio), individually; CARRIE L. TOPACIO (also known as CARRIE LYNN FIELD), individually; the marital community of CONRADO A. TOPACIO and CARRIE L. TOPACIO; HENRY L. JACKY, individually; JENNIFER E. JACKY, individually; the marital community of HENRY L. JACKY and JENNIFER E. JACKY; JAMES P. KOORY, individually, and the marital community of JAMES P. KOORY and CRYSTAL B. KOORY; SANDRA E. TUREK, individually; CHJ PROPERTIES LLC, a Washington limited liability company; CHJ FOOD SERVICES LLC, a dissolved Washington limited liability company; DALAWA LLC, a Washington limited liability company doing business as Vantage Commercial Partners; GREEN SKY NW LLC, a Washington limited liability company doing business as Mari J's Highway Pot Shop; JESSICA ELIZABETH-ANN JORDAN, individually; MERCHANTS BONDING COMPANY (MUTUAL), a surety bond company registered in the State of Washington;	)	No. 79152-4-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

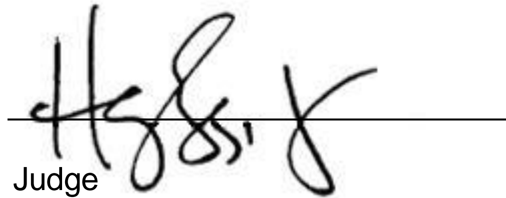
No. 79152-4-I/2

GEORGINA GAIL LUKE (also known Ginger Luke), individually and the marital community comprised of her and HANS JAKOB LUECK,	)))))
Respondents.	))

The respondents filed a motion for reconsideration of the opinion filed on February 3, 2020. The appellants filed a response. A majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:



Judge

CORR CRONIN LLP

April 22, 2020 - 4:42 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Jennifer L. Habu, Appellant v. Conrado A. Topacio, Respondent (791524)

The following documents have been uploaded:

- PRV_Petition_for_Review_20200422163453SC881347_1720.pdf
  This File Contains:
  Petition for Review
  The Original File Name was 2020 04 22 Petition for Review.pdf

A copy of the uploaded files will be sent to:

- Aaron@tal-fitzlaw.com
- attyjord1@gmail.com
- bmarksdias@corrcronin.com
- cnelson@corrcronin.com
- dpatterson@corrcronin.com
- gary@tal-fitzlaw.com
- kmj@johanassocs.com
- matt@tal-fitzlaw.com
- phil@tal-fitzlaw.com
- sbenbow@wshblaw.com
- sfogg@corrcronin.com

Comments:

Sender Name: Kelly Sheridan - Email: ksheridan@corrcronin.com
Address:
1001 4TH AVE STE 3900
SEATTLE, WA, 98154-1051
Phone: 206-625-8600

Note: The Filing Id is 20200422163453SC881347