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STATE OF WASHINGTON

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COURT OF APPEALS OF THE STATE OF WASHINGTON

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ERIC R. ENGELLAND and CHARLENE C. ENGELLAND,  
a marital community,

Plaintiffs-Appellants

v.

FIRST HORIZON HOME LOANS,  
a division of FIRST TENNESSEE BANK NATIONAL ASSOCIATION,  
a District of Columbia corporation  
licensed to do business in Washington State,

Defendant-Respondent

and

QUALITY LOAN SERVICE CORP. of WASHINGTON,  
a Washington state corporation,

Defendant

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ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
(Hon. Anna M. Laurie)

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RESPONDENT FIRST HORIZON'S BRIEF

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Ronald E. Beard, WSBA No. 24014  
David C. Spellman, WSBA No. 15884  
Andrew G. Yates, WSBA No. 34239  
Attorneys for Respondent

Lane Powell PC  
1420 Fifth Avenue, Suite 4100  
Seattle, WA 98101  
Telephone: 206-223-7000  
Facsimile: 206-223-7107

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## I. INTRODUCTION

This appeal arises from the trial court's order enforcing a settlement agreement and loan modification agreement. When the trial court entered the order, Appellants Eric and Chalene Engelland (the Engellands) were more than four years in default on their home mortgage.<sup>1</sup> Three months earlier, they had informed this Court of the settlement of their suit against Respondent First Horizon Home Loans, a division of First Tennessee Bank National Association (First Horizon).

On appeal, the Engellands argue that there could be no binding settlement unless they had signed a settlement agreement or their attorney had signed a CR 2A stipulation. But neither a signed agreement nor a stipulation is a requirement for a binding settlement.

The contemporaneous emails and representations to the trial and appellate courts demonstrate the parties had agreed to the material terms of their settlement and loan modification agreements. The Engellands' lawyer acted with apparent authority and his knowledge is deemed to be their knowledge. Prior to the time of the signing and delivery of the formal contracts, their lawyer made a binding promise and agreement that the terms were accepted and that he would hold their signed agreements, pending resolution of an escrow impound issue. Their lawyer admitted

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<sup>1</sup> Mr. Engelland is occasionally referred to by his first name for clarity. No disrespect is intended.

that the escrow impound issue had been resolved. The Engellands' conclusory testimony against enforcement of the settlement agreement failed to raise a genuine issue of material fact. The trial court properly enforced the settlement agreement and its attorney fees award to First Horizon was reasonable.

## **II. COUNTERSTATEMENT OF ISSUES**

1. Whether the trial court correctly ruled that the Engellands' lawyer made promises binding them?

2. Whether the trial court properly enforced the agreement to settle the case where the parties agreed upon the subject matter of the agreement, the terms of the agreement were set out in the correspondence and settlement documents, and the parties intended that a binding agreement to be formed prior to execution and delivery of the final settlement documents.

3. Whether the trial court properly exercised its discretion to award First Horizon a majority but not all of its requested attorney fees incurred in enforcing the parties' agreement to settle.

### III. COUNTERSTATEMENT OF THE CASE

#### A. In February 2008, the Engellands Defaulted on their Home Loans.

Eric Engelland owned and operated a mortgage brokerage (Harbor Point Financial) in Gig Harbor, Washington. Clerk's Papers (CP) 358; 6. After operating the business for ten years, Eric sold it to First Horizon and went to work for them as a branch and area manager in March 2006. CP 306. Eight months later, the Engellands borrowed \$810,000 from First Horizon to fund the purchase and construction of improvements on real property located in Silverdale, Washington (the Property). CP 306; 360; 6. The Engellands received a \$650,000 first position loan and a \$160,000 second position loan, and secured these loans with Deeds of Trust against the Property. CP 397; 20.

Less than a year later, the Engellands obtained loan modification agreements dated May 24, 2007. CP 40-48. In February 2008, after defaulting on the modified repayment obligations, the Engellands executed a Special Forebearance Agreement. CP 360-70. The Engellands later defaulted on this agreement and did not accept a subsequent offer of a permanent loan modification. CP 354.

**B. A Series of Notices of Trustee Sales Were Recorded Between 2008 and 2011.**

On October 31, 2008, the successor trustee of the Engellands' first-position Deed of Trust recorded a Notice of Trustee's Sale against the Property. CP 9. The trustee cancelled the sale and recorded a new Notice of Sale on May 10, 2010. CP 10-11. After loss mitigation discussions between the Engellands and First Horizon concluded without a resolution, the trustee recorded another notice ten months later, setting a sale date of June 10, 2011. CP 13.

**C. After the Court Denied a Preliminary Injunction in the Summer of 2011, the Engellands Brought An Interlocutory Appeal.**

The Engellands filed this suit four days before the trustee's sale scheduled for June 10, 2011. CP 1. The Court temporarily restrained the sale but denied the Engellands' motion for a preliminary injunction, dissolving the order restraining the sale effective July 1, 2011. CP 329-31; 427-28. After unsuccessfully moving for reconsideration, the Engellands sought an interlocutory appeal to this Court on August 1, 2011. CP 457-59; 460-66.

**D. In December 2011, the Court Dismissed the Appeal on the Basis of a Settlement.**

While the appeal was pending, the parties engaged in settlement negotiations. After First Horizon sent the Engellands a loan modification

agreement and settlement agreement in late November, First Horizon and the Engellands filed a Joint Motion for Withdrawal/Dismissal of Petition for Discretionary Review (Joint Motion).<sup>2</sup> The Joint Motion represented that “[t]he parties have reached an understanding on the underlying dispute, and in the interest of judicial economy, desire to withdraw [the Engellands’] Motion for Discretionary Review.”<sup>3</sup> Six days later, this Court entered its Ruling of Dismissal on the basis that “**the parties have stipulated that all issues in this matter have been fully settled and that the cause may be dismissed without cost to any party.**” (Emphasis added).<sup>4</sup> As explained more fully below, First Horizon successfully moved to compel enforcement of the settlement agreement in the spring of 2012.

**E. The Parties Negotiated Settlement and Modification Terms from August 2011 through February 2012.**

On August 10, 2011, First Horizon’s lawyers sent the Engelland’s lawyer a written “offer to modify your clients’ first-position mortgage loan.” CP 50. The written offer also invited the Engellands to make a proposal for the second loan. CP 50. Two days after receiving the August 10 offer, the Engellands’ lawyer responded in a signed letter. CP 54-56. Engellands made a counterproposal on the first loan for a different interest

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<sup>2</sup> Joint Mot. (Dec. 21, 2011), Appendix A to Respondent’s Brief.

<sup>3</sup> Joint Mot. (Dec. 21, 2011), Appendix A to Respondent’s Brief.

<sup>4</sup> Ruling (Dec. 27, 2011), Appendix B to Respondent’s Brief.

step rate structure and a lower capitalized balance, among other differences. CP 54-55. The Engellands also proposed a principal reduction and new payment terms for the second loan. CP 56.

On September 26, 2011, First Horizon through its lawyers rejected the Engellands' counterproposal and informed the Engellands' lawyer that the offered modification of the first loan was the first offer for that obligation. CP 36 ¶ 6. The lawyers agreed that any new arrangement for the smaller second loan would be handled as part of a settlement and release agreement under which the Engellands would pay \$250 a month toward the second loan. *Id.* The Engellands' lawyer sent First Horizon's lawyers an email stating "please accept this email as confirmation that my clients have authorized me to request that we proceed to draft settlement documents based on the terms discussed." CP 59. The Engellands' lawyer also proposed that the parties enter into a CR 2A agreement if final settlement documents were not completed by the end of that week. *Id.* After further email discussion, the parties agreed to proceed with formal loan documentation and the settlement agreement based on the agreed terms. CP 58.

Two months later, First Horizon's lawyers sent the Engellands' lawyers a Loan Modification Agreement for the first loan and a Settlement and Release Agreement for the second loan. CP 61-72 (email, Nov. 28,

2011, with attachments). Later in December, this Court entered its dismissal on the basis of the case being fully settled.<sup>5</sup> The next day, the Engellands' lawyer responded with proposed revisions to the Settlement and Release Agreement and informed First Horizon that **“we have no requested revisions to the loan modification.”** (emphasis added). CP 74 (email, Dec. 28, 2011). The only caveat was that if the Engellands' proposed changes to the Settlement and Release Agreement for the second loan required changes to the Loan Modification Agreement, the changes would be made. Subsequently, the parties made no changes of that kind, so the caveat was not applicable. *Id.*

**F. The February 3rd Detailed Loan Modification Agreement Expressly Capitalized Escrow Advances.**

While the Engellands had no revisions to the loan modification, they made revisions to the Settlement and Release Agreement. On January 18, 2012, First Horizon's lawyer sent the Engellands' lawyer a redlined version of the Engellands' proposed changes to the Settlement and Release Agreement. CP 88-94. The redlines rejected the Engellands' proposed revision that required: “Defendant [First Horizon] shall provide a current statement of account for the escrow/impound account ... within ten (10) days of execution ...” CP 97.

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<sup>5</sup> Ruling (Dec. 27, 2011), Appendix B to Respondent's Brief.

The deletion of the requirement for a current escrow statement was consistent with the August 10, 2011 offer of a loan modification, attaching a calculation sheet. CP 50-51. The offer's calculation sheet disclosed the series of fees and arrearages that would be capitalized. CP 51. Those fees and arrearages included "other advances" for taxes and insurance. *See* CP 51. The Deed of Trust securing the first loan is a uniform security instrument, requiring the borrower to pay the escrow items. *See* CP 400 ¶ 9. The Deed of Trust Paragraph 9's "protective advances" provisions authorize the lender to make advances to protect its security interest and its rights in the event that borrower fails to make required payments of sums such as property taxes or insurance, and allows the lender to add the amounts to the borrower's debt. CP 404.

Sixteen days after making the January 18 counteroffer, First Horizon's lawyers sent the Engellands' lawyer an email attaching a more detailed and updated loan modification agreement with slightly more favorable terms.<sup>6</sup> This version of the Loan Modification Agreement confirmed that:

The modified principal balance of my Note will include all amounts and arrearages that will be past due as of the

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<sup>6</sup> *See* CP 74 (email, Feb. 3, 2012, from the Engellands' lawyer). The Loan Modification Agreement was updated, because of the Engellands' delay in execution, not because of any disagreement over its terms, though the updated agreement contained more favorable terms than the original modification agreement to which the Engellands agreed. *See* CP 74 (email stating that no revisions to the Loan Modification Agreement were requested).

Modification Effective Date (including unpaid and deferred interest, fees, escrow advances and other costs ... collectively “Unpaid Amounts”).

CP 104 (Section 3 entitled “The Modification,” subsection B). The agreement included a specific dollar amount for the estimated escrow payment going forward to be \$907.79. *Id.*

**G. The February 17th Email Confirmed that the Engellands’ Lawyer Would Be Holding Signed Agreements.**

Eleven days after receiving the more detailed Loan Modification Agreement with the capitalized escrow provision, the Engellands’ counsel asked: “Is [the negative escrow balance] being capitalized?” CP 109 (email, Feb. 17, 2012). The answer to this question was plainly and unequivocally “yes,” from the face of the Loan Modification Agreement itself. *See* CP 104 (quoted above). The Engellands also raised their prior direct payment of the hazard premium, which the loan’s sub-servicer had also advanced. CP 109, 128, 142. *See also* CP 51-52 and CP 400, 404.<sup>7</sup>

While raising the question about the negative escrow balance, the Engellands’ lawyer sent an email confirming that:

[M]y clients have authorized me to indicate that they will execute the attached versions of the settlement agreement and loan modification agreement (provided the that the settlement agreement dates are updated, e.g. payment to commence 3/1/12) as soon as the negative escrow balance is addressed. In the interest of expediting resolution and

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<sup>7</sup> Nationstar is the loan’s sub-servicer and advanced this payment. First Horizon is the master servicer of the Engellands’ loan and the others in the same securitization trust.

anticipating that the escrow balance will be accounted for and addressed in short order by your client, I will have my clients execute a clean version of the settlement agreement (with adjusted dates) and loan modification agreement to be released upon resolution of the above escrow impound issue.

CP 109 (email, Feb. 17, 2012) (emphasis added).

**H. The February 27th Email Confirmed the Receipt of the Escrow/"New Principal Balance" Information and that the Agreements Would Be Signed.**

Ten days after receiving the email promising that the signed agreements were being held for subsequent release, First Horizon's lawyers provided a Settlement and Release Agreement with the requested updated dates. CP 128 (email, 11:21 a.m., Feb. 27, 2012). Also, First Horizon confirmed that the sub-servicer of the loan had advanced the hazard premiums in September of 2011. *Id.* The email reminded the Engellands that there was no reason for them to have also made a direct payment for the hazard premium, because "[t]his is an escrowed loan." *Id.* Two minutes later, First Horizon's lawyers sent a separate email confirming that the double payment of the hazard premium had been returned to the Engellands. CP 142 (email, 11:23 am, Feb. 27, 2012).

An hour and twenty minutes later, the Engellands' lawyer sent an email confirming he "will contact my clients' regarding their signatures on the documents. .... Thank you for tracking down the answers to my

questions on the ‘New Principal Balance’ breakdown.” CP 141. The “deferred ... escrow balances” were captured in the “New Principal Balance” term, which was ¶ 3B of the detailed Loan Modification Agreement, which had been previously approved. CP 104 (¶ 3B). Before that final exchange of emails on February 27, the lawyers for First Horizon and the Engellands spoke several times that day about the remaining details of the settlement. CP 141.

Twelve days later, First Horizon’s lawyers sent an email asking, “Why do you continue to delay finalizing this settlement when all the terms are agreed?” CP 141 (email, Mar. 12, 2012). In reply, the Engellands’ lawyer stated that they wanted to begin making payments on June 1—three months after the March 1 commencement date—with the capitalization of any negative escrow balance. CP 144 (email, Mar. 12, 2012), CP 173.

**I. The Engellands Have Appealed from An Order Compelling Enforcement of the Settlement Agreement.**

On March 30, 2012, the Engellands and the trustee for the Deed of Trust stipulated to the dismissal of the entire case with prejudice. CP 511-13. On April 2, 2012, the court entered a corresponding order ruling: “all the claims of the parties against each other and the entire case shall be dismissed entirely with prejudice[.]” CP 511-13. The same day, the court

granted the motion to enforce the settlement agreement and dismissed the case. CP 186-87. “To sweeten the pot,” the court fashioned an order permitting the Engellands to make the payments for March and April by May 2 without breaching the agreements and deferring a decision on First Horizon’s request for attorney fees. CP 230. Apr. 2, 2012 RP at 29:25-31:16

A month later, the Engellands timely appealed the dismissal order. CP 227. Two days later, the Court entered judgment in favor of First Horizon, awarding it \$7,380.00 in attorney fees. CP 269.

#### IV. ARGUMENT

##### A. The Summary Judgment Standard of Review Applies.

Where a motion to enforce a settlement agreement is based on declarations, this court conducts a de novo review as if it were considering a motion for summary judgment. *Condon v. Condon*, --- Wn.2d ---, --- P.3d ---, 2013 WL 1163949 ¶ 19 (Mar. 21, 2013); *In re Marriage of Ferree*, 71 Wn. App. 35, 43, 856 P.2d 706 (1993); *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 697, 994 P.2d 911 (2000) (evaluating the standard of review).<sup>8</sup>

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<sup>8</sup> The court’s decision to enforce a settlement agreement is in essence an action for specific performance that is reviewed for an abuse of discretion. *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 704 (9th Cir. 1989). See also *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993) (applying abuse of discretion in reviewing trial court’s decision to enforce a written settlement agreement based on letters exchanged by

The moving party bears the initial burden of showing that there is no genuine dispute regarding the existence and material terms of a settlement agreement. *Ferree*, 71 Wn. App. at 41. This requirement is “a specific application of the general rule that one who would recover on a contract must prove its existence and terms.” *Id.* Once the moving party meets this burden, the non-moving party must come forward with evidence that presents a genuine dispute of fact. *Id.* at 44. The Engellands were required to “set out specific facts sufficiently rebutting [First Horizon’s] contentions and disclosing the existence of a material issue of fact.” *Heath v. Uruga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001). They could not “rely on speculation, argumentative assertions that unresolved factual issues remain, or having [their] affidavits accepted at face value.” *Id.*

**B. The Lawyer’s Promises Are Legally Binding.**

The Engellands have appealed from the court’s dismissal of the case and its ruling:

[I]t is the emails and telephone calls between attorneys that are dispositive. The February 17th email from Mr. Ahrens bound his clients to the agreement once the escrow issue was settled. ... The escrow issues were resolved. It was resolved by phone call and

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counsel). A trial court abuses discretion when it fails to hold an evidentiary hearing after a nonmoving party has raised a genuine of fact in response to a summary judgment motion. *Condon*, 2013 WL 1163949 ¶ 19 n. 14.

email. Consequently, there was a deal, and I am going to hold that the Engellands are bound to it.

Apr. 2, 2012 RP at 29:12-24; CP 227-47.

The lawyer's promises are legally binding. When a lawyer has appeared for a party, the court and other parties are entitled to rely upon that authority. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). "Generally, an attorney representing a client in litigation is authorized to speak for the client concerning that litigation." *State v. Williams*, 79 Wn. App. 21, 28, 902 P.2d 1258 (1995). A lawyer's letter can be an admission by the party. *Green v. Fuller*, 159 Wash. 691, 695-96, 294 P. 1037 (1930). The same rule applies to the formal email communications in this case where the lawyer was negotiating a loan modification and settlement.

"Settlement agreements are governed by general principles of contract law." *Morris v. Maks*, 69 Wn. App. 865, 868, 850 P.2d 1357 (1993). The objective manifestation test requires "for a contract to form, the parties must objectively manifest their mutual assent," and "the terms assented to must be sufficiently definite." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 94 P.3d 945 (2004). Acceptance is an expression (communicated by word, sign, or writing to the person making

the offer) of the intention to be bound by the offer's terms. *Plouse v. Bud Clary of Yakima, Inc.*, 128 Wn. App. 644, 648, 116 P.3d 1039 (2005).

“Most persons are now aware ... of the fact that some promises are binding.” Restatement (Second) of Contracts § 21 cmt. a (1981) (“Intent to be legally bound”). Even if the Engellands were subjectively mistaken about the legal effect of the emails, “such mistakes do not necessarily deprive their acts of legal effect.” *Id.* “Neither real or apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.” Restatement (Second) of Contracts § 21. *Id.*, ill. 2 (“A and B both think such promises are not binding unless in writing. Nevertheless there is a contract, unless one of them intends not to be legally bound and the other knows or has reason to know of that intention”).

The Engellands' subjective, unexpressed intentions cannot thwart the binding promises. *Condon*, 2013 WL 1163949 ¶ 20. The applicable principle of law is: “We impute to a person an intention corresponding to the reasonable meaning of his words and acts. Unexpressed intentions are nugatory when the problem is to ascertain the legal relations, if any, between the two parties.” *Maks*, 69 Wn. App. at 871-72 (citing *Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 517, 408 P.2d 382 (1965)). The

“subjective intention to be bound only upon the execution of the final settlement is expressed nowhere in the exchange of correspondence.” *Id.* at 871. The same rule applies to the emailed promises sent long after the parties had informed this Court that the case had settled.

Black letter contract law recognizes parties may have an enforceable contract before they prepare and adopt a written contract:

It is thus possible to make a contract the terms of which include an obligation to execute subsequently a final writing which shall contain certain provisions. If parties have definitely agreed to do so, and that the final writing shall contain these provisions and no others, they have concluded the contract.

Restatement (Second) of Contracts § 27 (“Existence of Contract Where Written Memorial Is Contemplated”); *see, e.g., Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913); *Stottlemyre v. Reed*, 35 Wn. App. 169, 171, 665 P.2d 1383 (1983) (citing § 27) (enforcing oral settlement agreement).

In the February 17th email, the Engellands’ lawyer “definitely agreed to” having the Engellands “execute a clean version of” both the Loan Modification Agreement and settlement agreement “to be released upon resolution of the ... escrow impound issue.” *Compare* Restatement § 27 (“parties have definitely agreed to ...”) *with* CP 109 (email, Feb. 17, 2012) (stating the promise). First Horizon relied upon the promise, by providing an updated settlement agreement and additional information about the New Principal Balance covering escrow amounts and by not

resuming the nonjudicial foreclosure process, which had begun four years earlier in February 2008.

**C. The Evidence Satisfies the Applicable Three-Part Test.**

When a party alleges the existence of a binding agreement to settle based on correspondence or other informal writings, there is a well-established three-part test to determine if there is an enforceable agreement. *Maks*, 69 Wn. App. at 869 ((citing *Loewi v. Long*, 76 Wash. 480, 484, 136 P. 673 (1913)). “Washington courts 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.* Here, all of the requirements for an enforceable agreement to settle are present.

**1. The Parties Agreed to a Loan Modification and a Settlement.**

The first part of the test is agreement to the subject matter. Here, the subject matter was the dismissal of the suit in exchange for modifying the first and second loans. The method was through a Loan Modification Agreement for the first loan and a Settlement and Release Agreement for the second loan, which also incorporated the agreement with respect to the first loan by reference. *See* CP 50-56 (initial exchange of correspondence establishing the parameters of settlement).

## **2. The Material Terms Are Stated in the Documents.**

The second part of the test is that the terms are all stated in the informal writings. *Maks*, 69 Wn. App. at 869. Here, the final form of the Loan Modification Agreement and the Settlement and Release Agreement were reduced to a writing and agreed upon. *See* CP 109 (correspondence stating that Engellands will execute attached forms of settlement documents upon resolution of escrow questions); 111-26 (forms of settlement documents Engellands agreed to execute); 128-39 (correspondence confirming Engellands will execute documents and attaching updated Settlement and Release Agreement with new payment start date). There were not material terms to be resolved.

In *Maks*, a settlement agreement was enforced over the objection of one of the parties. The trial court and court of appeals ruled that warranties, outstanding balances, and the form of a lease agreement were not material to a settlement between partners, where a letter agreement set forth the transfer of ownership interests, assumption of liabilities, cash payment at closing, payment of attorney fees, and one year rental/storage agreement. 69 Wn. App. at 869-70 & n. 2.

In this case, the escrow balance statement was not a material term, where the amount was being capitalized and the estimated amount was already indicated in the documents approved by the Engellands. The

loan's modified terms for interest rate, term, amount of the principal balance, and the like were all agreed to, as was the final form of the Settlement and Release Agreement. CP 109-27; 128; 131-39. The documents and other information provided to the Engellands from start to finish established that any negative escrow balance would be capitalized into the new principal balance of the loan. *See, e.g.*, CP 51 (modification worksheet provided on August 10, 2011 showing that advances would be capitalized); CP 74 (email from Engellands' lawyer stating that they had no modifications to original loan modification agreement, Dec. 28, 2011); CP 104 (updated loan modification agreement provided on February 3, 2012 stating that modified principal balance would include escrow advances).

**a. The Engellands Later Admitted The Terms Were Fine But They Wanted a New Deal.**

An interpretation giving reasonable, fair, just and effective meaning to all manifestations of intention is preferred to an interpretation which leaves a part of such manifestations unreasonable, imprudent or meaningless. *Pub. Util. Dist. No. 1 of Lewis Cnty. v. Wash. Pub. Power Supply Sys.*, 104 Wn. 2d 353, 374, 705 P.2d 1195 (1985) (provision in loan agreements would be rendered meaningless if lender's interpretation of contract were adopted). Here, the Engellands' interpretation that an

escrow balance statement was an implied condition would render meaningless the express provisions deleting the requirement and capitalizing the past due escrow balance. *Condon*, 2013 WL 1163949 ¶ 20 (stating courts will not imply obligations into contracts absent legal necessity).

The “context rule” permits the court to consider the “subsequent conduct of the parties ... and the parties’ reasonableness of the respective interpretations ...” *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). The Engellands subsequently agreed to “execute the settlement documents reflecting a June 1 payment and a capitalization of any reconciled (negative) escrow balance.” CP 173 (email, Mar. 20, 2012). Their subsequent acknowledgement of the capitalization of the escrow amounts confirms the unreasonableness of their prior interpretation that they needed a current escrow statement. They simply wanted a new deal—three more months of payment-free occupancy in the house.

**b. Once the Escrow Condition Was Satisfied, the Engellands Could Not Render the Promise and Agreements Illusory.**

Once their lawyer agreed the escrow condition was satisfied, the Engellands could not render the promise and agreement illusory under contract law, as explained in this section, and estoppel law, as explained later in Section B. 3. Their lawyer had made a definite promise, First

Horizon relied upon the promise, accepted the offer, committed to enter into the associated contracts instead of proceeding with foreclosure.<sup>9</sup>

Even if the court were to consider the escrow statement to be an omitted term, there is a contractual remedy as well as a statutory remedy. The statutory remedy under the Real Estate Settlement Procedures Act (RESPA) permits the Engellands to request an accounting of the escrow.<sup>10</sup> The contractual remedy is provided in Restatement (Second) of Contracts § 204, Supplying an Omitted Essential Term, stating: “When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable is supplied by the court.” *Accord P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 208, 289 P.3d 638 (2012) (distinguishing between an unenforceable agreement to agree, an enforceable agreement with open terms, and an agreement to negotiate).

But the Engellands never established that the escrow statement was “essential to a determination of their rights and duties” and needed to be supplied by the court. § 204. Their request for an escrow statement should be viewed in the context of the implied duty of good faith and fair dealing.

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<sup>9</sup> *Accord Arango Constr. Co. v. Success Roofing, Inc.*, 46 Wn. App. 314, 730 P.2d 720 (1986) (promissory estoppel based on subcontractor’s bid).

<sup>10</sup> A servicer’s obligations with respect to mortgage loan escrow accounts are governed by the (RESPA) and its implementing regulations. *See* 24 C.F.R. § 3500.17. For example, 24 C.F.R. § 3500.17(i) requires a servicer or sub-servicer to provide an annual escrow account statement.

The implied duty of good faith espouses “faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” Restatement (Second) of Contracts § 205 cmt. a (1981). Good faith restrains the discretionary authority granted to one party to determine a contract term. *See, e.g., Jones v Hollingsworth*, 88 Wn.2d 322, 327, 560 P.2d 348 (1977) (discussing good faith). “[B]ad faith” occurs when one acts “for the sole purpose of undoing” what had been previously agreed. *Id.* at 329-30 (affirming trial court’s ruling of bad faith). Ultimately, the Engellands were satisfied with the capitalization term, and they offered no evidence below demonstrating good faith dissatisfaction with the escrow balance and the capitalization of it.

In summary, the Court properly exercised its powers because the material terms were stated in the emails and approved settlement documents. *Maks*, 69 Wn. App. at 869. The Court exercised its equitable powers to accommodate in part the Engellands’ new request—permitting them to make the March and April payment in May. Apr. 2, 2012 RP at 29:25-31:16.

**3. The Promise to Hold and Later Release Signed Agreements Was the Culmination of Six Months of Dealings.**

The third part of the test is that “the parties intended a binding agreement prior to the time of the signing and delivery of a formal

contract.” *Maks*, 69 Wn. App. at 869 (quoting *Loewi*, 76 Wash. at 484). The Engellands’ rely upon *Howard v. Dimaggio*, 70 Wn. App. 734, 736, 855 P.2d 335 (1993). Appellants’ Brief (App. Br.) at 10. But unlike the lawyer in that decision, the Engellands’ lawyer did not reserve an escape hatch. He could have stated that he had “accepted the [settlement] offer *subject to* [the client’s] approval.” *Id.* (italics added). *Id.* at 837 (citing deposition testimony that “he accepted the dollar amounts of the proposed settlement *contingent upon* Ms. Howard’s *approval* of the terms and conditions of the release and hold harmless documents”). The February 17th and 28th emails, however, did not use similar “escape hatch” language. *Cf. Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 424-26 (7th Cir. 1989) (affirming 12(b)(6) dismissal of claim to enforce a letter of intent with escape hatches).

The definite promise was: “I will have my clients execute a clean version ... to be released upon the resolution of the above impound dispute.” CP 109 (email, Feb. 17, 2012). The email objectively manifests the existence of “a binding agreement prior to the time of the signing and delivery of a formal contract.” *Loewi*, 76 Wash. at 484. The signed agreements would be held and delivered at a later date. CP 109 (email, Feb. 17, 2012) (“released upon resolution of the ... impound issue”).

Whether by mistake, neglect, or subterfuge, the Engellands never signed the agreements.

**C. The Conclusory Testimony Failed to Rebut the Uncontroverted Documentary Evidence.**

Relying upon the documentary evidence, First Horizon moved to enforce the settlement. When responding to the motion, the Engellands were required to “set forth specific facts sufficiently rebutting [First Horizon’s] contentions and disclosing a material issue of fact” for trial. *Uraga*, 106 Wn. App. at 513. The Engellands failed to offer specific facts contravening the documentary evidence establishing the breach of the agreements. Therefore, the court properly granted the motion to compel enforcement of the agreements.

During oral argument, the court observed: “There’s not anything in further email communications about the escrow account being a continuing issue. How do I resolve that?” RP at 20:1-17. In response, the Engellands’ lawyer admitted, “if you are looking just based on my email alone, you know, that that may be a reasonable inference that there is no escrow, negative escrow balance.” Apr. 2, 2012, RP at 20:19-22. *See also* CP 155 ¶9 (conclusory testimony by Engellands’ lawyer).

The transactional documents imposed no immediate duty to pay an escrow balance. Below, the Engellands “had expressed concern over their

escrow impound account and, ultimately, the \$33,566.66 negative balance. ... Yet, the proposed settlement documents do not include any such term ... and do not address the same.” CP 154:3-8. First Horizon’s counsel refuted that absurd myth, during oral argument. “It’s clear on the face of the loan modification agreement what’s going to happen with the escrow. It’s going to be capitalized. It’s going to be rolled into the unpaid balance. I’m not sure how else we can respond to this concern.” RP at 23:2-7.

Eric Engelland’s testimony had completely ignored the February 27th’s email from his attorney stating “Thank you for tracking down the answers to my questions on the ‘New Principal Balance’ breakdown.” CP 128-29 (email, Feb. 27, 2011). The “New Principal Balance” refers back to the detailed Loan Modification Agreement ¶ 3.B’s “New Principal Balance” term, capitalizing the “deferred ... escrow advances” in the modified principal for the note. CP 104. Eric Engelland could not disavow his lawyer’s statements and knowledge. His lawyer’s statements are admissions, and “[t]he [lawyer]’s knowledge is deemed to be the client’s knowledge, when the attorney acts on his behalf.” *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978); *Williams*, 79 Wn. at 28 (lawyer as speaking agent for client). See RPC 1.4(a)(1)-(3) requiring a lawyer to promptly inform the client and to keep the client reasonably informed). The unchallenged and irrefutable documentary evidence

eliminated any reasonable concern that the Engellands would be required to pay cash within three days to extinguish the prior escrow deficit. Their unsupported speculations did not refute the uncontroverted record.

“The nonmoving party must set forth specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Seven Gables Corp. v. MGM/UA Enter. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The conclusory testimony ignoring the contemporaneous emails and Loan Modification Agreement ¶ 3.B could not contravene the documentary evidence and raise a genuine issue of material fact for trial. *See* App. Br. at 1-2; *id.* at 12.

Perhaps because it does not favor them, the Engellands skip the required contractual analysis and base their argument on the misperception that CR2A and RCW 2.44.010 control. As discussed in more detail in Section E, *infra*, neither rule is applicable and even if one or both of them were, they would not operate to bar enforcement of the settlement agreement.

The Engellands fail to address the decisions cited below enforcing settlements even in the absence of fully-executed final settlement documents. *See, e.g., Morris v. Maks*, 69 Wn. App. at 869-72 (*supra* at

20).<sup>11</sup> Similarly, *In re Marriage of Ferree*, this Court enforced a marital separation agreement that had not been signed by the party resisting enforcement where proposed findings and conclusions and a decree of separation had been drafted and the affidavits submitted established that there was no genuine dispute that an agreement had been reached. 71 Wn. App. at 44-45.

Additionally, the decision in *McKelvey v. American Seafoods*, C99-2108L, 2000 WL 33179292 (W.D. Wash. Apr. 7, 2000) illustrates that an agreement to settle a case on specific terms is enforceable summarily even if the expected formal settlement documents have not been signed because one of the parties refuses to do so. In that case, McKelvey, a seaman, filed a personal injury lawsuit against American Seafoods and other defendants. His lawyer made a written settlement demand. American Seafood's lawyer sent McKelvey's lawyer a letter with a counter-offer and accusing McKelvey of faking his injuries. Upon hearing American Seafood's counter-offer, but prior to reading the letter, McKelvey authorized his lawyer to accept it. McKelvey's lawyer then accepted the counter-offer in a short letter. He also asked for a release and said he would dismiss the case once the settlement check had cleared.

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<sup>11</sup> The Engellands did not raise the statute of frauds below or on appeal. The original notes and prior loan modification agreements satisfy the statute, and that "the original satisfaction of the statute passes through to the contract as modified." *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn. App. 637, 644, 898 P.2d 347 (1995).

After reading the letter from American Seafood's lawyer, McKelvey refused to sign the release. American Seafood then moved to enforce the settlement agreement. The Court rejected McKelvey's argument that there was no enforceable settlement agreement in the absence of the signed release, noting that there was no dispute about McKelvey's willing and informed acceptance of the counter-offer, that he had the benefit of his lawyer's advice, and that he was not defrauded or confused about the terms in any way. *Id.* at \*1-2. Accordingly, the Court enforced the settlement, dismissed the suit and ordered the parties to negotiate and finalize the release in 30 days.

**D. Equity Bars the Engellands From Denying the Existence of a Binding Agreement to Settle.**

"Equity's goal is to do substantial justice." *Hornback v. Wentworth* 132 Wn. App. 504, 513, 132 P.3d 778 (2006) (affirming trial court's equitable rescission of real estate contract). Courts sitting in equity have broad discretion to shape the appropriate relief. *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). The Engellands should be equitably estopped from denying that they reached a binding agreement and promised to execute it.

Equitable estoppel "precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that

contract imposes” and the doctrine may require a person to perform “despite never having signed the agreement,” if it “knowingly exploits” the contract in which provision at issue is contained. *Townsend v. Quadrant Corp.* 173 Wn.2d 451, 461, 268 P.3d 917 (2012) (addressing agreement to arbitrate in real estate purchase and sale contracts not signed by minor children of plaintiffs) (internal citations and quotations omitted).

Equitable estoppel is based on the notion that “a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.” *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993).

The elements of equitable estoppel, which must be established by clear, cogent and convincing evidence, are (1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 239-240, 272 P.3d 289 (2012).

The first element (inconsistent statements and acts) is met, because the Engellands dismissed their interlocutory appeal on the basis of a settlement and promised to deliver written settlement documents, never

did so, yet now disavow the existence of a binding settlement. CP 109; Appendices A, B. The second element (reliance) is also met. Since the July 2011 dissolution of the order restraining the trustee's sale, First Horizon delayed pursuing a trustee's sale in reliance on the Engellands' representations. First Horizon worked with them to finalize the settlement rather than moving forward with a foreclosure sale, in the hopes that the settlement would result in the Engellands' loans finally being performing assets. Appendices A, B; CP 74; 426-28. The third element (injury) is met because the Engellands induced First Horizon to devote considerable time and resources toward settlement, all the while continuing not to receive the benefit of any loan payments, yet forgoing its right to realize on its collateral through foreclosure.

The Engellands have been living in the Property without making regular payments on either of their mortgage obligations since at least April 2009. *See* CP 176. In February 2012, when a final settlement was reached, the Engellands had missed over \$200,000 in payments on the first loan alone. CP 181. By disavowing the agreement to settle (on terms extremely favorable to them), the Engellands have prolonged litigation for over an additional year, all while continuing to reside in the Property without making any payments. This is exactly the type of circumstance

equity seeks to avoid. The Engellands should be estopped from denying the existence of a binding agreement to settle the case.

**E. CR 2A and RCW 2.44.010(1) Do Not Bar Enforcement of the Agreement Because There is No Genuine Dispute Regarding its Material Terms.**

The Engellands' position in this appeal rests on the premise that CR 2A and RCW 2.44.010(1) create an absolute bar to enforcement of the agreement. This premise is incorrect.

“The purpose of CR 2A is not to impede without reason the enforcement of agreements intended to settle or narrow a cause of action[.]” *In re Marriage of Ferree*, 71 Wn. App. at 41. Rather, the underlying purpose of CR 2A and RCW 2.44.010 is to avoid disputes regarding the existence and terms of settlement agreements. *Morris*, 69 Wn. App. at 869. Strict compliance with RCW 2.44.010(1) is not required. *Stottlemyre*, 35 Wn. App. at 172.

CR 2A applies only when (1) the agreement was made by the parties or attorneys “in respect to the proceedings in a cause,” and (2) the “purport” of the agreement is disputed and even then it supplements rather than supplants the common law of contracts. *Lavigne v. Green*, 106 Wn. App. 12, 23 P.3d 515 (2001); *In re Marriage of Ferree*, 71 Wn. App. at 39. In order for CR 2A to apply, the “purport” of the agreement must be disputed. *Lavigne*, 106 Wn. App. at 19. “A litigant’s remorse or second

thoughts about an agreement is not sufficient.” *Id.* Nor do “the unsworn assertions of ... counsel” create a genuine dispute. *In re Marriage of Ferree*, 71 Wn. App. at 45-46.

Here, there is no *genuine* issue of fact regarding the terms of the parties’ agreement and reasonable minds could reach but one conclusion as to its terms. The issue of the negative escrow balance which the Engellands argue is material is a red herring. *See supra.* at 10-11.

Each and every term of the agreement to settle the case was agreed upon and reduced to writing in the final settlement documents that their lawyer specifically represented that they would sign. *See* CP 109, 111-115, 128, 131-39, 142. The Engellands request on March 12, 2012 to start making payments pursuant to these exact agreements on June 1, 2012 underscores, rather than calls into question, the completeness of the agreements as of February 2012. *See* CP 144. *See also* CP 173 (stating “[the Engellands] are willing to execute the settlement documents reflecting a June 1 payment commencement and a capitalization of any reconciled (negative) escrow balance.”). There is no genuine dispute with respect to the existence or terms of the agreement, and therefore CR 2A is inapplicable.

Similarly, RCW 2.44.010(1), which does not require strict compliance, is satisfied to the extent it is applicable independent of CR

2A. *See Stottlemyre*, 35 Wn. App. at 172. The Engellands' lawyer had the authority to represent that they would sign the agreements as soon as their "questions" about the negative escrow balance were addressed. CP 109. Their lawyer had already agreed to dispense with a CR 2A document in favor of final loan and settlement documents. CP 59. Moreover, their lawyer had already signed two stipulations representing that the entire litigation had been resolved, obtaining orders to that effect from this Court and the superior court. CP 511-13.<sup>12</sup> Their lawyer also acknowledged at the hearing on the motion to enforce the settlement agreement that "if you are looking just based on my email alone, you know, that that may be a reasonable inference that there is no escrow, negative escrow balance." Apr. 2, 2012 RP at 20:19-22. *See also* CP 155 ¶9. CR 2A and RCW 2.44.010(1), to the extent they are even applicable to this case, are satisfied because the purposes they serve are satisfied.

**F. The Trial Court Did Not Abuse Its Discretion in Making its Attorney Fees Award.**

For the reasons above, the Court properly enforced the parties' agreement to settle and therefore the award of attorney fees to First Horizon should be upheld. The Engellands argue that \$2,164.50 worth of these fees should have been excluded from the award because they were

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<sup>12</sup> *See also* Appendices A, B.

incurred in connection with “negotiating, drafting and consummation of the agreement.” App. Br. at 16.

Whether an award of attorney fees is authorized is reviewed *de novo*, but the issue here, the reasonableness of the fees awarded, is reviewed only for an abuse of discretion. *Wash. State Commc’n Access Project v. Regal Cinemas, Inc.*, --- Wn. App. ---, 293 P.3d 413, 433 (2013).<sup>13</sup> The trial court did not abuse its discretion. The trial court expressly considered the Engellands’ argument that some of First Horizon’s fees were spent on activities other than “enforcement” and rejected it. *See* May 4, 2012 RP at 8:20-25, 9:1-11, 22-25, 10:1-25, 11:1. The court carefully concluded that after mid-February 2012,” all of the efforts of First Horizon would be towards enforcement” and “a reasonable attorney’s fee for the efforts put out by First Horizon is close to what they have asked for,” but reduced the requested amount based on time spend prior to mid-February 2012. *Id.* at 10:19-20; 11:7-14. The attorney fee award should be affirmed.

**G. First Horizon is Entitled to Appellate Attorney Fees, But Even if the Engellands Prevail They Would Not Be Entitled to Fees.**

The Engellands take the novel position that they are not bound to the terms of the Settlement and Release Agreement, but they are allowed

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<sup>13</sup> Washington Appellate Reports citation forthcoming.

to take advantage of its prevailing party attorney fee provision in the event that their appeal is successful. *See* Br. of App. at 16.

A prevailing party on appeal may recover fees under RAP 18.1 if applicable law grants the party the right to recover these fees, i.e., there is a contract, statute or recognized ground that permits such an award of attorney fees. *See Thompson v. Lennox*, 151 Wn. App. 479, 491, 212 P.3d 597 (2009). Here, if the Engellands are successful on appeal, it would require a conclusion that neither party is subject to the Settlement Agreement and Release. It therefore follows that that agreement's attorney fees provision is of no force or effect with respect to either party.

If, however, First Horizon prevails and the Settlement Agreement and Release is binding on the parties, it would be entitled to its attorney fees and costs under the agreement's prevailing party provisions and RAP 18.1. Indeed, this is the result that the Court should reach.

**V. CONCLUSION**

For the reasons above, First Horizon respectfully requests that this Court affirm the trial court's order enforcing the parties' settlement agreement and uphold the judgment awarding First Horizon the attorney fees incurred in enforcing that agreement.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of March, 2013.

LANE POWELL PC

By

*Andrew Yates by*  
*DES*

Ronald E. Beard, WSBA No. 24014

David C. Spellman, WSBA No. 15884

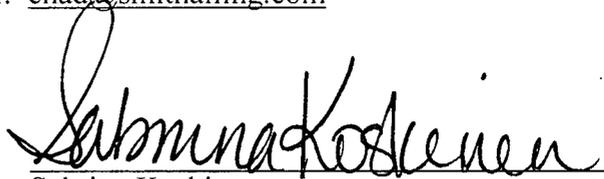
Andrew G. Yates, WSBA No. 34239

Attorneys for Respondent First Horizon  
Home Loans, a division of First Tennessee  
Bank National Association

**DECLARATION OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the 29th day of March, 2013, I caused a true and correct copy of Respondent First Horizon's Brief to be served on the following via messenger and email as indicated below:

Chad E. Ahrens  
Smith Alling, P.S.  
1102 Broadway Plaza, Suite 403  
Tacoma, WA 98402  
Email: [chad@smithalling.com](mailto:chad@smithalling.com)

  
Sabrina Koskinen

# **APPENDIX A**

COURT OF APPEALS  
DIVISION II

No. 42440-1-II

11 DEC 21 PM 4:05

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
DEPUTY

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ERIC R. ENGELLAND and CHARLENE C. ENGELLAND, a marital  
community,

Plaintiffs/Petitioners

v.

FIRST HORIZON HOME LOANS, a division of FIRST TENNESSEE  
BANK NATIONAL ASSOCIATION, a District of Columbia corporation  
licensed to do business in Washington State, and QUALITY LOAN  
SERVICE CORP. OF WASHINGTON, a Washington State corporation,

Defendants/Respondents

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ON APPEAL FROM KITSAP COUNTY SUPERIOR COURT  
(Hon. M. Karlynn Haberly)

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JOINT MOTION FOR WITHDRAWAL/DISMISSAL OF  
PETITION FOR DISCRETIONARY REVIEW

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Chad E. Ahrens  
WSBA No. 36149  
Peter G. Marcek  
WSBA No. 43094  
SMITH ALLING, P.S.  
Attorneys for Petitioners  
Eric R. Engelland and  
Charlene C. Engelland

Smith Alling, P.S.  
1102 Broadway Plaza, Ste. 403  
Tacoma, Washington 8402  
Telephone: (253) 627-1091  
Facsimile: (253) 627-0123

Ronald E. Beard  
WSBA No. 24014  
Andrew G. Yates  
WSBA No. 34239  
LANE POWELL PC  
Attorneys for Respondent  
First Horizon Home Loans, a division  
of First Tennessee Bank, N.A.

Lane Powell PC  
1420 Fifth Avenue, Ste. 4100  
Seattle, Washington 98101  
Telephone: (206) 223-7000  
Facsimile: (206) 223-7107

1. Identity of Moving Parties. Petitioners Eric R. Engelland and Charlene C. Engelland (“Engelland”) and Respondent First Horizon Home Loans, a division of First Tennessee Bank, N.A. (“First Horizon”) jointly move for a withdrawal/dismissal of Petitioners Motion for Discretionary Review of the trial court’s June 24, 2011 Order and July 19, 2011 Order (as defined herein).

2. Statement of Relief Requested. Engelland and First Horizon jointly request that Petitioners’ Motion for Discretionary Review be withdrawn and dismissed without costs.

3. Facts Relevant to Motion. The parties have reached an understanding on the underlying dispute and, in the interest of judicial economy, desire to withdraw Petitioner’s Motion for Discretionary Review.

4. Grounds for Relief and Argument. Pursuant to RAP 7.3, the Court of Appeals has broad authority to act. Petitioners and Respondent jointly move herein and this Court should exercise its authority to preserve judicial economy and to allow the parties to focus resources on resolution.

5. Conclusion. For the reasons above, Engelland and First Horizon jointly request that Petitioners' Motion for Discretionary Review be withdrawn and dismissed.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of December, 2011.

SMITH ALLING, P.S.

LANE POWELL PC

By  \_\_\_\_\_

Chad E. Ahrens  
WSBA No. 36149  
Peter George Marcek  
WSBA No. 43094

Attorneys for Appellants Eric R.  
Engelland and Charlene C.  
Engelland

By  \_\_\_\_\_ for Andrew Yates

Ronald E. Beard  
WSBA No. 24014  
Andrew G. Yates  
WSBA No. 34239

Attorneys for Respondent  
First Horizon Home Loans, a  
division of First Tennessee Bank  
National Association

**DECLARATION OF COUNSEL  
RE: ELECTRONIC SIGNATURE/APPROVAL**

11 DEC 21 PM 4:05  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

I, CHAD E. AHRENS, hereby declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct:

1. I am an attorney with the law firm of Smith Alling, P.S., located in Tacoma, Washington. I make this declaration pursuant to GR 17(a)(2).

2. On December 21, 2011, I received via electronic transmission an email (attached) giving me authority to file the document entitled Joint Motion for Withdrawal/Dismissal of Petition for Discretionary Review from attorney Andrew Yates. I have examined the document consisting of two (2) pages, and this document should be accepted by the Court for filing.

Executed at Tacoma, Washington, on this 21 day of December, 2011.

[Signature]  
CHAD E. AHRENS

# **APPENDIX B**

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

ERIC & CHARLENE ENGELLAND,

Petitioners,

v.

FIRST HORIZON HOME LOANS, et  
al.,

Respondents.

No. 42440-1-II

RULING OF DISMISSAL

FILED  
COURT OF APPEALS  
DIVISION II  
11 DEC 27 AM 11:45  
STATE OF WASHINGTON  
BY DEPUTY

**COUNSEL** for the parties have stipulated that all the issues in this matter have been fully settled and that the cause may be dismissed without cost to any party. Accordingly, it is

**ORDERED** that this matter is dismissed without cost to any party.

**DATED** this 27<sup>th</sup> day of December, 2011.

*Eric B. Schmitt*

COURT COMMISSIONER

Peter George Marcek  
Smith Alling, P.S.  
1102 Broadway Ste 403  
Tacoma, WA, 98402-3526  
peter@smithalling.com

Andrew Gordon Yates  
Lane Powell PC  
1420 5th Ave Ste 4100  
Seattle, WA, 98101-2375  
YatesA@LanePowell.com

Albert H Lin  
Albert H. Lin  
19735 10th Ave NE Ste N200  
Poulsbo, WA, 98370-7478  
alin@mccarthyholthus.com

Chad E Ahrens  
Smith Alling, P.S.  
1102 Broadway Ste 403  
Tacoma, WA, 98402-3526  
chad@smithalling.com

Ronald Edward Beard  
Lane Powell PC  
1420 5th Ave Ste 4100  
Seattle, WA, 98101-2338  
beardr@lanepowell.com