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Court of Appeals No. 51222-0-II  
Trial Court No. 17-2-00870-08

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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DEL RAY PROPERTIES, INC.,

Appellant,

v.

SHARON DOERR and RANDALL BECK,

Respondents

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**APPELLANT DEL RAY PROPERTIES, INC.'S OPENING BRIEF**

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## I. INTRODUCTION

This appeal asks whether a trial judge can impose *punitive* sanctions for violations of a preliminary injunction that allegedly occurred *outside* the presence of the Court. It also asks whether a ratepayer should be held in contempt for not remaining current on its water bills, when the water company (City of Longview) could not provide consistent or accurate billings.

Appellant, Del Ray Properties, Inc., owns two mobile home parks in Longview, Washington, defined in the proceedings as “Del Ray I” and “Del Ray II.” The City of Longview (“City”) supplies water service for the tenants in both parks through several meters. The tenants do not have their own individual water meters serving their respective lots.

Del Ray began to question the City’s water bills after it noticed the statements were irregular, misleading, and inaccurate statements. Del Ray continued to make payments to the City based upon amounts it determined were actually due and owing. Rather than working with Del Ray, the City responded by sending shut-off warnings to Del Ray’s tenants.

Concerned their water may be turned off, a tenant from each of the two parks (Doer and Beck) sued Del Ray and obtained preliminary injunctions requiring Del Ray to pay its “water, sewer and garbage bill to

the City” “as the bill becomes due....” Separately, the City sued Del Ray regarding the payments it alleged remained unpaid.

Del Ray attempted to comply with the court order but continued to receive differing and arbitrary payment figures from the City. Recognizing the potential flaws with its billings, and in a good faith effort to work with Del Ray to reach an agreed upon accounting, the City agreed to not give any further shut-off notices until after Del Ray and the City had either resolved the billing issues, or had allowed the court to decide the issue. The tenants would not be affected by the City and Del Ray’s dispute.

Despite this agreement, and knowing there was no risk of receiving any further shut-off notices, tenant Sharon Doerr asked the trial court to find Del Ray in contempt for not paying the City’s disputed bills in full. The trial court ignored the City and Del Ray’s CR 2A agreement, overlooked the fact that the City’s irregular billings prevented Del Ray from knowing the precise amounts due, and found Del Ray in contempt, despite there being no risk to the tenants of having their water supply interrupted.

The court ordered Del Ray to pay Doer \$3,300 “as a *punitive* sanction” as punishment for the contempt. It also ordered Del Ray to pay Doer’s \$2,674.00 in legal fees.

The trial court's Order of Contempt must be reversed and vacated because there was insufficient evidence that Del Ray willfully violated the court's preliminary injunction, and the \$3,300 fine was imposed as a *punitive* sanction as opposed to a remedial measure.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in making Findings of Fact #1 and #2 (including subparts). CP 151.
2. The trial court erred in finding Del Ray in contempt of the Order Grantion (sic) Motion for Preliminary Injunction when there was insufficient evidence that Del Ray received the billing and notice of the non-payment. CP 150-53.
3. The trial court erred in imposing punitive sanctions against Del Ray for violating the Order Grantion (sic) Motion for Preliminary Injunction. CP 150-53.
4. The trial court erred in awarding Doerr her attorneys' fees related to the Order on Hearing Re Contempt. CP 150-53.
5. The trial court erred in entering the Order on Hearing Re Contempt against Del Ray. CP 150-53.
6. The trial court erred in denying Del Ray's Motion for Reconsideration. CP 157-58.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. A finding of contempt must be supported by substantial evidence that shows the contemnor intentionally disobeyed a clear court order. Since the City was unable to provide precise or accurate bills, the City agreed under CR 2A to not issue any shut-off notices to Del Ray's tenants until the parties had attempted to resolve their dispute, and Del Ray agreed to pay the bills under protest to keep the accounts current. Did the trial court err in finding Del Ray in

contempt when Del Ray tried to comply with the injunction and took steps to ensure its tenants would receive no further shut-off notices from the City and the bills would be timely paid?

- B. Except as provided in RCW 7.21.050, an action to impose punitive sanctions for contempt must be commenced by the appropriate prosecuting authority. Here, the court punished Del Ray by imposing a \$3,300 punitive sanction for events that occurred outside the Court's presence and without following the criminal process in RCW 7.21.050. Did the trial court err when it imposed punitive sanctions?

#### **IV. STATEMENT OF THE CASE**

##### **A. Del Ray's Mobile Home Park**

Del Ray owns two mobile home parks in Longview, WA, called "Del Ray I", and "Del Ray II." CP 2-3, 52. Because the City does not provide meters for each tenant, Del Ray receives one bill for each of the two parks. CP 52. The tenants' rent includes water service, even though the tenants' water use is not individually metered. CP 13.

##### **B. Del Ray has experienced numerous problems with the City's water billing practices**

Due to sudden and dramatic increases, Del Ray began to question its water and sewer bills. CP 39-43. This resulted in Del Ray discovering several irregularities, including inaccurate meter readings, undisclosed

meter readings, and overstated bills. *Id.* As a result, Del Ray challenged the City on its billing practices.<sup>1</sup>

**C. City sends shut-off notices.**

The City responded to Del Ray's challenges by first filing a lawsuit in August 2016. CP 179-80. Rather than allowing the dispute to be resolved through the courts, the City began to send regular shut-off notices to each tenant. CP 1-8; 51-58. The City never actually terminated the tenants' utility services, as the notices were just a threat to compel Del Ray to abandon its legal challenges. CP 118.

**D. Beck and Doerr Complaints and Injunctive Relief**

Northwest Justice Project then had one tenant from each of Del Ray's two parks (Sharon Doerr and Randall Beck) file two separate lawsuits against Del Ray for harm caused by the shut-off notices. CP 1-8; 51-58. Neither of these lawsuits included the City, nor did these plaintiffs seek to intervene in the City's lawsuit. *Id.* Within days, the trial court granted the tenants' respective motions for preliminary injunctions. CP 70-71; CP 45-46.

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<sup>1</sup> For example, the utility bills would show as paid in full, with no arrearages owed by Del Ray each month. CP 39-40. Del Ray paid each invoice sent by the City. At the time of the Beck Complaint, Del Ray's monthly bill showed a current balance of \$6,376.79. CP 39. The City never sent a bill for \$5,596.55, as claimed by the City. *Id.* Curiously, the City sent at least eight shutoff notices to Del Ray, but each invoice was shown as paid. CP 39. In fact, Del Ray believes at the time the Beck lawsuit was filed, it had overpaid by over \$24,875.75. CP 40, 42.

On August 9, 2017, the trial court issued a preliminary injunction in the Doerr lawsuit requiring Del Ray to: (1) pay its disputed water bill of \$1,609.73 by August 10, 2017, and (2) keep its utility bills current. CP 70-71. The order was conditioned upon Doerr posting a \$1 bond. CP 71.<sup>2</sup> On September 8, 2017, the trial court consolidated the Beck, Doerr, and City lawsuits. CP 47-50.

**E. City still cannot provide Del Ray with accurate billing statements.**

After the injunctions were entered, Del Ray tried to work with the City to determine the amounts due in order to avoid a violation of the orders. CP 118; CP 138-141. This proved to be nearly impossible. The history of the various amounts claimed to be owed by the City show the difficulty Del Ray experienced in obtaining a correct figure. CP 142-146.

City Fiscal Support Specialist Susan Chamberlain submitted a declaration to support the Doerr injunction on August 8, 2017. CP 64-67. In this Declaration, Chamberlain stated a bill was generated on July 9, 2017, for \$5,646.92 and the total balance owed was \$12,928.57 (reflecting a balance owed from the previous month). CP 66. She stated that a payment of \$5,671.92 was made on July 25, 2017, reducing the balance to

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<sup>2</sup> Although not directly relevant to this appeal, the trial court also issued a similar preliminary injunction in the Beck lawsuit. CP 45-46. The Court waived the bond requirement. CP 46.

\$7,256.65. *Id.* On July 26, 2017, a shutoff notice was issued for the past due balance of \$1,609.73, but the total balance owed was \$7,281.65 (only a portion was overdue at that time). CP 66. The Court relied upon this Declaration in granting the preliminary injunction.

On August 24, 2017, Chamberlain submitted her Second Declaration in support of the Motion for Contempt against Del Ray. CP 76-77. In this Declaration, Chamberlain accurately stated that Del Ray paid \$1,660 (the amount to be paid was \$1,609.73, Del Ray paid extra in a sign of good faith and also because it still questioned the City's accounting). CP 77. However, Chamberlain testified that the City recently issued a new past due notice on August 10th, just one day after the Injunction was granted, for a bill purportedly generated on July 11th, which was now a different date than the one she provided in her first declaration just two weeks prior. *Id.*

More troubling was her testimony that the City was now claiming an entirely different amount was owed. Rather than the \$5,646.92 balance claimed to be owing on August 8th, the City now claimed the bill generated was for \$5,596.65. *Id.* If the difference was due to the balance owed, reflecting Del Ray's slight overpayment, then the balance could quickly be reconciled. However, this does not explain why the City claimed the bills were generated on two different dates and for two

different amounts (the generated bill amount from the July invoice would not reflect the overpayment made in August, since clearly the bills were generated a month before the payment was made). Del Ray's concerns with the City's whimsical billing practices were now on full display.

The situation with the billings only got worse. Chamberlain issued yet a new Declaration on September 5, 2017, in Support of the Motion for Order to Show Cause. CP 82. This latest Chamberlain Declaration states that the July bill was generated on July 9, 2017 for \$5,646.92. CP 85. However, Chamberlain did nothing to explain the discrepancies between her prior Declarations. Chamberlain further tried to summarize the billings and payments. But her explanations just added more to the confusion.

For example, Chamberlain states that an invoice was generated on July 9th for \$5,646.92; however, the invoice amount is for \$5,671.92. CP 85; 101. Chamberlain states that a \$25 charge from June is included in the invoice, but Exhibit O does not list a \$25 charge like Exhibit N. CP 100, 101. The City could not determine how much Del Ray purportedly owed on its bills.

**F. Acknowledging the potential confusion, and in a good faith effort to resolve the billings, the City and Del Ray entered CR 2A agreement to (1) prevent the City from issuing any more shut-off notices, and (2) attempt to resolve the billing discrepancies.**

Del Ray had its new attorney contact the City Attorney to work out a process to resolve the dispute because it legitimately believed that it had been systemically overbilled by the City. CP 142-146. Del Ray also hired accounting experts to review the billings to determine if Del Ray was past due on its bills. CP 139.

Del Ray and the City entered a CR 2A agreement wherein the City agreed to not issue any more shut-off notices until the City and Del Ray had attempted to resolve the billing and accounting issues. CP 114-116. Del Ray also agreed to pay all new invoices “under protest” to protect its right to seek a refund for any overpayments. *Id.* Del Ray and the City agreed to a process to attempt to reconcile the difference while giving the tenants the assurances that their utility services would not be terminated. *Id.*

However, Doerr was not satisfied with this agreement and still demanded that Del Ray be held in contempt for not paying the amounts due. Leading up to the October 4th contempt hearing, Del Ray sought to know how much was owed to the City for its water service. CP 142-146. On October 3rd, Del Ray’s attorney emailed the Respondents’ counsel and

stated that Del Ray would pay \$20,055.93 within five days, and confirming agreement to the CR2A stipulated order. *Id.* On October 4th, the day of the hearing, the City's attorney corrected the amount owed that was due by September 24th. CP 143. This amount changed after Del Ray had already mailed out checks totaling \$20,055.93. *Id.* That amount changed once more later in the day. CP 142. Thus, even on the day of the hearing, the City had difficulties explaining the precise amount the City believed was due. *Id.*

Larry Foster, owner of Del Ray, submitted a Declaration on October 3, 2017, disputing that he was in contempt of the prior injunctions because he had paid every invoice he received from the City. CP 117-18. Foster stated that he paid the amounts ordered by the Court, and that he was making another payment of \$20,194.64 to the City. *Id.*

But none of this mattered. At the October 4th show cause hearing, the trial judge rejected the CR 2A agreement and ruled that Del Ray was in contempt of Court for not paying \$5,596.65, despite the uncontroverted evidence showing the discrepancies. CP 150-153.

The Court imposed a \$3,300 fine against Del Ray for "punitive sanctions," plus \$2,674.00 in costs and fees. CP 152. Moreover, the Order of Contempt did not provide Del Ray any opportunity to cure (or purge) the contempt. *Id.* The court imposed these sanctions despite

acknowledging that the tenants had not, and would not, receive any further shut-off notices. CP 114-16. There was also no evidence of any damages suffered by the tenants.

Del Ray moved for reconsideration of the Contempt Order on October 16, 2017. CP 124-134. The basis for Del Ray's motion for reconsideration was that the Court's preliminary injunction required Del Ray to pay \$1,609.73 by August 10, 2017, as the "outstanding utility bill" and to pay the other bills as they become due. CP 125. Del Ray showed that it paid \$1,660.00 on August 10, 2017. Del Ray also brought the inconsistencies in Chamberlain's declarations; the only evidence relied upon to find Del Ray in contempt, to the Court's attention. Those inconsistencies in Chamberlain's two Declarations are summarized as follows:

1. "As per decision made by Judge Evans on 8/9/17, **the delinquent** bill in the amount of \$1,609.73 was to be paid" by August 10, 2017.
2. On August 9, 2017, the City issued a new bill for \$6,376.79, which would not be due until September 9, 2017.
3. On August 10, 2017, Del Ray paid \$1,660, which was about \$50 more than ordered by the Court.

4. On August 29, 2017, Del Ray paid \$6,376.79, which was paid about two weeks before the August 9, 2017 bill was due.
5. On September 9, 2017, the City issued a new bill for \$5,739.66, which did not need to be paid until October 9, 2017.
6. On September 9, 2017, the City issued a “past due notice” of \$5,596.65 with a statement it needed to be paid by September 25, 2017. The Court relied solely upon this last bill to find Del Ray in contempt.

Del Ray submitted declarations showing it paid the \$1,660; it attempted to pay each bill from the City, but it was never provided a clear accounting of the balance; Del Ray never received the September 9, 2017 late notice; and the City failed to provide a clear accounting until just hours before the October 4th hearing. CP 127. Del Ray also disputed that it intended to violate the Court’s order. *Id.* The court denied Del Ray’s Motion for Reconsideration. CP 157-58. Del Ray timely appealed the Court’s rulings. CP 159-172.

## V. ARGUMENTS

### A. **Standard of Review**

The review of a trial court’s authority to impose contempt sanctions is *de novo*. *In re Dependency of A.K.*, 162 Wn.2d 632, 644, 174 P.3d 11 (2007). Del Ray’s challenge to the court’s factual

findings is reviewed under the substantial evidence standard, which exists “when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 679-80, 101 P.3d 1, 20 (2004).

A superior court’s statutory authority is a question of law reviewed *de novo*. *Okeson v. City of Seattle*, 150 Wn.2d 540, 548-49, 78 P.3d 1279 (2003); *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004). Thus, the trial court’s imposition of a punitive sanction for the alleged contempt is reviewed under the error of law standard because the trial court exceeded its contempt authority, or violated the appropriate processes, under RCW Chapter 7.21.

**B. Because the amounts due on the utility bills were unclear, and Del Ray did its best to satisfy the court’s order, Del Ray could not be found in contempt of court**

“Contempt of court” requires an “intentional...disobedience of any lawful...order...of the court.” RCW 7.21.010(1). If a superior court bases its contempt finding on a court order, “the order must be strictly construed in favor of the contemnor,” *Stella Sales, Inc. v. Johnson*, 97 Wn. App 11, 20, 985 P2d 391 (quoting *State v. Boatman*, 104 Wn.2d 44, 46, 700 P2d 1151 (1985), *rev. den.* 139 Wn.2d.1012 (1999)). And the facts found to support the finding must constitute a plain violation of the order. *Johnston*

*v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982).

Here, the trial court erroneously found that Del Ray “had notice of the court order, willfully refused to abide by the court order, had the ability to comply with the order, and is in willful contempt of this order.” CP 151. Larry Foster’s Declaration states that Del Ray always paid its bills to the City as they became due, and that he only recently challenged them when they disproportionately increased with no reason. CP 139. Del Ray then hired an accountant to review the billings once the City could not explain why the billings had drastically increased. *Id.* Importantly, at the time of the August 9th Contempt Order, Del Ray did not know that the City claimed that it owed another \$5,596.65, based upon the July 9th billing. *Id.* Foster stated that if the City, or the court, included this amount in the Contempt Order and brought it to his attention, he would have paid that amount promptly. But since he did not have notice of it, he failed to pay it before the October 4th hearing. *Id.*

After Del Ray hired an attorney to help work with the City and straighten out the issues with the billings, Del Ray was finally informed that it owed \$20,194.64 on both accounts. CP 140. This final figure was only provided after much back and forth between Del Ray’s attorney and

the City attorney. Once the amount was provided by the City, Del Ray paid it the same day. CP 140.

The only evidence before the Court regarding Del Ray's alleged contempt were the inconsistent and arbitrary declarations from Susan Chamberlain, the City's finance specialist. These declarations were all over the board, containing contradictory and misleading information regarding the billings. For example, in her Second Declaration, Chamberlain swears that on August 10, 2017, she mailed Del Ray a past due notice of \$5,596.65 that was for a "bill issued on 07/11/2017." She also swears that the "final date for payment" on that notice was "08/22/2017." She did not provide copies of that notice.

But in her third declaration, Chamberlain swears she issued this past due notice on September 9, 2017, not August 10, 2017, and that the late notice was for a bill generated on July 9, 2017, not July 11, 2017. She also fails to say anything in her third declaration about an August 10, 2017, "late bill," a bill she swears she sent in her second declaration.

Chamberlain's billing practices raise additional questions. For example, why did the City advise the Court on August 9, 2017, that Del Ray only owed \$1,609.73 when, according to Chamberlain's newest declarations, Del Ray also owed \$5,646.65 for a bill generated on July 9th? As the City acknowledges, Del Ray paid \$1,660.00 on August 10,

2017, as ordered by the Court. It could have easily paid the additional \$5,646.65 if brought to Del Ray's attention and included in the Order. If the City believed Del Ray owed another \$5,646.65, then it should have requested that as part of the July 9th order and the City could have disclosed that to the Court on August 9th.

Chamberlain contradicted herself in the two Declarations, and she failed to provide proof these late notices were mailed. Contrast this to Larry Foster's Declaration where he stated that Del Ray was current as of October 3, 2017, one day before the contempt hearing, after he mailed the City a check for \$20,194.64. CP 118.

Further, Del Ray and the City entered into a binding agreement under CR 2A that protected the tenants from any further turn-off notices while affording Del Ray (and the City) a reasonable opportunity to try and resolve the discrepancies. The trial court rejected the CR 2A agreement for no reason and held Del Ray in contempt, even in the face of overwhelming evidence that even the City was confused about how much was owed. The trial judge did this even though the purpose of the injunction (i.e., protect the tenants from having their water shut-off) was served.

Simply put, the facts show no clear intentional disobedience of a lawful and clear court order. The undisputed facts instead show that Del Ray was attempting to pay what the City claimed was owed. But due to

the ever-changing numbers from the City, Del Ray had an impossible task. CP 128. Del Ray's conduct certainly was not intentional disobedience of the Contempt Order.

**C. The trial court's award of punitive sanctions against Del Ray violated RCW 7.21.040 substantive and procedural requirements**

Del Ray next challenges the \$3,300 fine imposed for the alleged contempt because it violates the trial court's authority, and Del Ray's due process rights, under RCW 7.41.040. The trial court imposed a criminal sanction for an alleged contempt that occurred outside the court's presence. As clearly stated by Division III in *State v. Sims*, 1 Wn. App. 2d 472 (2017), such "summary sanctions for contempts that d[o] not occur in" the court's presence are invalid absent the process prescribed by RCW 7.21.040(2).

There is no doubt that the contempt here was punitive rather than remedial. Indeed, the Contempt Order expressly states, "as a punitive sanction, Defendant [Del Ray] shall pay \$3,300.00 to Plaintiff, Sharon Doerr...." The Order also awarded Doerr her attorneys' fees and costs. *Id.* Moreover, the Contempt Order did not provide Del Ray with an ability to purge the contempt.

Under Washington law, there are two forms of contempt sanctions: remedial and punitive. A "remedial sanction" is "a sanction imposed for

coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person's power to perform." RCW 7.21.010(3). A "punitive sanction" is "a sanction imposed to punish a past contempt of court for the purpose of upholding the authority of the court." RCW 7.21.010(2).

Unlike remedial sanctions, punitive sanctions do not allow the party to purge the contempt. *State v. Buckley*, 83 Wn. App. 707, 711, 924 P.2d 40 (1996). A court may punish the past contemptuous act with a fine and/or imprisonment, but only after the contemnor has been provided the panoply of rights described under RCW 7.21.050(2).

In contrast, a remedial sanction must contain a purge clause or it loses its coercive character and becomes punitive. *In re Structured Settlement Payment Rights of Rapid Settlements, Ltd.*, 189 Wn. App. 584, 613, 359 P.3d 823 (2015), *rev. den.*, 185 Wn.2d 1020, 369 P.3d 500 (2016). Further, remedial monetary sanctions can only accrue from the date of the contempt finding and must include a purge clause to avoid being considered a punitive sanction. *See State v. Sims*, 1 Wn. App. 2d 472, 476, 406 P.3d 649, 651 (2017).

Because of due process concerns, the distinction between punitive and remedial sanctions matters. RCW 7.21.040 describes the process that must be afforded to those facing a punitive sanction. *In re Interest of*

*M.B.*, 101 Wn. App. 425, 453, 3 P.3d 780 (2000). “Unless the contemptuous act occurred in the presence of the court, these procedures require the county prosecutor or city attorney to file a complaint or an information and for a trial to occur before a neutral judge. RCW 7.21.040(2), .050(1); *see also In re Interest of Mowery*, 141 Wn. App. 263, 276, 169 P.3d 835 (2007).” *State v. Sims*, 1 Wn. App. 2d at 480. This obviously did not occur. In fact, the City Attorney responsible for criminal prosecutions actually entered into a CR 2A agreement to avoid having Del Ray held in contempt.

There is no dispute that the trial court did not afford Del Ray the process required under RCW 7.21.040(2). Absent such compliance, the trial court lacked the authority to impose punitive sanctions. *See id.* The Order of Contempt must be vacated.

## **VI. CONCLUSION**

Del Ray did not intentionally violate the trial court’s order. Indeed, it did all it could to comply and to protect its tenants from any further shut-off notices. Regardless, the trial court exceeded its authority when it imposed a summary punitive fine for an alleged act that occurred outside

the presence of the court. The trial court's decision should be vacated and remanded.

DATED this 23rd day of February, 2018.

Respectfully Submitted,

LANDERHOLM, P.S.

/s/ Phillip J. Haberthur

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 23rd day of February, 2018, a copy of the foregoing **APPELLANT DEL RAY PROPERTIES, INC.'S OPENING BRIEF** was delivered via first class United States Mail, postage prepaid, to the following person:

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**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

DATED: February 23, 2018  
At: Vancouver, Washington

*/s/ Heather Dumont*  
\_\_\_\_\_  
HEATHER A. DUMONT

**LANDERHOLM, P.S.**

**February 23, 2018 - 11:21 AM**

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