

64439-4

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No. 64439-4-1

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

AMY RIMOV, a single woman,  
Plaintiff/Respondent,

v.

MARY SCHULTZ, a single woman; and MARY SCHULTZ AND  
ASSOCIATES, P.S. a/k/a MARY SCHULTZ, P.S, a Washington State  
Professional Services Corporation,  
Defendants/Petitioners.

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COURT OF APPEALS  
DIVISION I  
SPokane, WA

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RESPONDENT'S BRIEF

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## I. INTRODUCTION & STATEMENT OF THE CASE

This case involves Ms. Rimov's claims for: (1) an equitable distribution of property following the termination of a six year committed intimate relationship<sup>1</sup> between Ms. Rimov and Schultz; and (2) for damages arising from a separate employment relationship between Ms. Rimov and Schultz. Ms. Schultz defends based primarily upon a 2007 Settlement Agreement and Release of All Claims (hereinafter "the Release Agreement").

Before the suit was filed, the parties attempted to resolve the matter between themselves. However, the validity of the Release Agreement proved too great a hurdle to meaningful settlement discussions. As a result, the parties agreed to submit the enforceability of the Release Agreement to a Retired Spokane County Superior Court Judge (The Honorable Michael Donahue) for a non-binding determination, which the parties intended as a tool for settlement discussions. Retired Judge Donahue often mediates civil disputes. That non-binding determination came out in Ms. Schultz's favour.

Some months after the non-binding determination was made, Ms. Rimov brought suit against Ms. Schultz. Ms. Schultz moved to dismiss, arguing that the non-binding advisory opinion was, in fact, an arbitration award that precludes any

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<sup>1</sup> The Washington State Supreme Court has substituted the phrase "Washington's law of committed intimate relationships" for the older phrase "meretricious relationship doctrine." However, no substantive change in law was effected by this change in terminology. See *Oliver v. Fowler*, 161 Wn.2d 655, 668-69 (2007).

further litigation. Ms. Schultz's central arguments were (and remain): (1) that the parties' agreement to submit the issue to Retired Judge Donahue was an arbitration agreement; (2) that the proceeding before Retired Judge Donahue was an arbitration; and (3) that His Honour's decision therein was a binding arbitration award.

By a September 18, 2009 Order, the Trial Court correctly denied Ms. Schultz's motion to dismiss. The Trial Court concluded that the parties had no agreement to arbitrate, that the proceeding before Judge Donahue was not an arbitration, and that His Honour's decision was not a binding arbitration award. Ms. Schultz brought this appeal.

The Trial Court did not err in denying Ms. Schultz's motion to dismiss, and the Court should affirm. Arbitration is contractual. Arbitration is only permitted where the parties agree to it. Once the parties agree to it, the process is somewhat outlined and bounded by statute. However, there is no provision of Washington's arbitration act that ensnares parties to a binding outcome where no binding process was agreed to. The Release Agreement contains no arbitration provision, and no subsequent agreement to arbitrate was made.

Parties to a dispute are free to utilize any process that they deem appropriate to assist them in resolving a dispute. Parties could flip a coin. Parties could privately or cooperatively ask mock juries to evaluate their claims. As took place in this matter, parties can ask a retired judge to offer an advisory opinion.

The fact that in asking for such an advisory opinion the parties used the phrase “non-binding arbitration” does not invoke Washington’s Arbitration Act and render binding that which was intended as advisory.

With all due respect, Ms. Schultz’s argument is a word game. The parties never intended the proceeding before Retired Judge Donahue (regardless of what name was put to it) to bind either party, to finally resolve any issue, or to preclude litigation on any issue. The parties sought Retired Judge Donahue’s opinion to assist them in attempting an out of Court settlement. Ms. Schultz’s attempt to make more of that process than it was is not supported by the facts.

Ms. Rimov asks the Court to allow this matter to proceed to discovery and to litigation so that the Release Agreement’s enforceability may be determined on its merits. The Trial Court properly allowed this matter to proceed. Ms. Rimov respectfully asks the Court to affirm the Trial Court’s September 18, 2009 Order and to similarly allow this matter to proceed.

## **II. ISSUES PRESENTED**

Ms. Schultz improperly described the issues before the Court; the issues are properly stated as:

- A. Whether parties to a dispute are at liberty to seek an advisory opinion as a device to assist them in exploring a potential settlement?

- B. Whether Washington's Arbitration Act applies to bar litigation in instances where: (1) the parties never had an agreement to arbitrate; and (2) where no arbitration took place?

### III. STATEMENT OF FACTS

**A. MSES. RIMOV AND SCHULTZ WERE COMMITTED INTIMATE PARTNERS FROM SEPTEMBER 2001 UNTIL JULY 2007.**

Ms. Schultz hired Ms. Rimov as an associate attorney, and Ms. Rimov began working on December 18, 2000. (CP 2).

Ms. Rimov and Ms. Schultz began a romantic relationship in October 2001. (CP 4).

In October or November 2001, Ms. Rimov and her children moved in with Ms. Schultz. From that time until July 2007, Mses. Schultz and Rimov lived as a family, along with Ms. Rimov's children. (*Id.*). Ultimately, the relationship failed and Ms. Rimov was forced to leave the family home in July 2007. (CP 19-20).

**B. IN JANUARY 2007, MS. SCHULTZ FORCED A FAUSTIAN BARGAIN ON MS. RIMOV – EXECUTE A DOCUMENT ENTITLED “SETTLEMENT AGREEMENT AND RELEASE OF ALL CLAIMS” OR IMMEDIATELY LEAVE THE FAMILY HOME AND LOSE HER JOB.**

In 2006, Ms. Schultz expressed a desire that she and Ms. Rimov enter into an agreement regarding the couple's assets. (CP 14). Discussion regarding such an agreement continued off and on over the next few months. (*Id.*).

On or about January 16, 2007, Ms. Schultz demanded that Ms. Rimov and the children move out of the family home unless Ms. Rimov executed an agreement that waived Ms. Rimov's right to an equitable distribution of the couple's property. (CP 15-7). Additionally, Ms. Rimov understood that Ms. Schultz would immediately terminate her employment if Ms. Rimov refused to sign the agreement, which would have left Ms. Rimov unemployed, with no residence, with no car, and with no telephone. (*Id.*). Having no real choice, Ms. Rimov executed a "Settlement Agreement and Release of All Claims" on or about January 20, 2007. (*Id.*).

Even that could not keep the peace long. In July 2007, Ms. Rimov moved out of the family home, and on February 8, 2008, Ms. Schultz terminated Ms. Rimov's employment. (CP 19-20).

**C. MS. SCHULTZ WAS MS. RIMOV'S LAWYER AND OWED HER ALL THE DUTIES THAT A WASHINGTON STATE LAWYER OWES HER CLIENTS.**

Ms. Rimov was married (but separated) when she and Ms. Schultz began living together. (CP 4-5). On December 5, 2001, Ms. Rimov filed a petition for marital dissolution from her then husband. Ms. Schultz provided legal advice and assisted Ms. Rimov in preparing that petition, and as of March 28, 2002, Ms. Schultz had officially appeared as counsel for Ms. Rimov. (*Id.*). This representation continued through various parenting plan and/or child support

modifications. This representation predates the self-serving and onerous agreement that Ms. Schultz required Ms. Rimov to execute.

**D. AFTER THEIR PERSONAL AND PROFESSIONAL RELATIONSHIPS FAILED, MSES. RIMOV AND SCHULTZ BECAME ADVERSARIAL, HIRED COUNSEL, AND DISCUSSED POSSIBLE SETTLEMENT.**

Ms. Rimov retained Witherspoon Kelley to represent her in a potential claim against Ms. Schultz. (CP 206-7). Ms. Schultz retained Dunn & Black to represent her in relation to Ms. Rimov's potential claim. (*See Id.*). On February 12, 2009, counsel met at Witherspoon Kelley's offices to discuss the dispute. (CP 207). During that meeting, Ms. Schultz and her lawyers requested that the parties submit their dispute to a binding and confidential arbitration. (*Id.*). Witherspoon Kelley, on Ms. Rimov's behalf, refused; however, Witherspoon Kelley proposed a mediation. (*Id.*). Ms. Schultz, however, was very confident that the January 2007 Settlement Agreement and Release of All Claims would be enforced and would bar any claim by Ms. Rimov. (CP 208). The parties' differing views on the enforceability of the agreement, therefore, proved a stumbling block to mediation. (*Id.*). In an effort to further settlement discussions, the parties agreed to submit the enforceability of the agreement to Retired Judge Donahue for an advisory opinion. (*Id.*). There was no agreement to arbitrate reached at counsels' February 12, 2009 conference nor in the correspondence confirming the agreement reached thereat. (CP 206-18).

**E. FACTS REGARDING THE PARTIES' AGREEMENT REGARDING THE PROCEEDING BEFORE RETIRED JUDGE DONAHUE.**

Immediately following the parties' conference (discussed above), counsel for Ms. Rimov wrote to counsel for Ms. Schultz. (CP 212-13). That letter is clear that the proceedings that the parties agreed to were to be non-binding, in all circumstances. (*Id.*). The parties' agreement was not for a determination that would be binding, unless a party objected or sought a review *de novo* (as was the case in *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885 (2001), *infra*). The determination that the parties agreed to was understood and intended to be wholly advisory. (CP 212-13). Two days later, counsel for Ms. Schultz responded to Ms. Rimov's counsel's letter and acknowledged that the parties agreed to a non-binding determination solely regarding the enforceability of the release agreement between Ms. Schultz and Rimov. (CP 217-18).

On October 23, 2008, Ms. Schultz, having assumed representation of herself, wrote to Ms. Rimov's counsel and clearly encapsulated the parties' agreement. (CP 269). Ms. Schultz wrote: "I agreed to a non-binding arbitration as to the validity of the [release] agreement." (*Id.*).

It is clear from the parties' correspondence and communications regarding the proceedings before Judge Donahue that no one intended the proceedings to have any binding effect. (*See* CP 212-13, 217-18, 269). This is not a situation wherein the parties contemplated a binding procedure with the possibility of a *de*

*novo* appeal. (*See Id.*). This is not a situation where the parties designed an alternative dispute resolution process, but afforded themselves an escape hatch. (*See Id.*). This is not a situation wherein the parties agreed to forego the judicial forum for another venue. (*See Id.*). This is not a situation wherein the parties agreed to waive their rights to a jury trial. (*See Id.*). Whatever the parties called it, the parties intended the proceeding before Retired Judge Donahue to be wholly advisory. (*See Id.*).

#### IV. ARGUMENT

##### A. STANDARD ON MOTIONS FOR DISCRETIONARY REVIEW.

The Court reviews the trial Court's decision on Ms. Schultz's CR 12(b)(6) motion to dismiss as a question of law *de novo*. *San Juan County v. No New Gas Tax*, 160 Wn.2d 141, 164 (2007). Ms. Schultz bore the burden below, and bears the burden on this appeal, to establish "beyond a doubt that the claimant can prove no set of facts consistent with the complaint that justifies recovery." *Yeakey v. Hearst Communications, Inc.*, \_\_ Wn. App. \_\_ (July 2, 2010) (*citing San Juan County*, 160 Wn.2d at 164). Washington's Courts have declined to adopt the more demanding pleading standard adopted by the Federal Courts. *McCurry v. Chevy Chase Bank, FSB*, \_\_ Wn.2d \_\_ (June 24, 2010) (declining to adopt the *Ashcroft v. Iqbal*<sup>2</sup> plausibility standard). Therefore, it remains the rule in Washington that a CR 12(b)(6) motion should be granted "only in the unusual

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<sup>2</sup> 129 S.Ct. 1937 (2009)

case in which the plaintiff's allegations show on the face of the complaint an insuperable bar to relief." See *San Juan County*, 160 Wn.2d at 164.

In considering this matter the Court must, like the Trial Court was obliged to do, accept Ms. Rimov's proffered facts as true and draw all reasonable inferences in her favour. See *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 66-7 (1991). The Trial Court did not err in denying Ms. Schultz's motion. The appeal turns on whether the parties' agreement to seek Retired Judge Donahue's input was an agreement to arbitrate. Taking the undisputed facts in the light most favourable to Ms. Rimov, it is undeniable that (regardless of how the parties' referred to their arrangement) they did not intend the proceeding before Retired Judge Donahue to be a substitute for the judicial process, and they did not intend Retired Judge Donahue's determination to be binding – under any circumstances.

Ms. Rimov never agreed to submit any issue to arbitration; Ms. Rimov never agreed to forego her right to judicial process; and the proceeding before Retired Judge Donahue was not an arbitration – it was a mock summary judgment hearing for the sole purpose of obtaining an advisory opinion to assist the parties' settlement efforts.

**B. THE PARTIES NEVER ENTERED INTO AN ARBITRATION AGREEMENT.**

There is no dispute regarding the words that the parties used in agreeing to the proceeding before Retired Judge Donahue. There is no dispute that the

parties, including Ms. Schultz, understood and intended that the proceeding was to have absolutely no binding effect. (*See* CP 269). Ms. Schultz’s entire argument, despite the gilding placed upon it, is that despite the parties’ actual agreement and despite the parties’ actual mutual intent, the use of the word “arbitration” renders binding a determination that the parties intended to have no binding effect.

***1. The parties’ communications and correspondence demonstrate a clear intent to seek a wholly non-binding advisory opinion.***

Ms. Schultz’s argument must be rejected because the parties did not enter into an arbitration agreement. The correspondence among the parties and Retired Judge Donahue clearly demonstrate the parties’ intent that His Honour consider this matter in a mock summary judgment fashion and issue an advisory opinion regarding the Release Agreement’s enforceability.

In Washington, parties are free to decide whether they wish to use arbitration in lieu of judicial process and are free to decide which issues they want to arbitrate. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 894 (2001). However, once the parties agree to arbitrate one or more issues, an arbitration decision is reviewable only in accord with the limited provisions of Washington’s Arbitration Act. *Id.* at 897. The touchstone of the process remains a contractual agreement between the parties to waive their right to judicial process and to submit their dispute to arbitration. RCW 7.04A.060 allows an arbitration

agreement to be quite informal; however, an arbitration agreement must exist only where the parties intend to submit their dispute to a non-judicial resolution, in lieu of judicial resolution. *See Id.*, RCW 7.04A.010.

Despite the parties' use of the phrase "non-binding arbitration" to describe the proceedings before Retired Judge Donahue, it is clear that the parties did not intend to submit any dispute to a non-judicial resolution. (*See* CP 212-13, 217-18, 269). In fact, when Ms. Schultz misunderstood Ms. Rimov's counsel's correspondence to reference more complete proceedings than a mock summary judgment type proceeding, Ms. Schultz was quick to point out that she had not consented to anything beyond a non-binding determination regarding the enforceability of the Release Agreement. (CP 269-71). The parties did not intend to submit their dispute to arbitration, and it is the parties' intent, rather than the use of the word "arbitration," that should govern the outcome of this appeal.

**2. *Ms. Schultz's conduct following the proceeding before Retired Judge Donahue is inconsistent with her present argument that the proceeding was an "arbitration."***

Ms. Schultz's conduct following Retired Judge Donahue's advisory opinion was inconsistent with her present position. If Ms. Schultz believed Retired Judge Donahue's decision to be an arbitration award, she would have taken steps to reduce that award to judgment. *See* RCW Ch 7.04A. Ms. Schultz took no such steps. Ms. Schultz's conduct is consistent with her correspondence and with her intent. (CP 269).

The parties asked Retired Judge Donahue to issue an advisory opinion and he did so. The parties never entered into an agreement to arbitrate any issue. *See* RCW 7.04A.060. At a bare minimum, under CR 12(b)(6) or the CR 56, standard factual issues regarding whether an agreement to arbitrate was ever formed require this case to be tried and resolved by a jury. Therefore, the Court should affirm the Trial Court's denial of Ms. Schultz's motion to dismiss.

**C. MS. SCHULTZ'S ARGUMENT THAT WASHINGTON LAW DOES NOT ALLOW FOR "NON-BINDING ARBITRATION" MISCONSTRUES THE LAW.**

Ms. Schultz's entire appeal is based upon *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885 (2001). Ms. Schultz argues that *Godfrey* requires the Court to hold that the parties' use of the word "arbitration" should trump their undeniable mutual intent to seek a non-binding determination to assist their settlement efforts – Ms. Schultz is mistaken.

*Godfrey* arose from a Hartford Underinsured Motorist Insurance policy. 142 Wn.2d at 889. The insurance policy at issue contained a clause that required the parties to submit disputes to arbitration and stated that the arbitrators' decision would be binding regarding liability and would be binding regarding the amount of damages, unless either party demanded a trial *de novo* on damages within 60 days of the arbitration award. *Id.* at 890. The parties were in dispute regarding whether Hartford owed an insurance obligation and regarding the amount of damages, if any, due to Mr. and Mrs. Godfrey. *Id.* at 889-90. Following an

arbitration and an arbitration award in the Godfreys' favour, Hartford demanded a trial *de novo* on the amount of damages. The Godfreys successfully moved for summary judgment, arguing that the trial *de novo* provision was inconsistent with Washington's Arbitration Act. *Id.* at 890-1.

On appeal Hartford argued that the contractual provision should be enforced as written. *See generally, Id.* The State Supreme Court held that the trial *de novo* provision of the Hartford insurance policy violated Washington's public policy by being inconsistent with the Arbitration Act. *Id.* at 894-7. *Godfrey* holds only that once the parties agree to arbitrate (that is, once the parties agree to forego a judicial forum for another one) they are bound by the results of their arbitration. *See Id.*

Importantly for this case, *Godfrey* does not hold, imply, or intimate that parties to a dispute cannot seek and obtain an advisory opinion from a retired Superior Court Judge regarding a legal issue, in order to assist the parties' settlement efforts. Furthermore, nothing in *Godfrey* precludes parties from agreeing at the outset that such an advisory opinion will not be binding should settlement efforts fail; that is precisely what happened in this case. The fundamental and key distinction between *Godfrey* and this matter is that the parties in *Godfrey* undeniably intended to forego the judicial forum for arbitration (in all instances *vis a vis* liability and at least in the first instance *vis a vis* damages), while the parties in this matter did no such thing. By submitting at

least one issue to arbitration, the parties in *Godfrey* invoked Washington's Arbitration Act and vested the arbitrator with jurisdiction. Again, in this case the parties did no such thing. Before *Godfrey* can apply, Ms. Schultz must establish that the parties intended to forego the judicial forum for an alternate forum.

**D. THE PROCEEDING BEFORE RETIRED JUDGE DONAHUE WAS NOT AN ARBITRATION.**

Ms. Schultz also argues that the Arbitration Act's statute of limitations bars Ms. Rimov's action and that the Trial Court deprived Ms. Schultz of vested rights to the purported arbitration award. Both these arguments fail for the same reasons that Ms. Schultz's other arguments fail – namely: (1) the parties never had an agreement to arbitrate; and (2) the proceeding before Retired Judge Donahue was not an arbitration.

Absent an agreement to arbitrate, the provisions of Washington's Arbitration Act – RCW 7.04A – are inapplicable. *See Godfrey*, 142 Wn.2d at 894. The State Supreme Court articulated the reasons for this bedrock principle in *Price v. Farmers Ins. Co.*:

(a) that parties are free to decide whether they wish to use arbitration in lieu of the judicial process, (b) that they may agree on what matters they wish to submit to an arbitrator, [and] (c) that a party is only required to arbitrate those matters which are the subject of such an arbitration agreement . . .

133 Wn.2d 490, 496 (1997) (*quoted in Godfrey*, 142 Wn.2d at 894).

**1. Ms. Rimov was under no obligation to assert a lack of an arbitration agreement before Retired Judge Donahue because the proceedings before His Honour were not an arbitration.**

Ms. Schultz also argues that Ms. Rimov waived her right to deny that an agreement to arbitrate existed, on the sole basis that the issue was not raised before Judge Donahue. This argument is without merit because its sole basis is the conclusion itself -- like all of Ms. Schultz's other arguments, the argument presupposes that an agreement to arbitrate existed, from that presupposition Ms. Schultz argues that an arbitration took place, and from that false premise Ms. Schultz concludes that Ms. Rimov cannot deny that an agreement to arbitrate existed. The argument is circular, is unsupported by the facts of this case, and is unsupported by the fundamental premise of arbitration -- namely, that arbitration is fundamentally contractual and that no party can be forced into arbitration without contractually agreeing to do so. *See Broom v. Morgan Stanley DW, Inc.*, \_\_ Wn.2d \_\_ (July 22, 2010). Ms. Schultz maligns Ms. Rimov's arguments as a "post hoc characterization of [the] proceedings," but in truth it is Ms. Schultz who seeks to mischaracterize the proceedings before Judge Donahue as an arbitration. (*See* Ms. Schultz's Brief at p. 25). Ms. Schultz's argument misses the point; Ms. Rimov had no reason to challenge any alleged agreement to arbitration because no such agreement ever existed and no arbitration took place.

Ms. Schultz relies upon RCW 7.04A.230(1)(e) and *MBNA America Bank v. Miles*, 140 Wn. App. 511 (2007) to support her argument that Ms. Rimov was

obliged to assert a lack of an agreement to arbitrate before Judge Donahue.

Neither the Statute nor the case support Ms. Schultz's argument.

Ms. Schultz's statutory reliance is misplaced for the simple reason that the proceeding before Retired Judge Donahue was not an arbitration; therefore, none of the provisions of RCW Ch. 7.04A apply. The proceedings before Judge Donahue were nothing more than an advisory opinion to guide the parties' settlement efforts. There was never an agreement by the parties to forego the judicial forum; even more tellingly, there was never an agreement to waive any party's right to a jury trial.

Ms. Schultz's reliance upon *MBNA America Bank* is equally misplaced. *MBNA America Bank* arose as a claim for money due on a credit card account. 140 Wn. App. at 512. When the original account was opened, the contract contained no arbitration provision; however, the contract contained a provision that allowed the bank to amend the agreement, provided that certain notice requirements were met. *Id.* Before the dispute arose, the bank amended the agreement to contain an arbitration provision, and before that provision became effective, each card holder was entitled to opt out of the arbitration provision by providing written notice of his or her objection. *Id.* Mr. Miles (the card holder at issue in the case) did not opt out of the arbitration provision. *Id.* Ultimately, the bank filed an arbitration action (presumably via an arbitration complaint, which was notably absent from this matter), and in that actual arbitration Mr. Miles

objected to that arbitration, arguing that the agreement to arbitrate was ineffective. *Id.* at 513.

There are, therefore, two key distinctions between this matter and *MBNA America Bank*, each of which renders the case wholly inapposite to the issue before the Court: (1) in *MBNA America Bank*, there was concededly an arbitration agreement and the dispute revolved around the enforceability of that agreement; in this case, there simply is no agreement to arbitrate any issue; and (2) in *MBNA America Bank*, there was an actual arbitration and an actual arbitration award; in this case, there was no arbitration and no award was issued. Absent an agreement to arbitrate, Washington's Arbitration Act is inapplicable, and because no such agreement existed and because no arbitration took place, the Trial Court correctly denied Ms. Schultz's motion to dismiss. *See Godfrey*, 142 Wn.2d at 894. The Court should affirm the Trial Court's decision for the same reasons.

## V. CONCLUSION

Based upon the foregoing, Ms. Rimov respectfully asks the Court to affirm the Trial Court's denial of Ms. Schultz's motion to dismiss. Ms. Rimov and Ms. Schultz never agreed to arbitration. Ms. Rimov and Ms. Schultz did not arbitrate. Therefore, the Arbitration Act's limitations periods are inapplicable to this matter. Moreover, being an appeal of a motion to dismiss under CR 12(b)(6), the Court is obliged to take all facts in the light most favourable to Ms. Rimov.

Under that standard, Ms. Schultz's appeal must be denied and the Trial Court affirmed.

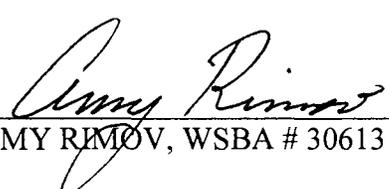
DATED, this 26th day of July, 2010.

**WITHERSPOON KELLEY**



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AMY RIMOV, WSBA # 30613