No. 94680-9

SUPREME COURT OF THE STATE OF WASHINGTON

Birney Dempcy and Marie Dempcy, husband and wife, and their marital community, Petitioners

v.

Chris Avenius and Nela Avenius, husband and wife, and their marital community, Jack Shannon, an individual, Respondents

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RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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1. Identity of Respondents

The Respondents, Chris Avenius and Nela Avenius, Jack Shannon, and Radek Zemel join in this Answer.

2. Issues Presented for Review

2.1 Should the Court of Appeals' Order Withdrawing and Substituting Opinion dated April 3, 2017 be reviewed by the Supreme Court? Answer – No.

2.2 Should the Court of Appeals' Unpublished Opinion dated April 3, 2017 ("Substitute Opinion") be reviewed by the Supreme Court? Answer – No.

2.3 Should the Court of Appeals' Order Denying Motion for Reconsideration in Cause No. 73869-9-I [sic] dated May 16, 2017 be reviewed? Answer – No.

2.4 Upon Denial of the Petition for Review, should the Respondents Be Entitled to an Award of their Additional Attorney Fees? Answer - Yes.

3. Statement of the Case

3.1 Parties and Properties.

The Respondents Christopher and Nela Avenius reside at 425 94th Ave SE, Bellevue, WA 98004 ("Avenius Property"). CP 8. The Respondent Jack Shannon resides at 407, 94th Ave. SE, Bellevue, WA 98004. CP 8. The Respondent Radek Zemel resides at 403 94th Ave. SE, Bellevue, WA 98004. CP 9. The Petitioners, Birney and Marie Dempcy reside at 429 94th Ave SE, Bellevue, WA 98004. CP 8. All parties are part of the Pickle Point Association, a private homeowners association. CP 121, 134-135. The Pickle Point Association and its members and properties are governed by a set of recorded Declaration of Protective Covenants, Restrictions, Easements, and Agreements for Pickle Point Association recorded in 1990 under King County Recording No. 9006081651 ("Covenants"). CP 121-136. In addition to the privately owned properties, there is a fifth common property owned by all 4 of the parties as tenants in common. CP 9. The common property consists mostly of an unused tennis court.

3.2 Petitioners' Allegations and Procedural History.

In terms of relevance to this appeal and Petition, the claims made by both the Petitioners and Respondents can be divided into two categories - the "Covenant Claims" and the "Non-Covenant Claims." The

Covenant Claims were addressed by the Court of Appeals at pages 7-11 of its Substitute Opinion; the Non-Covenant Claims at pages 4-7. The Petitioners only brought Covenant Claims. In addition to defending against the Petitioners' Covenant Claims, the Respondents brought a single Non-Covenant Claim against the Petitioners – a claim for partition of the commonly held property including the tennis court. CP 27, 30, 40, 49, 50.

In its Substitute Opinion, the Court of Appeals upheld the trial court's dismissal of all of the Petitioners' Covenant Claims. Substitute Opinion, Pages 7-11. The Court of Appeals reversed the trial court's granting of summary judgment for partition, thus deciding in favor of the Petitioners on the Respondents' Non-Covenant Claim. Substitute Opinion, Pages 4-7.

In its "Original Opinion" dated December 19, 2016, the Court of Appeals did not award attorney's fees to any party. Original Opinion at Pages 11-12. In addition, neither party was awarded attorney fees on appeal. Original Opinion at Page 12.

Following the Original Opinion, the Petitioners filed their Motion for Reconsideration dated January 6, 2017 and the Respondents filed their

Motion for Reconsideration dated January 9, 2017. The Court of Appeals denied the Petitioners' Motion for Reconsideration by Order dated April 3, 2017. The Court of Appeals granted the Respondents' Motion for Reconsideration by Order dated April 3, 2017, which Order also withdrew the Court of Appeals' Original Opinion and replaced it with the Substitute Opinion. The Substitute Opinion mirrors the Original Opinion except the Substitute Opinion awarded attorney fees and costs to the Respondents.

4. Argument

4.1 Substitute Opinion Not In Conflict With Any Supreme Court Cases.

The Substitute Opinion is not in conflict with any decisions of the Supreme Court. So the Petitioner does not satisfy RAP 13.4(b)(1). The Petitioner claims that two Supreme Court cases conflict with the Substitute Opinion, American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wash. 2d 217, 797 P.2d 477 (1990) (Petition for Review, Pages 2, 7) and Singleton v. Frost, 108 Wash. 2d 723, 742 P.2d 1224 (1987) (Petition for Review, Pages 3, 16).

The Petitioners' citation to Singleton v. Frost completely misses the mark. The issue in our case is which party prevailed on the Covenant

Claims, not whether the Court of Appeals did or did not exercise discretion in awarding or not awarding attorney fees. In Singleton, the holder of a promissory note sued and won, yet the trial court did not award attorney fees to the holder in spite of a prevailing party attorney fee provision in the promissory note. Singleton v. Frost, 108 Wash. 2d at 727. There was no dispute as to who was the prevailing party under the promissory note so the Supreme Court awarded attorney fees to the note holder. The Substitute Opinion is clearly not in conflict with the holding in the Singleton case.

In American Nursery Products, Inc. v. Indian Wells Orchards, supra, the appellant (American Nursery) contracted with the respondent (Indian Wells) to provide tree nursery services for the respondent. The respondent was to provide apple trees to the appellant and the appellant was to grow them and deliver them back to the respondent's orchard after they had matured. The contract contained a clause that excluded consequential damages in the event of a breach. The appellant failed to deliver all of the contracted for trees and the respondent failed to pay the full amount due under the contract. The Supreme Court held in favor of the respondent and awarded damages. However, the Supreme Court also

found for the appellant that the exclusionary clause applied and therefore the respondent could not recover consequential damages. Both parties sought appellate attorney fees under RAP 18.1 as the prevailing party. The Supreme Court held:

> "However, because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract. See Sardam v. Morford, 51 Wash.App. 908, 756 P.2d 174 (1988). We decline to award attorney fees on appeal."

American Nursery Products, Inc. v. Indian Wells Orchards, 115 Wash. 2d 217, 234-35, 797 P.2d 477, 487 (1990). See also, City of Lakewood v. Koenig, 160 Wash. App. 883, 896, 250 P.3d 113, 120 (2011). The American Nursery case is not applicable to our case. Our case involves a single prevailing party (the Respondents) on the Covenant Claims, which are the only claims where attorney fees could be awarded. Had the Petitioners and the Respondents each prevailed on some of the Covenant Claims, then the holding in American Nursery might be applicable.

The Petitioners do cite to a third Supreme Court case, Carter v. Weowna Beach Community Corp., 71 Wash. 2d, 498, 429 P.2d 201 (1967). However, that case is a partition case which has nothing to do with attorney fees. So that case does not fall within RAP 13.4(b)(1) and is

not applicable to the attorney fee issues sought to be reviewed by the Petitioners.

Based on the foregoing, the Substitute Opinion is not in conflict with any Supreme Court cases so the Petitioners cannot satisfy RAP 13.4(b)(1).

4.2 Substitute Opinion Not in Conflict with Any Published Court of Appeals Decisions.

The Petitioner cited seven published Court of Appeals decisions in their Petition to try and claim that they satisfied RAP 13.4(b)(2). The Petitioners have not. Four cases were cited in a string cite. Petition for Review, Page 2. The case of Rowe v. Floyd, 29 Wash. App. 532, 629 P.2d 925 (1981) (Both parties prevailed in a dispute arising from a single contract, so no attorney fees were awarded), was included in this first string cite but never again discussed. Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wash. App. 86, 285 P.3d 70 (2012), and Sardam v. Morford, 51 Wash. App. 908, 756 P.2d 174 (1988), are cited as support for the notion that the award of attorney fees was mandatory. As discussed above regarding the cases of Singleton v. Frost, supra, and American Nursery Products, Inc. v. Indian Wells

Orchards, supra, the issue before the Court of Appeals was not whether the award of attorney fees was mandatory or not. The Court of Appeals needed to determine which side prevailed on the Covenant Claims. These 2 cases are not applicable to the issues raised in this Petition. After the first string cite, Mellon v. Regional Trustee Services Corp., 182 Wash. App. 476, 334 P.3d 1120 (2014), was only referenced one time. Petition for Review, Page 7. It was only cited in a discussion about the irrelevant (to this Petition) Second Appeal. See, Section 4.4 of this Answer below. That leaves the 3 cases of Marassi v. Lau, 71 Wash. App. 912, 859 P.2d 605 (1993), abrogated by Wachovia SBA Lending, Inc. v. Kraft, 165 Wash. 2d 481, 200 P.3d 683 (2009), Stott v. Cervantes, 23 Wash. App. 346, 595 P.2d 563 (1979) and Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wash. App. 762, 677 P.2d 773 (1984), which cases will be discussed below.

The Petitioners wrongly claim that the Court of Appeals held that the Covenants prohibited partition. Petition for Review, Page 8. This is an attempt to bring the Respondents' partition counterclaim under the umbrella of the Covenants. But the Court of Appeals confirmed that the Respondents brought their partition counterclaim under RCW 7.52.

Substitute Opinion, Page 5. The Court of Appeals also confirmed that the common area in question was created by deeds and that these deeds created equitable interests in the common area. Substitute Opinion, Page 5. The Court of Appeals discussed the holding in Carter v. Weowna Beach, supra, as an exception to the right of partition under RCW 7.52. The Court of Appeals did also mention Covenant Section 5.1 as having "bolstered" these equitable interests. Substitute Opinion, Page 5. However, it did not state that any part of the Covenants prohibited partition. Had the Covenants prohibited partition as the Petitioners claim, there would have been no need for the Court of Appeals to address RCW 7.52 and the Carter v. Weowna Beach case. It could have simply stated that the Covenants prohibited partition.

The Respondents are properly the prevailing parties on the Covenant Claims by having successfully defended all of the Covenant Claims. In Newport Yacht Basin Association of Condominium Owners v. Supreme Northwest, Inc., 168 Wash. App. 86, 285 P.3d 70 (2012), the Court of Appeals cited Marassi but held that a party can be a prevailing party if they successfully defend against a claim as opposed to bringing its own counterclaim.

> "Moreover, a successful defendant can also recover as a prevailing party. Marine Enterprises, Inc. v. Sec. Pac. Trading Corp., 50 Wash.App. 768, 772, 750 P.2d 1290 (1988). The defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff's claims. See Marassi v. Lau, 71 Wash.App. at 916, 859 P.2d 605."

Id., at 99 (emphasis added).

With respect to the award of attorney fees, the partition statute, RCW 7.52, does not provide for the prevailing party to recover attorney fees. The Court of Appeals addressed that very issue in the case of Hamilton v. Huggins, 70 Wash. App. 842, 851, 855 P.2d 1216 (1993):

> "In sum, this is not a "prevailing party" statute. We hold that RCW 7.52.480 does no more than codify the common benefit rule. Applying that conclusion to the facts of this case requires we reverse that portion of the trial court's decision taxing Huggins with fees incurred by the trustees that were not for the common benefit."

Id., at 852 (emphasis added). Moreover, even the Petitioners affirmatively argued that attorney fees were not recoverable under the Non-Covenant Claim of partition.

> "Third, under RCW 7.52.480 there are two mentions of attorney fees – neither of which is applicable here."

Brief of Appellant at Page 45.

Based on the foregoing, the fact that the Petitioners prevailed on the Non-Covenant Claim of partition is irrelevant to the award of attorney fees to the prevailing party on the Covenant Claims (the Respondents).

The case of Seattle First National Bank, N.A. v. Siebol, 64 Wash. App. 401, 824 P.2d 1252 (1992); review denied, 119 Wash. 2d 1010 (1992), is illustrative. In this case the bank sought to foreclose on promissory notes, deeds of trust, mortgages and security agreements, all of which documents had prevailing party attorney fee provisions in them. Id. at 409. In turn, the debtor counterclaimed for damages based on equitable promissory estoppel for having relied on an oral promise by the bank to provide certain financing. Id. at 405. The trial court awarded money damages and attorney fees in favor of the bank as the prevailing party under the contract documents, but the debtor was awarded a damage offset based on their successful claim of promissory estoppel. The debtor appealed, in particular disputing the award of attorney fees in favor of the bank.

> "The Siebols contend Seafirst should not have been awarded attorney fees because most of the trial focused on their counterclaim and affirmative defense, and the amount of the equitable offset awarded as recoupment. . . . Pursuant to RCW 4.84.330, the prevailing party in an action to enforce or defend a contract is entitled to attorney fees and

> costs when the contract so provides. Seafirst sued to collect under the terms of the Siebols' promissory notes, mortgages, security interests, and deeds of trust. Those documents expressly provide for costs of collection including attorney fees. The award of an equitable offset does not make the Siebols a prevailing party entitled to fees under RCW 4.84.330."

Seattle First National Bank, N.A. v. Siebol, 64 Wash. App. at 409–10 (emphasis added). RCW 4.84.330 only applies when there is a contract claim with that contract having an attorney fee provision. In our case, the only claims to which RCW 4.84.330 applies are the Covenant Claims won solely by the Respondents.

The Court of Appeals arrived at a similar decision in a case with a fact pattern similar to ours. In JDFJ Corp. v. International Raceway, Inc., 97 Wash. App. 1, 970 P.2d 343 (1999), as amended on reconsideration in part (1999), the appellant (IRI) was the prevailing party against the respondent (JDFJ) in a claim regarding the extension of a written lease which contained an attorney fees provision. Since the lease issues constituted two-thirds of the action, the appellant IRI was awarded two-thirds of its attorney fees.

> "The trial court found that neither party prevailed on the timber trespass issue and that IRI was the prevailing party on the lease issue. The court held that the lease issue constituted two-thirds of the consolidated action and

> awarded IRI two-thirds of its attorney fees. JDFJ asks us to apply the "substantially prevailing party" standard used in *Hertz v. Riebe* to hold that IRI should not have been awarded attorney fees because both parties prevailed on a major issue. We disagree with and decline to follow *Hertz* because it adds confusion to an issue clarified in *Marassi v. Lau*."

Id. at 7. The Court of Appeals went on to confirm that without an underlying contract or statute, the court lacked authority to award attorney fees. Therefore it did not award the respondent JDFJ any attorney fees on the non-contractual claim it won.

> "Under Washington law, a court lacks authority to award attorney fees to a party absent a contract, statute, or recognized ground of equity permitting fee recovery. The basis for JDFJ's attorney fee claims is RCW 4.84.330, which states that a contract containing an attorneys fee provision entitles the prevailing party in an enforcement action to recover reasonable attorneys fees and costs. No similar statute provides for attorneys fees in a timber trespass action.

Id. at 7-8 (emphasis added). The result in the JDFJ case is directly on point with our case. The Respondents are the prevailing parties on all of the Covenant Claims. The Petitioners prevailed on the Non-Covenant Claim of partition.

The Respondents should be awarded that portion of their attorney fees incurred in successfully defending all of the Covenant Claims which

is what the trial court ordered when it granted the Respondents' Motion for Partial Summary Judgment on the Covenant Claims.

> "Pursuant to Section 6.1 of the CC&Rs [the Covenants], the plaintiffs [the Petitioners] shall pay the defendants' [the Respondents'] reasonable attorney fees, court costs and other expenses of litigation relating to the CC&Rs, the amount of which shall be determined at the time of entry of final judgment in this matter."

CP 722 (emphasis added). The trial court granted attorney fees in favor of the Respondents because the Respondents were the sole prevailing party on the Covenant Claims. The trial court did not award attorney fees to either side on the Non-Covenant Claim of partition.

In Stott v. Cervantes, 23 Wash. App. 346, 595 P.2d 563 (1979), the plaintiff/buyer of real property claimed money damages against the seller because of misrepresentations made by the seller as to the condition of the property. The plaintiffs' money damage claim was the only claim before the court. Instead of being awarded all of their claimed money damages, the court awarded the plaintiff/buyer only about 1/3 of the money damages claimed. Id. at 564. The lower court did not award attorney fees to the plaintiff/buyer because the plaintiff/buyer was awarded less than the amount they sought in money damages. The Court of Appeals reversed and did award the plaintiff their attorney fees reasoning that even if the

plaintiff did not recover all that they sought, they still won because they were awarded part of the money damages they sought. Unlike our case, the Stott case was only about a single money damage claim in which the plaintiffs won their cause of action but were not awarded all of their claimed money damages. That is not our case.

Silverdale Hotel Associates v. Lomas & Nettleton Co., 36 Wash.App. 762, 677 P.2d 773 (1984), is similar to Stott. Silverdale entered into a construction loan agreement with Lomas & Nettleton, the successor lender. The lender breached the loan agreement by failing to pay three legitimate draw requests made by Silverdale. Id. at 764-765. Silverdale sued the lender for money damages as a result of the lender's failure to fund the draw requests. The trial court awarded money damages to Silverdale but did not award lost profits claimed by Silverdale nor did the trial court award attorney fees to Silverdale as the prevailing party. Id. at 765. The Court of Appeals reversed as to attorney fees. Id. at 774. As in the Stott case, the plaintiff brought a single claim for money damages and the Court of Appeals found that even though the plaintiff did not recover all of the money it sought in damages, it did prevail and money damages were awarded so the plaintiff was entitled to attorney fees as the

prevailing party. Id. at 774. Again, unlike our case, the plaintiff in Silverdale did not lose anything. They just did not win as much money as they sought to recover. This holding is not applicable to the issues in this Petition.

With its Substitute Opinion, the Court of Appeals correctly applied the holding in Marassi v. Lau, supra. The Marassi case arose from a contract dispute between a seller and a buyer/developer. Both sides raised claims arising out of the same written contract which contained a prevailing party attorney fee clause. The Court of Appeals in Marassi did recognize authority that in certain cases when both parties prevailed on major issues each side had to bear their own attorney fees. Marassi v. Lau, 71 Wash. App. at 916. However, ultimately, the Marassi court did not so hold. Instead, the Court of Appeals developed a proportionality approach to awarding attorney fees only in certain cases when a major issue analysis would lead to an unfair result. Phillips Building Co. v. An, 81 Wash. App. 696, 702, 915 P.2d 1146, 1149 (1996). But ours is not a case where both sides prevailed on major issues arising out of the same contract. On the Covenant Claims, the Respondents were the sole prevailing parties. Even if the partition claim was the only claim in this

case, the Petitioners would not have been entitled to recover their attorney fees under RCW 7.52. See Hamilton v. Huggins, 70 Wash. App. at 7.

A further clarification of the rules announced in Marassi, supra, and JDFJ Corp. v. International Raceway, Inc., supra, is found in the latter case of Transpac Development, Inc. v. Oh, 132 Wash. App. 212, 130 P.3d 892 (2006), where the Court of Appeals held:

> Following Marassi and Int'l Raceway, we conclude that when distinct and severable claims are involved, an order that leaves both parties to bear their own costs is not adequately supported by a bare conclusion that each party recovered on a substantial theory. As stated in Marassi, the question as to which party substantially prevailed is too subjective and difficult to assess without a more detailed consideration of what actually happened in the litigation.

Id. at 219. The Court of Appeals also set up the approach for deciding attorney fee requests:

> Marassi calls for the court to determine the amount of attorney fees each party would be entitled to for prevailing against the other's claim, as if there were two separate lawsuits, and then to offset one award against the other.

Id. at 220 (emphasis added).

In our case, the Non-Covenant Claim (partition) and the Covenant Claims should be considered as "two separate lawsuits." The parties agree that the Non-Covenant Claim of partition does not provide for attorney

fees, while the Covenant Claims clearly do. Employing the offset rule from Transpac, the Respondents should be entitled to that proportion of their total attorney fees incurred which is attributable to the Covenant Claims, recognizing that partition attorney fees are not recoverable by either side.

4.3 Order Denying Petitioner's Motion for Reconsideration Should be Disregarded

On Page 1 of their Petition, the Petitioners state that they want the Supreme Court to review the Court of Appeals' denial of their Motion for Reconsideration. Petition for Review, Appendix C. This request should be ignored by the Supreme Court. In their Petition, the Petitioners state: "However, to be clear, the Appellants [sic] are not asking the Supreme Court to reverse the holding of the Substitute Opinion except as to the award of attorney fees . . ." Petition for Review, Pages 3-4. The Petitioner's Motion for Reconsideration did not address attorney fees at all. It only addressed the Petitioners complaints about the Court of Appeals' non-attorney fee decisions. Inexplicably, the Petitioners go to great lengths to discuss the non-attorney fee issues, mostly in Pages 10-15 of their Petition for Review. Since the Petitioners concede that they are

not asking the Supreme Court to review anything other than the award of attorney fees, the Order Denying the Petitioner's Motion for Reconsideration and the Petitioner's non-attorney fee arguments should be disregarded.

4.4 Court of Appeals Case No. 73869-1-I Should be Disregarded.

A second appeal under Cause No. 73869-1-I arose out of the same underlying superior court case ("Second Appeal"). The Court of Appeals made its decision in that case by unpublished Opinion dated September 26, 2016 so it is not a published opinion satisfying RAP 13.4(b)(2). Additionally, Mr. Shannon and Mr. Zemel were not parties to the Second Appeal.

The Petitioners moved for reconsideration of the Court of Appeals Opinion in the Second Appeal by Motion dated October 14, 2016. The Court of Appeals denied the Petitioner's Motion for Reconsideration by Order dated November 21, 2016. The Petitioners petitioned the Supreme Court for review of the Court of Appeals' Opinion in the Second Appeal by Petition dated December 20, 2016. The Supreme Court denied the Petitioner's Petition for Review by Order dated March 29, 2017 under Supreme Court Cause No. 93982-9. Inexplicably, the Petitioners cite to

the Second Appeal in this Petition. The Second Appeal is irrelevant to this Petition and should be disregarded.

4.5 Respondents Should be Awarded Their Attorney Fees for Answering the Petition for Review.

Pursuant to RAP 18.1(j), the Respondents request an award of attorney fees for having had to answer this Petition for Review. The Court of Appeals determined that the Respondents were the prevailing party on appeal with respect to Covenant Claims. Substitute Opinion, Pages 6-7. Therefore, upon denial of this Petition for Review, the Respondents should be awarded their attorney fees for having had to answer this Petition.

> "Both parties further contend they should be awarded attorney fees on appeal. RAP 18.1 allows the award of attorney fees on appeal if authorized by applicable law. A contractual provision authorizing attorney fees is authority for granting fees incurred on appeal. Leen v. Demopolis, 62 Wash.App. 473, 485, 815 P.2d 269 (1991), review denied, 118 Wash. 2d 1022, 827 P.2d 1393 (1992). The parties' agreement and RCW 4.84.330 authorize the award of attorney fees to the prevailing party. Because Dynasty has substantially prevailed on appeal, it should be entitled to a reasonable award of attorney fees for the expense of this appeal."

Marassi v. Lau, 71 Wash. App. at 920. See also, Transpac Development, Inc. v. Oh, 132 Wash. App. at 221.

5. Conclusion

The Substitute Opinion is not in conflict with any Supreme Court cases and therefore, the Petitioners cannot satisfy RAP 13.4(b)(1). The Substitute Opinion is itself an unpublished opinion (the Petitioners have never moved for publication) and the Substitute Opinion is not in conflict with any published Court of Appeals decisions. Therefore RAP 13.4(b)(2) is not satisfied. Finally, this is a Petition asking the Supreme Court to review a prevailing party attorney fee case. There is no substantial public interest in this case. RAP 13.4(b)(4). The Petition for Review should be denied.

DATED this 2nd day of August, 2017.

Respectfully Submitted,

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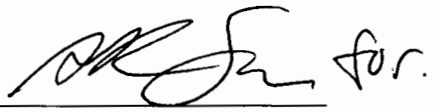

Cristina Mehling, WSBA 38862

CERTIFICATE OF SERVICE

I certify that on the 2nd day of August, 2017 I caused a true and correct copy of this RESPONDENTS' ANSWER TO PETITION FOR REVIEW to be served on the following in the manner indicated below:

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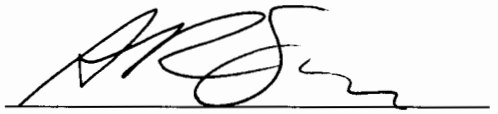

Allen R. Sakai

JEPPESEN GRAY SAKAI PS

August 02, 2017 - 2:01 PM

Transmittal Information

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