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COURT OF APPEALS  
DIVISION II

2012 DEC 28 PM 4:00

STATE OF WASHINGTON

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DEPUTY

No. 43420-2-II  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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

Appellants,

v.

FIRST HORIZON HOME LOANS, a division of FIRST TENNESSEE  
BANK NATIONAL ASSOCIATION, et al.,

Respondents.

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**APPELLANTS' OPENING BRIEF**

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Chad E. Ahrens, WSBA No. 36149  
SMITH ALLING, P.S.  
Attorneys for Appellants,  
Eric R. Engelland and  
Charlene C. Engelland

1102 Broadway Plaza, Ste. 403  
Tacoma, Washington 98402  
Telephone: (253) 627-1091  
Facsimile: (253) 627-0123

**TABLE OF CONTENTS**

I. INTRODUCTION .....1

II. ASSIGNMENTS OF ERROR .....2

III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR.....3

IV. STATEMENT OF THE CASE.....3

A. Procedural History .....3

B. Statement of Facts.....4

V. ARGUMENT .....6

A. THE TRIAL COURT ERRED BY ENFORCING THE ALLEGED SETTLEMENT AGREEMENT BECAUSE THE PARTIES NEVER EXECUTED AN ENFORCEABLE AGREEMENT IN ACCORDANCE WITH CR 2A .....9

B. THE TRIAL COURT ERRED WHEN IT AWARDED ATTORNEYS’ FEES AND COSTS BECAUSE FIRST HORIZON SHOULD NOT HAVE PREVAILED, AND THE SETTLEMENT AGREEMENT THAT WAS IMPROPERLY ENFORCED DID NOT HAVE A PROVISION FOR RECOVERY OF FEES INCURRED FOR THE NEGOTIATION, DRAFTING, OR CONSUMMATION OF THE AGREEMENT .....15

C. **THE ENGELLAND’S ARE ENTITLED TO AN AWARD OF FEES AND COSTS AS THE PREVAILING PARTY ON APPEAL**.....16

VI. CONCLUSION.....16

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*Brinkerhoff v. Campbell*,  
99 Wn. App. 692, 994 P.2d 911 (2000).....6, 7

*Bryant v. Palmer Coking Coal Co.*,  
67 Wn. App. 176, 858 P.2d 1110 (1992) .....9, 11

*Eddleman v. McGhan*,  
45 Wn.2d 430, 275 P.2d 729 (1954).....8

*In re Marriage of Ferree*,  
71 Wn. App. 692, 994 P.2d 911 (2000) .....7

*Howard v. Dimaggio*,  
70 Wn. App. 734, 855 P.2d 335 (1993).....9, 10, 12

**FEDERAL CASES**

*Keybank NA v. Bingo*,  
No. C09-849RSM, 2011 WL 780837 (W.D. Wash. 2011).....7

**STATUTES**

RCW 2.44.010 ..... 2, 3, 6-10, 15, 17

**WASHINGTON COURT RULE**

Civil Rule 2A ..... 1, 2, 3, 7-10, 12, 13, 15, 17

I.

**INTRODUCTION**

This appeal is from a trial court order granting First Horizon's Motion to Enforce a Settlement Agreement. CP 186-204. First Horizon argued that a Settlement Agreement<sup>1</sup> had been entered into between First Horizon and the Engellands to finalize the Engellands' loan modification and settle their claims against their mortgage servicer and Mr. Engelland's former employer, First Horizon. While it is undisputed that the final form of the loan modification for the first was agreed upon and the parties were close to reaching settlement of this matter, the parties *never reached a final* settlement agreement, and no document that satisfied Civil Rule 2A was ever signed by either party.

Moreover, any offer or counteroffer purportedly agreed to by the Engellands was expressly conditioned upon First Horizon satisfactorily addressing concerns arising from certain terms contained (or lack thereof) in the *draft* settlement documents exchanged by the parties including, but not necessarily limited to, the amount, breakdown, and capitalization of

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<sup>1</sup> For purposes of Appellant Brief, the term "Settlement Agreement" shall mean the Settlement and Release Agreement (Redacted) together with the Loan Modification attached thereto as Exhibit A as attached to the April 2, 2012 Order Granting First Horizon's Motion to Enforce Settlement Agreement. CP 190-204.

escrow balances. Despite the representations of First Horizon at the trial court, the express conditions raised by the Engellands have not been satisfied and the parties have not otherwise agreed on settlement terms.

The trial court examined and relied upon communications between counsel to wrongly determine that, in accordance with the Civil Rule 2A requirements, the parties had entered into a final settlement agreement, and that the settlement agreement was enforceable. This holding overlooks the absence of a mutual agreement between the parties, or a document that otherwise complies with statute or rule. The trial court failed to properly apply the requirements of Civil Rule 2A or RCW 2.44.010. For these reasons, the Engellands respectfully request this Court reverse the trial court's enforcement of the settlement agreement.

## II.

### ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Defendants' motion for revision. CP 186-204.
2. The trial court erred when it granted Defendants' motion for attorneys' fees. CP 269-272.

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### **III.**

#### **ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR**

1. Whether the trial court erred by enforcing an alleged settlement agreement that does not conform to RCW 2.44.010 or Civil Rule 2A. (Assignment of Error 1).
2. Whether the trial court erred by awarding attorneys' fees when the enforcement of the settlement agreement was improper, and the alleged settlement agreement did not have a provision for attorneys' fees incurred in negotiation, drafting, and consummation of the agreement. (Assignment of Error 2).

### **IV.**

#### **STATEMENT OF THE CASE**

##### **A. Procedural History**

First Horizon filed a Motion to Enforce the Settlement Agreement and For Attorneys' Fees on March 21, 2012. CP 27-34. The basis of First Horizon's motion is that the Engellands had agreed to the Settlement Agreement, but refused to perform under the terms of the Settlement Agreement. First Horizon relies upon e-mail communication between counsel for both parties to assert that a final agreement was made in February 2012. CP 29-30. The Engellands responded by pointing to the actual language of the e-mail communications to establish that no final

agreement was ever reached. *See* CP 152. On April 2, 2012, after oral argument, the trial court granted First Horizon's motion and reserved the issue of fees. CP 186-204. On May 4, 2012, the trial court awarded the full amount of fees requested by First Horizon. CP 269-272. This appeal followed.

### **B. Statement of Facts**

On August 10, 2011, First Horizon made its initial offer of proposed settlement on the Engellands' 1<sup>st</sup> mortgage. *See* CP 50-52. On August 12, 2011, the Engellands promptly responded with their counteroffer on both the 1<sup>st</sup> and 2<sup>nd</sup> mortgages at issue. *Id.* First Horizon rejected the Engellands' counteroffer and the parties continued to negotiate settlement terms. *See* CP 35-144. In late September 2011, the Engellands, through their counsel, indicated that the parties should proceed to draft settlement documents upon "terms discussed." CP 58-59. However, neither the Engellands nor their counsel communicated acceptance of any terms discussed. *Id.*; CP 178-180; and CP 154-155. Likewise, neither First Horizon nor their counsel communicated acceptance of any terms discussed. CP 58-59. Rather, the parties merely communicated their intent to proceed with the drafting and continued negotiation of written agreements, based upon terms discussed, with the ultimate goal of reaching a final agreement to resolve the matter. *Id.*

More than *two months* after the September 26<sup>th</sup> email exchange between the parties' counsel, First Horizon produced draft documents on November 28, 2011. *See Id.*; CP 61-86. In transmitting the draft settlement documents, First Horizon communicated its expectation that the Engellands review, accept, and commence payment less than 72 hours after receipt (as the draft documents were received by the Engelland's counsel on November 28<sup>th</sup> and contemplated payment by December 1<sup>st</sup>). *Id.* Needless to say, the Engellands did not accept or commence payment within said timeframe. *See* CP 180.

The parties continued to negotiate settlement terms and conditions, and, while they agreed in principle on certain terms, certain terms remained to be addressed. *See* CP 175-180. Based upon prior dealings and historical issues with First Horizon servicing, the Engellands had concerns about the state of their escrow impound account and how that would be addressed in the Settlement Agreement. *Id.* CP 179. In particular (but not necessarily limited to), on February 17, 2012, the Engellands communicated concerns regarding the escrow impound account associated with their mortgage in the Settlement Agreement. *Id.* and CP 109-126. In fact, with the anticipation that First Horizon or their counsel would promptly address the issue, the Engellands requested a current statement of account for their escrow impound account and that

the parties cooperate to obtain “an understanding of what their obligations are under the agreement in order to ensure performance.” *Id.* Notably, First Horizon did not even attempt to address these concerns until February 27, 2012 and did so *only verbally*. *See* CP 141-142. Equally of note, the Settlement Agreement (nor any other writing) fails to address the Engelland’s concerns and terms regarding the escrow impound account. *See* CP 173-174. Essentially, First Horizon expected that the Engellands execute the Settlement Agreement without the inclusion of a material term and/or without any other written commitment on the part of First Horizon to address the same. *Id.* and CP 175-180. To do so, the Engellands risk having a \$33,566.66 negative escrow balance demanded from them. *Id.* Accordingly, the Engellands did not execute the settlement agreements and, to date, no settlement documents have been executed and delivered by either party. *Id.*

## V.

### ARGUMENT

The trial court’s decision to enforce a settlement agreement is reviewed under the summary judgment standard when there is a dispute of material fact, and the moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely in dispute. *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696-97, 994 P.2d 911, 914-15 (2000); *See*

*In re Marriage of Ferree*, 71 Wn. App. 35, 43, 856 P.2d 706 (1993). This Court reviews the trial court's order enforcing the settlement agreement on the same standard as summary judgment: de novo. *Brinkerhoff*, 99 Wn. App. at 697.

The party moving to enforce a settlement agreement carries the burden of proving that there is no genuine dispute over the existence and material terms of the agreement. *Ferree*, 71 Wn. App. at 41. In considering the motion to enforce, this Court reads the parties' submissions in the light most favorable to the Engellands, as the nonmoving party, and determines whether reasonable minds could reach but one conclusion. *Id.* at 44.

Courts are granted the authority to enforce settlement agreements from statute and rule. Both Civil Rule 2A (CR 2A) and RCW 2.44.010 require the court to *disregard* all agreements and stipulations that are *not* in open court or are *unsigned* by the parties.<sup>2</sup> CR 2A "Stipulations" provides:

***No agreement or consent between parties or attorneys*** in respect to the proceedings in a cause, the purport of which

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<sup>2</sup> Despite the absence of a codified rule or statute under federal law, the federal court must still undertake a similar analysis which considers: (1) if there is a complete agreement; and (2) whether both parties have either agreed to the terms of the settlement or authorized their respective counsel to settle the dispute." *Keybank NA v. Bingo*, No. C09-849RSM, 2011 WL 780837 at \*4 (W.D. Wash. 2011). Washington State's rules more stringently require the agreement signed in writing. *See* RCW 2.44.010.

is disputed, *will be regarded by the court unless* the same shall have been *made and assented to in open court on the record, or entered in the minutes*, or *unless the evidence thereof shall be in writing and subscribed by the attorneys* denying the same.

(Emphasis Added.) Similarly, RCW 2.44.010 provides in part:

An attorney and counselor has authority:

To bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court; *but the court shall disregard all agreements and stipulations* in relation to the conduct of, or any of the proceedings in, and action or special proceeding *unless such agreement* or stipulation is *made in open court, or* in the presence of the clerk, and entered in the minutes by him, *or signed by the party against whom the same is alleged*, or his attorney.

(Emphasis Added). The purpose of settlement negotiations is “served by barring enforcement of an alleged settlement agreement that is genuinely disputed.” *In re Patterson*, 93 Wn. App. 579, 583, 969 P.2d 1106 (1999). The rules are designed to avoid disputes regarding the enforceability of settlement agreements, and to “give certainty and finality to settlements and compromises, *if they are made.*” *Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954)(emphasis added). “[N]egotiations toward a compromise are not binding upon the negotiators.” *Id.* If the parties dispute the existence of an agreement, and there is noncompliance with the rule or statute, “*the trial court [is] [ ] without authority to enforce the*

*alleged settlement agreement.” Howard v. Dimaggio, 70 Wn. App. 734, 739, 855 P.2d 335 (1993) (emphasis added) (citations omitted).*

**A. THE TRIAL COURT ERRED BY ENFORCING THE ALLEGED SETTLEMENT AGREEMENT BECAUSE THE PARTIES NEVER EXECUTED AN ENFORCEABLE AGREEMENT IN ACCORDANCE WITH CR 2A.**

Agreements lacking conformity with CR 2A or RCW 2.44.010 are not enforceable settlement agreements, despite the parties’ proclamation that a settlement has been reached. In *Bryant*, the court of appeals reversed a trial court’s decision to enforce a settlement between two parties in a quiet title action. *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 177, 858 P.2d 1110 (1992). The parties had agreed to settle the matter and notified the court to strike the trial date because an agreement had been reached. *Id.* at 177. The attorney for the Bryants, the plaintiffs, sent the defendants a letter memorializing the agreement. *Id.* The letter acknowledged that the parties would still meet to finalize certain details regarding a boundary line. *Id.* Palmer, the defendant, decided not to continue with the settlement and believed that the framework for settlement had been discussed but many details were left to future agreement. *Id.* In reversible error, the trial court found that although the letter did not constitute the agreement, a settlement agreement existed. *Id.*

at 178. The court of appeals reversed because the alleged settlement agreement did not conform to CR 2A or RCW 2.44.010.

Similarly, oral agreements to enter into settlement do not constitute settlement agreements for purposes of enforcement under CR 2A. The plaintiff in a personal injury suit arising from an automobile accident refused to sign settlement documents despite her attorney's agreement to the settlement, subject to her approval. *Howard*, 70 Wn. App. at 736. Ms. Howard, the plaintiff, had received all documents necessary to execute the settlement, but never signed them. *Id.* at 737. In the meantime, the defendant's insurer issued a check to the plaintiff's insurer for the subrogation interest. *Id.* The trial court that enforced the settlement agreement was reversed because the absence of conformity to the statute or rule rendered the settlement agreement unenforceable, despite the attorney's verbal acceptance of the agreement, and the insurer's payment under the settlement. *Id.* at 739.

In this case, the trial court erred by enforcing the Settlement Agreement even though the alleged agreement undisputedly was never made in open court, and was never final and signed in writing by the Engellands or their counsel. These deficiencies render the agreement unenforceable under both CR 2A and RCW 2.44.010. The Engellands and First Horizon never executed an agreement in conformity with the rule or

statute for two reasons: (1) there was never a final agreement between the parties; and (2) there is no writing signed by the Engellands or their counsel which agrees to the settlement terms. This case is similar to *Bryant* where the parties had reached an agreement, but both parties knew certain issues needed further discussion to establish the boundary line.

Here, while the parties agreed upon the final form of the loan modification for the “First Loan” and were in the final stages of reaching a settlement agreement, the ultimately had not agreed or entered into a final settlement agreement when the Engellands raised several concerns. This is a genuine dispute which raises an issue of material fact. The Engellands never had a meeting of the minds with First Horizon. The Engellands expressly indicated that they had issues or concerns regarding the escrow impound account and, when they were ultimately unsatisfied with First Horizon’s verbal response to these concerns, further indicated that they preferred a June 1 commencement date. *See* CP 175-183. First Horizon’s position that there is undisputedly a final agreement fails to recognize that the Engellands’ concerns were never satisfactorily addressed and that the Engellands never executed any final agreement; therefore, a final agreement was never reached.

Additionally, the trial court erred when it enforced the agreement based upon the “e-mails and the telephone calls between attorneys that are

dispositive.” Verbatim Report of Proceedings, April 2, 2012 at 29:12-14. The court continued, “[t]he February 17<sup>th</sup> e-mail from Mr. Ahrens bound his clients to the agreement once the escrow issue was settled.” *Id.* at 29:15-17.<sup>3</sup> This is patently against the requirements of CR 2A and the case law that interprets it. In *Howard*, the court could not find an enforceable settlement agreement when the attorneys indicated that the settlement was sufficient, subject to the client’s approval. The facts of this case are an even weaker basis to find a settlement agreement: the February 17th e-mail the trial court relied upon stated concerns that remained, and the Engellands still needed to agree. Counsel for both parties then exchanged communications in effort to resolve the Engellands concerns. When counsel for First Horizon submitted the Settlement Agreement on

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<sup>3</sup>The February 17th email stated: “As it stands, neither agreement expressly addresses this issue....With that said, my clients *have authorized me to indicate that they will execute the attached versions of the settlement agreement* and loan modification agreement (***provided that*** the settlement agreement dates are updated, e.g. payment to commence 3/1/12) as soon as the negative escrow balance is addressed.... I will have my clients execute a clean version of the settlement agreement (with adjusted dates) and loan modification to be released upon resolution of the above escrow impound issue.” Decl. of Yates, Ex. K. The notion that this email bound the Engellands to the agreement ignores the later communications between counsel; the exchange between counsel on February 27, 2012, which provided the alleged final settlement agreement, and where counsel for the Engellands informed counsel for First Horizon that Engellands still needed to sign the document; the Engellands’ concerns were never fully addressed; and the Engellands never signed a settlement agreement.

February 27th, counsel for the Engellands did not unequivocally bind the Engellands to the agreement. He instead indicated, "I received your voicemail and will contact my clients' regarding their signatures on the documents. While I can't promise producing their signatures today, I can promise that I'll get back to you by the end of the day." Decl. of Yates, Ex. L. This exchange does not constitute final agreement. Likewise, counsel's anticipation that his client's will sign a settlement agreement does not satisfy the CR 2A standards so as to render the agreement enforceable.

The significance attached to the e-mails exchanged between counsel for the parties is a factual dispute that creates a material issue: was there ever a final agreement? Whether a final agreement was ever executed is material to whether the court can enforce a settlement agreement. This material issue *alone* was enough to prevent the trial court from enforcing the alleged agreement. Moreover, the materiality of this issue is bolstered by the subjects of concern at the time the settlement agreement was purportedly agreed to. The Engellands' concerns that were never fully addressed are similarly material to the determination that the agreement was not final. The commencement date of repayment and the questions surrounding the escrow impound account (with a negative balance of \$33,566.66) are material issues that needed to be addressed

before the Engellands would have signed the settlement agreement. *See* Decl. of Engelland, CP 175-183. Averments that these issues were addressed through discussions regarding the payment of hazard premiums masks the heart of the Engellands' resistance to sign the settlement agreement: the agreement required repayment to commence three days after it was provided to the Engellands and a substantial negative balance remained in the escrow account without further explanation from First Horizon. These material issues remained unresolved on February 27, when First Horizon argues that settlement was reached.

Even if this Court finds a full and final agreement, there was never a proper settlement agreement executed by the parties to be enforced against the Engellands. There is no agreement made in accordance with the statute or the rule. First Horizon never signed a settlement agreement, or represented through counsel that it agreed to be bound by the terms. Similarly, the Engellands never reached a final agreement, never signed a final agreement, and counsel for the Engellands never unequivocally represented an authority to settle, or that a settlement had been reached. Instead, the trial court based its determination that an enforceable settlement agreement existed upon e-mail correspondence which generally approved the settlement agreement subject to clarification of several concerns and final acceptance by the Engellands. The trial court

committed reversible error when enforcing the agreement absent conformity with CR 2A and RCW 2.44.010.

**B. THE TRIAL COURT ERRED WHEN IT AWARDED ATTORNEYS' FEES AND COSTS BECAUSE FIRST HORIZON SHOULD NOT HAVE PREVAILED, AND THE SETTLEMENT AGREEMENT THAT WAS IMPROPERLY ENFORCED DID NOT HAVE A PROVISION FOR RECOVERY OF FEES INCURRED FOR THE NEGOTIATION, DRAFTING, OR CONSUMMATION OF THE AGREEMENT.**

The trial court's award of attorneys' fees should be reversed because First Horizon should not have prevailed on the enforcement of the settlement agreement. *See* CP 269-272. The settlement agreement provides:

Attorneys' Fees and Costs. The Parties *hereto shall bear their own fees, costs and expenses incurred in connection with the negotiation, drafting and consummation of this Agreement.* However, if any party institutes legal proceedings in connection with, or for the enforcement of this Agreement or any provision of it, *the prevailing party shall be entitled to recover* from the losing party its costs, including reasonable attorneys' fees, at both trial and appellate levels.

CP 201(emphasis added). First Horizon is not entitled to fees under the Settlement Agreement because enforcement of that agreement was in error. For the reasons set forth above, First Horizon should not have prevailed on its Motion to Enforce the Settlement Agreement, and subsequently, fees should not have been awarded.

Moreover, the trial court's order wrongfully awarded fees for the negotiation, drafting and consummation of the Agreement, which were explicitly excluded from the agreement. CP 269-272; 201. As the Engellands argued below, First Horizon's fee request includes \$2,164.50 in attorneys' fees for time spent in the negotiation, drafting and consummation of the agreement. *See* CP 236-242; CP 253. Activities such as, "updated loan modification agreement" to "[e]xchange email correspondence with plaintiff's counsel to complete settlement agreement" to "multiple telephone conferences with J. Halbach regarding calculation of payoff figures," clearly represent work for the negotiation or drafting of the settlement agreement. These fees should not have been included in the trial court's award.

**C. THE ENGELLAND'S ARE ENTITLED TO AN AWARD OF FEES AND COSTS AS THE PREVAILING PARTY ON APPEAL**

In the event this Court reverses the trial court's decision, pursuant to RAP 18.1, the Engellands are entitled to an award of their attorney's fees and costs as the prevailing party on appeal. The Settlement Agreement at issue provides that "... the prevailing party shall be entitled to recover from the losing party its costs, including reasonable attorney's fees, at both trial and appellate levels." CP 232. As the agreement subject to this dispute contains an attorney's fees and costs provision,

Washington law provides that the Engellands are entitled to recover their attorney's fees and costs if deemed the prevailing party on appeal. *See Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wash. App. 188, 692 P.2d 867 (1984). Thus, the Engellands hereby respectfully request an award of attorney's fees and costs upon presentation of the same.

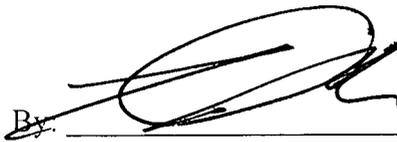
**VI.**

**CONCLUSION**

For the reasons set forth herein, this Court should reverse the trial court's grant of First Horizon's Motion to Enforce the Settlement Agreement and Attorneys' Fees. The Settlement Agreement was never agreed to by both parties, and was never executed in accordance with CR 2A or RCW 2.44.010. The Engellands, as the prevailing party, further requests an award of their attorney's fees and costs incurred in this appeal.

Respectfully submitted this 28<sup>th</sup> day of December, 2012.

SMITH ALLING, P.S.

By: 

CHAD E. AHRENS, WSBA #36149  
Attorneys for Appellants

**CERTIFICATE OF SERVICE**

I certify that on the 28<sup>th</sup> day of December, 2012, I caused a true and correct copy of this APPELLANTS' OPENING BRIEF to be served on the following via email and first-class mail as indicated below:

Ronald Beard/Andrew Yates  
Lane Powell, P.C.  
1420-5th Ave., #4100  
Seattle, WA 98101-2338  
Email: [beardr@lanepowell.com](mailto:beardr@lanepowell.com)  
[yatesa@lanepowell.com](mailto:yatesa@lanepowell.com)  
[strayerd@lanepowell.com](mailto:strayerd@lanepowell.com)

  
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Krista A. Davis