BEFORE THE HEARING EXAMINER
CITY OF SEATTLE

In the Matter of the Appeals of: **621 APARTMENTS LLCS, AND SEATTLE SHORT TERM RENTAL ALLIANCE, SEA TO SKY RENTALS AND MICHELLE ACQUAVELLA.** from a Determination of Non-Significance for Land Use Code and Licensing Code Text Amendments Related to Short Term Rentals.	Hearing Examiner Files: **W-17-002 and W-17-003 (consolidated)** CITY OF SEATTLE'S REPLY ON ITS MOTION TO DISMISS

I. INTRODUCTION

Appellants failed to establish standing for three key reasons. First, Appellants 621 Apartments LLCs and SSTRA's cannot rely on alleged conjectural harm to third-parties including a variety of customers who have stayed in their housing units for days or weeks. Second, Appellants – who own and operate approximately forty and one hundred rental housing units - the primary harm is economic, which is insufficient to establish SEPA standing. Finally, Appellants reliance on a speculative chain of events that they allege will occur if the proposed ordinance is adopted, which is also insufficient to establish SEPA standing.

II. ARGUMENT

As set forth in the City's Motion to Dismiss, Appellants have failed to meet the two-prong

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SEPA standing test:[1] First, the interest that Appellants are seeking to protect must be arguably within the zone of interests to be protected or regulated by the statute. And second, Appellants must allege an 'injury in fact,' *i.e.*, that he or she will be 'specifically and perceptibly harmed' by the proposed action."[2] Because Appellants rely on speculative injury, they fail to establish SEPA standing and the City's motion to dismiss must be granted.

1. Appellants fail to meet Prong 1 of SEPA's standing test. Economic interests are not within SEPA's zone of interests.

Appellants' fail to establish the first prong of the standing test that requires Appellants' alleged injuries be within the zone of interest protected by SEPA. The Court of Appeals Division One has stated "SEPA is concerned with broad questions of environmental impact";[3] "accordingly, our courts holds economic interests are not within the zone of interests protected by SEPA."[4] Washington case law is clear alleged economic injuries are not within the zone of interests protected by SEPA.

Appellants' cite to *West 514, Inc. v. City of Spokane* and *Indian Trails Property Association v. City of Spokane* in support of the proposition that impacts to elements of the environment that result from "economic effects" must be considered under SEPA.[5] In fact, here is what the *West 514* court said:[6]

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[1] Order on Motions to Dismiss/Cross Motion for Summary Judgment, In the Matter of the Appeal of Laurelhurst Community Club and Seattle Community Council Federation from a DNS by DPD, Hearing Examiner file W-11-007, p. 2 (2011).

[2] *Trepanier v. City of Everett*, 64 Wn. App. 380, 382, 824 P.2d 524 (1992), *review denied*, 119 Wn.2d 1012 (1992) ("*Trepanier*").

[3] *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807 (Div. 1, 1994) *review denied,* 125 Wn.2d 1025, 890 P.2d 464 (1995).

[4] *Harris v. Pierce County*, 84 Wn. App. 222, 230-33 citing *SCPRA v. Snohomish County*, 76 Wn. App. at 52, 882 P.2d 807; *Concerned Olympia Residents for Env't v. Olympia*, 33 Wn. App. 677, 682, 657 P.2d 780 (1993)(see also RCW 43.21C.010-020).

[5] Appellants' Response at p. 14.

[6] *W. 514, Inc. v. Cty. of Spokane*, 53 Wn. App. 838, 847–48, 770 P.2d 1065, 1070 (1989).

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> There is no doubt that a large mall in the Liberty Lake area will compete economically with downtown Spokane as well as other area retail centers. But economic competition, in and of itself, is not an environmental effect and need not be discussed in an EIS. WAC 197–11–448(3). What is missing here is evidence that the proposed mall is likely to have a significant adverse impact on the *physical* environment of downtown Spokane. While loss of retail sales and resulting blight is a possibility, West 514 did not establish the probability or likelihood of this occurring in Spokane...Thus, we affirm the Board's determination that a supplemental EIS is not required on this issue. In so holding, we recognize that if the *probable* effect of competition is downtown blight such *848 that the built environment is affected, then discussion of that effect in an EIS is called for. RCW 43.21C.030(2); WAC 197–11–444(2).

The cases are clear that economic impacts need only be analyzed in SEPA if the impacts are likely to result in impacts to the built environment. Here, like in *West 514*, there is no evidence that loss of business and resulting blight is likely due to the proposal. Here, neither the notices of appeal nor any of Appellants declarations establish the proposal will result in any actual probable effect on the built environment. Therefore, the City was not required to evaluate economic impacts of the proposal.

Likewise, Appellants attempt to distinguish *Snohomish County Property Rights Alliance v. Snohomish County* ("*SCPRA*"),[7] and *Harris v. Pierce County*,[8] misses the mark.[9] In both cases, the court found that the first prong of the two-part SEPA standing test had not been met because appellant's economic-based claims did not fall within the zone of interest of SEPA. In *Harris*, the appellant owned property subject to condemnation for use as a multi-use trail.[10] Similarly, in *SCPRA*, appellants alleged injury was based on concern with matters such as property values, property taxes, restriction on the use of property as affecting property value, and the cost of

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[7] 76 Wn. App. at 52.

[8] 84 Wn. App. 222, 230-33, 928 P.2d 1111 (1996).

[9] Appellants' Response p. 15, lines 24-26.

[10] *Harris v. Pierce County*, 84 Wn. App. 222 at 230.

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transportation facilities.[11] The Court concluded these interests are primarily economic and not within the zone of interests under SEPA.[12]

Like *SCPRA* and *Harris*, Appellants' interests are economic. It is no secret that property owners rent housing units to customers on platforms like Airbnb, HomeAway, VRBO, to make money. In fact, Airbnb disclosed the economic impact of Airbnb visitors in Seattle from August 2014 to July 2015 was $178 million.[13] And Puget Sound Sage report also found:[14]

- Seattle has a higher number of Airbnb listing per person than many other U.S. cities.
- Of the 4,170 listings on Airbnb in Seattle, about 2/3rds are "whole units" which could mostly be otherwise used as long-term units.
- While the vast major of host list only one whole unit- likely to be their primary residence- 12% list more than one.
- This small group of hosts together list 36% of all whole units in Seattle and functions as short-term property managers or even de facto hotels.
- Just 27 hosts who list five or more whole units on Airbnb in Seattle manage 10% of all whole units.
- Other research on Airbnb shows that the company makes as much as 40% of its revenue on multi-listing hosts across 12 major U.S. Cities including Seattle.

And contrary to Appellants' argument that the City's data is a small sample of skewed data,[15] the evidence provides otherwise. In fact, there is considerable data collected over several years, all

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[11] 76 Wn. App. 44, 52, 882 P.2d 807 (Div. 1, 1994) *review denied,* 125 Wn.2d 1025, 890 P.2d 464 (1995).

[12] *Id.*

[13] *See* p. 3 of Exhibit D to the Declaration of Aly Pennucci in support of the City's Motion to Dismiss, filed with the Examiner on June 30, 2017 (hereafter "Pennucci Decl. in support of City's Motion").

[14] P. 3 of Exhibit A to Pennucci Decl. in support of City's Reply.

[15] Appellants' Response, e.g., p. 16:16-19.

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demonstrating continued growth in the market of short-term housing units, in particular for those hosts with multiple units.[16] There is no doubt that the "short term rental" business is just that- a business – that is still growing significantly in Seattle. The number of property owners with more than six listings (commonly referred to as "multi-unit hosts") grew by 50% between September 2015 and April 2016[17] and 102 percent between October 2014 and September 2016.[18]

The proposal contains a definition for this type of "short-term rental" use, characterizing it as a lodging use, rather than as residential housing. The proposal would allow the vast majority of property owners to continue to offer "short-term rentals";[19] but after a period of grandfathering, owners will be prohibited from offering more than two short-term rentals. The rationale for this proposal is, in part, to curb the explosive growth in the number of property owners who own and rent out three or more properties[20] for "short-term rentals" because these units may otherwise be available for longer-term renters who are month-to-month or beyond. Further, the current hosts are not required to pay the same business taxes that other similar businesses pay (for example, hotels). It is beyond dispute that Appellants' interest as multi-unit property owners and "short-term rental operators" is economic.

While Appellants rely on *Leavitt* for the proposition that the court or Examiner should simply assume appellants have SEPA standing.[21] In *Leavitt*, the court did not evaluate whether

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[16] *See* e.g., p. 3 of Ex. D to Pennucci Decl. in support of City's Motion and P. 3 of Exhibit A to Pennucci Decl. in support of City's Reply.

[17] *See* p. 10 of Exhibit A to the Declaration of Aly Pennucci in support of the City's Reply to its Motion to Dismiss (Brief: Dramatic Growth of Short-Term Rentals in Seattle Could Reduce Apartment Supply (June 2016) prepared by Howard Greenwich, Puget Sound Sage)(hereafter "Pennucci Decl. in support of City's Reply.").

[18] *See* p. 6 of Exhibit B to the Pennucci in support of the City's Reply to its Motion to Dismiss (Report entitled "Hosts with Multiple Units- a Key Driver of Airbnb Growth, a comprehensive National review including a spotlight on 13 U.S. Markets (March 2017)".

[19] P. 10 of Exhibit A to Pennucci Decl. in support of City's Reply.

[20] *See* Exhibit B to Pennucci Decl. in support of City's Reply (p. 22 provides that between October 2014 and September 2016, there was a 183% increase in revenue generated by multi-unit entire-home hosts, totally almost $34 million.)

[21] Appellants' Response at p. 13:7-12.

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Leavitt met the 2-prong SEPA test. Instead, the *Leavitt* court assumed Leavitt has established standing only "*for purposes of this review.*"[22] This assumption allowed the court to address other issues at hand and does not in any way stand for the proposition that appellants do not need to establish both prongs of the SEPA standing test here. Nor did the court conclude, as argued by Appellants,[23] or even mention in passing that on a motion to dismiss for lack of SEPA standing that evidentiary facts should be construed in favor of the nonmoving party.

Similarly, Appellants' citation to *Kucera* is irrelevant to this proceeding. [24] This case does not involve an injunction like in *Kucera*. Appellants have failed to establish that its alleged interests all within the zone of interests protected by SEPA. For these reasons, Appellants failed to meet the first prong of the SEPA standing test.

2. Appellants' declarations rely on speculation and fail to establish facts of concrete and specific injury.

In cases where there are a series of future chain of events between the governmental action and the asserted injury, courts have declined to find "injury in fact."[25] Like in *SCPCA* and *Harris*, the courts held that "injury in fact" did not existing because the alleged injuries were too speculative.[26] In Appellants' response, Appellants' rely exclusively on seven declarations[27];

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[22] *Kucera v. State, Dept. of Transpo.,* 140 Wn.2d 200 (2000)(emphasis added).
[23] *Id.*
[24] Appellants' cite to p. 200, which is the short summary of the case on the very first page of the decision prepared by Westlaw, where it states, "the Supreme Court… held that the trail court should have considered whether the property owners had an adequate remedy at law and whether the high-speed operation of the passenger ferry caused actual and substantial injury, and should have balanced the relative interest of the parties and the public."
[25] *See SCPCA* and *Harris*.
[26] *SCPCA*, 76 Wn. Ap. at 53-54 (property owners' organization failed to show injury in fact where affidavits were speculative and merely asserted conclusions as to anticipated future effects of county-wide planning); *Harris*, 84 Wn. App. at 231-32 (rejecting SEPA standing for property owners in case of trail proposal where locations of trail acquisition had not yet been determined and thus effect on property was conjectural and speculative."
[27] Declarations of Acquavella, McDaniel, Morris, Smith, Cunniff, Friedland and Reid.

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however, these declarations lack any statement establishing an immediate, concrete and specific injury to Appellants to aesthetics, housing, traffic or historic resources.[28]

As discussed below, none of the appellants have established any such immediate, concrete and specific injury that will flow from the proposed legislation. Rather, the injuries alleged by Appellants are merely hypothetical and speculative.

a) Owners of Short-Term Rental Properties

The primary injury alleged by owners is both speculative and solely economic – these property owners "harm" stems from a series of unsubstantiated assumptions. According to Appellants, property owners use the income from short-term rentals to "maintain their properties in excellent condition to be competitive on the market."[29] The declaration continue to rely on a series of unsubstantiated assumptions. These assumptions do not establish an injury. As noted above, the proposal does not regulate home maintenance or in any way limit the standards to which these property owners maintain their home. Owners such as Patrice Smith, who lives in the Netherlands, could hire someone to maintain the exterior of her home even if it not Sea to Sky Rentals. Alternatively, Ms. Smith would move back to Seattle and maintain her home herself. Nevertheless, even if her garden beds "would be less beautiful maintained"[30], this does not establish a concrete aesthetic injury due to the proposed legislation. Similarly, Eric Friedland declares that due to the proposal, he will not be able to maintain his property to the highest standards and its condition will decline.[31] It is his choice to decide if he wants to spend less time

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[28] *See* Appellants' Response, pp. 17-19
[29] P. 9 of both Appeal Letters (May 8, 2017), incorporated into Appellants' Notices of Appeal, on file with the Examiner.
[30] Declaration of Patrice Smith, ¶3.
[31] Declaration of Eric Friedland, at ¶4 and 8.

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or energy maintaining his forty units, however, that does not establish concrete aesthetic injury, particularly where he controls the level of maintenance on his property and this proposal does not.

Moreover, Mr. Friedland's alleged injury is based on the claim that he would no longer be able to use his property for short term rental. Similarly, Ms. Smith's alleged injury that "my options for housing would be reduced because I would not have the option of staying in either [of my] units or staying in one and having friends stay in the other."[32] These claims are not concrete injuries under SEPA that are specific to Mr. Friedland or Ms. Smith, this proposal will affect numerous property owners in the City. Case law has been clear that these types of injuries are economic, not environmental.[33] However, none of the declarations establish that the proposal prohibits renting their property for longer-term rental (more than 30 days), nor does it prohibit the sale of real property.

Appellants also assert the restriction on the number of properties that any owner can rent short-term will "cause these owners to redevelop their properties or convert them to owner-occupied units," reducing rental availability.[34] Again, this "injury" is speculative. Property owners might instead sell their property to be a short-term rental exempt from the regulations (e.g., that it was purchased by a property owner as a second home), or it would be sold to be used for longer-term rental that would meet the needs of such users. A property owner or retain their property and use it for longer-term rentals (30 days or longer). Even if assumed true (which has not been established), there is no immediate, concrete and specific injury established by either Appellants.

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[32] Declaration of Patrice Smith at ¶ 8.

[33] *See Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 52, 882 P.2d 807 (Div. 1, 1994) *review denied,* 125 Wn.2d 1025, 890 P.2d 464 (1995) and *Harris v. Pierce County*, 84 Wn. App. 222, 230-33.

[34] *Id.*

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Finally, Appellants' alleged traffic impacts[35] are also based on several iterations of speculation that assume current short-term renters would not be able to find another short-term rental in the neighborhood and therefore would be forced to stay outside of the City and then to commute back into the City, into Mr. Friedland's neighborhood. Such a claim is the textbook definition of speculative and is in no way a likely result of the proposal, which will allow 80% of existing short-term rentals to continue.

b) Managers of Short-Term Rental Properties

Neither SSTRA or 621 alleged any new or different injury to managers of Short term rentals ("STR") beyond those injuries alleged to property owners, which the City has addressed above. Managers failed to establish managers of STRs will experience an immediate, concrete and injury to meet the "injury in fact" prong of the SEPA standing test.

c) Users of Short-Term Rental Properties

Friends of members of SSTRA and Raissa Renee Lyles use short-term rentals in the City.[36] The alleged injury to those who use short-term rentals includes "limited availability of units close to their destinations" in the City and increased transportation from outside of the City due to that limited availability.[37] This alleged injury is hypothetical and relies on multiple assumptions. Based on information available in 2017, most short-term rentals can continue under the proposed legislation.[38] Claims that the proposal will limit the availability of temporary housing is hypothetical. It requires additional speculation to conclude short-term users would have to drive further to find a short-term rental and such lack of availability will cause any appreciable increase

[35] Declaration of Eric Friedland at ¶6; Declaration of Michelle Acquavella at ¶; Declaration of Andres Morris at ¶6.
[36] 621 Appeal Letter at p. 1; SSTRA Appeal Letter at p. 1.
[37] *See* p. 10 of Appeal Letters, on file with the Examiner.
[38] *See* p. 8, lines 1-9 of Exhibit C2 to Pennucci Decl.

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in traffic. Appellants provide no facts in any of their declarations that short-term renters would leave the City to stay in short-term rentals outside the City; rather, it is pure speculation that appellant users (or family of users, such as Michele Acquavella's parents) would be injured by having to drive from short-term rentals located outside of the City to Seattle-based destinations. It is illogical to conclude that short-term rental users would elect to leave the City or would be forced downtown into a hotel when the vast majority of short-term rentals can continue under the proposal and there are lots of hotels throughout the City (not just in downtown) .

d) Workers and Residents near Short-Term Rental Properties

SSTRA's alleged injury to those who "live and working near short-term rentals" is similarly speculative. SSTRA claims that because owners of short-term rentals will not be making as much profit off the units if unable to lease them out for less than 30 days at a time, then the maintenance of the buildings will diminish, causing the appearance of these buildings to be unappealing to neighbors. Beyond mere conjecture, SSTRA has not and cannot show that individuals who work or live near short-term rental properties will be specifically and perceptibly harmed by the proposed legislation.[39] If anything, the proposal will cause a slight decrease of STR beyond the existing condition, where they are currently unregulated.[40]

Washington courts have rejected that SEPA standing can be based on citizen status.[41] To grant SSTRA standing based solely on a member living or working near a short-term rental provide no meaningful limitation on standing to appeal. SSTRA has provided no actual injury that is

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[39] *Trepainer v. City of Everett*, 64 Wn. App. 360, 382, 824 P.2d 524 (1992).

[40] *See* p. 6, 2nd paragraph of Ex. E to Pennucci Decl. (DNS provides "To the extent that approximately 20% of the units currently offered might not comply with the proposal, it is reasonable to anticipate that some might be able to modify their business operations within one year of the adoption of the legislation to comply, and that some other locations might need to cease operations.)

[41] *Snohomish County Property Rights Alliance v. Snohomish County*, 76 Wn. App. 44, 54, 882 P.2d 807 (1994), *review denied*, 125 Wn.2d 1025 (1995).

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immediate, concrete and specific to a member who lives or works near a short-term rental. Further, even if they had, no specific, immediate injury can be established because these uses are already throughout Seattle. If there is a slight reduction in the number of these short-term rentals, citizens might see less traffic and less noise, particularly in residential areas where short term rentals will be regulated. Likewise, Appellants' claims of injury are based primarily on speculation on what will happen should the revenue from existing short-term rentals be lost. These economic interests are not within the zone of interests addressed by SEPA, but even if they were, the causal relations between the proposed legislation and future lack of building maintenance or blight is similarly as tenuous and therefore cannot be injuries.

3. Appellants attempt to rely on alleged injuries to third parties does not establish injuries to Appellants and fails to meet Prong 2 of SEPA's standing test

Finally, Appellants may not rely on alleged harm to third-parties to establish standing. Mr. Friedland attempts to establish alleged injury to Ms. Lyles, his alleged short-term housing tenant, and other short term tenants, such as traveling nurses or other short-term rental tenants through his declaration.[42] Similarly, Ms. Acquavella,[43] and two SSTRA members, Chris McDaniel,[44] and Andrew Morris[45] all who own residential housing that he or she sells for short term stays, these property owners cannot rely on alleged injuries to short-term rental tenants. The alleged injury of

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[42] Declaration of Eric Friedland at ¶6 (attempting to establish injury to short-term tenants including visiting nurses, who he admits typically need housing for 13-week rotations, which is not regulated under the proposal) and ¶7 (attempting to establish injury for Raissa Lyles, a short-term tenant based on his alleged "injury" of having to find alternative housing during her 2-3 day stays in Seattle).

[43] Declaration of Michelle Acquavella at ¶4 (attempting to establish injury based on her parents alleged "injury" of having to find alternative housing during their visits to Seattle)

[44] Declaration of Chris McDaniel at ¶2 and 3, speculating as to what short-term renters would do if the proposal is enacted (rent a hotel in Lower Queen Anne or Northgate or rent in cities without such short-term regulations and drive into the City, respectively.)

[45] Declaration of Andrew Morris at ¶6 (attempting to establish injury to "short term renters" (guests) based on the 'lack of nearby short-term rental options' that will result from adoption of the proposal, including claims that such guests will need to stay at a hotel downtown or find a "short-term rental" in neighboring cities.)

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another cannot establish "injury in fact" standing under SEPA.[46] Therefore, Appellants' reliance on the declarations of third-party guests or customers who have stayed in their housing units cannot serve as a basis to establish standing for 621 or SSTRA.

Moreover, Appellants' attempt to rely on William Reid, a consultant out of Hillsboro, Oregon, to establish injury is baseless. Mr. Reid has no personal knowledge of the Seattle housing market or knowledge as to how Seattle housing units are currently being used. His declaration fails to establish any concrete or particularized harm to Appellants, as required to establish injury in fact. Rather, his declaration states the proposed legislation may have "potential impacts".[47] He also alleges that "reduced supply of short term rentals would threaten the return of 'corporate housing' demand."[48] In all, he simply states "These impacts will affect Seattle residents who are seeking short term or long-term rental housing." Nothing in his declaration establishes an injury on behalf of Seattle residents who are seeking short or long-term housing.

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[46] *See, e.g., KS Tacoma Holdings LLC v. Shorelines Hearing Board*, 166 Wn. App. 117, 272 P.3d 876, 138, where the court states "Generally, a party cannot rely on injuries to third parties to establish standing. *See, e.g., Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804, 105 S. Ct. 2965, 86 L.Ed.2d 628 (1985).

[47] Declaration of William Reid, p. 2:11-12.

[48] *Id.* at p.3:3-15.

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II. CONCLUSION

The City respectfully requests that the Examiner dismiss both appeals in their entirety because Appellants have not met either prong of standing under SEPA.

DATED this 21th day of July 2017.

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CERTIFICATE OF SERVICE

I certify that on this date, I electronically filed a copy of Respondent **City's Reply to its Motion to Dismiss and Declaration of Aly Pennucci In Support of City's Reply with Exhibits A-B attached** with the Seattle Hearing Examiner using its e-filing system.

I also certify that on this date, a copy of the same document was sent via email to the following parties:

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Dated this 21th day of July, 2017, at Seattle, Washington.

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