could result in a conviction -- has been stayed (delayed) under a plea deal. If Appellant fails to complete the program within the set amount of time, she will then be sentenced on the charges and "convicted" of the crimes.

The District concedes there is no "conviction," but takes the position that a guilty plea related to a felony charge "should be treated as a conviction." The panel disagrees. Under the terms of her plea deal, Appellant is required to successfully complete a court diversion / treatment program. If she successfully completes the program within a set amount of time, the court will remove the pending charges from her record. According to a copy of her current record, provided by Appellant at hearing, there is no conviction entered. Therefore, if Appellant successfully completed her program, and a court ordered dismissal of all charges, the court would not have to 'erase' something from her record. The conviction truly does not yet exist; it has not yet occurred, despite her guilty plea.

The District argues that TSPC's definition of "conviction," contained in OAR 584-020-0040(5)(c), supports its interpretation; again, this panel disagrees. Under that regulation, a "conviction includes any final judgment of conviction by court whether as the result of guilty plea, no contest plea or other means." The District reads "as a result of guilty plea" to mean that a guilty plea equals a conviction, but the panel reads it differently: what is required for a "conviction" is a "final judgment" by a court, and that final judgment might result from a guilty plea. Here, the court has not entered a final judgment. As the District itself acknowledges in its closing brief, "[Appellant's] participation in the drug court program for 18 months *stays* the entry of a conviction on her record if she meets all of the requirements of the program. If she does not meet all of the requirements of the program, [Appellant] *will be* convicted of felony cocaine possession" (emphases added).[83]

Therefore, the panel concludes that a conviction will result only if Appellant fails to successfully complete the diversion program. No conviction existed at the time the Board made its decision to terminate Appellant, and therefore that ground for dismissal is not based on true and substantiated facts.[84]

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[83] District Closing Brief p. 19.

[84] Note that at hearing, District witness and HR Director Bruce Smolinsky stated that Appellant had a "conviction." TR 217, 223. This is not accurate – she has not been convicted. This error again raises the question in the panels' minds whether the Board's dismissal decision was inadvertently premature, based on the mistaken belief that a conviction had been entered and appeared on her record.

B. The charged facts are not adequate to justify dismissal for immorality.

This panel concludes that the true and substantiated facts are inadequate to support dismissal for immorality within the meaning of ORS 342.865(1)(b). The FDAB has defined immorality, first in *Ross v. Springfield Sch. Dist.*, FD 80-1 (a series of cases that began in 1980 and concluded in 1987) as conduct that is "selfish, or in some cases malicious" and "shows a disregard for the rights or sensitivities of other persons."[85]

In successor cases following *Ross* addressing the standard of immorality, FDAB has identified that the teacher's "selfishness" must be "excessive" or "significant" to meet the standard. Additionally, the panel has determined immorality to exist only where the teacher intended to cause actual harm against others, such as causing injury, damage, or interfering with an investigation. *See Kari v. Jefferson Cty Sch. Dist.*, FDA 88-6 (1988), *reversed on other grounds*, 311 Or 289 1991, *order on remand, aff'd*, 120 Or App 99 (1993), *rev den*, 318 Or 25 (1993) (teacher who knowingly permitted her husband to illegally grow and sell marijuana from her house was not immoral); *Thyfault v. Pendleton Sch. Dist.*, FDA 90-4 (1991) (teacher who intentionally spanked a student and then urged a co-worker to lie for her was immoral); *Webster v. Columbia Educ. Service Dist.*, FDA 96-1 (1998), *aff'd without opinion*, 173 Or App 416 (1999) (teacher who bought morphine on school grounds was immoral: her purchase was a repeated event, "rather than an isolated and inadvertent providing of a temporary medicinal relief on one occasion," and, she lied to investigators about how she had purchased drugs); *Bergeson v. Salem* (teacher who consumed drugs off-duty but then purposefully drove her car into her husband's truck, which then crashed and damaged his girlfriend's garage, was immoral).

The District's evidence and argument does not demonstrate that Appellant acted excessively selfishly or engaged in conduct that caused actual harm to others. Illegal conduct is not *per se* immoral.[86] Instead, under prior FDAB cases analyzing immorality, this panel requires

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[85] *Ross v. Springfield School District*, 1987 Order on Remand No. 2, 17. *Ross* has a protracted history, beginning in 1980 and concluding in 1987, that includes two reviews and remands by the Oregon Supreme Court. In *Ross*, the District sought to terminate the educator for engaging in homosexual activity at an adult bookstore. The details of the incident became widely publicized in the community. On remand, the panel held that sexual conduct occurring without a reasonable expectation of privacy could be deemed immoral because the educator was engaging in "selfish" behavior (personal sexual gratification).

[86] *Ross*, 1987 Order on Remand No. 2.

two elements to find immorality: severe selfishness and direct harm.[87] The facts in this case do not establish either.

1. The District's reliance on cocaine use to support the grounds of "immorality."

The District based a finding of immorality on Appellant's drug use, not driving under the influence. The District's central witness, Human Resources Director Bruce Smolinsky, in explaining the District's reasoning for recommending dismissal to the Board, testified that Appellant's drunk driving was not immoral conduct; her cocaine use was immoral.[88] This difference was never adequately explained. The fact that alcohol is legal, and cocaine is illegal, is just that – a fact; the District's witnesses provided no context or explanation to persuade this panel that one is immoral simply because they have engaged in conduct that is illegal. As explained below, under FDAB case precedent, the District has not presented the panel with sufficient true and substantiated facts or argument to find that Appellant's cocaine use was excessively selfish, let alone malicious, or caused actual harm to anyone but herself.[89]

2. Appellant's off-duty cocaine use did not show excessive selfishness.

As explained above, the District's own view seems to be that Appellant's alcohol abuse and/or driving under the influence was not the basis for an immorality termination. The panel agrees that her alcohol-related conduct and driving under the influence, while dangerous, was not

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[87] *Bergerson v. Salem Keizer Sch. Dist.*, 194 Or App 301, 325 (2004), *rev. on other grounds*, 341 Or 401 (2006). The importance of selfishness and harm over criminality was made clear in *Bergerson*, where the court repeated *Ross'* holding that "[w]hether or not the conduct violates a criminal statute is not, in our opinion, material." The court went on to explain that a criminal act can constitute immorality where the act causes an effect or impact – or actual harm, as in the case of *Bergerson* – on others. Those acts are often, but not always, criminal, and the *Bergerson* court noted with approval the FDAB's focus on "harm to third parties." Or App at 324.

[88] As earlier noted, the District did not present any witnesses from the school board to reflect on the thinking at the time of the termination decision. It relied on Mr. Smolinsky to explain the District's logic for applying the immorality grounds to Appellant's conduct. When Mr. Smolinsky was asked to explain how and why he concluded that Appellant was immoral, he stated the difference was "the cocaine – the conviction." TR 222-224, 244. As explained elsewhere, Appellant was not convicted. More importantly, however, Mr. Smolinsky did not provide an explanation why the District viewed Appellant's cocaine use as more selfish or harmful than alcohol abuse.

[89] Appellant testified credibly about her commitment to participation in a substance abuse program, and her treatment counselor testified regarding her progress in overcoming a diagnosed substance abuse disorder. While she had not been diagnosed with a substance abuse disorder nor was she in treatment at the time of the incident, the District would have been on notice, at the time of her termination that, through her participation in court-authorized diversion, she was required to participate in treatment for any chemical dependencies and was prohibited from using illegal drugs.

excessively selfish as required under FDAB immorality precedent: Appellant credibly testified that she did not think she was too intoxicated to drive, and that her act amounted to a terrible instance of bad judgment.

Turning to cocaine use, the panel concludes that this act is not evidence of severe selfishness or maliciousness. The evidence presented by Appellant's witnesses on this subject is compelling, persuasive, and significantly, unrebutted by the District's witnesses. The drug court counselor for Appellant, Kay Cope, testified that, at the time Appellant engaged in illegal drug use, she suffered from two undiagnosed medical conditions and a substance abuse disorder. In the counselor's professional opinion, Appellant's drug abuse was likely an attempt to self-medicate her existing and, at the time, undiagnosed conditions. As the drug counselor explained, illegal drug use and abuse is not understood in terms of "selfishness," or presumed to be a "selfish," egotistical act but, as in Appellant's case, is linked to disease.[90] As Ms. Cope explained:

> Unfortunately, our folks that are in the drug court program have the reputation of being, oh, they're just a bunch of drug addicts. They're selfish people. All they care about is their drugs and themselves.
>
> And that's what the general public sees them as which affects their self-esteem and self-worth and self-confidence and all this. I understand where the public is coming from with that concept, but in my opinion -- and I've been doing this for 16 years and I've seen a lot of folks over the time I've been doing this -- I do not consider any of them as selfish people.
>
> And here's the reason why. I think the exact opposite is one of the reasons why we see so many people in our program is because they were the opposite. They would give the shirt off their back for somebody at the expense of themselves. So they're always putting others first, first, first, first. And pretty soon it gets to be burnout. So they're not selfish.[91]

The recognition that substance abuse can be connected to medical problems rather than a "selfish" predilection, is reflected in the District's own Human Resources policies. The District extends medical leave to teachers who enter treatment for substance abuse disorders, *even in cases of illegal drug use – which presumably includes cocaine -,*

[90] TR 322-324.
[91] TR 323.

without an automatic termination process, where the teacher admits to having used illegal drugs.[92]

Further, Appellant presented testimony from attorney Paul Kyllo, with a foundation established at hearing regarding his expertise on drug and alcohol criminal statutes. He credibly testified that the public's understanding and views on drug use are evolving and criminal penalties for drug crimes are correspondingly changing. This is evidenced by the Oregon Legislature's amendment of the criminal statutes applicable to controlled substances. Specifically, in 2017 – five months after Appellant's arrest -- the Legislature changed the designation from felony to misdemeanor for possession of certain amounts of cocaine.

The panel concludes that Appellant's cocaine abuse, despite being illegal behavior, cannot be reasonably described as excessively selfish or malicious under Board precedent.

3. Appellant's off-duty cocaine use did not show disregard for others.

In addition to selfishness, immorality also requires a showing that conduct was "other directed" – which is described in the case law as "disregard for the rights and sensitivities of others" (*Ross*) or, as the factual patterns of the case law strongly suggest, an actual impact or harm on others. The case *Bergerson v. Salem-Keizer School District,* FDA 02-2, involved a teacher who also engaged in drug abuse: she attempted suicide by consuming prescription drugs. The panel found the standard of immorality met because the teacher, after consuming the drugs, then drove to confront her estranged husband outside of his girlfriend's house, and then intentionally rammed her van into the back of his truck, pushing the truck into the garage and causing extensive damage as well as risking potential personal injury. The *Bergerson* panel reasoned that in order to be immoral, conduct must be "other directed:"

> Conduct that has been determined to meet the statutory ground of immorality is "other directed" in that it *harms* the legitimate interest of third party entities or individuals or is contrary to community standards like, for example, prohibitions evidenced in criminal statutes.[93]

[92] *See, e.g.,* D-17, the District's policy which contemplates discipline including termination, "*and/or*" satisfactory participation in drug treatment after *conviction* for a violation of a criminal drug statute.

[93] Relying on *Bergerson,* the District argues that Appellant's conduct violated "community standards articulated through criminal laws." District Brief, pp. 22-23. The panel disagrees. First, the panel views

(Emphasis added.) Importantly, the panel in *Bergerson* identified actual harm inflicted on other individuals or property; here, by contrast, Appellant's cocaine use did not result in actual harm toward others, nor did it appear purposefully designed to inflict harm upon others.

Further, even if this panel considers the District to have made an argument that Appellant's DUII represents immoral conduct, the evidence in this record falls short of meeting the Board's standard for immorality. It is true that attributes of her behavior could implicate immoral conduct, including that she was admonished by a police officer not to drive because he told her she was impaired, yet she elected – selfishly - to drive within a half-hour of that conversation because the wait time of an hour for a taxi was too long. Such conduct, standing alone, reflects poor judgment and the operation of her car while impaired potentially placed others at risk. However, drawing from Board precedent, immorality exists only where the teacher intended to cause actual harm against others, such as causing injury, damage, or interfering with an investigation.[94] Appellant testified that she believed she was not impaired and was stopped by an officer just outside the theater parking lot. There is no indication she acted maliciously or with intent to cause damage, harm to members of the public or to the passenger in the vehicle, by driving that evening. The immorality standard is not met on these facts.

Moreover, the District has not historically recognized driving under the influence as immoral conduct sufficient to terminate a teacher. Mr. Smolinsky acknowledged that the District's comparator history showed *several* instances of teachers or staff who had been arrested

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this argument as limited to those criminal laws Appellant admits to having violated, which are the specific crimes of possession of cocaine and driving under the influence. The evidence before this panel – consisting of disapproving emails from parents – is insufficient to determine that violation of these particular criminal laws amounts to a violation of community standards. Second, as Appellant argues in her brief (in reliance on the FDAB order on remand in *Ross)*, "whether or not the conduct violates a criminal statute is not, in our opinion, material to the question of whether the conduct is 'immoral.' Otherwise, the statutory ground related to convictions would be redundant." *Ross II*, Order on Remand, p. 25.

[94] Arguably, the exception here is *Ross*, because it is questionable how the educator's sex acts with another consenting adult harmed others. The panel views *Ross* as distinguished, however, because the panel deemed the sex acts to be so utterly objectionable and potentially harmful to an unwitting observer – and, indeed, the educator's actions were observed as part of surveillance activities at the location being conducted by the police. Moreover, the *Ross* panel was convinced that the educator's conduct was for personal sexual gratification, even at the expense of others where the educator should have known that others might see it. Here, there is no indication that Appellant drove under the influence for pleasure or gratification; she was highly upset, she did not want to remain in the parking lot for an hour, and she believed she could safely drive.

or convicted of a D.U.I.I. but were not dismissed as a result.[95]

The District presented evidence that parents in the District, as a result of local media coverage of Appellant's arrest, learned about the situation and reacted negatively.[96] The District did not present any witnesses to this effect; thus, the panel did not hear, nor could it draw any inferences about how Appellant's arrest had resulted in harm to them or their children. By contrast, Appellant called three witnesses, including one child, all of whom the panel found credible, who testified that they would welcome Appellant back into the classroom and view her recovery experience as adding, not detracting, from her value as an educator. But even assuming that parental or societal response to Appellant's conduct and the prospect of her returning to the classroom was widely and fervently negative, community opinion is insufficient under Board precedent to support a conclusion that Appellant engaged in immoral conduct. *Ross*, 300 Or 507, 515-516 (1986) ("[F]DAB is responsible for deciding on the criteria that make conduct immoral without looking for community opinion on immorality.")

For the above reasons, the panel concludes that the District has not offered sufficient evidence to conclude that Appellant's conduct was excessively "selfish" or malicious, or that she intended to harm anyone but herself.

C. The Charged Facts are Not Cause Constituting a Ground for the Revocation Of a Contract Teacher's License Under ORS 342.865(1)(i).

This panel concludes that the true and substantiated facts are not adequate to support a dismissal on the statutory grounds that Appellant engaged in conduct constituting a ground for the revocation of a teaching license by Teacher Standards and Practices Commission (TSPC), within the meaning of ORS 342.865(1)(i). Neither party presented evidence that, as of the hearing date, Ms. Crouch's license had been revoked or even suspended.

Conviction of a felony can be a mandatory ground for revocation.[97] Here, there has been no conviction. Even where Ms. Crouch entered guilty pleas to unlawful acts, to include possession of cocaine and driving under the influence, her violations would not establish a mandatory ground for revocation of an educator's license. For instance, the TSPC may revoke an educator's license for "gross neglect of duty." OAR 584-020-0040(3)(c). Gross neglect of duty is

[95] TR 222, D-13.
[96] D-6.
[97] ORS 342.865(1)(1); OAR 584-020-0040(5)(c).

"any serious and material inattention or breach of professional responsibilities," which *may* include a crime. OAR 584-020-0040(4)(l). Not all crimes meet the definition; what is required, and what the District has failed to establish, is a nexus between a specific professional duty and the conduct. *Eicks v. TSPC*, 270 Or. App 656 (2015).

The District cannot identify a specific teaching duty endangered by Appellant, apart from a generalized 'role model' aspect. Obviously, a reasonable observer would not view Appellant's conduct as modeling good behavior for students. However, the Oregon Supreme Court has addressed this very issue and has expressly disallowed TSPC from applying a general "good role model" rule as grounds for revocation. Rather, TSPC is instructed to identify professional duties it believes were violated that are "specific to a profession and are distinct from the moral and civil obligations of all citizens to behave ethically and to obey the laws at all times." *TSPC v. Bergerson*, 342 Or at 310. The Court held that teachers do not have an "independent duty to behave ethically at all times." *See Talbott v. TSPC*, 260 Or App 355 (2013).[98]

Similarly, the District has not established "gross unfitness," another TSPC standard that may warrant license revocation. Much like in cases of "gross neglect," TSPC is required to show that a teacher's conduct had a negative impact on their effectiveness as a teacher – specifically, a "status or trait" that renders them unqualified. The District has not offered evidence that Appellant remains an illegal drug user, or advocates the use of drugs, or that she was abusing, or in the future is at risk to abuse drugs in or around school property or in the presence of students or staff.

A review of TSPC cases involving teachers and substance abuse misconduct demonstrates that absent aggravating circumstances (which the panel does not find in this case), TSPC does not generally order revocation for drug- or alcohol-related misconduct. Typically, it imposes a sanction allowing the teacher an opportunity to seek treatment and retain their ability to return to the classroom. Some examples, which contrast with Appellant's situation, are identified below.[99] They underscore that even in instances of more extreme behavior or

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[98] In *Talbott*, a teacher gifting the principal a book with what could be construed as an inappropriate title, The Girl's Guide to Being a Boss (Without Being a Bitch), and expressing a low opinion of a colleague had no effect on or nexus to his professional responsibilities. However, the FDAB panel found that the same teacher's delivering a disrespectful letter to a complaining parent of a student was directly related to his teaching duties, despite being done off-duty.

[99] Appellant's closing briefing identified these cases, which the panel finds relevant and persuasive. They are available at http://www.tspc.state.or.us/geninfo her item.asp?id=4:

aggravating circumstances connected with substance abuse misconduct, the educator's license was not revoked:

- *In re Michael T. Maraia*, (Stipulation of Facts and Final Order (Nov 9, 2017). One-year suspension and four years' probation under the following facts:
    - Prior discipline by TSPC in 2003 based on conviction of Assault IV and Harassment relating to domestic violence.
    - May 2015 incident – Found asleep at the wheel of his car in the middle of an intersection, under the influence of alcohol and methamphetamine. Conviction of class C felony for possession of controlled substance and a misdemeanor. Subsequently convicted of DUII.
    - August 2015 incident – Stopped with nude dancer in car, and charged with soliciting sex in exchange for money and drugs. Mr. Maraia pleaded guilty to possession of methamphetamine but entered diversion, which he successfully completed.

- *In re Sharon Perry Cruickshank*, Stipulation of Facts and Final Order (June 20, 2016). Suspended right to re-apply for a license for one year, with probation where educator had four misdemeanor convictions between 2007 and 2012, including two DUIs, refusal to take a chemical test, and a misdemeanor reckless driving charge. Her explanation on her application was inconsistent with arrest reports.

- *In re Benjamin William Smith*, Stipulation of Facts and Final Order (Apr 11, 2016). Educator's application for license was granted, subject to three years' probation where applicant had been convicted four years earlier of DWI, manslaughter in the second degree, vehicular manslaughter, and leaving the scene of an accident resulting in death. He had been sentenced to one-year incarceration, and three years' probation, among other terms.

- *In re Shelli Waydean James*, Stipulation of Facts and Final Order (Aug 15, 2015). Reprimand with four years' probation where educator operated a motor vehicle while intoxicated while driving to pick up her daughter. She travelled nearly 100 miles per hour and drove recklessly before she struck another vehicle, injuring the other driver. Some time after she was taken into custody, James became uncooperative, verbally hostile, and fought with an officer. Her BAC was .154, twice the presumptive legal limit for DUII. She was charged with felony Assault 3, felony Aggravated Harassment, and misdemeanors including DUII, reckless driving, two counts of reckless endangerment, assault 4, resisting arrest, and disorderly conduct. She ultimately pleaded guilty to misdemeanor DUII, reckless endangerment, assault in the fourth degree, and resisting arrest. She was sentenced to 30 days in jail, placed on two years' probation, and fined. Her license was not revoked; she received a reprimand and probation from TSPC.

- *In re Deanna Allaine Green,* Stipulation of Facts and Final Order (June 25, 2015). Forty-five day suspension, and probation for the following facts: educator drove while severely intoxicated, and was cited for DUII with blood alcohol level of .22. The claim was resolved through DUII diversion.

Here, the record does not establish that Appellant's off-duty conduct has a nexus to her professional responsibilities. While it is evident that she demonstrated extremely poor judgment and engaged in high-risk behavior, her conduct does not satisfy the standards established by TSPC for gross neglect of duty or gross unfitness. To the extent a professional impact is recognized, the unrebutted direct testimony before this panel is that her teaching reputation has not been irreparably damaged by this incident.[100] To the contrary, three witnesses from the school community – two parents and a child – posited that Appellant's experience with addiction and recovery, especially as it flows out of a medical disorder – substance abuse – is an experience that permeates all levels and areas of society. Substance abuse and the poor decision-making associated with it can impact professionals, including teachers, and having this experience could enhance her value as a role model for recovery.

[100] The District's focus on media notoriety and the hearsay accounts of disappointed parents, while understandably significant, does not carry the evidentiary weight the panel gives to direct testimony.

For all the reasons discussed above, this panel does not believe that Appellant engaged in any serious and material inattention or breach of professional responsibilities. Even if her off-duty conduct is considered poor judgment and unacceptable role modeling, this panel nonetheless cannot conclude that her poor judgment in this instance was tantamount to a gross neglect of duty constituting grounds for the revocation of her license. The true and substantiated facts are not, therefore, adequate to support a dismissal pursuant to ORS 342.865(1)(i).

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position without back pay.

DATED this April 30, 2018

Robert Sconce, Panel Chair

DATED this _____, 2018

Kevin Cassidy, Panel Member

DATED this _____, 2018

Duane Johnson, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position without back pay.

DATED this _____, 2018

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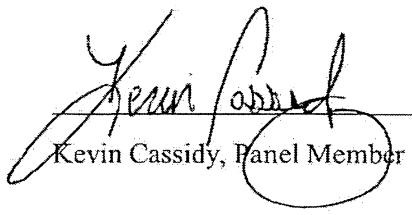
Robert Sconce, Panel Chair

DATED this April 30TH, 2018



Kevin Cassidy, Panel Member

DATED this _____, 2018

_____

Duane Johnson, Panel Member

Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

ORDER

The dismissal of Appellant is set aside. Appellant shall be reinstated to her position without back pay.

DATED this _____, 2018 _____

Robert Sconce, Panel Chair

DATED this _____, 2018 _____

Kevin Cassidy, Panel Member

DATED this 1st MAY, 2018 _____

Duane Johnson, Panel Member

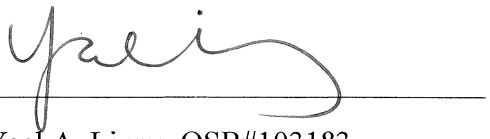
Notice: Under ORS 342.905(9), this order may be appealed in the manner provided for in ORS 183.480, and any appeal must be filed within 60 days from the date of service of this Order.

CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, I served a true and correct copy of FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by the method indicated below:

Margaret Olney Bennett Hartman Morris & Kaplan LLP 210 SW Morrison St. Suite 500 Portland, OR 97204	[ ] [X] [ ] [ ] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY
Rebekah Jacobson Garrett Hemann Robertson PC 1011 Commercial NE, Ste 210 PO Box 749 Salem, OR 97308	[ ] [X] [ ] [ ] [X]	HAND DELIVERY U.S. MAIL OVERNIGHT MAIL TELECOPY (FAX) ELECTRONICALLY

Respectfully submitted,



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