No. 314910-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

NORTHWEST WHOLESALE, INC., a Washington corporation,

Plaintiff,

vs.

PAC-O FRUIT, LLC a Washington limited liability company; GREG HOLZMAN, INC., a foreign corporation authorized to do business in the State of Washington; and HAROLD OSTENSON and SHIRLEY OSTENSON,

Defendants.

HAROLD OSTENSON and SHIRLEY OSTENSON, as members of PAC-O FRUIT, LLC a Washington limited liability company,

Appellants,

vs.

GREG HOLZMAN, an individual, TOTAL ORGANIC LLC, a Washington limited liability company, and GREG HOLZMAN, INC., a foreign corporation doing business in the State of Washington,

Respondents.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION.

Appellants Harold Ostenson and Shirley Ostenson (hereinafter collectively referred to as "Ostensons"), submit this Reply Brief to the Brief of Respondents submitted by Greg Holzman, Greg Holzman, Inc. ("GHI") and Total Organic LLC ("Total Organic"). All three Respondents will be collectively referred to herein as "Holzman."

II. ARGUMENT.

A. Respondents' Decision to Present Evidence After Plaintiffs Had Rested Waived Their CR 41(b)(3) Motion to Dismiss.

With respect to Holzman's oral Motion to Dismiss Pursuant to CR 41(b)(3), the following facts are undisputed:

1. The motion to dismiss was made after the Ostensons had rested their case-in-chief. RP 580:22-593:1.
2. Arguments were heard by the trial court on the motion to dismiss. RP 580:20-602:18.
3. The trial court did not then rule. RP 602:19-603:4.
4. Holzman then began presenting evidence in their case-in-chief. RP 604-809.
5. Holzman did not finish presenting their case. RP 829:23-830:15.

6. On September 7, 2012, the trial court heard further arguments on the motion to dismiss and dismissed Count VIII of the Ostensons' Complaint.

CR 41(b)(3) provides, in pertinent part:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal **on the ground that upon the facts and the law the plaintiff has shown no right to relief.** The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52(a).

CR 41(b)(3) (emphasis added).

Holzman's attempt to distinguish a sufficiency of the evidence challenge from a motion to dismiss brought under CR 41(b)(3) is without merit. Both a challenge to the sufficiency of evidence and motions under CR 41(b)(3) involve measuring the evidence presented against the law to determine whether a cause of action is supported.

When Holzman proceeded with their case in chief, they waived their motion and the court, in ruling on Holzman's motion, effectively denied the Ostensons, if not Holzman, "the benefit of all the evidence in the case to which they are both entitled." Hector v. Martin, 51 Wn.2d 707,

710, 321 P.3d 555 (1958); Heinz v. Blagen Timber Company, 71 Wn.2d 728, 730; 431 P.2d 173 (1967).

There is absolutely no authority under CR 41(b)(3) by which the trial court could dismiss Count VIII of the Ostensons' Complaint in the middle of the Holzman's case-in-chief.

B. The Issue of Preemption was Properly Raised Before the Trial Court and Preserved for Appellate Review.

To be perfectly clear, while the Ostensons agree that the provisions of the Washington Limited Liability Company Act, RCW Chapter 25.15 dealing with dissociation of members of a limited liability company and the right of members to bring derivative actions exist, the Ostensons have consistently disputed whether the dissociation provision under RCW 25.15.130(1)(d)(ii) can be enforced to divest then of their membership interest in Pac-O Fruit, LLC ("Pac-O") based upon the filing of their Bankruptcy Petition. This has always been the gravamen of the arguments advanced by the Ostensons.

The overarching issue has always remained whether the Ostensons became dissociated from Pac-O as a result of their bankruptcy filing.

In their response to the Motion to Dismiss Pursuant to CR 41(b)(3), the Ostensons presented arguments that the Stipulation amounted to the consent of all members under RCW 25.15.130(1)(d) and further,

that Holzman should be estopped from contesting the Ostensons' right to bring their derivative claim on behalf of Pac-O based upon doctrines of judicial estoppel, collateral estoppel and res judicata. CP 1860-1890.

In their Motion for Reconsideration, the Ostensons presented the additional argument that provisions of the Bankruptcy Code, 11 U.S.C. § 541(a)(1) precluded enforcement of the dissociation provisions of RCW 25.15.130(1)(d)(ii) under the Supremacy Clause and the Bankruptcy Clause of the United States Constitution. U.S. CONST. art. VI, cl. 2; art. I, § 8, cl. 4. CP 2056-2069; 2222-2233.

Holzman contends that because the Ostensons failed to raise the preemption argument prior to their Motion for Reconsideration, it should not be considered. This argument should be rejected. "By bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend on new facts." River House Development, Inc. v. Integrus Architecture, P.S., 167 Wn.App. 221, 231, 272 P.3d 289 (2012); Reitz v. Knight, 62 Wn.App. 575, 581, n. 4, 814 P.2d 1212 (1991), (in a nonjury trial, an issue or theory not dependent upon new facts may be raised for the first time through a motion for reconsideration and thereby be preserved for appellate review); Newcomer v. Masini, 45 Wn.App. 284, 287, 724 P.2d 1122 (1986).

In the instant case, the key issue of whether the Ostensons relinquished their membership interests in Pac-O as a result of filing for bankruptcy was always before the trial court. No additional evidence was needed to support the preemption argument. Whether in the context of arguments advanced in response to the CR 41(b)(3) motion or in support of the Motion for Reconsideration, the evidence relied upon remained the Operating Agreement of Pac-Organic Fruit, LLC (Exhibit P-26) and the Stipulation (Exhibit D-5). CP 1860-1890, 2056-2069, 2222-2233.

Furthermore, where Holzman had the opportunity to respond to the preemption argument and the trial court entertained and decided the issue, appellate review is appropriate. *See* River House Development, Inc., at 231. Holzman's contention that the trial court did not consider the preemption argument is not credible. Nothing in the Order Denying Ostensons' Motion for Reconsideration supports Holzman's contention that the trial court "refused to consider" Ostensons' argument. In fact, Judge Allan's letter ruling of January 23, 2013 indicates that, in reaching the conclusion that Washington law controlled the ability of Ostensons to assert a derivative claim against defendants *Holzman, et al.*:

> The court has reviewed all materials submitted in connection with the motion for reconsideration, including supplemental briefing submitted in the week following argument. The court has also considered selected portions of the materials submitted for the original motion to dismiss and arguments of counsel.

CP 2403-2404.

At the outset of the hearing on the Ostensons' Motion for Reconsideration on November 8, 2012, the trial court indicated that while she did not expect the arguments advanced in the Motion for Reconsideration, she would be taking the matter under advisement:

> THE COURT: ... So, I've reviewed the pleadings submitted. But it was, of course, a great surprise to me, when I started, this morning, to review this, to find out that there was a whole discussion of the interaction between Washington State law and bankruptcy law, that I wasn't expecting to be emerging from the briefs.
>
> And, so, my time that I set aside -- which was all morning -- to review this, was not, in fact, probably, sufficient for me to have a command of the – this interplay, here.
>
> So I'm probably, unfortunately, simply going to listen to your arguments today, and have to do some more reading on the -- this new area of discussion.
>
> So I -- I thought it was just going to be a re-discussion of what we'd already discussed. And, obviously, it encompassed a bit more than that.

RP 11/8/2012, at 3:12-4:2.

At the conclusion of the hearing, the trial court reaffirmed her intent to give the matter more thought before ruling:

> THE COURT: Okay. Well, as promised at the outset of the case, I'm taking this under advisement. I'm not sure what direction we'll be going on this, but you'll hear from me as soon as I have some idea.

RP 61:7-10.

After the hearing concluded on November 8, 2012, it took the trial court an additional two and a half months to issue its letter ruling.

A plain reading of the trial court's letter ruling of January 23, 2013 indicates that all pleadings and arguments were considered and that the preemption argument did not cause her to reconsider the dismissal of Count VIII. The Ostensons contend that this constituted an error of law.

As such, the issue of whether the dissociation provision of RCW 25.15.130(1)(d)(ii) preempted by the Bankruptcy Code has been preserved for appellate review.

Cases cited by defendants are all clearly distinguishable from this matter as they do not involve reconsideration based upon errors of law. *See* Hook v. Lincoln County Noxious Weed Control Board, 166 Wn.App. 145, 269 P.3d 1056 (2012) (new theories of the case presented as part of a motion for reconsideration need not be considered); Wilcox v. Lexington Eye Institute, 130 Wn.App. 234, 122 P.3d 729 (2005) (where appellant unsuccessfully relied upon doctrine of mutual mistake to invalidate forum selection clause in contract, motion for reconsideration cannot be used as vehicle to advance new theories of law with new and different citations to the record). The case of Teratron General v. Institutional Investors Trust, 18 Wn.App. 481, 569 P.2d 1198 (1977), is also of no relevance because

the appellants in Teratron never filed a motion for a new trial or reconsideration. Id., at 490.

Holzman contends that the trial court's denial of the Ostenson's Motion for Reconsideration is reviewed for abuse of discretion. *See* Brief of Respondents, at 17. This is not entirely correct. CR 59(a) sets forth nine grounds upon which a motion for a new trial or reconsideration may be based. One of the specified grounds is error of law. CR 59(a)(8). The Motion for Reconsideration in the instant matter sought reconsideration of the dismissal of Count VIII based upon an error of law. CR 59(a)(8); CP 2052-2055. "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." In re Marriage of Farmer, 172 Wn.2d 616, 625, 259 P.2d 256 (2011) *quoting* Noble v. Safe Harbor Family Pres. Trust, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. Id. Accordingly, "a trial court necessarily abuses its discretion" if the reviewing court determines that the trial court has committed an error of law, which is reviewed *de novo*. Id.; *see also* Johnson v. Howard, 45 Wn.2d 433, 436, 275 P.2d 736 (1954) (an order granting or denying a new trial is reviewed for abuse of discretion subject to the limitation that to the extent predicated on rulings of law, no discretion is involved).

Accordingly, the standard of review with respect to the trial court's denial of the Ostensons' Motion for Reconsideration is *de novo* as to whether the dissociation provision of RCW 25.15.130(1)(d)(ii) is preempted by the provisions of the Bankruptcy Code, 11 U.S.C. § 541(a)(1), *et seq.*

C. The Dissociation Provision of RCW 25.15.130(1)(d)(ii) is Preempted by the Bankruptcy Code and Cannot be Enforced Against the Ostensons.

Holzman contends that the Ostensons, by virtue of filing their Bankruptcy Petition, "were no longer members of" Pac-O. This proposition is predicated on the erroneous claim that the "Bankruptcy Code ... preempts all *state bankruptcy laws*." Brief of Respondents, at 19 (italics in original). Based upon this misstatement, Holzman apparently believes that the dissociation provisions of RCW 25.15.130(1)(d)(ii) can be enforced against the Ostensons because it is "Washington corporate law." Brief of Respondent, at 20.

However, the scope of preemption under the Bankruptcy Code is much broader than Holzman contends. Indeed, 11 U.S.C. § 541(c) does not reference "state bankruptcy laws," whatever that may be. Rather, 11 U.S.C. § 541(c) provides that all interest of the debtor in property becomes part of the bankruptcy estate "notwithstanding any provision in an [operating] agreement ... or applicable nonbankruptcy law [such as RCW

25.15.130] ... that is conditioned on the insolvency ... of the debtor, on the commencement of a case under [Title 11] ...." 11 U.S.C. § 541(c). This provision clearly preempts RCW 25.15.130(1)(d)(ii) under the doctrine of federal preemption.

As noted by the Washington State Supreme Court:

> The doctrine of federal preemption is derived from the *supremacy clause of the United States Constitution, article 6, section 2.* Federal law preempts state law when Congress intends to occupy a given field, when state law directly conflicts with federal law, or when state law would hinder accomplishment of the full purposes and objectives of the federal law. Preemption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.

Berger v. Personal Products, Inc., 115 Wn.2d 267, 270, 797 P.2d 1148 (1990).

Under the Supremacy Clause of the United States Constitution, the laws of the United States enacted pursuant to the Constitution are "the supreme law of the Land ...." U.S. CONST, art. VI, cl. 2.

Congress has authority under the Constitution "[t]o establish ... uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

Holzman's argument that, notwithstanding these provisions of the Constitution and Bankruptcy Code, this Court should find that RCW

25.15.130(1)(d)(ii) can trump the provisions of 11 U.S.C. § 541 is without any basis in law and should be rejected.

D. The Operating Agreement is an Executory Contract Within the Meaning of 11 U.S.C. § 365(e)(1).

Holzman next contends that the Pac-O Operating Agreement is not an executory contract and hence, 11 U.S.C. § 365(e)(1), is not applicable to preclude enforcement of the dissociation provision of the Operating Agreement. Again, Holzman is wrong.

In addition to the provision regarding the obligation of the Ostensons to provide additional capital, Holzman neglects to point out that Article 3, paragraph 3.4(b) of the Operating Agreement obligates Mr. Ostenson to lease the business premises to Pac-O and obtain and pay a loan against the premises for improvements which Holzman would guaranty:

> The Company [Pac-O] will lease its business premises from Harold T. Ostenson. Harold T. Ostenson will obtain a loan, secured by the business premises to build the necessary improvements. Pacific Organic Produce, Inc. will guaranty the loan. The lease between Harold T. Ostenson and the company will require that Harold T. Ostenson satisfy its obligations under the loan. The Company will have the right to cure a default by Harold T. Ostenson under the loan. If capital is necessary for the Company to cure a default by Harold T. Ostenson, Pacific Organic Produce, Inc. shall loan the necessary capital to the Company pursuant to a promissory note with interest at the maximum legal rate, which note will be secured by a second trust deed against the business premises.

See Ex P-26, at 3-4.

These obligations of the parties to the Operating Agreement are definite, continuing and sufficient to satisfy the definition of an executory contract under 11 U.S.C. § 365(e). *See* In re Allentown Ambassadors, Inc., 361 B.R. 422, 443-444 (Bankr. E.D. Pa. 2007) (Operating Agreement which imposed obligations to manage the LLC and provide additional capital if necessary was an executory contract).

The related argument advanced by Holzman, that the Operating Agreement was not an executory contract because it was not listed by the Ostensons in their Plan of Reorganization is the proverbial "red herring." Under 11 U.S.C. § 1123(b)(2), a Plan of Reorganization "**may** ...subject to section 365 of this *title [11 USCS § 365]*, provide for the assumption, rejection, or assignment of any executory contract ... not previously rejected under such section." 11 U.S.C. § 1123(b)(2) (emphasis added). Under 11 U.S.C. § 365(a) "the trustee ... **may** assume or reject any executory contract ... of the debtor." 11 U.S.C. § 365(a) (emphasis added). Both provisions are permissive, not mandatory. The fact that the Plan of Reorganization did not list the Operating Agreement means nothing. In re JZ L.L.C., 371 B.R. 412 (BAP 9th Cir. 2007) (assumption or rejection of an executory contract through a chapter 11 plan is permissive, not mandatory).

The Operating Agreement clearly meets the definition of an executory contract. Under 11 U.S.C. § 365(e)(1), its *ipso facto* bankruptcy clause cannot be enforced against the Ostensons.

E. The Ostenson Bankruptcy Estate, Including their Membership Interest in Pac-O, Became Part of the Bankruptcy Estate.

Holzman contends that, because state law defines a debtor's property interests, the *ipso facto* dissociation provisions of RCW 25.15.130(1)(d)(ii) can operate to divest the Ostensons of their membership interest of Pac-O. This argument, essentially contending that the Bankruptcy Code will defer to State laws is nonsense. The case of Butner v. United States, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979) cited by Holzman, in fact stands for the opposite proposition:

> Property interests are created and defined by state law. **Unless some federal interest requires a different result,** there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.

Id., at 55 (emphasis added).

Here, the dominant Federal interest is the need for uniformity. *See* U.S. CONST. art. I, § 8, cl. 4. The preemptive effect of the Bankruptcy Code on state nonbankruptcy laws has been recognized by the United States Supreme Court. *See* International Shoe Co. v. Pinkus, 278 U.S. 261, 265, 49 S.Ct, 108, 73 L.Ed. 318 (1929) ("States may not ... interfere with or complement the Bankruptcy Act or ... provide additional or

auxiliary regulations."). Therefore, while a debtor's pre-bankruptcy estate is determined by state law, the debtor's estate, at the commencement of a bankruptcy, becomes the "exclusive province of federal bankruptcy law." In re Pruitt, 410 B.R. 546, 553; 11 U.S.C. § 541(a)(1).

Accordingly, there is no doubt that the pre-bankruptcy property interests of the Ostensons included their membership interests in Pac-O. Under the Supremacy Clause of the United States Constitution and the Bankruptcy Code, no state law could divest them of those interests upon the filing of their Bankruptcy Petition.

Holzman misconstrues the holding of In re Garrison-Ashburn, L.C., 253 B.R. 700 (Bankr. E.D. Va. 2000). That case does not stand for the proposition that state law could control dissociation of a member upon the filing of bankruptcy. To the contrary, the Bankruptcy Court held:

> *Section 541(a)* clearly encompasses all of [the debtor's] ... interest in [the limited liability company] ..., whatever that interest may be, whether economic or non-economic. *Section 541(c)* makes plain that no restriction on the transfer of any interest of a debtor -- whether it arises from the operative documents themselves or from applicable nonbankruptcy law -- prevents an interest from becoming property of the estate. [The debtor's] interest in [the limited liability company] ..., **both his membership interest and his non-economic rights and privileges as a member, became property of the bankruptcy estate.**

Id, at 708.

However, the Bankruptcy Court further determined that the Operating Agreement was not an executory contract and that therefore, 11 U.S.C. § 365(c) and (e) were not applicable to prevent dissociation. Id., at 709. This is simply not the situation here, where as discussed above, the Pac-O Operating Agreement is, in fact, an executory contract.

Holzman attempts to distinguish the case of In re Daugherty Construction, Inc., 188 B.R. 607 (Bankr. D. Neb. 1995) from the case at bar by arguing that "termination" of a membership interest is different from "dissociation." *See* Brief of Respondent, at 26. This is a distinction without a difference. Under either concept, State law would be redefining legal or equitable interests of the debtor in derogation of 11 U.S.C. § 541.

The Ostensons' 49% membership interest in Pac-O followed them into and became a part of their bankruptcy estate. As such, pursuant to the Stipulation, they had standing to bring the derivative claim against Holzman. If successful, the recovery would have gone to Pac-O, ultimately benefitting the Ostensons themselves by increasing the value of their membership interests. Nothing in 11 U.S.C. § 541(b) precludes this result. Holzman's argument to the contrary should be rejected.

F. The Stipulation Represents the Consent of All Members of Pac-O Authorizing the Ostensons to Pursue Their Derivative Claim.

The Stipulation in this matter was signed by the Ostensons and

GHI, the two members of Pac-O as well as Mr. Holzman, individually, Mr. Holzman, on behalf of Pac-O, Mr. Holzman, on behalf of Pacific Organic Produce, Inc. and Mr. Holzman, on behalf of Total Organic LLC. Ex D-5 (Stipulation).

Paragraph 7 of the Stipulation preserved the following causes of action between the parties:

> a. Any purported claims of the Ostensons against Pac-O, including, but not limited to, claims for unpaid lease installments, wages, expense reimbursement, dividends, fruit proceeds, and/or failure to pay Keybank's line of credit, provided that the Ostensons shall not be entitled to assert those purported claims, whether derivatively or directly (including by way of a veil-piercing or similar theory) against Holzman, GHI or POP, such purported claims to be released; and
>
> b. Any purported claims of Pac-O (and Pac-O only) against Holzman, GHI, POP and/or Total Organic for their alleged failure to pay packing fees, expenses, and revenues earned solely by Pac-O or fruit proceeds or rent due Pac-O or for conversion of assets of Pac-O.

Ex D-5 (Stipulation).

This Stipulation was approved by the Bankruptcy Court and incorporated into the Ostensons Plan of Reorganization. Ex D-5 (Order). It is conceded that while the words "dissociation" and "consent" do not appear in paragraph 7 of the Stipulation, the only fair reading of these provisions is that the derivative claims allowed thereunder were to be

brought by the Ostensons. When questioned by the trial court on this point, counsel for Holzman ducked the question as follows:

> THE COURT: Under [paragraph] 7.b [of the Stipulation], ... that makes it look like claims could be asserted by Pac-O, against Mr. Holzman, POP, and Total Organic for certain things.
>
> MR. DUNCAN: Right.
>
> THE COURT: **Who would be bringing those claims, if not the Ostensons**?
>
> MR. DUNCAN: Well, the answer to that question is -- and I will tell you what the -- what the expectation was, when this document was entered into.
>
> First, you'll hear, from Mr. Holzman, that he agreed to this, as part of this resolution, in the bankruptcy court, **only because he didn't think there were any**. He wouldn't have done this.

RP 38:21-39:8 (emphasis added).

The non-response of Holzman's counsel to the trial court's question speaks volumes as to the intent of the parties at the time of the execution of the Stipulation.

G. The Court Erred in Refusing to Find Holzman's Oral Motion to Dismiss Barred Under the Doctrines of Judicial Estoppel, Collateral Estoppel and Res Judicata.

The Ostensons assert that Holzman should be barred from challenging their standing to bring the derivative claims on behalf of Pac Organic Fruit, LLC pursuant to the Stipulation based upon the doctrines of judicial estoppel, collateral estoppel and res judicata. All arguments

advanced by Holzman simply beg the question of whether the Ostensons are authorized under the Stipulation to bring the derivative claim. The Ostensons believe otherwise.

First, the equitable doctrine of judicial estoppel is applicable here, because Holzman is asserting a position in this matter regarding the Ostensons' membership interest in Pac Organic Fruit, LLC which is different than the position taken before the Bankruptcy Court which approved the Stipulation. If the Ostensons are precluded from asserting the derivative claim authorized by the Stipulation then that provision of the Stipulation becomes meaningless because realistically, no one else could or would make such a claim. Under the doctrine of judicial estoppel, Holzman should be precluded from essentially reinventing a position contrary to that taken in Bankruptcy Court regarding the Ostensons' right to bring a derivative claim on behalf of Pac-O pursuant to the Stipulation in order to obtain a different and inconsistent advantage in another court. In re JZ L.L.C., at 420.

Second, the doctrine of collateral estoppel should be applied to bar Holzman from essentially re-litigating the claim determined by the Bankruptcy Court, that the Ostensons have the right to prosecute the derivative claims against defendants on behalf of Pac Organic Fruit, LLC.

Third, Holzman should be barred from challenging their standing to bring the derivative claims on behalf of Pac Organic Fruit, LLC based upon the doctrine of res judicata as this issue was also determined by the Bankruptcy Court.

H. The Derivative Claim Set Forth in Count VIII is Authorized by the Stipulation and Not a Direct Claim by the Ostensons Against Holzman.

Holzman's alternative contention that the derivative claim asserted by the Ostensons in Count VIII of the Complaint is really a direct action against Holzman is without merit and should be rejected. The argument is simply not supported by the plain language of paragraph 7 of the Stipulation.

There is no doubt that Counts I through VII of the Ostensons' Complaint asserting direct actions against Pac-O are completely in compliance with the paragraph 7.a of the Stipulation. CP 484-487. No claims "for unpaid lease installments, wages, expense reimbursement, dividends, fruit proceeds, and/or failure to pay Keybank's line of credit" are being asserted "derivatively or directly (including by way of a veil-piercing or similar theory) against Holzman, GHI or POP." There is also no doubt that the derivative claim asserted in Count VIII falls within the parameters of paragraph 7.b of the Stipulation. CP 488. The derivative claim asserted against Mr. Holzman, GHI and Total Organic are based on

their failure to pay packing fees, expenses, and revenues earned solely by Pac-O or fruit proceeds or rent due Pac-O or for conversion of assets of Pac-O. These are solely Pac-O's claims, specifically permitted by the Stipulation. Holzman does not contend otherwise.

Instead, Holzman's argument is based upon the premise that, should the Ostensons successfully litigate all claims, they would stand to benefit. That is, if the Ostensons prevail on the derivative claim, the recovery would go to Pac-O. If the Ostensons further prevail on their direct claims against Pac-O, they would be paid with funds wrongfully appropriated by Holzman. Therefore, Holzman concludes that the derivative action is really a direct claim by the Ostensons against Holzman in disguise. This "reasoning" is logically wanting and flies in the face of the plain language of the Stipulation. Parenthetically, it is noted that this argument, which concedes a potential benefit to the Ostensons, contradicts Holzman's argument that the derivative claim is precluded by 11 U.S.C. § 541(b).

The bottom line is that whether the Ostensons receive a financial benefit as a result of this litigation has absolutely nothing to do with their right to bring claims authorized by the Stipulation.

I. Motion for Attorney Fees.

In their Opening Brief, the Ostensons moved, pursuant to RAP 18.1, for an award of attorney fees as may be allowed by law. Under RCW 25.15.385:

> If a derivative action is successful, in whole or in part, as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, from any recovery in any such action or from a limited liability company.

RCW 25.15.385.

Should the Ostensons prevail on this appeal, an award of their reasonable attorney fees is requested.

III. CONCLUSION.

Wherefore, based upon the foregoing points and authorities, the Ostensons respectfully request that the Court of Appeals reverse the trial court's dismissal of Count VIII of the Complaint.

DATED this 10th day of October, 2013.

LAW OFFICES OF MARIS BALTINS, P.S.

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Attorneys for Appellants

CERTIFICATE OF SERVICE

Seth Thompson hereby declares under penalties of perjury of the laws of the State of Washington that:

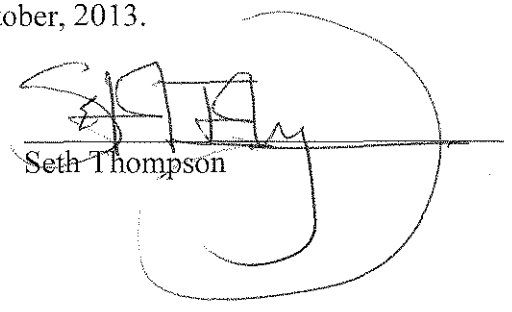
1. I am and at all times hereinafter mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years and not a party to this action.

2. On the 10th day of October, 2013, I caused to be served a true and correct copy of the foregoing document and attached appendix by first class mail, postage prepaid, upon the following party:

Daniel J. Appel
Law Offices of Dale M. Foreman, P.S.
124 N. Wenatchee Avenue, Suite A
Wenatchee, WA 98801

3. On the 10th say of October, 2013 also served a copy of the foregoing document and attached appendix on said party by electronic mail, addressed to: daniel@daleforeman.com.

DATED this 10th day of October, 2013.



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APPELLANTS' APPENDIX

11 U.S.C § 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this *title [11 USCS §§ 765* and *766*] and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

* * *

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor; or

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

* * *

(e) (1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on--

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if--

(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering

performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

11 U.S.C § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this *title [11 USCS § 301, 302,* or *303*] creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this *title [11 USCS § 329(b), 363(n), 543, 550, 553,* or *723*].

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this *title [11 USCS § 510(c)* or *551*].

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (*20 U.S.C. 1001* et seq.; *42 U.S.C. 2751* et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that--

(A) (i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 544(a)(3) of this *title [11 USCS § 365* or *544(a)(3)*]; or

(B) (i) the debtor has transferred such interest pursuant to a written conveyance of a production payment to an entity that does not

participate in the operation of the property from which such production payment is transferred; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in clause (i) only by virtue of section 365 or 542 of this *title [11 USCS § 365* or *542*];

(5) funds placed in an education individual retirement account (as defined in *section 530(b)(1) of the Internal Revenue Code of 1986* [*26 USCS § 530(b)(1)*]) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of such account was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were placed in such account;

(B) only to the extent that such funds--

(i) are not pledged or promised to any entity in connection with any extension of credit; and

(ii) are not excess contributions (as described in *section 4973(e) of the Internal Revenue Code of 1986* [*26 USCS § 4973(e)*]); and

(C) in the case of funds placed in all such accounts having the same designated beneficiary not earlier than 720 days nor later than 365 days before such date, only so much of such funds as does not exceed $ 6,225;

(6) funds used to purchase a tuition credit or certificate or contributed to an account in accordance with *section 529(b)(1)(A) of the Internal Revenue Code of 1986* [*26 USCS § 529(b)(1)(A)*] under a qualified State tuition program (as defined in section 529(b)(1) of such Code [*26 USCS § 529(b)(1)*]) not later than 365 days before the date of the filing of the petition in a case under this title, but--

(A) only if the designated beneficiary of the amounts paid or contributed to such tuition program was a child, stepchild, grandchild, or stepgrandchild of the debtor for the taxable year for which funds were paid or contributed;

(B) with respect to the aggregate amount paid or contributed to such program having the same designated beneficiary, only so much of such amount as does not exceed the total contributions permitted under section 529(b)(6) of such Code [*26 USCS § 529(b)(6)*] with respect to such beneficiary, as adjusted beginning on the date of the filing of the petition in a case under this title by the annual increase or decrease (rounded to the nearest tenth of 1 percent) in the education expenditure category of the Consumer Price Index prepared by the Department of Labor; and

(C) in the case of funds paid or contributed to such program having the same designated beneficiary not earlier than 720 days nor later

than 365 days before such date, only so much of such funds as does not exceed $ 6,225;

(7) any amount--

(A) withheld by an employer from the wages of employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [*29 USCS §§ 1001* et seq.] or under an employee benefit plan which is a governmental plan under *section 414(d) of the Internal Revenue Code of 1986* [*26 USCS § 414(d)*];

(II) a deferred compensation plan under *section 457 of the Internal Revenue Code of 1986* [*26 USCS § 457*]; or

(III) a tax-deferred annuity under *section 403(b) of the Internal Revenue Code of 1986* [*26 USCS § 403(b)*]; except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2) [*11 USCS § 1325(b)(2)*]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title; or

(B) received by an employer from employees for payment as contributions--

(i) to--

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 [*29 USCS §§ 1001* et seq.] or under an employee benefit plan which is a governmental plan under *section 414(d) of the Internal Revenue Code of 1986* [*26 USCS § 414(d)*];

(II) a deferred compensation plan under *section 457 of the Internal Revenue Code of 1986* [*26 USCS § 457*]; or

(III) a tax-deferred annuity under *section 403(b) of the Internal Revenue Code of 1986* [*26 USCS § 403(b)*];

except that such amount under this subparagraph shall not constitute disposable income, as defined in section 1325(b)(2) [*11 USCS § 1325(b)(2)*]; or

(ii) to a health insurance plan regulated by State law whether or not subject to such title;

(8) subject to subchapter III of chapter 5 [*11 USCS §§ 541* et seq.], any interest of the debtor in property where the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, where--

(A) the tangible personal property is in the possession of the pledgee or transferee;

(B) the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price; and

(C) neither the debtor nor the trustee have exercised any right to redeem provided under the contract or State law, in a timely manner as provided under State law and section 108(b) [*11 USCS § 108(b)*]; or

(9) any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made--

(A) on or after the date that is 14 days prior to the date on which the petition is filed; and

(B) under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, prior to the filing of the petition, to require compliance with the prohibition.

Paragraph (4) shall not be construed to exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement.

(c)

(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement, and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

* * *

11 U.S.C. § 1123. Contents of plan

* * *

(b) Subject to subsection (a) of this section, a plan may--

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this *title [11 USCS § 365]*, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for--

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests;

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims; and

(6) include any other appropriate provision not inconsistent with the applicable provisions of this *title [11 USCS §§ 101* et seq.].