

73434-2

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Court of Appeals  
Division I  
State of Washington

73434-2

No. 73434-2-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re: the Receivership of

NAME INTELLIGENCE, INC., a Washington corporation,  
and JAY WESTERDAL, an individual; WESTERDALCORP LLC,  
a Washington limited liability company.

Respondents,

Per and Melody Westerdal,

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE RONALD KESSLER

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BRIEF OF RESPONDENTS

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SMITH GOODFRIEND, P.S.

By: Howard M. Goodfriend  
WSBA No. 14355

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109  
(206) 624-0974

Attorneys for Respondents

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## I. INTRODUCTION

The superior court has the discretion to appoint and to discharge a receiver, who serves as an arm of the court. That discretion is guided by the principle that receivership, under which the state seizes a party's assets, is an extraordinary remedy.

Here, after entering a judgment for the debtor's breach of a settlement agreement that was secured by the debtor's property, the superior court appointed a receiver at the request of the creditor who sought satisfaction of the judgment from the debtor's assets. The creditor was paid in full, the receivership estate remained solvent and the debtor timely contested two unrelated remaining creditors' claims. As the receiver acknowledged to the court, those claims could only be resolved after discovery and trial and did not require further participation by the receiver, who was charging the estate \$6,000 per month, plus \$525 per hour in attorney fees.

The superior court properly exercised its discretion to terminate the receivership, which had achieved its purpose. Maintaining the receivership pending adjudication of the remaining contested claims added an unnecessary layer of complexity and expense with no corresponding benefit, and prejudiced no one. The court's decision was not an abuse of discretion.

## **II. RESTATEMENT OF ISSUES RELATED TO ASSIGNMENT OF ERROR**

Did the superior court abuse its discretion in terminating a receivership after finding that the receiver had accomplished its purpose and that, because any unresolved and contested claims would have to be resolved through separate litigation, continuation of the receivership would not resolve that claim in a “just and reasonably speedy manner”?

## **III. RESTATEMENT OF THE CASE**

### **A. Jay Westerdal’s creditor obtained a summary judgment for breach of a settlement agreement and then secured the appointment of a receiver to marshal his assets and liquidate his property.**

Respondent Jay Westerdal was a principal and founder of Name Intelligence, Inc., a Washington corporation engaged in the purchase and sale of internet domain names. This case arises from an action for breach of an agreement that obligated Jay, Name Intelligence and another company he controlled, Westerdalcorp, LLC, to make periodic payments totaling \$2.5 million to Raymond Bero in settlement of litigation. The settlement agreement was secured by Jay’s promissory note, a Security and Pledge Agreement covering assets held by Name Intelligence and Westerdalcorp, Jay’s guaranty, as well as a guaranty limited to \$200,000 that was given

by appellants Melody and Per Westerdal, Jay's parents. (CP 65-145)

Upon Jay's default, Bero filed this action in King County Superior Court. After agreeing to dismiss Per and Melody Westerdal, Bero, on January 21, 2014, obtained a partial summary judgment for \$1,427,630.33 against Jay Westerdal, Name Intelligence and Westerdalcorp (collectively, "Jay"), representing all remaining sums due, plus interest and attorney fees. (CP 1134-42) When Jay was unable to satisfy or supersede the judgment, Bero exercised his right under the Security and Pledge Agreement to the appointment of a receiver. (CP 41-55, 105)

Judge Ken Schubert granted Bero's motion on August 1, 2014, finding that Bero had a perfected lien in Jay's real estate and personal property, that the Security Agreement and Pledge Agreement authorized appointment of a receiver and that RCW 7.60.025(1) authorized appointment of a receiver to preserve revenue producing property to satisfy the Bero judgment. (CP 204-21) The court also found that Jay Westerdal, Name Intelligence and Westerdalcorp were in imminent danger of insolvency. (CP 207-09) The court appointed Resource Transition Consultants, LLC as a



general receiver under RCW 7.60.015, with authority to “market, sell and liquidate” the debtors’ property. (CP 211)

In addition to granting the receiver the right to hire counsel, accountants and other professionals and administrative service providers, the court authorized a \$6,000 monthly fee to the receiver, and a commission of between 1% and 2% from the gross sale price of any receivership property that was liquidated. (CP 213, 216-17) On September 3, 2014, the receiver employed Dillon Jackson of the law firm of Foster Pepper, PLLC to represent the receiver at an hourly rate of \$525. (CP 235, 246-47)

**B. Jay satisfied the Bero judgment in full and paid back Per and Melody the full amount owed on their loans to Jay, which the receiver listed as a secured claim.**

The appellants’ statement of the case levels numerous accusations that Jay undermined and interfered with the receiver. While these allegations are all contested, they are irrelevant to any issue on review. The court considered those accusations before terminating the receivership and discharging the receiver based on the undisputed fact that the purpose of the receivership had been satisfied, the secured creditors paid, and it was not necessary to compel Jay’s compliance with any order of the court. Appellants ignore the undisputed evidence that guided the court’s exercise of discretion:

With the receiver taking steps to sell the most valuable of the domain name (Holiday.com), Jay obtained the funds necessary to pay Bero. (CP 282-85) Bero acknowledged satisfaction of the judgment in full on December 1, 2014. (CP 412)

Appellants Per and Melody Westerdal, Jay's parents, had loaned Jay \$200,000 to pay Bero, and loaned him an additional \$130,000 in July 2013. (CP 790-91, 801-02, 813) Even though the elder Westerdals had agreed that Jay would not be obligated to repay the \$200,000 until early 2015, they asserted a claim to the receiver for \$350,000, who listed them as secured creditors in the initial report on September 15, 2014. (CP 240, 312)

In a hearing on November 14, 2014, the court agreed that the parents' claim for funds advanced to Jay came within the purview of the receivership, because its purpose was to ensure that all parties who were contractually due money from Jay, including his parents, got what they were owed:

Isn't that the whole crux of the thing is that what we have right now is an assumption of a contract that would allow for payment of all liabilities including to his parents. His parents are going to have a nice holiday. They get their money finally back. You guys [Bero's counsel] are going to get your fees . . . . And everyone goes home. Isn't that what was supposed to happen?

(CP 868)

Jay paid both loans in full on December 3, 2014, tendering a check to Per and Melody of \$359,028.65. (CP 791, 816-17) The Westerdals acknowledged the payment. (CP 835)

**C. Per and Melody submitted an untimely claim to an ownership interest in Holiday.com, which Jay disputed.**

On December 8, 2014, after expiration of the 30 day notice required by RCW 7.60.210(2), Per and Melody submitted what they called an “amended claim,” asserting a 25% interest in the Holiday.com domain name. (CP 829-30) Per valued the amount of the claim at \$1,385,797.97, asserting it was based on “an understanding . . . that by working on and developing the holiday.com website that this would entitle me to part ownership . . . . In addition, for many years I have paid the housing costs for holiday.com.” (CP 831, 834)

On December 17, Jay disputed the timeliness of the claim. (CP 497) He also contested his parents’ ownership interest in Holiday.com, as well as their assertion that the domain name had a value of \$5 million. (CP 498, 829)<sup>1</sup> He sought mediation of his

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<sup>1</sup> Jay asserted that he agreed to provide Per a 25% commission on all money earned by Holiday.com following his father’s assumption of webmaster duties, with this income terminating three years after his services as webmaster ceased. (CP 797)

parent's contested claims under RCW 7.60.220(2), and "[i]f the mediation fails, the remaining issues should be part of a declaratory judgment action and not part of the Receivership." (CP 499) Because the claim was contested, on December 19, 2014, Judge Schubert denied without prejudice the elder Westerdal's motion to allow their claim. (CP 573, 903)

**D. The court terminated the receivership because it had fulfilled its purpose and because Per and Melody's remaining contested claim could only be resolved following trial.**

In addition to Per and Melody's claim to Holiday.com, the British online auctioneer Breathe Luxury submitted a claim alleging that Jay had interfered with its contract to market the domain name Holiday.com. (CP 734-36) Jay had entered into the contract prior to the receivership. After Breathe Luxury's attempts to sell the domain name at auction failed to result in significant bids, the receiver alleged that Jay, who had long expressed concerns with Breathe Luxury's marketing efforts, had interfered with the process by casting doubt about marketability of the title to the Holiday.com domain name. Jay denied the allegations. (CP 517-22) The receiver did not approve any claim by Breathe Luxury or list Breathe Luxury as a creditor in its monthly or final reports. (CP 975; *see* CP 722-24, 734-36)

The receiver initially alleged that Jay's alleged interference with the Holiday.com auction was in contempt of court. (CP 287-96) In the December 19, 2014 hearing, the court deferred any finding of contempt pending discovery and then an evidentiary hearing to resolve the contested allegations. (CP 891)

In February 2015, Per and Melody filed a Second Amended Claim (CP 833-35), along with a motion for an order directing the receiver to sell Holiday.com and disburse 25% of the proceeds to them. (CP 591-92) Jay timely objected to his parents' Second Amended Claim within 30 days under RCW 7.60.220(1). (CP 785)

On March 11, 2015 Jay moved to terminate the receivership on the ground that its original purpose had been fulfilled. (CP 605-06) The receiver opposed the motion pending resolution of the contempt issue and the Per and Melody Westerdal claims. (CP 843-44)

On March 23, 2015, Judge Ronald Kessler ordered the receivership terminated pending resolution of the issue of civil contempt. The court found the unresolved disputed claim of Per and Melody to an equity interest in Holiday.com was not within "the scope of the initial order appointing a general receiver," and would not "be resolved quicker within the receivership than via

separate cause or causes of action in light of the apparent complexity of the factual issues which the parties will need to flesh out through discovery.” (CP 908-09) The court noted that even if the receiver could establish its allegation that Jay interfered with the Holiday.com auction, there was no longer any contempt left to purge because the allowed claims had been paid in full. (CP 909) However, the court declined to enter an order discharging the receiver, authorizing any party to notify the court should they wish to pursue contempt sanctions. (CP 909)

The receiver informed the court that the contempt proceeding was moot, and submitted its petition to terminate the receivership, and authorize the payment of its fees and costs. (CP 967) On June 1, 2015, the court approved a total of \$86,751.14 in attorney fees and costs to the receiver’s counsel, approved the receiver’s final accounting, discharged its bond, and closed the case. (CP 1192-94)

#### IV. ARGUMENT

**A. This Court reviews the trial court’s decision to discharge a receiver for abuse of discretion.**

This court reviews the trial court’s decision to appoint or to terminate a receiver for abuse of discretion. *See Mony Life Ins. Co. v. Cissne Family, L.L.C.*, 135 Wn. App. 948, 952, 148 P.3d 1065

(2006) (“The power to appoint a receiver is discretionary.”); *King Cnty. Dep’t of Cmty. & Human Servs. v. Nw. Defenders Ass’n*, 118 Wn. App. 117, 122, 75 P.3d 583 (2003); *Brown v. Mead*, 22 Wn.2d 60, 64, 154 P.2d 283 (1944); *Liebman & Co. v. Institutional Investors Trust*, 406 A.2d 37, 38 (Del. 1979) (“The appointment of a receiver Pendente lite is discretionary with the Court, and so is a decision to continue or to terminate such a receivership.”) (citations omitted). Because court control of a person’s property and affairs is such an extraordinary remedy, appointment of a receiver is necessarily a fact intensive inquiry that must “be exercised with caution in view of all the facts and circumstances of the particular case.” *Nw. Defenders Ass’n*, 118 Wn. App. at 122 (citation and internal quotation omitted).

The receivership statute, RCW ch. 7.60 grants trial courts broad discretion over receiverships. The receiver serves at all times as an arm of the court that appoints it. “[T]he court in all cases has exclusive authority over the receiver . . . and the exclusive jurisdiction to determine all controversies relating to the collection,

preservation, application, and distribution of all the property.” RCW 7.60.055. See Stoebuck and Weaver, 18 *Wash. Prac.: Real Estate: Transactions* § 18.6 (2d ed.) (2004) (“As an officer of the court, the receiver is not an agent of a party; he is appointed in the court’s discretion under its equity powers and is subject to the court’s control.”).

Confirming this discretionary authority, the statute gives the court upon the motion of “any party in interest . . . the power to discharge the receiver and terminate the court’s administration of the property over which the receiver was appointed.” RCW 7.60.290(5). The court may discharge the receiver upon the court’s own motion or the receiver’s motion upon “completion of the receiver’s duties with respect to estate property.” RCW 7.60.290(1), (5).

**B. The court properly exercised its discretion in discharging the receiver after the receiver fulfilled its initial purpose and because continuation of a receivership would be a waste and inefficient use of judicial resources.**

The court acted within its discretion in terminating the receivership because the receiver had achieved its initial purpose and had no further obligations with respect to estate property. The extraordinary remedy of receivership was unnecessary to resolve



Per and Melody's contested claim. Neither the receivership statute nor the court's initial order appointing a receiver precluded the trial court's exercise of discretion to terminate the receiver once it fulfilled the task for which it was appointed. That the elder Westerdals must now litigate their claim to their son's property in an ordinary civil action is not the type of prejudice that outweighed the advantages to judicial economy in terminating the receivership.

- 1. The superior court at all times controls the receiver. As a statutory proceeding under Washington law, the receivership is not governed by the strictures of federal bankruptcy law.**

Receivership is an extraordinary remedy, authorized only if "reasonably necessary and . . . other available remedies either are not available or are inadequate," and only upon certain specified grounds. RCW 7.60.025(1). A court may appoint a receiver over a solvent entity only in exceptional circumstances. *See Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 625, 102 P. 654 (1909) (reversing appointment of receiver over solvent corporation).

A receiver may be appointed as either a general receiver, with authority "to take possession and control of all or substantially all of a person's property," or a custodial receiver, appointed "to take charge of limited or specific property." RCW 7.60.015. Here,

the court found the appointment of a general receiver necessary to protect Bero's secured interest in Jay's and Name Intelligence's property, RCW 7.60.025(1)(a), (b), and to give effect to Bero's judgment. RCW 7.60.025(1)(c).

Per and Melody primarily rely on federal bankruptcy law to argue that the receiver could not be discharged prior to adjudication of their particular claim. But a receiver's primary role is to safeguard property for the benefit of adjudicated creditors. A receivership under Washington law is not governed by the strict rules concerning federal bankruptcy actions:

Receivership law is less defined than bankruptcy law, which allows the moving party flexibility in crafting the scope and course of the receivership. A counterbalancing disadvantage, however, is that bankruptcy law, being more defined, affords greater predictability.

Another advantage of receiverships is a greater ability to define and manage the scope of the receivership. A receiver may be sought to manage all aspects of a defendant's business and property, to preserve a single piece of property, or for all things in between.

Friedland, *Strategic Alternatives For and Against Distressed Businesses*, § 11:14 (2015). This was not a bankruptcy estate established to liquidate a debtor's assets under the federal bankruptcy code, but a receivership over a solvent estate governed by Washington law.

2. **The court properly interpreted its own order appointing the receiver, and, in any event, had the discretion, if it deemed necessary, to terminate the receivership after it achieved its purpose.**

The purpose of the receivership was to ensure satisfaction of the judgment in favor of Bero for breach of a settlement agreement. Per's and Melody's contention – that the superior court was bound by its initial order or by statute to keep the receivership open pending resolution of any and all contested claims – is without merit. The trial court had discretion to terminate this general receivership once the Bero judgment was paid in full.

While Per and Melody argue that the trial court had statutory authority to continue a general receivership until every single creditor claim was resolved, they cite no authority that *required* the court to maintain the receivership after its primary purpose had been achieved. RCW 7.60.200-.220 authorizes the receiver to consider creditor claims, but the receivership statute does not mandate they each be resolved prior to termination.

Instead, the court at all times retains discretion regarding the creation, supervision and termination of the receivership. The receivership statute vests in the court “the power” to terminate the receivership on a party's motion:

Upon motion of any party in interest, or upon the court's own motion, the court has the power to discharge the receiver and terminate the court's administration of the property over which the receiver was appointed.

RCW 7.60.290. The statutory grant of authority, or "the power to" terminate a receivership implies a discretionary, rather than mandatory duty. *See State v. City of Seattle*, 137 Wash. 455, 462, 242 P. 966 (1926) (statutory grant of authority implies a discretionary power).

The policy against imposing the extraordinary receivership remedy supports the trial court's order of termination. "Ordinarily a receivership should be terminated as soon as practicable after its purposes have been accomplished." *Boothe v. Summit Coal Min. Co.*, 63 Wash. 630, 634, 116 P. 269 (1911) (internal quotations omitted).

The receivership was established "under RCW 7.60.025(1)(c) in order to give effect to th[e] Court's Judgment on Plaintiff's Motion for Partial Summary Judgment" that found Jay's breach of the Bero settlement. (CP 208) The Order Appointing Receiver emphasizes the purpose of the receivership, stating that it "shall terminate only upon payment in full of all amounts due the Receiver and satisfaction in full of all amounts due under the [Bero]

Judgment.” (CP 220) Once the judgment was satisfied and all amounts due were paid to Bero (and to the elder Westerdals to the extent they advanced payments on behalf of Jay), the purpose of the receivership was fulfilled.

As the receivership estate was solvent, Per’s and Melody’s assertion that their contested claim was entitled to “absolute priority” is misplaced. RCW 7.60.230(1) (“Allowed claims in a general receivership shall receive distribution.”). As their claim had not been allowed, Per and Melody had no vested right in the receivership or any of its property and had no independent basis under the statute to continue a receivership to assert their contested claim to Holiday.com. But for the enforcement actions of Bero, there would have been no basis for appointment of a receiver. Per and Melody’s contested claim to Holiday.com gave them no “probable right or interest” in that property. As the receiver himself acknowledged, their claim required a trial.<sup>2</sup> (3/20 RP 28) There was no evidence or allegation that Jay was impairing the value of the intangible asset. RCW 7.60.025(1)(a). Per and Melody had no

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<sup>2</sup> In addition to disputing the merits of the Per and Melody claim, Jay asserted that the claim was outside the scope of the receivership, that the claim was time barred, and that their claim to the receiver lacked sufficient documentation to be considered. (CP 497-99, 766-85) Jay reserves the right to assert these defenses in the event the receivership is reinstated.

other basis under RCW 7.60.025 for the court to continue controlling the assets of Jay under the extraordinary remedy of receivership.

The superior court has the inherent authority to interpret and enforce its initial receivership order to determine whether the primary purpose of the receivership had been achieved. *See Allen v. American Land Research*, 95 Wn.2d 841, 852, 631 P.2d 930 (1981) (“[S]uperior court’s inherent authority to enforce orders and fashion judgments is not dependent on the statutory grant.”). Moreover, since receivership is an equitable remedy and the receiver serves at the direction of the court, the court retained authority to modify that order in light of any changed circumstances. *See State v. Superior Court*, 161 Wash. 550, 556, 297 P. 774 (1931) (statutory receiver “becomes the ordinary chancery receiver and an arm of the court which appointed him”); *State ex rel. Bradford v. Stubblefield*, 36 Wn.2d 664, 674, 220 P.2d 305 (1950) (court of equity’s inherent power to modify injunction). And even if the initial receivership order gave the receiver plenary authority over all of Jay’s assets on behalf of all of Jay’s creditors, the court maintained the authority to modify its order at any point until the receiver was discharged and the receivership terminated.

*See, e.g., Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992) (trial court has authority to modify interlocutory order at any time until entry of final judgment).

This Court should affirm the trial court's exercise of discretion to terminate the receivership once its purpose had been achieved.

**3. The court properly found that maintaining a receiver to assist in the pursuit of contested claims would add an unnecessary level of complexity and waste resources.**

There was ample factual basis for the trial court to find that Per's and Melody's claims would not "be resolved quicker within the receivership than via separate cause or causes of action in light of the apparent complexity of the factual issues which the parties will need to flesh out through discovery." (CP 908) Jay timely contested their claim to ownership of Holiday.com, asserting not only that the claim was untimely (CP 497), but also on the merits, because Per had in fact been paid the commission on revenues that he and Jay had agreed to – 25% of all advertising revenues from Holiday.com until Per's services as webmaster terminated. (CP 791-92) That arrangement was confirmed by the Holiday.com business plan. (CP 822)

The receiver never accepted the elder Westerdal's untimely claim, which was submitted on December 8, 2014, well in excess of 30-days after Per and Melody received notice of the receivership. (CP 497)<sup>3</sup> The receiver did not accept Per and Melody's claim on the merits either, nor could he under RCW 7.60.220 in light of Jay's timely objection. Instead, the receiver conceded that the issue should be set for trial with a right to discovery under a case scheduling order. (3/20 RP 28) The receiver stated that he had no further duties with respect to Jay's estate while the claim was pending, and that there was no further basis to pay the receiver his monthly fee of \$6,000, or the receiver's counsel's fees at \$525 per hour. (3/20 RP 28: "I can discuss with my client either reducing or waiving the monthly fee during this time.") Per and Melody agreed that the receiver was being paid "an awful lot if he isn't doing anything." (3/20 RP 33)

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<sup>3</sup> See RCW 7.60.210(2) ("Claims must be served by delivering the claim to the general receiver within thirty days from the date notice is given by mail under this section, unless the court reduces or extends the period for cause shown . . .") Without citation to the record, Per and Melody contend they never received the receiver's notice. (Resp. Br. 11) But Per and Melody were parties to the action in which a receiver was appointed, were listed on the declaration of service (CP 1195-1200), and were listed as secured creditors due to their loan to Jay in the receiver's financial report of September 15, 2014. (CP 241)



The trial court did not abuse its discretion in terminating the receivership in light of the substantial waste of resources that would result in maintaining it pending the resolution of a disputed claim.

**4. There was no prejudice to Per and Melody, whose only remaining claim was a disputed interest in Holiday.com.**

No one was prejudiced by termination of the receivership. Termination of the receivership did not prejudice Per and Melody or the other party whose contested claim remained unresolved, Breathe Luxury<sup>4</sup>, because those claims would have to be resolved after discovery and trial regardless of whether pursued inside or outside of the receivership. And while Per and Melody make much of Jay's alleged "flouting of the court's authority," the court agreed with the receiver that the hotly contested issue of Jay's alleged contempt of court was moot once the Bero judgment was paid in full. (CP 967, 1192-94)

While Per and Melody would have undoubtedly preferred to have the receiver liquidate Holiday.com and pay them 25% of the proceeds, they had the same unsecured and contested claim to Jay's

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<sup>4</sup> Jay had also contested Breathe Luxury's claim that he interfered in its auction of Holiday.com. (CP 649-53) As the receiver predicted, Breathe Luxury has not further pursued its claim by filing a civil action, and has not challenged the termination of the receivership.

property after termination of the receivership that they had when it was initiated. They were not prejudiced by termination of the receivership. To the contrary, they reaped substantial benefits because the receivership expedited payment of the debt owed to them by Jay.

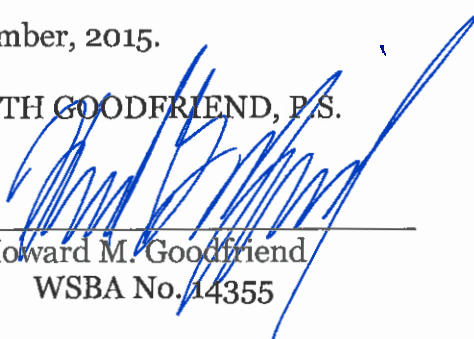
If Per and Melody ultimately prevail in establishing an interest in Holiday.com, they could assert that interest against the asset or its proceeds. As the receivership had substantial assets, there was no independent basis to maintain court control over those assets pending resolution of their claim, particularly at a cost of \$6,000 per month to pay the receiver, plus attorney fees of \$525 per hour.

## V. CONCLUSION

The trial court acted well within its discretion in terminating the receivership. This Court should affirm.

Dated this 1<sup>st</sup> day of December, 2015.

SMITH GOODFRIEND, P.S.

By:   
Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Respondents

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on December 1, 2015, I arranged for service of the foregoing Brief of Respondents, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Marc S. Stern Attorney at Law 1825 NW 65th Street Seattle, WA 98117 <a href="mailto:office@hutzbah.com">office@hutzbah.com</a>	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Dillon E. Jackson Foster Pepper PLLC 1111 3rd Ave Ste 3400 Seattle WA 98101-3264 <a href="mailto:jackd@foster.com">jackd@foster.com</a>	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 1st day of December,  
2015.

  
Jenna L. Sanders