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COURT OF APPEALS DIV  
STATE OF WASHINGTON  
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No. 70118-5-I

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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OM ENTERPRISES V LLC; AMARNATH DEVA, Manager of OM  
Enterprises V LLC,

Plaintiff/Appellant,

vs.

KAMAL TANDON and ANITA TANDON, husband and wife and the marital community composed thereof; SUNIL DHAR and RENUKA DHAR, husband and wife and the marital community composed thereof; SUNIL DHAR, TRUSTEE OF SUNIL AND RENUKA DHAR TRUST; AJAY KOTTAPALLI and MAHIJA KOTTAPALLI, husband and wife and the marital community composed thereof; CHANDRA BHASKARA and LAKSHMI RAMASUBRAMANIAN, husband and wife and the marital community composed thereof; DINESH NAKKA and SREEDEVI NAKKA, husband and wife and the marital community composed thereof; JAMES POOLEY and JANE DOE POOLEY, husband and wife and the marital community composed thereof; JAMES POOLEY, TRUSTEE OF ANDERSON POOLEY FAMILY TRUST; KAMLAWANTI GOUNDER, a single person; SHYAMAL GOUNDER, a single person and in his capacity as legal guardian of KAMLAWANTI GOUNDER; BALRAJ BAKSHI and JANE DOE BAKSHI, husband and wife and the marital community composed thereof; SUDERSHAN BAKSHI and

JOHN DOE BAKSHI, wife and husband and the marital community composed thereof; KERRY NEWMAN and JANE DOE NEWMAN, husband and wife and the marital community composed thereof; MICHAEL BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; BIDAN BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; TAD BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; MUBARAK GROUP INC., a Washington corporation; P THREE COMPANIES LLC, a Virginia limited liability company; VARA P. BONAGIRI and SUSHANI PALADI, husband and wife and the marital community composed thereof; RAM PAUL GUPTA and SAROJ GUPTA, husband and wife and the marital community composed thereof; PAUL GUPTA, TRUSTEE OF SAROJ AND PAUL GUPTA TRUST; PRASAD ILLAPANI and JANE DOE ILLAPANI, husband and wife and the marital community composed thereof; PRITHIPAL SINGH and RAJINDER SINGH, husband and wife and the marital community composed thereof; PRITHIPAL SINGH, TRUSTEE OF PRITHIPAL SINGH and RAJINDER K. SINGH TRUST; KEVERAN NAICKER and GYAN DEVI NAICKER, husband and wife and the marital community composed thereof; RAM KUMAR and GEETA SWAMY, husband and wife and the marital community composed thereof; RAM PRASAD and JANE DOE PRASAD, husband and wife and the marital community composed thereof; RAMESH BACHALA and SARALA BACHALA, husband and wife and the marital community composed thereof; SHIVANCHAL ENTERPRISES LLC, a Washington limited liability company; RAVI MITTAL and JANE DOE MITTAL, husband and wife and the marital community composed thereof; RAVI MUMMULLA and JANE DOE MUMMULLA, husband and wife and the marital community composed thereof; ROHAN SAMUEL LAM and JANE DOE LAM, husband and wife and the marital community composed thereof; SAMANTHAPUDI RAJU and MADHAVI RAJU, husband and wife and the marital community composed thereof; SREENATH GAJULAPALLI and ARUNA GAJULAPALLI, husband and wife and the marital community composed thereof; SRIKANTH KASAM and JANE DOE KASAM, husband and wife and the marital community composed thereof; SURENDER ZUTSHI and RUCHI ZUTSHI, husband and wife and the marital community composed thereof; SURENDER ZUTSHI, TRUSTEE of ZUTSHI FAMILY R. TRUST; MADHUSUDHAN REDDY and

VINAYA REDDY, husband and wife and the marital community composed thereof; VIPAN GUPTA and SUNITA GUPTA, husband and wife and the marital community composed thereof; ZAFAR RIZVI and YOSHIKO RIZVI, husband and wife and the marital community composed thereof; HARINDER SANGHA and JANE DOE SANGHA, husband and wife and the marital community composed thereof; KIRAN ELLANTI and JANE DOE ELLANTI, husband and wife and the marital community composed thereof; MAHIDER REDDY and JANE DOE REDDY, husband and wife and the marital community composed thereof; SOVITA RIMAL and RAJ SHARMA, wife and husband and the marital community composed thereof; AMARNATH DEVA and JAYA DEVA, husband and wife and the marital community composed thereof; VENU GOPAL and JANE DOE GOPAL, husband and wife and the marital community composed thereof; FLOYD MCEWEN, individually; GILBERT MCEWEN, individually; ARDELLA HARN, individually; VIRGINA BRAESCH, individually; and LONDA BLAKE, individually,

Defendants/Respondents.

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**OPENING BRIEF OF APPELLANT**

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## I. INTRODUCTION

A Washington limited liability company was formed to invest in Papa John's pizza restaurants in India. During the establishment of the company, the first manager of the LLC kept poor records of the capital contributions made by a large number of investor members. The manager then resigned as manager, retaining his ownership in the company. The new LLC manager salvaged the company by selling the company holdings in India.

The new manager brought an action in the Snohomish County Superior Court for an accounting and for dissolution of the company. As part of the winding up of the company, the new manager determined each member's capital contribution and corresponding ownership interest from available records and requests made to members and owners. Based on the records available, the manager corrected and adjusted the capital accounts of several members. He proposed an adjustment to the resigned manager's capital account that would reduce the manager's Capital Account by the amount of unauthorized or unexplained company payments. The adjustments would result in extinguishing the former manager's ownership interest.

The trial court held that this adjustment to the Capital Account was not authorized by statute, case law, or equity. The trial court found in favor of an intervening creditor's claims under a charging order that the LLC lacked the authority to make the adjustment and any such adjustment was time-barred. The trial court held the intervening creditor was not subject to the same defenses as the former manager.

However, the adjustment to an owner's capital account is permitted by the terms of the Limited Liability Company agreement and by state law. The creditors, as assignees of the former manager, are subject to the same defenses.

## **II. ASSIGNMENTS OF ERROR**

1. The Trial Court erred in holding that Appellant had no grounds in law or equity to conduct an adjustment to the Tandon Capital Account. (Conclusions of Law 2–4.)

2. The Trial Court erred in holding that Appellant was required to bring an action against a resigned manager to recover unauthorized distributions. (Conclusion of Law 3.)

3. The Trial Court erred in holding that, as holders of a charging order on ownership interests, the Respondents are not subject to the same defenses as the owner of the interests. (Conclusions of Law 5–6.)

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. During the time a limited liability company member acted as manager of the company, a substantial number of payments were made by the company to the manager for unauthorized and unexplained charges. During the winding up and accounting of the company, is the company permitted to decrease the member's capital account in the amount of these unauthorized and unexplained payments? (Assignment of Error 1.)

2. Under the facts described in Issue Statement No. 1, is the adjustment to the capital account permitted when the winding up occurs four years after the unauthorized and unexplained disbursements? (Assignment of Error 2.)

3. Under the facts described in Issue Statement No. 1, is the adjustment to the capital account now barred if the member's ownership units are now subject to a charging order on behalf of judgment creditors? (Assignment of Error 3.)

### **IV. STATEMENT OF THE CASE**

#### ***The Creation Of OM Enterprises V LLC***

Appellant OM Enterprises V LLC ("OM") is a Washington Limited Liability Company formed on March 31, 2005. CP 96. OM served as a holding company for OM Pizza & Eats India Private Limited

("OM India"), a company registered in India to engage in restaurant related businesses. CP 96-97. In April of 2005, OM entered into a Master Franchise Agreement ("Franchise Agreement") with Papa John's International ("PJI") authorizing OM to open and operate Papa John's franchises in India. CP 371. OM exercised its rights under the Franchise Agreement through OM India. CP 96-97, 371. OM's primary purpose therefore was to raise capital to fund OM India's implementation of the Franchise Agreement in India. CR 97.

Kamal Tandon was the founding Member Manager and initial President of OM. CP 97. He was also the founder of OM India. CP 97. In such capacities he arranged for the opening and operation of four Papa John's franchise locations in India by OM India. CP 97. In order to raise capital to begin and operate the franchise locations in India, Mr. Tandon recruited investors to become members in OM. CP 97. Co-Appellant Amarnath Deva and each of the defendants to this lawsuit are investors who Mr. Tandon convinced to invest in OM. CP 97.

In his capacity as the Member Manager and President of OM, Mr. Tandon was in complete control of the accounting and bookkeeping of the company. CP 97. Mr. Tandon was responsible for maintaining records

for expenditures made on OM's behalf as Manager from OM's accounts. CP 97.

***Mr. Tandon's Resignation***

Sometime in early 2007, Mr. Tandon stopped performing his managerial responsibilities to OM. On March 9, 2007, he tendered his resignation from the Board of Managers. CP 97.

At the time of Mr. Tandon's resignation, Amarnath Deva was the acting Vice President of OM and working in India overseeing the day-to-day operations of the Papa John's restaurants. CP 97. Upon Mr. Tandon's resignation, Mr. Deva returned to the United States to gain control of OM's accounts and assume management of OM as its sole remaining active Member Manager. CP 97.

Upon assuming management responsibility for OM, Mr. Deva found that Mr. Tandon had failed to maintain accurate bookkeeping records and that Mr. Tandon had used OM funds for his own personal purposes. CP 97. He also discovered that Mr. Tandon had not kept clear records of the capital contributions by OM's members. CP 97. For example, he had issued membership units in OM to some individuals without receiving, or at the very least recording, any capital contribution in return. CP 98.

### ***The Sale Of OM India***

Meanwhile, OM fell behind the development schedule required under the Franchise Agreement and PJI attempted to revoke the agreement. CP 98, 372. Mr. Deva, with the help of OM Member Paul Gupta, negotiated a deal that in exchange for PJI not revoking the Franchise Agreement, OM would sell its shares of OM India and its rights under the Franchise Agreement to JIP Fashion and Restaurants India Private Limited (“JIP”). CP 98, 372.

At a May 24, 2007 meeting, the members of OM approved the sale of all of the assets of OM (namely OM’s shares in OM India and its rights under the Franchise Agreement) to JIP and authorized Mr. Deva to enter and finalize negotiations with JIP. CP 98, 373. On September 10, 2007, Mr. Deva signed a Sale Purchase Agreement on behalf of OM transferring all of OM’s rights in the Franchise Agreement and its interest in OM India to JIP. CP 98, 373.

### ***Winding Up OM Enterprises V LLC***

It took a number of years for the proceeds from the sale to be transferred from India to the United States. CP 98, 373-374. However, in 2011, OM received the funds from India and commenced the present

action to dissolve OM and seek declaratory relief on how to distribute OM's remaining assets following dissolution. CP 241, 373-374.

As part of winding up, Mr. Deva undertook a process to determine each member's interest in the company assets. CP 98-102. To determine each member's membership interest and right to proceeds, Mr. Deva relied on the terms of OM's Limited Liability Company Agreement. Section 17.3 of OM's Limited Liability Company Agreement (the "LLC Agreement") provides that upon dissolution, but after payment of creditors and the establishment of any reserve deemed necessary by the Board of Managers, the remaining company assets are to be distributed as follows:

17.3.3 To the Unit Holders in proportion to the positive balances of their respective capital Accounts, as determined after taking into account all Capital Account adjustments for the taxable year during which the liquidation occurs.

CP 126.

What constitutes a Capital Account adjustment can be found in Section 10.2.1 of the LLC Agreement which defines "Capital Account." CP 116-117. In relevant part, Section 10.2.1 provides "[a] capital account ("Capital Account") shall be maintained for each Unit Holder" and that such accounts shall be *increased* by:

(a) the amount of cash and the Fair Market Value of property (net of related liabilities) originally contributed to the Company by such Unit Holder as a capital contribution,

(b) the amount of additional cash or the Fair Market Value of additional property (net of related liabilities) contributed to the Company by the Unit Holder, and

(c) such Unit Holder's share of Net Profits and Gain on Sale of the Company.

CP 116. Capital Accounts maintained for a Unit Holder shall be *decreased* by:

(x) all distributions to such Unit Holder from the Company other than repayment of loans or interest thereon,

(y) such Unit Holder's share of Net Losses and Loss on Sale of the Company and

(z) all other payments allocated such Unit Holder.

CP 116.

Given Mr. Tandon's poor record keeping with respect to the amount of each member's capital account and contributions thereto, and his issuance of membership units in exchange for no capital contributions in some instances, OM worked with its members prior to filing the present action to verify and confirm each member's capital contribution to OM for purposes of verifying their capital contributions to OM and the balance of their Capital Accounts. CP 98-99, 221-240.

To do this, OM first reviewed the minimal records that Mr. Tandon maintained and provided regarding member capital contributions. CP 98. The best record that OM was able to locate was a January 3, 2007 email from Mr. Tandon to OM member Ram Paul Gupta that listed the supposed capital contributions of OM's members. CP 98-99. Using this email as a starting point, OM asked each of its members to provide affirmative proof of their claimed capital contributions to OM. CP 99. OM's members responded by providing cancelled checks, transfer slips, deposit slips, wire transfer information, bank records, receipts issued by OM, and other information showing that they made capital contributions to OM and in what amounts. CP 99. If a party claimed a membership interest in OM but did not provide affirmative proof of a capital contribution to OM, OM did not credit them with a capital contribution for purposes of calculating the balance of their capital account. CP 99.

Based on the information provided by its members, OM proposed in its Amended Complaint to use each member's verified capital account balance (as confirmed under the above described process) divided by the total of all verified capital balances to determine each member's pro rata share of any assets to be distributed to OM's members following

dissolution of OM in accordance with 17.3 of the LLC Agreement. CP 374-375.

***The Tandon Capital Account***

The January 3, 2007 email from Mr. Tandon that served as the initial starting point for OM's attempt to determine the capital account balances of OM's members indicates that Mr. Tandon made \$513,400.00 in capital contributions to OM between March 7, 2005 and January 23, 2006. CP 99, 137-138. But unlike OM's other members, Mr. Tandon never provided additional affirmative proof of Mr. Tandon's capital contributions to OM; for example, he provided no cancelled checks, no transfer slips, no deposit slips, no wire transfer information, no bank records, no receipts issued by OM, nor any other information showing that Mr. Tandon made capital contributions to OM. CP 99.

Mr. Deva reviewed Mr. Tandon's January 3, 2007 email and OM's bank records to determine whether deposits were made into OM accounts on or about the dates, and in the amounts, identified and attributed to Mr. Tandon in his email. CP 99. Based on that review, OM identified \$440,800.00 of deposits in OM accounts that approximately correspond with amounts and dates of capital contributions attributed to Mr. Tandon in the January 3, 2007 email, and were not subsequently returned for

insufficient funds. CP 99, 140-141. OM further reduced this amount by \$25,000.00 because OM Members Kamlawanti and Shynan Grounder demonstrated that contributions claimed by Mr. Tandon on his own behalf on June 21, 2005 and July 8, 2005 (\$15,000 and \$10,000 respectively) were actually made by the Grounders for their own benefit. CP 99-100, 140-141. Accordingly, OM only identified \$415,800.00 of the contributions claimed by Mr. Tandon in the January 3, 2007 email that (i) have a possible corresponding deposit in an OM bank account, (ii) were not returned for lack of sufficient funds, and (iii) are not, as far as OM is aware, attributable to another member of OM (the “Potential Tandon Capital Contributions”). CP 100, 140-141.

OM’s bank accounts were intended to be used for the limited purposes of making payments to OM’s two domestic vendors (Papa John’s and United Source One) and to transfer funds into OM India’s bank accounts in India. CP 100-101. In his review of OM’s bank records, Mr. Deva identified sixty-two (62) payments or withdrawals made by Mr. Tandon from OM bank accounts between March 25, 2005 and June 2, 2006 totaling \$490,401.95 that were unrelated to either of these two limited purposes. CP 101, 143-147. Such payments included payments from OM accounts to pay Mr. Tandon’s personal credit cards (OM did not

have any credits cards in the United States). CP 101, 143-147. They also included transfers or checks to other franchises or companies owned by Mr. Tandon, but in which OM was not an investor, owner or participant. CP 101, 143-147.

As noted above, Section 10.2.1(x) of the LLC Agreement provides that all distributions to Unit Holders from the Company other than repayment of loans or interest thereon shall decrease that Unit Holder's Capital Account. CP 116. Section 10.2.1(z) provides further that a Unit Holder's Capital Account shall also be decreased by "all other payments allocated such Unit Holder." CP 116.

OM proposed to calculate the balance of the Tandon capital account by offsetting the \$415,800.00 in Potential Tandon Capital Contributions by the \$490,401.95 in unauthorized payments made by Mr. Tandon from OM accounts for his benefit. CP 101-102. This produces a negative capital account balance for the Tandon interest, but OM proposed to use a \$0.00 capital account balance for the Tandon capital account interest for purposes of determining each member's pro rata share of OM's remaining assets. CP 101-102. This meant that the Tandon interest in OM would receive a 0.00% pro rata share of OM's remaining assets following dissolution under OM's distribution proposal.

### ***The Mittal Judgment***

Following his resignation from OM, Mr. Tandon, his wife, Anita Tandon, and other commonly-held entity defendants (including OM) were sued in July of 2006 by Ravi Mittal, Ripu Mittal and Shivanchal Enterprises LLC (collectively the “Mittals”). CP 202. The claims asserted by the Mittals included dishonor of checks, Washington State Securities Act violations and breach of contract. CP 202. The Mittals received a judgment against Tandon (but not against the other defendants) in King County Superior Court in the amount of \$116,795.81 on December 10, 2007. CP 206-210. In an effort to collect on the judgment, the Mittals received a Charging Order on July 9, 2008 charging Kamal and Anita Tandon’s interest in OM with payment of the unsatisfied amount of the judgment. CP 215-218. As of November 5, 2012, the Mittals calculated the outstanding amount of the judgment plus accrued interest to total \$107,184.88. CP 150-151.

The Mittals, as the holders of a charging order against the Tandon interest in OM, are the only defendants in this action who answered OM’s Amended Complaint. CP 339-347. In their answer they asserted counterclaims requesting the court declare OM’s proposal for distributing OM’s remaining assets invalid and requiring OM to recompute the pro

rata shares of OM's members by giving full credit to all of the capital contributions claimed by Kamal Tandon with no reductions due to unauthorized payments received by Mr. Tandon from OM prior to the date of the Mittals charging order. CP 346.

***Summary Judgment Decision In Superior Court***

The Mittals brought a summary judgment motion in the OM dissolution action. The trial court, by The Honorable Richard Okrent, granted the Mittal's motion, holding, in summary, that (i) the only basis in the law for OM's proposal is contained in RCW 25.15.180; (ii) RCW 25.15.180 does not allow an automatic offset with respect to distributions; (iii) because OM did not bring an action within the proper time it could not take advantage of RCW 25.15.180; (iv) there is no equitable basis for offset because there is no agreement for offset and no privity between OM and the Mittals as holders of the Tandon interest under a charging order; (v) the Mittals are third parties who do not stand in the shoes of the Tандons for purposes of calculating the balance of the Tandon Capital Account. CP 58-61.

OM filed a motion for reconsideration of the trial court Order on Summary Judgment. The trial court denied OM's motion holding, in summary, that OM's characterization of Kamal Tandon's wrongful

withdrawals and payments from OM accounts cannot be treated as distributions because such a claim is time barred by RCW 25.15.235(3). CP 10-11.

## V. ARGUMENT

### A. **Washington Law Permits Limited Liability Company Members To Define Ownership Interests.**

The trial court held that no case law, statute, or ground in equity provided grounds for OM to “seek or make the offset” to the Tandon capital account. In doing so, the trial court misunderstood the nature of limited liability companies and the calculation of ownership interests and distributions.

Washington passed the Washington Limited Liability Company Act in 1994. Laws of 1994, ch. 211. The LLC form provided an additional option for Washington-based risk-averse investors and businesspersons to participate in the local economy. *A Step in the Right Direction: Washington Passes the Limited Liability Company Act*, 18 Seattle U.L. Rev. 197, 198 (1994).

“(A limited liability company) has characteristics that are common to both corporations and general partnerships. For example, the LLC is a separate legal entity which allows its owners to directly participate in

management as they would in a general partnership and still provide them with the personal limited liability protection afforded to shareholders of a corporation.” *Operational Overview of the Washington Limited Liability Company Act*, 30 Gonz. L. Rev. 183, 184 (1995).

Limited liability companies are a hybrid of partnerships and corporations. *See, Maple Court Seattle Condominium Association v. Roosevelt, LLC*, 139 Wash. App. 257, 262, 160 P.3d 1068 (2007). Washington courts use case law interpreting partnership agreements and partnership statutes in interpreting limited liability company issues. *See, Koh v. Inno-Pacific Holdings, Ltd.*, 114 Wash. App. 268, 271-272, 54 P.3d 1270 (2002); *see generally, Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wash. App. 443, 456-457, 158 P.3d 1183 (2007).

The Washington Limited Liability Act permits LLC agreements to define the earnings and ownership of a company:

Profits and losses will be allocated among the members in the manner provided in the LLC agreement. In the event there is no such agreement or the agreement does not so provide, profits and losses will be allocated in proportion to the agreed values assigned to member LLC contributions as shown on the records of the LLC. Interim distributions to existing members during the lifetime of a LLC will be allocated among the members in the manner provided in the LLC agreement. In the event there is no such agreement

or the agreement does not so provide, distributions will be allocated in proportion to the agreed values assigned to member LLC contributions as shown on the records of the LLC.

30 Gonz. L. Rev. at 203.

A member's investment in a LLC is referred to as a contribution. *Id.*, 193. Contributions can take one of the following forms: (1) cash, property, or services provided to the LLC; or (2) a promissory note or other obligation to contribute cash or property or to perform services for the LLC in the future. *Id.* RCW 25.15.190. Generally, a member is required to make agreed upon LLC contributions despite disability, death, or other reasons. Under those circumstance, if the agreed upon contribution was to take the form of property or services, the LLC may require that the contribution be made in cash. 30 Gonz. L. Rev. at 193; RCW 25.15.195. The LLC must maintain a record of the amount of cash and the description of the agreed value of other property or services contributed or agreed to be contributed to the LLC by its members. Voting and distribution rights of members are frequently tied to "agreed values." 30 Gonz. L. Rev. at 193.

In the case of OM's LLC Agreement, as noted above, the agreement defines how each member's capital account is calculated. Section 17.3 of the LLC Agreement provides that upon dissolution, but

after payment of creditors of the company and the establishment of any reserve deemed necessary by the Board of Managers, the remaining company assets are to be distributed as follows:

17.3.3 To the Unit Holders in proportion to the positive balances of their respective capital Accounts, as determined after taking into account all Capital Account adjustments for the taxable year during which the liquidation occurs.

What constitutes a Capital Account adjustment can be found in Section 10.2.1 of the LLC Agreement which defines “Capital Account”. In relevant part, Section 10.2.1 provides “[a] capital account (“Capital Account”) shall be maintained for each Unit Holder” and that such accounts shall be *increased* by:

- (a) the amount of cash and the Fair Market Value of property (net of related liabilities) originally contributed to the Company by such Unit Holder as a capital contribution,
- (b) the amount of additional cash or the Fair Market Value of additional property (net of related liabilities) contributed to the Company by the Unit Holder, and
- (c) such Unit Holder’s share of Net Profits and Gain on Sale of the Company.

Capital Accounts maintained for a Unit Holder shall be *decreased* by:

- (x) all distributions to such Unit Holder from the Company other than repayment of loans or interest thereon,

(y) such Unit Holder's share of Net Losses and Loss on Sale of the Company and

(z) all other payments allocated such Unit Holder.

CP 116.

Notably, Section 10.2.1(x) expressly provides that all distributions to Unit Holders from the Company other than repayment of loans or interest thereon shall decrease that Unit Holder's Capital Account.

The process of auditing, accounting, and adjusting capital accounts is significant for income tax purposes. The United States Department of Treasury Regulation § 1.704-1 addresses the multitude of issues that relate to a partnership's determination of a partner's share.<sup>1</sup> 26 C.F.R. 1.704-1. The regulations address, among other things, the circumstance where corrective allocations must be made to a partner's capital account. 1.704-1(b)(4)(x).

A limited liability company's obligations during its dissolution are also defined by the Washington Limited Liability Company Act:

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<sup>1</sup> This Treasury Regulation is cited by the OM Enterprises V Limited Liability Company Agreement, Section 10.2: "The foregoing provisions defining a Unit Holder's Capital Account are intended to comply with capital account maintenance provisions of Treasury Regulation 1.704-1(b) and shall be interpreted and applied consistent with such Regulation..."

(2) In winding up its activities, the limited liability company:

(a) May file a certificate of dissolution with the secretary of state to provide notice that the limited liability company is dissolved, preserve the limited liability company's business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, transfer the limited liability company's property, settle disputes, and perform other necessary acts; and

(b) Shall discharge the limited liability company's liabilities, settle and close the limited liability company's activities, and marshal and distribute the assets of the company.

RCW 25.15.295. (Emphasis added.)

Washington cases provide numerous examples of the winding up and accounting process. “In an action for an accounting, ‘the court (or more commonly, an auditor, master, or referee subject to court review) conducts a comprehensive investigation of the transactions of the partnership and the partners, adjudicates their relative rights, and enters a money judgment for or against each partner according to the balance struck.’” *Guntle v. Barnett*, 73 Wash. App. 825, 830, 871 P.2d 627

(1994)(Citing 2 Alan R. Bromberg and Larry E. Ribstein, *Partnership*, § 6.08(a) and *Holman v. Cape*, 45 Wn.2d 205, 206, 273 P.2d 664 (1954)).<sup>2</sup>

When an action for an accounting is being used to wind up the partnership's affairs, the court is obligated to provide for a full accounting of the partnership assets and obligations and distribution of any remaining assets or liabilities to the partners in accordance with their interests in the partnership. *Id.*; *Box v. Crowther*, 3 Wash. App. 67, 77-78, 473 P.2d 417 (1970).

Following the Agreement's terms defining the method for calculating each member's capital account, OM's new manager proposed the allocation described above, where Mr. Tandon's capital account would be adjusted to zero (\$0). This calculation is not an affirmative action against Mr. Tandon. It is not a claim against him to bring money back into the LLC. Rather, it is a commonly performed accounting process as part of the winding up of the business.

In a case with similar facts, the Maryland Court of Appeals held that the holder of a charging order against a partnership interest and

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<sup>2</sup> “[A]s a general matter, a statute of limitations will not commence to run on a cause of action for an accounting of partnership affairs before the dissolution of the partnership in question.” Russell G. Donaldson, *When Statute of Limitations Commences to Run on Right of Partnership Accounting*, 44 A.L.R.4th 678 (1986); *Laue v. Estate of Elder*, 106 Wash. App. 699, 25 P.3d 1032 (2001);

associated capital account was not entitled to precedence over subsequent adjustments to the capital account arising from the earlier theft of partnership funds by the partner whose interest was subject to the charging order. *O.C. Partnership v. Owrutsky and Associates, P.A.*, 596 A.2d 76, 88 Md. App. 507, 510 (1991). The Court stated:

The theft of Partnership funds . . . constituted a valid debt to the Partnership. Only after settling that debt could the amount of Anderson's capital account be determined. The monies, if any, remaining in Andersen's capital account would be the amount subject to attachment under [the] charging order. As Andersen was indebted to the Partnership in an amount greater than his capital account, there was no surplus available . . .

In point of fact, it was unnecessary for the Partnership to obtain a judgment against Andersen in order to adjust Andersen's capital account. The existence of a valid debt from Andersen to its partners was sufficient.

*Id.* at 510-511.

Washington courts have likewise permitted recalculation of ownership interests upon dissolution of a partnership. In *Crofton v. Bargreen*, the respondent had made an initial capital contribution of \$27,900.09 to a partnership engaged in a wholesale beer distribution business. 53 Wn.2d 243, 332 P.2d 1081 (1958). In the partnership's eighth year, the respondent's partner exercised his right under the

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*Malnar v. Carlson*, 128 Wash.2d 521, 529, 910 P.2d 455 (1996).

partnership agreement to repurchase respondent's interest, effectively triggering dissolution of the partnership. *Id.* at 246-247. At that time, the respondent's account revealed that from January 1, 1945 through April 30, 1953, his initial capital contribution (\$27,900.90) plus his share of the profits (\$259,885.33) totaled \$287,786.23. *Id.* at 247. But his withdrawals during the same period totaled \$280,718.17. *Id.* In other words, he had overdrawn his capital account by \$20,832.84. *Id.*

In reversing the Court of Appeals, the Washington Supreme Court held that "compelling appellant to disregard respondent's overdrafts and pay him the same sum to acquire respondent's interest as though he had maintained his capital account intact, is unreasonable, since it does violence to the intentions of the parties." *Id.* at 253. Accordingly, the court held "it was entirely proper to deduct the amount of respondent's overdrafts (\$20,073.78) from the upset price of \$27,900.90, leaving a net balance of \$7,068.06." *Id.*

Courts in other jurisdictions have obtained similar results. *See Schoeller v. Schoeller*, 497 S.W.2d 860, 869 (Mo.App. 1973) (held that deduction partner's beginning capital from the total capital account as of the date of dissolution was proper for determining pro rata share of total capital accounts where partner who did not at any time actually contribute

his starting capital to partnership); *Sebring Associates v. Coyle*, 347 N.J. Super. 414, 429-430, 790 A.2d 225 (“It defies common sense and practical business realities to construe the term ‘aggregate case distribution’ as the gross amounts paid into the partnership undiminished by withdrawals and distributions.”); *Williams v. Richey*, 948 A.2d 564, 569 (D.C. App. 2006) (“Before a distribution may be accomplished, the capital accounts must be brought up to date.”).

Thus, contrary to the trial court’s Order on Summary Judgment, OM did have the authority, under the terms of the LLC Agreement and Washington law, to make the adjustment to the Tandon Capital Account.

**B. The Adjustment Of Capital Accounts Is Not Barred By Failing To Bring An Action Following the Resignation of a Manager.**

The trial court held that OM’s exclusive remedy for offsetting the contributions made to the Tandon Capital Account by the distributions made from OM to Mr. Tandon was under RCW 25.15.180 and that the applicable statute of limitations had run preventing OM from bringing an action under RCW 25.15.180. In its entirety, RCW 25.15.180 provides:

A manager may resign as a manager of a limited liability company at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement. A limited liability company agreement may provide that a manager shall not have the right to resign as a manager of a

limited liability company. Notwithstanding that a limited liability company agreement provides that a manager does not have the right to resign as a manager of a limited liability company, a manager may resign as a manager of a limited liability company at any time by giving written notice to the members and other managers. If the resignation of a manager violates a limited liability company agreement, **in addition to any remedies otherwise available under applicable law**, a limited liability company may recover from the resigning manager damages for breach of the limited liability company agreement and offset the damages against the amount otherwise distributable to the resigning manager.

(Emphasis added.)

This statute, permitting a claim against a manager after the improper resignation of the manager, does not apply to these facts: First, it identifies a cause of action that arises when an LLC Agreement provides that a manager may not resign, but the manager resigns anyway. In such a case, the company can sue for damages arising from such resignation which can then be offset against amounts otherwise distributable to the resigning manager. OM is not asserting a claim against Mr. Tandon or the Mittals based on Mr. Tandon's resignation as manager from OM. Instead OM is attempting to give operation to all of the requirements of the LLC Agreement in calculating the balance of the Tandon Capital Account to be used in the pro rata distribution calculation.

Second, by its express terms, the claim and offset authority under RCW 25.15.180 is “in addition to any remedies otherwise available under applicable law.” As discussed above, the LLC Agreement expressly requires that member Capital Accounts be reduced by distributions made by OM to members. By the very terms of RCW 25.15.180, this requirement and authority to reduce the Tandon Capital Account by the amount of distribution taken by the Tandons from OM is in no way limited or diminished by RCW 25.15.180. For these reasons, the Court’s ruling that OM’s failure to assert an offset under RCW 25.15.180 prohibits OM from determining the balance of the Tandon Capital Account in accordance with the terms of the LLC Agreement is erroneous.

**C. The Adjustment Of Capital Accounts Is Not An Action For The Recovery Of An Unlawful Disbursement.**

The trial court held that RCW 25.15.235(3) prohibits the adjustments to the Tandon Capital Account because, under that statute, a member who receives a distribution from a limited liability company has no liability to the company unless the company brings an action to recover the distribution within three years from the date of the distribution. At first blush, the statute seems superficially applicable. However, ultimately it too does not apply.

RCW 25.15.235(3) is a subsection of RCW 25.15.235. It is axiomatic that statutes must be read in their entirety. Accordingly, RCW 25.15.235 in its entirety provides:

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business, or (b) all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability.

(2) A member who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to a limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a member under a limited liability company agreement or other applicable law for the amount of a distribution.

(3) *Unless otherwise agreed*, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the

amount of the distribution after the expiration of three years from the date of the distribution ***unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.***

RCW 25.15.235.

Read completely, this statute contemplates a circumstance where (i) a distribution is made to a member when insufficient funds are available for creditors, and (ii) the company or a creditor brings an affirmative action against that member to ***recover*** the amounts so paid. Under such conditions, the company must bring an action within three years of such distribution or it cannot affirmatively recover the amount paid from the member. The statute says nothing of how such distribution should be accounted for in determining that member's capital account balance in the event the action is not brought to recover the distributed amount.

In this instance, OM is not bringing an action to recover funds. Rather, OM is proposing to give operation and meaning to the express terms of the LLC Agreement by adjusting the balance of the Tandon Capital Account to reflect the fact that the Tandons received distributions or payments from OM. This is not an affirmative act of recovery. Instead,

it is an accounting in accordance with Section 10.2.1 of the LLC Agreement.

Even if RCW 25.15.235(3) could be read to require limited liability companies to sue their members in order to adjust their capital accounts to reflect distributions, the first four words of the subsection provide “unless otherwise agreed.” In this case, OM’s members agreed in Section 10.2.1 of the LLC Agreement that OM does not have to bring such lawsuits in order to reduce member capital account balances so they reflect distributions, but instead the agreement expressly directs the company to do so unilaterally without seeking adjudication. See, LLC Agreement § 10.2.1 (Capital Accounts “**shall** be decreased by (x) all distributions to such Unit Holder from the Company . . . (z) all other payments allocated to such Unit Holder” (emphasis added)).

In conclusion, because OM is not bringing an affirmative action to recover the distributions made to the Tandons before the Mittals’ received their charging order, RCW 25.15.235(3) does not limit OM’s ability to determine the balance of the Tandon Capital Account in accordance with the terms of its LLC Agreement and to use such balance in the pro rata calculation to be used for distributing OM’s remaining assets.

**D. The Mittal's Economic Interest, Because It Is An Assignment, Receives No Greater Status Than Tandon's Member Interest.**

The Court held that in the context of the Mittal's interest in the Tandon Capital Account, they are third parties with no relationship with OM that would allow OM to reduce the Tandon Capital Account. However, the Mittal's interest in the Tandon Capital Account stems from a charging order issued under RCW 25.15.255, which states:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company interest of the member with payment of the unsatisfied amount of the judgment with interest. **To the extent so charged, the judgment creditor has only the rights of an assignee of the limited liability company interest.**

RCW 25.15.255 (emphasis added); *see also*, RCW 25.15.250(2)(a) (assignments of LLC interest "entitles the assignee to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item **to which the assignor was entitled**, to the extent assigned").

Contrary to the Court's holding that the Mittals are third parties with no relationship with OM that would allow OM to reduce the Tandon Capital Account by the amounts distributed to the Tandons, the Mittals are in fact mere assignees of the Tandon interest in the Tandon Capital

Account. An assignee is no simple third party. To the contrary, assignees like the Mittals absolutely step into the shoes of the assignor and cannot recover more than an assignor could recover. *See, Puget Sound National Bank v. State Dept. of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (“An assignee of a contract ‘steps into the shoes of the assignor’” and an “assignment carries with it the rights and liabilities as identified in the assigned contract, but also all applicable statutory rights and liabilities”). This a general principal of assignments recognized under both the common law and statute. *See, Havsy v. Flynn*, 88 Wash. App. 514, 519, 945 P.2d 221 (1997) (assignees cannot recover more than assignors can recover); *Pacific N.W. Life Ins. Co. v. Turnbull*, 51 Wash. App. 692, 700, 754 P.2d 1262, *review denied*, 111 Wn.2d 1014 (1988); *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 359, 662 P.2d 385 (1983); RCW 4.08.080; Civil Rule 13(j).

This means that the Mittals, as assignees of the Tandon interest in the Tandon Capital Account, have the right to have their interest in the Tandon Capital Account determined in accordance with the terms of the LLC Agreement for purposes of calculating their share of the distribution of OM’s remaining assets.

The amount of distributions made to the Unit Holder of the Tandon interest prior to the date of the Mittal Defendant's charging order exceeds the amount of contributions made by the Unit Holder. Accordingly, by operation of the terms of the LLC Agreement, when the Mittals received their Charging Order, the balance of the Capital Account they received an interest in was a Capital Account with no positive balance, and under the law of assignments they could receive no more than this. Under Section 17.3.3 of the LLC Agreement, Unit Holders who do not have a positive balance in their Capital Account do not receive a share of the distribution of OM's remaining assets upon dissolution. This treats the Tandon interest, for which the Mittals have the rights of assignees, no better or worse than is required under the LLC Agreement or RCW 25.15.255. The Court's ruling to the contrary was erroneous. The Tandon interest was not the only interest adjusted by the new manager. To insulate the Tandon interest from adjustment because of the charging order would be unfair to other members and improperly immunize one ownership interest at the expense of the others.

**E. The Mittal's Enforcement Of Their Charging Order Would Result In Double Payment To Tandon.**

In its Order, the Trial court found the verifiable share of the Tandon Capital Account is roughly between \$415,800 and \$513,400.<sup>3</sup> However, in so concluding, the trial court focused exclusively on the capital **contributions** allegedly made under Section 10.2.1(a) by Mr. Tandon to his Capital Account, but completely ignored the **reductions** required under Section 10.2.1(x) that arise from Mr. Tandon taking \$490,401.95 in priority distributions from the Company, all of which occurred before the Mittal's received their charging order on July 9, 2008. This action fails to give meaning and operation to all of the provisions of the LLC Agreement that are relevant to determining the balance of the Tandon Capital Account. According to the new manager's calculations,

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<sup>3</sup> Contrary to the Court's finding of fact that the Tandons made between \$415,800 and \$513,400 in capital contributions is verified, OM notes that neither it nor the Mittals have *verified* the amount of the Tandon contributions. The Mittals have provided no evidence on the level of contributions made by the Tandons. For its part, OM has only identified \$415,800.00 of the contributions claimed by Mr. Tandon in the January 3, 2007 email that (i) have a possible corresponding deposit in an OM account, (ii) were not returned for lack of sufficient funds, and (iii) are not, as far as OM is aware, attributable to another member of OM. Given Mr. Tandon's propensity to claim contributions made by others in his own name, OM cannot and did not verify if these amounts were actually contributed by the Tandons. Accordingly, this finding is not supported by the evidence in the record.

Mr. Tandon already received the return of the entire value of his contribution.

It also results in a circumstance where the Mittals would receive a distribution of OM's remaining assets (due to their charging order against the Tandon interest in OM) even though, under operation of the LLC Agreement, the Tandon Capital Account has a negative balance. As stated above, Section 17.3.3 only allows Unit Holders with positive Capital Account balances to share in the distribution of OM's remaining assets upon dissolution. The trial court's ruling, therefore, will cause OM to violate the express terms of the LLC Agreement in distributing its remaining assets upon dissolution. For that reason, it is erroneous as a matter of law.

**F. The Appellate Court Engages In The Same Review As The Trial Court.**

When reviewing an order granting summary judgment, this court must engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court must consider the evidence in light most favorable to the nonmoving part. In this case, the interpretation of the OM LLC Agreement and the application of Washington law are clearly legal issues permitting de novo review by the

Appellate Court without deference to the trial court's review of factual materials. As to factual issues, although the parties may disagree over the amount determined for Mr. Tandon's capital contributions and unauthorized withdrawals, the amount of the contributions and withdrawals was not an issue resolved at summary judgment. For the purpose of the summary judgment and appellate review, OM's allegations that Mr. Tandon's unauthorized distributions exceeded his contributions must be assumed to be true.

## VI. CONCLUSION

For the reasons stated above, Appellant OM Enterprises V LLC respectfully requests that the trial court decision be reversed. The Appellants request that the case be remanded to the superior court in its entirety for resolution by the trial court.

Dated this 1st day of July, 2013.

MARSH MUNDORF PRATT SULLIVAN  
+ McKENZIE, P.S.C.



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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
2013 JUL -3 PM 1:38

**No. 70118-5-I**

COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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OM ENTERPRISES V LLC; AMARNATH DEVA, Manager of OM  
Enterprises V LLC,

vs.

KAMAL TANDON and ANITA TANDON, husband and wife and the marital community composed thereof; SUNIL DHAR and RENUKA DHAR, husband and wife and the marital community composed thereof; SUNIL DHAR, TRUSTEE OF SUNIL AND RENUKA DHAR TRUST; AJAY KOTTAPALLI and MAHIJA KOTTAPALLI, husband and wife and the marital community composed thereof; CHANDRA BHASKARA and LAKSHMI RAMASUBRAMANIAN, husband and wife and the marital community composed thereof; DINESH NAKKA and SREEDEVI NAKKA, husband and wife and the marital community composed thereof; JAMES POOLEY and JANE DOE POOLEY, husband and wife and the marital community composed thereof; JAMES POOLEY, TRUSTEE OF ANDERSON POOLEY FAMILY TRUST; KAMLAWANTI GOUNDER, a single person; SHYAMAL GOUNDER, a single person and in his capacity as legal guardian of KAMLAWANTI GOUNDER; BALRAJ BAKSHI and JANE DOE BAKSHI, husband and wife and the marital community composed thereof; SUDERSHAN BAKSHI and JOHN DOE BAKSHI, wife and husband and the marital community composed thereof; KERRY NEWMAN and JANE DOE NEWMAN,

husband and wife and the marital community composed thereof; MICHAEL BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; BIDAN BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; TAD BREWSTER and JANE DOE BREWSTER, husband and wife and the marital community composed thereof; MUBARAK GROUP INC., a Washington corporation; P THREE COMPANIES LLC, a Virginia limited liability company; VARA P. BONAGIRI and SUSHANI PALADI, husband and wife and the marital community composed thereof; RAM PAUL GUPTA and SAROJ GUPTA, husband and wife and the marital community composed thereof; PAUL GUPTA, TRUSTEE OF SAROJ AND PAUL GUPTA TRUST; PRASAD ILLAPANI and JANE DOE ILLAPANI, husband and wife and the marital community composed thereof; PRITHIPAL SINGH and RAJINDER SINGH, husband and wife and the marital community composed thereof; PRITHIPAL SINGH, TRUSTEE OF PRITHIPAL SINGH and RAJINDER K. SINGH TRUST; KUYERAN NAICKER and GYAN DEVI NAICKER, husband and wife and the marital community composed thereof; RAM KUMAR and GEETA SWAMY, husband and wife and the marital community composed thereof; RAM PRASAD and JANE DOE PRASAD, husband and wife and the marital community composed thereof; RAMESH BACHALA and SARALA BACHALA, husband and wife and the marital community composed thereof; SHIVANCHAL ENTERPRISES LLC, a Washington limited liability company; RAVI MITTAL and JANE DOE MITTAL, husband and wife and the marital community composed thereof; RAVI MUMMULLA and JANE DOE MUMMULLA, husband and wife and the marital community composed thereof; ROHAN SAMUEL LAM and JANE DOE LAM, husband and wife and the marital community composed thereof; SAMANTHAPUDI RAJU and MADHAVI RAJU, husband and wife and the marital community composed thereof; SREENATH GAJULAPALLI and ARUNA GAJULAPALLI, husband and wife and the marital community composed thereof; SRIKANTH KASAM and JANE DOE KASAM, husband and wife and the marital community composed thereof; SURENDER ZUTSHI and RUCHI ZUTSHI, husband and wife and the marital community composed thereof; SURENDER ZUTSHI, TRUSTEE of ZUTSHI FAMILY R. TRUST; MADHUSUDHAN REDDY and VINAYA REDDY, husband and wife and the marital community composed thereof; VIPAN GUPTA and SUNITA GUPTA, husband and

wife and the marital community composed thereof; ZAFAR RIZVI and YOSHIKO RIZVI, husband and wife and the marital community composed thereof; HARINDER SANGHA and JANE DOE SANGHA, husband and wife and the marital community composed thereof; KIRAN ELLANTI and JANE DOE ELLANTI, husband and wife and the marital community composed thereof; MAHIDER REDDY and JANE DOE REDDY, husband and wife and the marital community composed thereof; SOVITA RIMAL and RAJ SHARMA, wife and husband and the marital community composed thereof; AMARNATH DEVA and JAYA DEVA, husband and wife and the marital community composed thereof; VENU GOPAL and JANE DOE GOPAL, husband and wife and the marital community composed thereof; FLOYD MCEWEN, individually; GILBERT MCEWEN, individually; ARDELLA HARN, individually; VIRGINA BRAESCH, individually; and LONDA BLAKE, individually,

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**DECLARATION OF SERVICE  
OF OPENING BRIEF OF APPELLANT**

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Karl F. Hausmann hereby certifies under penalty of perjury under the laws of the State of Washington as follows: On July 1, 2013, I deposited in the United States mail at Mill Creek, Washington, the original of the Opening Brief of Appellant and this Declaration of Service postage prepaid for regular mail to:

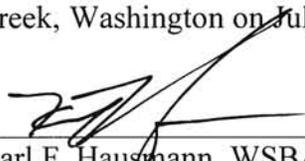
Clerk of the Court of Appeals, Division I  
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One Union Square  
Seattle, WA 98101-1176

and a true copy of the Opening Brief of Appellant, and a true copy of this Declaration of Service postage prepaid for regular mail to the following:

Katherine Hendricks  
Hendricks & Lewis, PLLC  
901 Fifth Avenue, Suite 4100  
Seattle, WA 98164

**I declare under penalty of perjury under the laws of the State of Washington that the foregoing statement is true and correct.**

Signed at Mill Creek, Washington on July 1, 2013.



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