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NO. 71524-1

COURT OF APPEALS,
DIVISION I
STATE OF WASHINGTON

THE FEDERAL DEPOSIT INSURANCE CORPORATION, as the receiver for THE COWLITZ BANK, a Washington State banking corporation,

Plaintiff,

v.

GRANITE HIGHLANDS, LLC, *et al.*,

Defendants.

WASHINGTON STATE DEPARTMENT OF REVENUE,

Appellant,

v.

PACIFIC REALTY ADVISORS, LLC, as general receiver of Defendants, and THE FEDERAL DEPOSIT INSURANCE CORPORATION, as the receiver for THE COWLITZ BANK, a Washington State banking corporation,

Respondents.

RESPONDENT FDIC'S RESPONSE BRIEF

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I. INTRODUCTION AND OVERVIEW

This is a case of first impression, in which a Washington court of appeals is being asked to decide whether a King County Superior Court-approved transfer of a judgment debtor's real property by a general receiver, who was appointed over the judgment debtors and their assets at the request of the judgment creditor in order to give effect to its judgment, is exempt from real estate excise tax as being "upon execution of a judgment."

The Superior Court appointed Pacific Realty Advisors, LLC as the general receiver of defendant Granite Highlands, LLC and its property, expressly to give effect to the FDIC's judgment in excess of $19 million. By order of the Superior Court, the receiver took control of that property, with the power to dispose of it exempt from the real estate excise tax. Proceeding under that appointment, the receiver entered into an agreement to transfer a parcel of Granite Highlands, LLC's real property ("Lot 6") to a third party for a selling price of $72,950. The receiver asked the Superior Court for the order approving the transfer to include a specific provision that it

was exempt from the 1.78 percent real estate excise tax on the selling price (or $1,298.51), consistent with the order appointing the receiver.

The Superior Court said yes, the receiver's transfer of Lot 6 meets all the statutory criteria for the exemption under RCW 82.45.010(3)(i),[1] by its plain language. That is, it was a transfer or conveyance, pursuant to an order of sale by the court, upon execution of the FDIC's judgment. "Execution" includes the receivership that the FDIC had imposed on Granite Highlands, LLC and its real property on the grounds of giving effect to the FDIC's judgment, with the power of the receiver to liquidate that property.

There is no dispute here that the receiver's sale was a transfer or conveyance or that it was pursuant to an order of sale by the court. The State of Washington Department of Revenue is appealing the Superior Court's decision because it wants the definition of

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[1] This subsection was renumbered as RCW 82.45.010(3)(j) effective June 12, 2014, because the Legislature amended the real estate excise tax statute to exclude transfers by transfer on death deed from the definition of "sale," which became codified as new RCW 82.45.010(3)(b). *See* Second Engrossed Substitute House Bill 1117, Laws of 2014, ch. 58, § 24, at 23.

execution of a judgment to be narrow—only in accordance with a *writ* of execution, and not including a transfer by a receiver appointed to give effect to the judgment. The State of Washington's approach would allow judgment creditors only to use a sheriff to liquidate a judgment debtor's property to recover on their claims, not to have a receiver appointed to do the same thing, if they want the sale to be exempt from the 1.78 percent tax on the selling price. There is no legal authority for the State of Washington's extremely narrow statutory construction.

Rather, the Superior Court correctly determined that the receiver is entitled to the excise tax exemption for the transfer of Granite Highlands, LLC's real property. The appointment of the receiver was an execution by the FDIC on its judgment against defendants, using the plain and ordinary meaning of the word "execution" as defined in the dictionary, as required by the Washington Supreme Court when the applicable statute contains no definition. In a nutshell, execution involves a process or appointment of an officer to give effect to a judgment by seizing and

selling property of a judgment debtor. That is exactly what a receiver does and the receiver in this case did.

In addition, although the Superior Court granted the exemption on the basis of the broad definition of "execution," its decision is equally supported by the fact that the original order appointing the receiver expressly provides that the real estate excise tax exemption applies to the receiver's sales, and the State of Washington has never appealed that order. Before approval of the transfer on appeal here, the Superior Court had entered another order approving the exemption for the receiver's transfer of other real property owned by Granite Highlands, LLC, including on notice to and without objection by the State of Washington. The State of Washington is collaterally estopped from objecting to the exemption for the transfer of Lot 6, because the Superior Court previously granted the exemption to the receiver under another order in connection with the transfer of other lots in the same real estate development, of which the State received advance notice but failed to object.

This Court should affirm the Superior Court's decision and hold that no real estate excise tax must be paid by the receiver on its[2] transfer of real property of judgment debtor Granite Highlands, LLC. Affirmance will allow the receiver to disburse to the FDIC, for application to its judgment balance, the $1,298.51 amount of the excise tax that the receiver voluntarily reserved pending the outcome of this appeal.

II. ASSIGNMENT OF ERROR

As stated by the State of Washington: "The trial court erred in granting the General Receiver an exemption from payment of the real estate excise tax on the sale of real estate." The FDIC disagrees with the State of Washington. To the contrary, the Superior Court did not err and properly granted the exemption to the receiver.

III. ISSUES ARISING FROM ASSIGNMENT OF ERROR

1. "Is the sale of real property in a receivership exempt from the real estate excise tax when the plain language of the statute

[2] The State of Washington's opening brief refers in several instances to the receiver with a feminine pronoun. The receiver is a limited liability company, Pacific Realty Advisors, LLC, not an individual, and its managing member is John P. Rader.

does not exempt sales in a receivership?" The particular transfer on appeal here is exempt in this receivership. The issue as expressed by the State of Washington contains the false premise that the plain language of the statute does not exempt sales in a receivership proceeding. But the statute exempts transfers "upon execution of a judgment," which encompasses a receivership that is grounded on giving effect to a judgment, such as this receiver appointed to liquidate the real property subject to the FDIC's judgment.

2. "Was the Receiver's sale of real property an 'execution upon a judgment' when the receiver did not have a judgment against the debtors and did not bring an execution action?" Yes, the receiver's transfer is "upon execution of a judgment." The receivership itself, pursuant to the order appointing and governing the powers and duties of the receiver, including to seize and liquidate property of the judgment debtors, is an execution of the *FDIC's* judgment. The receiver does not need its own judgment against the judgment debtors or to liquidate their property using another process outside the receivership. Execution is what the

receiver does, through transferring real property by order of the Superior Court.

3. "Does granting the Receiver a tax exemption violate the basic rule that exemption statutes are to be strictly construed when the Receiver's position avoids payment of the excise tax in all receivership sales of real property?" No, the exemption does not violate strict construction. The exemption sought is fully within the real estate excise tax exemption statute, not an attempt to characterize some other kind of regulatory formula as an exemption or to impose an exemption where the Legislature has not expressly provided for one. The statute provides for an exemption "upon execution of a judgment," and the receivership is such an execution. The Legislature did not limit executions to writs of execution carried out by a sheriff or any other particular method. The receiver's and the FDIC's position would *not* avoid payment of the excise tax in *all* receivership sales of real property, only when the receiver is appointed to give effect to a judgment, which is the setting of this case. The receiver and the FDIC are not arguing that the exemption

applies to all receiverships, and this Court does not need to reach the question whether the exemption applies to all receiverships. That is a question for another case. This Court can simply affirm the exemption for the transfer of Lot 6 by this receiver.

IV. STATEMENT OF THE CASE

A. The Cowlitz Bank obtained a judgment against Granite Highlands, LLC, the owner of the real property sold here.

The Cowlitz Bank made several loans (the "Loans") to defendants between 2004 and 2007. Defendants include Granite Highlands, LLC, the owner of the real property sold and at issue here, Lot 6. Defendants defaulted on the Loans in 2008 resulting in a loan modification (the "Loan Modification") in which Cowlitz Bank agreed to extend the loans and waive the defaults in exchange for additional collateral and other consideration. In 2009, defendants defaulted on the Loans as modified by the Loan Modification. Cowlitz Bank filed its Complaint for Monies Due in Clark County Superior Court (the "Clark County Court") on or around July 31, 2009. The Clark County Court entered a judgment against defendants on May 7, 2010, for the total principal obligation of

$13,034,547.35, plus interest in the amount of $1,253,623.21, advances and expenses in the amount of $150,555.28, attorneys' fees in the amount of $64,685.23, and costs in the amount of $3,409.11. (*See* CP 7, Ex. A.) On May 12, 2010, Cowlitz Bank recorded the judgment with the King County Recorder's Office under recording number 20100512000034. On May 17, 2010, Cowlitz Bank filed an abstract of judgment with the Clerk of the King County Superior Court along with a case assignment designation and case information cover sheet under case number 10-2-17621-7 SEA. (*See* CP 7 Exs. B, C & D.)

On July 30, 2010, Cowlitz Bank, including those branches operating under the name "Bay Bank (a Division of The Cowlitz Bank)", was closed by the Washington Department of Financial Institutions, and the FDIC was named receiver of Cowlitz Bank. Accordingly, by operation of law, the FDIC succeeded to the interests of Cowlitz Bank as plaintiff in this case and as the holder of the judgment and was authorized as a real party in interest to continue to seek execution of the judgment in its own name as

receiver of Cowlitz Bank or in the name of Cowlitz Bank. (*See* CP 6.)

Defendants failed to satisfy any portion of the judgment since July 1, 2011, when a partial release of judgment lien was filed with the Clark County Court in the amount of $58,852.25. (*See* CP 6 Ex. E; CP 7.)

Defendants own real estate throughout Washington, including developable lots and raw land owned by Granite Highlands, LLC and generally located on North 6th Street in Washougal, Clark County, and commonly known as "Granite Highlands," Lot 6 of which is the property involved in this appeal. Defendants also own other properties in Clark, Cowlitz, and Snohomish Counties, as well as partnership interests or stock in entities that own real property. The FDIC holds a deed of trust on, security interest in, or judgment lien on each of these real estate and equity interests. (*See* CP 7.)

These assets produce little to no income. Defendants lacked liquid assets to pay the judgment or their other debts. Given defendants' financial condition, they also lacked the resources to

preserve and protect their real estate. Specifically, defendants owe a substantial amount in delinquent real property taxes for their real estate. To avoid a tax foreclosure, Cowlitz Bank was forced to pay a portion of defendants' real property taxes owing for 2006 and 2007 to Snohomish and Clark Counties in the aggregate amount of $150,535.42, including on Granite Highlands. (*See* CP 7 Ex. A.)

Rather than complete seriatim foreclosures or seek writs of execution property by property, the FDIC decided that it would be most efficient to seek the appointment of a general receiver of defendants to give effect to the judgment and control, sell, and manage defendants' assets, including, among others, Lot 6 and the other real property lots of Granite Highlands. (*See* CP 7 Ex A.)

B. <u>The Superior Court appointed Pacific Realty Advisors, LLC as general receiver of defendants, by an order that has not been appealed</u>.

On April 9, 2013, the FDIC filed its Motion and Petition for Appointment of General Receiver and Memorandum in Support Thereof (the "Receivership Petition") against defendants. (*See* CP 3.) The Receivership Petition and the Order Appointing General

Receiver (the "Receivership Order") entered on April 22, 2013, state that the basis for appointment of the receiver was to give effect to the judgment, by giving the receiver possession of and power to liquidate the Assets (as defined in the Receivership Order), including without limitation Lot 6 of Granite Highlands. (*See* CP 3; CP 12.) The Receivership Order expressly provides that the receiver's sale of those Assets is upon execution of a judgment and therefore exempt from real estate excise tax. (*See* CP 12.) As of the date of the Receivership Order, defendants jointly and severally owed the FDIC $19,118,931.93 on the judgment, with interest accruing at the rate of $3,974.47 every day thereafter. (*See* CP 38.)

The receiver provided notice of the entry of the Receivership Order to the State of Washington Department of Revenue and Attorney General's Office on June 20, 2013. (*See* CP 29.) The State of Washington has not appealed the Receivership Order.

Since the entry of the Receivership Order, again on notice and hearing to the State of Washington Department of Revenue and Attorney General's Office and all other required parties in interest,

(*see* CP 28; CP 59), and before the entry of the order on appeal here, the receiver had sought and obtained two other orders of the Superior Court expressly approving the sale of other Assets as exempt from the real estate excise tax. Each of those orders contained the following language: "FURTHER ORDERED that the sale of the Property [or Properties] shall be considered an order of sale by the Court to execute upon a judgment for purposes of RCW 82.45.010(3)(i) and therefore the sales are exempt from real estate excise taxes." (CP 36; CP 69 (the "First Granite Highlands Order").) The State of Washington did not object to either of those motions or seek relief or appeal from either order.

C. The receiver filed a motion to transfer Lot 6 exempt from the real estate excise tax, and the Superior Court granted it.

On or about November 18, 2013, the receiver filed Receiver's Motion to Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens and Pay Broker (the "Lot 6 Sale Motion"), to transfer Lot 6 of Granite Highlands free and clear of liens and exempt from the real estate excise tax. (*See* CP 77.)

The Lot 6 Sale Motion was supported by the Declaration of John P. Rader ("Rader Decl."), the managing member of the receiver. (*See* CP 78.) The Superior Court had previously entered the First Granite Highlands Order, covering Lots 2, 10, 12, 14, 15, and 16 in Granite Highlands, including an exemption from the real estate excise tax on the basis of RCW 82.45.010(3)(i). (*See* CP 69.)

On November 22, 2013, the State of Washington filed and served its Objection to Sales of: (1) Brady Road and (2) Granite Highlands Without Payment in Full of Real Estate Excise Tax (the "Lot 6 Sale Objection").[3] (*See* CP 81.) The State of Washington filed no declarations or other evidence in support of the Lot 6 Sale Objection. That same day, the FDIC filed its Joinder in Receiver's Motion to Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens and Pay Broker. (*See* CP 83.)

On December 16, 2013, the FDIC filed the Plaintiff's Reply in Support of the Receiver's Motion to Approve the Sale of Real

[3] The State of Washington withdrew the portion of the Lot 6 Sale Objection regarding Brady Road, because the receiver was not requesting an excise tax exemption with respect to that property.

Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens and Pay Broker (the "FDIC's Lot 6 Reply"). (*See* CP 94.) The FDIC's Lot 6 Reply highlighted that the plain and ordinary usage of "execution," whether as defined in the dictionary or by reference to the related "Executions" statute, was broad enough to include appointment of a receiver, such as by entry of the Receivership Order. The FDIC's Lot 6 Reply referred to the files and records in the case and also noted that the State of Washington had failed to appeal the Receivership Order and remained bound by its provision that sales of real property by the receiver were exempt from the real estate excise tax.

At the same time, the receiver filed Receiver's Reply in Support of Motion to Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens and Pay Broker (the "Receiver's Lot 6 Reply"). (*See* CP 96.) The Receiver's Lot 6 Reply adopted the arguments in the FDIC's Lot 6 Reply and noted that the only controverted issue before the Superior Court was

whether the transfer was upon execution of a judgment and thus exempt from the excise tax.

At a hearing on December 18, 2013, the Superior Court heard argument from counsel for the State of Washington, the receiver, and the FDIC. There was no dispute about the facts or that the Lot 6 Sale Motion should otherwise be granted. The State of Washington objected only to the portion of the Lot 6 Sale Motion that called for the real estate excise tax exemption. The Superior Court overruled the Lot 6 Sale Objection and granted the Lot 6 Sale Motion, including the real estate excise tax exemption on the transfer of Lot 6. The Superior Court ruled that "execution" is broadly defined and can include a receivership. The ruling is reflected in the Order Granting Receiver's Motion to (1) Approve the Sale of Real Property (Lot 6, Granite Highlands Phase IV) Free and Clear of Liens; and (2) Pay Broker [Dkt. # 101] (the "Lot 6 Sale Order") as follows: "FURTHER ORDERED that the sale of the Property shall be considered an order of sale by the Court to execute upon a judgment for purposes of RCW 82.45.010(3)(i) and therefore the sale is

exempt from real estate excise taxes[.]" (CP 101.) This language was the same as that in the First Granite Highlands Order.

The State of Washington filed a motion for reconsideration of the Sale Order, but the Superior Court denied it on January 7, 2014. (*See* CP 104.) The State of Washington has not assigned any error or stated any issue with respect to the Superior Court's denial of the motion for reconsideration. The issue before this Court is whether the Superior Court properly interpreted the excise tax statute to grant the exemption for the transfer of Lot 6.

The Lot 6 Sale Order has not been stayed pending appeal. But the receiver is voluntarily holding in reserve the $1,298.51 amount of the excise tax that would otherwise be charged to the receiver in the absence of an exemption, pending the outcome of the State of Washington's appeal. The FDIC is entitled to have that amount disbursed to it under the Lot 6 Sale Order.

V. ARGUMENT

This Court should affirm the Lot 6 Sale Order, which reflects the Superior Court's approval of the transfer of Lot 6 exempt from

the real estate excise tax. First, as the Superior Court determined, the transfer is exempt as "upon execution of a judgment" because the plain and ordinary meaning of "execution" encompasses this receivership, in which the Superior Court had appointed the receiver expressly to give effect to the FDIC's judgment. Second, the exemption is within the rule of strict construction of tax exemption, as receivership is within the meaning of "execution." Third, the Receivership Order's provision that the receiver may transfer real property exempt from the excise tax remains in full force because the State of Washington has not appealed it and cannot collaterally attack it through this appeal of the Lot 6 Sale Order. Fourth, the State of Washington is collaterally estopped from objecting to the exemption because the Superior Court previously approved the sale of other lots at Granite Highlands on notice to and without objection by the State of Washington.

This Court's review of the Lot 6 Sale Order on appeal is *de novo*. "[T]he applicable standard of review is *de novo* because the evidence before the trial court consisted entirely of affidavits and

the proceeding is similar to a summary judgment proceeding." *Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000). The Superior Court's decision was based on the Rader Decl., the files and records in the receivership case, and the parties' legal arguments. Hence, this Court can determine on the same record that the transfer of Lot 6 by the receiver is exempt from the real estate excise tax. *See Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001).

A. **The Lot 6 Sale Order is an order by the Superior Court approving a transfer or conveyance of real property upon execution of a judgment, according to the plain meaning and ordinary usage of "execution."**

The transfer of Lot 6 by the receiver is exempt from the real estate excise tax. It qualifies for the exemption because it meets the following statutory criteria: (a) "a transfer or conveyance"; (b) "made pursuant to an order of sale by the court"; and (c) "upon execution of a judgment." RCW 82.45.010(3)(j) (formerly (i)).

First, the Receivership Order is an "execution" of the FDIC's judgment, according to the plain and ordinary meaning of

"execution," because the Superior Court appointed the Receiver to give effect to that judgment and seize and sell Granite Highlands, LLC's and the other defendants' assets to generate money to pay the FDIC. The plain meaning of "execution" is in the dictionary and statutes related to execution. Second, the State of Washington's argument that there is no exemption because the excise tax statute does not refer to transfers "in a receivership proceeding" does not hold up, because "execution" covers receiverships to give effect to judgments. Third, the State of Washington's argument that the receiver is not executing on its own judgment misses the point that the receiver was appointed as a form of execution of the FDIC's judgment. Fourth, the State of Washington's argument that the receiver is not executing on a judgment because it did not use a writ of execution to the sheriff to transfer Lot 6 ignores the fact that the execution is implemented through the receiver's ability to transfer property by obtaining an order of the Superior Court, which does not render the definition of "seller" to include "receiver" superfluous.

1. The appointment of the receiver under the Receivership Order is an "execution" of the FDIC's judgment.

The appointment of the receiver under the Receivership Order is an "execution" of the FDIC's judgment. This is true under the dictionary definition or by reference to related statutes.

a. "Execution" as defined in the dictionary encompasses appointment of a receiver to give effect to a judgment.

"Execution" as defined in the dictionary encompasses appointment of a receiver to give effect to a judgment. The dictionary is where the Washington State Supreme Court looks first when the Legislature has not defined a term in the particular statute:

> In interpreting a statute, our primary objective is to ascertain and give effect to the intent of the legislature. *State v. Watson,* 146 Wash.2d 947, 954, 51 P.3d 66 (2002). "In order to determine legislative intent, we begin with the statute's plain language and ordinary meaning." *Nat'l Elec. Contractors Ass'n v. Riveland,* 138 Wash.2d 9, 19, 978 P.2d 481 (1999). . . . Where the legislature has not defined a term, "this court will give the term its plain and ordinary meaning ascertained from a standard dictionary." *Watson,* 146 Wash.2d at 954, 51 P.3d 66.

Cornu-Labat v. Hosp. Dist. No. 2 Grant Cnty., 177 Wn.2d 221, 231-32, 298 P.3d 741 (2013) (citing Webster's Third New International Dictionary (2002)); *see also State v. Sweany*, 174 Wn.2d 909, 916, 281 P.3d 305 (2012) (using dictionary definition from Webster's for defining "value" where term was undefined by statute) (citing *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131 (2010) (holding that when a term is undefined by statute, it is given its "ordinary meaning, and the court may look to a dictionary for such meaning")). The Supreme Court also uses Black's Law Dictionary. *See Wachovia SBA Lending, Inc. v. Kraft*, 165 Wn.2d 481, 492, 200 P.3d 683 (2009).

The term "execution" is not defined in RCW 82.02.010, which provides general definitions for the excise tax title, or in RCW 82.45.010-.033, which has definitions for the real estate excise tax. Accordingly, this Court must look to the dictionary for the plain meaning of "execution." These definitions include:

> **3 a :** the process for carrying into effect the judgment or decree of a court; *esp* **:** the enforcement of such judgment or decree by arrest of the person or seizure

> of the property of a debtor. **3 b :** a judicial writ by which an officer is empowered to carry a judgment into effect – called also *final process*.

Webster's at 794.

> **1.** The act of carrying out or putting into effect (as a court order . . .); . . . . **3.** Judicial enforcement of a money judgment, usu. by seizing and selling the judgment debtor's property; . . . . **4.** A court order directing a sheriff or other officer to enforce a judgment, usu. by seizing and selling the judgment debtor's property. . . .

Black's Law Dictionary at 689 (10th ed. 2014). In light of the dictionary definitions, the State of Washington's concept of "execution" as done only through a writ to the sheriff is far too narrow. It is an unfounded assumption. Using the sheriff is just one alternative.

To give effect to the FDIC's judgment against defendants, the Superior Court ordered the appointment of the receiver to seize and sell their property, including Lot 6 owned by Granite Highlands, LLC. *Giving effect* to a judgment is the same as *execution* of a judgment. The dictionary definitions of "execution" are entirely consistent with the "give effect" wording of RCW 7.60.025(1)(c).

This is a classic example of the statute being so clear on its face that no judicial construction is necessary. *See State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The FDIC's judgment was the factual and legal basis for the entry of the Receivership Order and the continuing efforts of the receiver to liquidate the Assets, including as reflected in the Lot 6 Sale Order. The entry of the Receivership Order carried the judgment into effect and resulted in enforcement by the receiver's seizure and possession of the Assets of defendants, exactly as contemplated by the definitions in the standard dictionaries quoted above. Therefore, this receivership falls squarely within the dictionary definition of "execution."

b. Receivership is a kind of execution under the "Executions" statute and an alternative to using the sheriff under the "Proceedings Supplemental to Execution" statute.

The "Executions" statute, RCW ch. 6.17, and the "Proceedings Supplemental to Execution" statute, RCW ch. 6.32, reinforce the fact that the Receivership Order is a kind of execution and that the appointment of a receiver is an alternative to using the

sheriff for execution. "If, after looking to the dictionary, the meaning of a term is still unclear, its meaning may be gleaned from 'related statutes which disclose legislative intent about the provision in question.'" *Cornu-Labat*, 177 Wn.2d at 232 (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002)). Although *one* way to carry out an execution of a judgment is by issuance of a writ to the sheriff, there is no authority for the State of Washington's proposed narrow interpretation that execution is limited to that method. First, the receivership is an "execution" because it (1) is against the property of the judgment debtor, (2) is for the delivery of possession or real or personal property, or (3) commands the enforcement of or obedience to any other order of the court. Second, the appointment of a receiver for execution, as an alternative to using the sheriff, has long been recognized in Washington's related "Proceedings Supplemental to Execution" statute and as an equitable remedy for execution by judgment creditors.

(1) The receivership is an "execution" because it (a) is against the property of the judgment debtor, (b) is for the delivery of possession or real or personal property, or (c) commands the enforcement of or obedience to any other order of the court.

The receivership is an "execution" because it (a) is against the property of the judgment debtor, (b) is for the delivery of possession or real or personal property, or (c) commands the enforcement of or obedience to any other order of the court. The "Executions" statute, RCW ch. 6.17, relates to executions of judgments. "[T]he party in whose favor a judgment of a court has been or may be filed or rendered, or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued for the collection or enforcement of the judgment at any time within ten years from entry of the judgment or the filing of the judgment in this state." RCW 6.17.020(1). "'Court' as used in this section includes but is not limited to . . . superior courts . . . of the counties of the state of Washington. . . ." RCW 6.17.020(5). "There shall be three kinds of executions: First, against the property of the judgment

debtor; second, for the delivery of the possession of real or personal property or such delivery with damages for withholding the same; and third, commanding the enforcement of or obedience to any other order of the court." RCW 6.17.060. Enforcement of a money judgment may be by "execution," and nowhere does the statute say that it is limited to a writ. *See* RCW 6.17.070. This statute does not impose any limitations on the modes of execution that a judgment creditor may employ, although it does contain procedures to follow if the creditor chooses to pursue execution by a writ to the sheriff. *See* RCW 6.17.090-.190.

The Receivership Order is an "execution" of the FDIC's judgment according to the three kinds described in RCW 6.17.060. Again, "execution" does not have to be by writ to fit within those descriptions. First, it is against the property of defendants. The Receivership Order provides that the receiver "is appointed as the general receiver as defined in RCW 7.60.015 of Defendants and all the tangible and intangible real and personal property owned by Defendants (the 'Assets'), wherever located, including without

limitation the Collateral as legally described on Exhibits A, B, C, D, and E hereto, with authority to take possession and control, and to sell, liquidate, and/or wind-up the affairs of Defendants and the Assets." (CP 12.) Exhibit E to the Receivership Order lists Lot 6.

Second, the Receivership Order is for the delivery of the possession of real and personal property or such delivery with damages for withholding the property. It provides as follows: "Defendants and their respective officers, executors, personal representatives, heirs, trustees, beneficiaries, directors, shareholders, managers, members, employees, agents, accountants and attorneys shall provide the Receiver promptly upon request with all documents and records (including but not limited to financial records) and all information and with access to the Assets and all employees of Defendants (both within and without the state of Washington), which the Receiver may at any time request." Furthermore, "the Receiver shall be authorized without further order of this Court, to have the exclusive power and authority to sell, transfer, or otherwise

liquidate the Assets in accordance with RCW 7.60.260(1), (2) & (3). . . ." (CP 12.)

Third, the Receivership Order commands the enforcement of or obedience to any other order of the court. "The Court finds that a general receiver should be appointed over Defendants in order to give effect to the Judgment and to preserve, protect, market and sell the Assets (as defined [in the Receivership Order])." In addition: "Defendants, and their officers, executors, personal representatives, heirs, trustees, beneficiaries, directors, shareholders, managers, members, employees, agents, accountants and attorneys, shall cooperate with the Receiver in connection with the Receiver's assumption and performance of the Receiver's duties, so as to enable the Receiver to assume and perform the Receiver's duties without jeopardy to the assets of Defendants. . . . Defendants and their officers, executors, personal representatives, heirs, trustees, beneficiaries, directors, shareholders, managers, members, employees, agents, accountants and attorneys are hereby enjoined

from obstructing, delaying or interfering with the Receiver in the performance of the Receiver's duties." (CP 12.)

(2) A receiver is recognized in Washington's related "Proceedings Supplemental to Execution" statute and as an equitable remedy.

Appointment of a receiver for execution, as an alternative to using the sheriff, has long been recognized in Washington's related "Proceedings Supplemental to Execution" statute and as an equitable remedy for execution by judgment creditors. The "Proceedings Supplemental to Execution" statute, RCW ch. 6.32, relates to executions of judgments—in particular, measures available after entry of a judgment to examine debtors and obtain delivery of their property. It specifically contemplates that a receiver supersedes a sheriff in the judgment-enforcement process. "At any time after the commencement of a special proceeding authorized by this chapter, and before the appointment of a receiver therein, or the extension of a receivership thereto, the judge . . . may make an order permitting the person or corporation to pay the sheriff designated in the order a sum on account of the alleged indebtedness not exceeding the sum

which will satisfy the execution." RCW 6.32.070. The judge may "make an order directing the judgment debtor, or other person, immediately to pay the money or deliver the articles of personal property to a sheriff designated in the order, *unless* a receiver has been appointed or a receivership has been extended to the special proceedings, and in that case to the receiver." RCW 6.32.080 (emphasis added). "*Unless* a receiver has been appointed or extended with respect to money or property in the hands of the sheriff, the judge may direct the sheriff to apply the money, the property, or the proceeds of the property, upon an execution in favor of the judgment creditor issued either before or after the payment or delivery to the sheriff." RCW 6.32.100 (emphasis added). In other words, a receiver is just as qualified as, and even has superiority, to a sheriff to conduct the execution of a judgment.

Furthermore, the Superior Court is also not restricted to the letter of the "Proceedings Supplemental to Execution" statute, but can appoint a receiver for execution in its equitable discretion. *See Kreide v. Independence League of Am.*, 188 Wash. 376, 62 P.2d

1101 (1936). In *Kreide*, the plaintiffs obtained a money judgment against the defendants. The judgment went unsatisfied and the defendants were insolvent, so the plaintiffs sought appointment of a receiver, but the trial court denied the application. The Supreme Court reversed with instructions to appoint the receiver, referencing the then-in-effect version of the "Proceedings Supplemental to Execution" statute:

> The equitable powers of the court may be invoked as occasion may arise. The statutory proceedings supplementary to execution (Rem. Rev. Stat. § 613 et seq.) provide for the entry by the court of an order requiring a judgment debtor to appear before the court at a specified time and place to answer concerning property which it appears by affidavit he refuses to apply toward the satisfaction of an unsatisfied judgment. Section 640 provides that at any time after the entry of such an order, or the issuance of a warrant of arrest, the judge before whom the order or warrant is returnable may appoint a receiver of the property of the judgment debtor. Corporations as well as individuals are subject to the procedure outlined by the sections referred to, and it does not appear that service of the order to appear and answer must be made by the sheriff.

Kreide, 188 Wash. at 379. The Supreme Court noted that it did not matter in seeking the appointment of the receiver that the plaintiff

had not first obtained an order requiring the defendant corporation's officer to appear in person to answer concerning the property. The order to show cause for appointment of a receiver with respect to that property was sufficient. It was appropriate for the trial court to assume equitable powers and grant full relief, after entry of the judgment. It was evident from the record that there was an unsatisfied judgment against the defendant who was insolvent but owned property that was subject to the claims of creditors, including the judgment creditor plaintiff, and the trial court had erred by not ordering the appointment of a receiver. *See id.* at 379-80.

Like the plaintiff in *Kreide*, the FDIC holds an unsatisfied judgment against Granite Highlands, LLC and the other defendants. It could have pursued proceedings supplemental to execution to obtain information about and control of the Assets. Those proceedings contemplate appointment of a receiver. The FDIC did not first ask for an order compelling defendants to personally appear and answer concerning the Assets, but instead went straight for the appointment of the receiver to take control of defendants and the

Assets by filing the Receivership Petition. This put defendants in the position of having to respond to the facts of the unsatisfied judgment, their insolvency, and the availability of assets to be applied to the FDIC's claims. The effect is the same as going through execution by supplemental proceedings, in which a receiver may be appointed at any point. Defendants did not oppose the Receivership Petition, and the Superior Court properly entered the Receivership Order in the exercise of its equitable powers as a means of execution by the FDIC on the judgment, for the purpose of holding defendants and their assets accountable to satisfy their debts.

2. The State of Washington's argument that there is no exemption because the excise tax statute does not refer to transfers "in a receivership proceeding" does not hold up, because "execution" covers receiverships to give effect to judgments.

It does not matter, as the State of Washington argues in its opening brief, that the exemption statute does not refer to transfers "in a receivership proceeding." Receivership is already covered under the exemption statute because the receiver was appointed as a form of execution of the FDIC's judgment.

3. The State of Washington's argument that the receiver is not executing on its own judgment misses the point that the receiver was appointed as a form of execution of the FDIC's judgment.

The State of Washington cites no legal authority for the position that, in order to qualify for the exemption, the seller of the property is the one that has to have the judgment against the debtor. By this logic, not even the State of Washington's preferred seller, the sheriff, could be entitled to the excise tax exemption, because the creditor—not the sheriff who is conducting the sale and granting the sheriff's deed—is the one who has the judgment against the debtor. The FDIC holds the judgment, and its chosen method of execution was to ask the Superior Court to appoint the receiver as the Superior Court's agent to seize and sell Lot 6, the property of judgment debtor Granite Highlands, LLC.

4. The receiver does not need to execute by issuing a writ to the sheriff because execution is implemented through the receiver's ability to transfer property by order of the Superior Court.

The State of Washington's argument that the receiver is not executing on a judgment because it did not use a writ of execution to

the sheriff to transfer Lot 6 ignores the fact that the execution is implemented through the receiver's ability to transfer property by obtaining an order of the Superior Court. The State of Washington cites no authority that the receiver would have to apply for a writ of execution and have the sheriff sell the property over which the receiver has been appointed in order for the exemption to apply. It is the receiver's appointment under the Receivership Order that is the process for execution of the FDIC's judgment, and the receiver has the express power of sale under RCW 7.60.260 and the Receivership Order. One advantage of having a receiver appointed to execute on a judgment where real property is located in multiple counties is efficiency. There is no reason to penalize efficiency by denial of the tax exemption, when the purpose to be served is the same, whether the seller is a sheriff or a receiver: sale of property to generate money to pay toward satisfaction of a judgment.

Granting the exemption to the receiver does not render the definition of a receiver as a "seller" under the excise tax statute superfluous. The significance of being a "seller" is that, unless there

is an exemption, the seller is obligated for the excise tax levied on the sale. "There is imposed an excise tax upon each sale of real property. . . ." RCW 82.45.060. "The tax levied under this chapter is the obligation of the seller. . . ." RCW 82.45.080(1). To be exempt from taxation, the sale must fall within the exclusions from the term "sale" as defined in the excise tax statute. RCW 82.45.010(3).[4]

But determining whether someone is a "seller" is only the first step. A seller is entitled to claim an exemption— i.e., that the transfer or conveyance is not a "sale" for the purposes of levying excise tax. Even if the receiver is a "seller," it would be the one to make the request, because it would be the one obligated to pay. This interpretation is not superfluous because "seller" is not left without meaning. *See Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 104, 829 P.2d 746 (1992) (holding that statutory language was not superfluous because the court could interpret one subsection as

[4] An additional basis for the exemption is that the receiver here is an agent of the Superior Court under RCW 7.60.005(10), and thus should be considered to be the state of Washington, which is excluded from the definition of "seller" in the excise tax exemption statute altogether. *See* RCW 82.45.020. The State of Washington Department of Revenue itself has previously concluded that a sale by a receiver is actually a sale by the court. (*See* CP 96 Ex A.)

abrogating a municipality's quasi-judicial immunity according to an "arbitrary, capricious or unlawful" standard, while liability for ministerial acts is determined according to the "intent" standard of another subsection). A seller can still be entitled to the exemption, or not, depending on whether it meets the statutory criteria for exclusion from the definition of "sale." The receiver is so entitled.

It is an exaggeration for the State of Washington to argue that affirming the exemption in this case would mean that a receiver would never be liable for the excise tax. A receiver, to the extent it is a "seller," is exempt from the tax only if the court-ordered transfer or conveyance is "upon execution of a judgment" or otherwise falls into another category of exemption. The receivership statute contains 40 grounds for appointment of a receiver, only four of which refer to giving effect to or execution of a judgment. *See* RCW 7.60.025(1)(a)-(nn). Here, the basis for appointment of the receiver was "[a]fter judgment, in order to give effect to the judgment." RCW 7.60.025(1)(c). Unfortunately for the State of Washington, as much as it would like all receivership sales to be

subject to excise tax, the transfer of Lot 6 under the Lot 6 Sale Order is upon execution of the FDIC's judgment and thus not a "sale" for the purposes of the excise tax statute. It happens to be that this receiver, as the Superior Court's agent and acting to give effect to the FDIC's judgment, is the seller, and is entitled to the exemption.

B. <u>The exemption is within the rule of strict construction of tax exemptions</u>.

The exemption is within the rule of strict construction of tax exemptions. There is nothing ambiguous about the meaning of "execution." It is plainly set forth in the dictionary, and the receivership qualifies as an execution of the judgment. The cases cited by the State of Washington, while stating the correct rule that there is strict construction of tax exemptions, are not analogous, because either the party seeking the exemption did not qualify for it or there was not actually an exemption.

The exemption is clearly stated in the statute. In *Spokane County v. City of Spokane*, 169 Wash. 355, 13 P.2d 1084 (1932), the County of Spokane acquired real property standing in the name of

the City of Spokane through foreclosure of unpaid county taxes. The County brought an action to quiet title, but the City resisted it, on the ground that the property was municipally owned and therefore not subject to taxation. The City brought an action against the County to cancel the assessment for county taxes against the property, which the City had acquired from its own foreclosure of local improvement assessments.

The trial court held that the City was entitled to the exemption, because Article VII, Section 2, of the Washington Constitution provided for an exemption of the property of municipal corporations from taxation. But the County appealed. The Supreme Court reversed on the basis that the statute regarding foreclosure of local improvement assessments said nothing about an exemption for such sales:

> Had the Legislature intended to exempt such property from taxation, there would have been a provision in the statute to the effect that such property would not be subject to the lien of all unpaid general taxes. Property acquired by a county by foreclosure of a lien of general county taxes is expressly exempted from taxation while it is the property of the county.

* * *

> Surely, had the Legislature intended to exempt from taxation property acquired and held by a city, as in the cases at bar, the Legislature would have manifested such purpose by specific terms as it did in the case of property acquired by a county by foreclosure of the lien of general county taxes.

169 Wash. at 359-60. The Supreme Court also held that the City was not acting in its capacity as a municipality, but instead as a trustee for the benefit of bondholders, so it did not qualify for the constitutional municipality exemption. *See id.* at 361-62.

Following the reasoning of *Spokane County*, this Court should *affirm* the granting of the exemption in this case. The Legislature has stated in the real estate excise tax statute that the exemption applies expressly to transfers approved by courts "upon execution of a judgment," without any limitation on the kind or method of execution. There is an express exemption for "execution." Had the Legislature meant to limit it to a writ of execution, the drafters would have said "writ of execution." Strict construction does not mean picking and choosing from the definitions in the dictionary to suit the predilections of the State of

Washington, where the Legislature has chosen to use a term that has many meanings, including primary meanings that describe to a T what a receiver does: an officer's carrying into effect a judgment by seizing and selling property of the judgment debtor.

Affirming the exemption is also appropriate because the exemption is an actual exemption, not some other type of regulation. In *Belas v. Kiga*, 135 Wn.2d 913, 959 P.2d 1037 (1998), several county assessors challenged the constitutionality of a value-averaging system or real property assessment enacted by referendum, and petitioned for a writ of mandamus ordering the Director of the State Department of Revenue to disregard the value-averaging system. In support of the statute's constitutionality, the State of Washington argued that the value-averaging system was valid under the constitutional power to grant tax exemptions.

The Supreme Court held that the value-averaging system was not a tax exemption and could not be excepted from the state constitutional uniformity requirement for real property taxation. *Id.* at 924. As a law enacted by referendum, it had not been presented

to the voters as an exemption from taxation. The Supreme Court noted that most of the statutory exemptions are codified in RCW ch. 84.36. *See id.* at 931. "These exemptions fall in basically three classes: where the exemption is defined by some characteristic of the property owner (i.e., low-income, retired or disabled); use of the property creates the exemption (i.e., homes for the sick, aging or homeless); or the use to which the property is put meets some public need to encourages a publicly-desired use (i.e., historical landmark or timber preservation)." *Id.* at 931-32. With reference to another exemption, "it was clear in that statute that the Legislature was intending to create an exemption, as the statute very clearly states that such property is 'exempt' from taxation." *Id.* at 932 (citing RCW 84.36.400)).

The referendum's language and information provided to voters did not say anything about an exemption. "[W]e conclude that since an exemption cannot be extended by ambiguous language, it should not be created by language that does not clearly create an exemption." 135 Wn.2d at 934. "Exemptions may not be created by

implication. We conclude value averaging is an assessment formula and not a tax exemption." *Id.* at 935.

Unlike the referendum in *Belas*, the excise tax statute is not ambiguous about whether there is an exemption. The exemption is not in some far-flung section of the RCWs; it is in RCW 82.45.010(3), where exemptions are expressly listed. Moreover, it is in one of the typical kinds of categories in which exemptions apply, "the use to which the property is put meets some public need or encourages a publicly-desired use," here the exercise of a secured or judgment creditor's rights against real property being the common thread that runs through all the things listed in RCW 82.45.010(3)(i): deeds of trust, foreclosures, deeds in lieu of foreclosure—and judgment executions.

C. <u>The Lot 6 Sale Objection and this appeal are an inappropriate collateral attack on the Receivership Order</u>.

The Court should affirm the tax exemption because the appeal of the Lot 6 Sale Order is an inappropriate collateral attack on the Receivership Order. The Receivership Order prospectively provides

that sales of real property Assets by the receiver are exempt from the real estate excise tax. And Lot 6 is expressly identified in the Receivership Order as one of the Assets that is subject to the real estate excise tax exemption. (*See* CP 12.) Accordingly, an existing, undisturbed order of the Court, the Receivership Order, already provides for the exemption in any sale by the receiver.

The only way to undo the provisions of the Receivership Order is by an appeal of the Receivership Order. It is binding on the State of Washington even though originally entered without notice. *See Pratt v. Anderson*, 126 Wash. 30, 31, 216 P. 885 (1923).[5]

In *Pratt*, the superior court appointed a receiver following several judgments against debtors. The receiver then brought separate actions against the debtors to set aside fraudulent transfers.

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[5] *See also Sage v. Intergraphics, Inc.*, 19 Wn. App. 938, 941-42, 578 P.2d 878(1978) ("The absence of notice cannot be raised here as a collateral challenge to the authority of the receiver to proceed.") (citing *Ganoung v. Chinto Mining Co.*, 26 Wn.2d 566, 174 P.2d 759 (1946)). Not having been appealed, the Receivership Order cannot now be destroyed. *See Herr v. Schwager*, 145 Wash. 101, 105-06, 258 P. 1039 (1927) (following *Pratt*); *see also Carroll v. Pac. Nat. Bank*, 19 Wash. 639, 642, 54 P. 32 (1898) ("Where a court has jurisdiction of the parties and the subject-matter, and appoints a receiver, the validity of that appointment cannot be challenged in a collateral suit. High, Rec. (3d Ed.) § 39a. . . .").

The debtors did not receive notice that a receiver had been appointed until they were served with an order to attend and submit to an examination by the receiver. In their answer to the receiver's action, the debtors sought to attack the appointment of the receiver on the basis that they had not received prior notice of the appointment and that the receiver was not qualified to serve. Nevertheless, the receiver prevailed in the fraudulent transfer action and obtained another judgment against the debtors. The debtors appealed that judgment, but not the order appointing the receiver in the first place. The Supreme Court affirmed the judgment and held: "These questions could and should have been raised directly by an appeal from the order appointing the receiver, and the present attempt to raise them as a defense to the action brought by the receiver, after his appointment and qualification, is a collateral attack, which cannot, under elemental rules, be now considered." 126 Wash. at 31-32.

As was the situation in *Pratt*, the Superior Court appointed the receiver with certain powers granted under the Receivership

Order, including to sell real property free and clear of liens, exempt from the real estate excise tax. While the Superior Court made the appointment without notice to the State of Washington, the State of Washington subsequently did receive notice of the entry of the Receivership Order. Rather than appeal the Receivership Order, the State of Washington attempted to challenge the receiver's tax exemption through an objection to the Lot 6 Sale Motion. That attempt is an impermissible collateral attack on the Receivership Order, which this Court cannot consider. [6]

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[6] The State of Washington received notice and has actual knowledge of the receiver's appointment, so is bound by the receiver's acts with regard to Asset dispositions. "Creditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as parties." RCW 7.60.190(1). "Orders of the court with respect to the treatment of claims and disposition of estate property, including but not limited to orders providing for sales of property free and clear of liens, are effective as to any person having a claim against or interest in the receivership estate and who has actual knowledge of the receivership, whether or not the person receives written notice from the receiver and whether or not the person appears or participates in the receivership." RCW 7.60.190(4).

D. <u>The State of Washington is collaterally estopped from objecting to the tax exemption for the transfer of Lot 6 because the Superior Court previously granted an exemption in the First Granite Highlands Order</u>.

The State of Washington is collaterally estopped from objecting to the tax exemption for the transfer of Lot 6 because the Superior Court previously granted an exemption in the First Granite Highlands Order. "For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004) (citing, e.g., *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998)).

The State of Washington is collaterally estopped from objecting to the Lot 6 Sale Motion or appealing the Lot 6 Sale Order. The Superior Court already decided the issue in the Lot 6 Sale Order: whether the receiver is entitled to the excise tax exemption for transfers of the Granite Highlands lots. The issue was decided by a judgment on the merits: the First Granite Highlands Order, in which the Superior Court expressly granted the exemption under RCW 82.45.010(3)(i). The State of Washington was a party to the First Granite Highlands Order, receiving notice of it as instructed by the receivership statute. "Any request for relief against a state agency shall be mailed to or otherwise served on the agency and on the office of the attorney general." RCW 7.60.190(3). Applying collateral estoppel to the State of Washington will not work an injustice. Injustice is concerned with procedural, not substantive irregularity. *See Christensen*, 152 Wn.2d at 309 (citing *Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 795-99, 982 P.2d 601 (1999)). The State of Washington had a full and fair opportunity to litigate the First Granite Highlands Order. It had at least 30 days' notice of

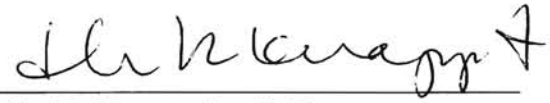
that motion, and a hearing date with oral argument when it could have appeared in person to argue any objections, but it did not object. Therefore, the receiver remains entitled to the exemption.

VI. CONCLUSION

The Superior Court was right to determine that the receiver is entitled to the real estate excise tax exemption under RCW 82.45.010(3)(i), because the receiver's transfer of Lot 6 is "upon execution of a judgment." This Court should affirm the Lot 6 Sale Order, so that the receiver can disburse the reserved $1,298.51 in Lot 6 sale proceeds toward satisfaction of the FDIC's judgment.

DATED this 18th day of August, 2014.

MILLER NASH LLP



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