

NO. 44745-2-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATEWIDE GENERAL INSURANCE AGENCY
and MARCEL MATAR,

Appellants,

v.

MIKE KREIDLER, Insurance Commissioner, and
CASCADE NATIONAL INSURANCE COMPANY,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION

Cascade National Insurance Company (“Cascade”) is an insurance company in receivership. Insurance receiverships are strictly controlled by a special statutory framework in the Washington State Insurance Code, Chapters 48.31 and 48.99 RCW. By statute, only the Insurance Commissioner may be appointed as Receiver. The Receiver has the authority to manage the assets of the company, and pursue claims the company may have against third parties to recover assets and amounts owed to the company. In addition, insurance receiverships have strict statutory procedures that allow potential creditors to present their “Proofs of Claim” against the company to the Receiver. These claims are then determined by the Receiver, subject to confirmation by the superior court in which the receivership proceedings are initiated. For approved Proofs of Claim, the statutes set forth a priority classification system for payment from the company’s assets.

This is an appeal of an order granting summary judgment to the Receiver of Cascade in his Adversary Claim against Statewide General Insurance Agency and Statewide’s guarantor, Marcel Matar (collectively referred to as “Statewide”). Statewide, an

appointed agent of Cascade, was authorized to sell Cascade personal automobile insurance policies, and to collect premiums for those policies on behalf of Cascade. However, right after Cascade was placed in receivership for purposes of rehabilitation in May 2005, Statewide stopped remitting the full premium amounts due to Cascade. The Receiver filed this Adversary Claim to recover those premiums due to Cascade. In addition, in prior receivership proceedings, the Receiver denied six (6) Proofs of Claim filed by Statewide and the superior court confirmed those denials.

In his motion for summary judgment on the Adversary Claim, the Receiver sought a judgment for the full net premiums due for the period of April through December 2005, under the 2004 General Agency Agreement between Cascade and Statewide. After reviewing the plain language of that agreement, and the statutes controlling insurance company receiverships, the superior court correctly determined there was no genuine issue of material fact as to the amount due, that no offsets against that amount were permitted, that the proper means for Statewide to advance a claim is through the Proof of Claim process, and that Statewide had improperly withheld the net premium amount due of \$941,878.55. And, by unilaterally withholding premium funds due Cascade and

the Receiver, Statewide has wrongfully retained assets of Cascade and circumvented the statutory priority system for payment of claims from the receivership assets. Statewide failed to identify any issue of fact to preclude summary judgment. The decision of the superior court should be affirmed.

II. ISSUES

1. Where Cascade relied on Statewide's monthly accounting reports to calculate the net premium due of \$941,878.55 for April through December 2005, did the superior court correctly conclude Statewide failed to raise a genuine issue of material fact?

2. Did the superior court properly determine that once Cascade was in receivership, Washington's Insurance Code required Statewide to submit Proofs of Claim to the Receiver rather than unilaterally offset and withhold premium from the Receiver for various amounts Statewide claimed it was owed?

3. Did the superior court properly determine that the language of the 2004 agreement between Cascade and Statewide also prohibited any claimed offset and withholding of premium by Statewide?

4. Should the Court reject the defenses Statewide raises for the first time in this appeal?

III. STATEMENT OF THE CASE

A. Insurance Company Receiverships in Washington.

Insurance companies are highly regulated under state law. Under certain circumstances such as a deteriorating financial condition, the Insurance Commissioner has the statutory authority to petition the court to place an insurance company into receivership. CP 4-9. The receivership of an insurance company is strictly controlled by a special statutory framework. RCW 48.31.025-.360; RCW 48.99.010-.900. Only the Insurance Commissioner may commence the receivership of an insurance company, and only the Commissioner may be appointed as Receiver. RCW 48.31.111(1). Receiverships may be commenced to rehabilitate a company, or reform the deficiencies that caused the company to be placed in receivership in the first place. Generally, rehabilitation allows the company to continue to do business as an insurer. RCW 48.31.040(1). If the Receiver determines that the company cannot be rehabilitated, receivership proceedings can be commenced as, or converted to, a liquidation, in which case the business of the company eventually ceases, and

the assets of the company are liquidated to its approved creditors. RCW 48.31.040; RCW 48.31.050.

In receivership proceedings, the Receiver is empowered to take control and possession of all assets and rights of action of an insurance company, and to bring claims on behalf of the company. RCW 48.31.040; RCW 48.31.060; RCW 48.31.131(2). CP 5, 7. This may include pursuing claims in other jurisdictions against entities whose conduct has led to the financial insolvency of the company. It may include filing adversary claims in the receivership court against individuals or entities that hold company assets or owe money to the company. The Receiver is authorized to take all necessary action to marshal the assets of the company. RCW 48.31.040(1); RCW 48.31.060(1). CP 5, 7.

After entry of the order of liquidation, no action may be commenced against the insurance company or the Receiver. RCW 48.31.131. CP 6. Rather, anyone asserting a claim against the company must file a "Proof of Claim" with the Receiver within four (4) months after entry of the order of liquidation declaring the insurer insolvent. RCW 48.31.310(1). CP 8. The Receiver determines whether to accept or deny each claim and issues a determination. Each determination is then filed in the superior court

for hearing and confirmation. RCW 48.31.145. Even if a claim is approved by the Receiver and confirmed by the receivership court, it can only be paid in accordance with the priority classification system set forth in RCW 48.31.280. All approved claims in one class must be paid in full before the next class is entitled to any distribution from the receivership estate. A creditor is expressly prohibited from circumventing the statutory priorities for payment of approved claims through “equitable remedies.” RCW 48.31.280.

B. The Cascade Receivership.

On November 30, 2004, the superior court entered its Order Appointing Receiver for Purposes of Seizing a Domestic Insurer, commencing delinquency proceedings against Cascade. CP 200-01. Several months later, on May 6, 2005, the court entered an Order Commencing Rehabilitation Proceedings for the Purpose of Selling a Domestic Insurer. CP 433-39. The order authorized the Receiver to take possession of all assets and rights of action belonging to Cascade, and to conduct the business of Cascade. CP 434, at ¶2. The order further required that anyone in possession of assets belonging to Cascade must deliver and surrender those assets to the Receiver. CP 434-435, at ¶4. It provided that no one in possession of assets of Cascade was permitted to offset those

assets without the express approval of the Receiver. CP 435, ¶6. The order further enjoined any actions or assertion of claims against Cascade except for claims properly brought in the statutory receivership process. CP 436, at ¶11; CP 437, at ¶14. Finally, the Receiver was authorized to pursue all claims against third parties on behalf of Cascade. CP 435, at ¶7.

Six months later after rehabilitation efforts failed, the Receiver petitioned the court for an Order of Liquidation and Approval of Plan of Liquidation, which was entered November 4, 2005. CP 4-9. The liquidation order reaffirmed the Receiver's authority, and reiterated the restrictions and requirements as to claims, legal actions, or offset attempts which had been previously included in the rehabilitation order. CP 4-9. The Plan of Liquidation fixed March 4, 2006, as the deadline for the filing of Proofs of Claim with the Receiver. CP 1014, at ¶4.

C. The 1999 General Agency Agreement With Statewide.

In February 1999, several years before Cascade was placed in receivership, Cascade and Statewide entered into a Personal Lines General Agency Agreement ("1999 Agreement") authorizing Statewide to be its General Agent, to write and issue Cascade personal automobile insurance policies in California, and to collect

the premiums due to Cascade for those policies. CP 338-73. Under the 1999 Agreement, Statewide was required to hold all premiums due from policyholders in a trust account as a fiduciary, and to make monthly accounting reports to Cascade. Statewide earned commissions and fees for its work based on the amount of the premiums for the policies it sold, which were to be deducted from the net premium paid over to Cascade. CP 342-43, CP 359. Statewide was obligated to pay Cascade all premiums when due, whether or not the policyholder had in fact paid Statewide. CP 342. Mr. Matar signed a personal guaranty for payment of all amounts due Cascade under the 1999 Agreement. CP 356.

In 2003, Cascade and Statewide disagreed as to the amount of premium due and ultimately negotiated a resolution, entering into an agreement dated December 31, 2003 ("2003 Settlement Agreement"). CP 375. Statewide agreed to pay Cascade the negotiated sum of \$230,000 (defined as the "Past Due Amount"), which represented "unpaid Earned Premiums for policies, excluding active files, written through December 31, 2003." CP 375. The Past Due Amount was for unpaid premium amounts due Cascade for the time period of February 1, 1999 to December 31, 2003, and specifically excluded active policyholder files. CP 375. Under the

2003 Settlement Agreement, Statewide was allowed to make periodic payments on the \$230,000 Past Due Amount. CP 375.

D. The New 2004 General Agency Agreement With Statewide.

After executing the 2003 Settlement Agreement, Cascade and Statewide entered into a new General Agency Agreement, effective January 1, 2004 ("2004 Agreement"). CP 377-421. The 2004 Agreement once again authorized Statewide to act as Cascade's General Agent to sell Cascade's personal automobile insurance policies in California, and to collect premiums on behalf of Cascade from policyholders. CP 377-421. The 2004 Agreement recited that Statewide would produce, underwrite and administer Cascade policies in California "during the period from the date of this Agreement" until the Agreement terminates. CP 377. It also expressly acknowledged that the 1999 Agreement between the parties was terminated by mutual consent as of December 31, 2003. CP 377.

Article 2.1 of the 2004 Agreement specified that Statewide's compensation would be commissions and fees "in connection with new and renewal policies effective January 1, 2004 and thereafter." CP 383. Article 4.1 of the 2004 Agreement entitled "EXPENSES"

provided that Statewide “shall pay all expenses incurred by it in connection with marketing, producing, underwriting and servicing” the policies, including its “office facilities, personnel, utility services, data processing . . . supplies, telephone, postage, and other general business services.” CP 387.

Pursuant to the 2004 Agreement, Statewide was to establish a new Premium Trust Account to deposit net premiums due Cascade. CP 384-87. Once the total monthly premiums due were calculated, Statewide was entitled to withhold only provisional commissions (defined as commissions and certain installment and policy fees) to arrive at the net premium amount to be deposited into the Premium Trust Account. CP 384 (Articles 2 and 3.2(a)). These provisional commissions withheld by Statewide were subject to annual adjustments based on the loss ratio of the business written by Statewide. CP 383 (Articles 2.3 and 2.4). The 2004 Agreement also required Statewide to remit all premium due to Cascade, even if Statewide had not yet received the premium payment from a policyholder, on the earlier of the day the premiums were received or when the premiums were due by depositing them into the new Premium Trust Account. CP 384 (Articles 3.1 and 3.2(a)). Statewide was required to reconcile the Premium Trust

Account monthly and forward documentation of the reconciliation and business transacted to Cascade. CP 384-85 (Articles 3.2(b), 3.5(b), and 3.6).

The premium amounts due Cascade were defined as “trust funds” under the 2004 Agreement at Article 9.3(a). CP 395. It also provided that in any action brought by Cascade to recover trust funds:

...[I]t shall be conclusively presumed that the General Agent [Statewide] is a fiduciary of the Company [Cascade] with respect to trust funds and is liable to the Company for trust funds which have not been timely paid, and the General Agent waives (i) any right it may have to assert any counterclaim, cross-claim, or set-off in the action or proceeding,....

CP 395. Although the 2004 Agreement allowed Statewide as a General Agent to bring a separate action or proceeding as an alleged creditor of Cascade, any such separate proceeding could not be used to “delay, hinder or defeat the Company’s right to promptly recover any trust funds then due or to levy upon any judgment therefore.” CP 395.

In addition to executing the 2004 Agreement as President of Statewide, Mr. Matar also executed a Guarantee of Payment of Trust Funds, giving his personal and unconditional guarantee of

“full and prompt payment of trust funds as and when they are due and payable.” CP 423-24.

E. Statewide’s Unauthorized Withholding of Trust Funds.

For a time, pursuant to the terms of the 2004 Agreement, Statewide regularly calculated the commission and policy fees to which it was entitled and deducted those authorized amounts from the month’s premium amount due Cascade. CP 426. Statewide regularly forwarded its Monthly Production Reports to Cascade, and after reconciliation, Statewide paid over to Cascade the net premium amount due. CP 426. Without dispute or question, Statewide operated consistent with the provisions of the 2004 Agreement from January 1, 2004 to March 31, 2005. CP 426-27. During that time period, Statewide reported approximately \$3.9 million in premium and paid over to Cascade approximately \$3.2 million in net premium, about eighty-two percent (82%) of the total premium reported, after withholding provisional commissions as authorized by the 2004 Agreement. CP 547-48.

On May 6, 2005, the Court entered the order that commenced the rehabilitation phase of this receivership, requiring the surrender of any assets belonging to Cascade, and prohibiting offsets of those assets by any potential creditors. CP 433-39. On

June 8, 2005, Cascade received Statewide's Monthly Production Report for the month of April 2005. For the first time, Statewide had deducted and withheld from the premium amount due Cascade significant sums allegedly for items or adjustments which were expressly not permitted under the 2004 Agreement. CP 427. By taking these unauthorized deductions, Statewide withheld "trust funds" due Cascade under the 2004 Agreement. CP 427. Statewide continued to withhold trust funds from Cascade thereafter. For the time period of April through December, 2005, Statewide reported in its Monthly Production Reports \$1.3 million in premium, but paid over to Cascade the total sum of only \$90,000, or roughly seven percent (7%). CP 547-48.

F. The Receiver Calculates Net Premium Amounts Due Based on Statewide's Monthly Production Reports.

Under the terms of the 2004 Agreement, Statewide bore the sole obligation to account for trust funds due to Cascade. CP 395. Cascade had "no obligation to account for premiums or other funds received by or due" to Cascade, because as a general agent, Statewide was "solely responsible for maintaining the books, files, record and accounts relating to premiums and other funds." CP 395.

Using the Monthly Production Reports prepared and submitted by Statewide, Cascade's expert accountant, Barbara Huang, calculated the net premium amount due Cascade for the period of April 1 through December 31, 2005, to be \$941,878.55, after properly deducting authorized commissions and fees due Statewide. CP 426-28. Statewide does not contend that any of its Monthly Production Reports were erroneous as to the gross premium amount. It does not dispute that the deductions it took for the time period of January 1, 2004 through March 31, 2005, were appropriate under the language of the 2004 Agreement. Likewise, Statewide does not dispute or contest its own calculation of the gross premium amount and the amount of authorized deductions as set forth in its Monthly Production Reports for April through December, 2005.

Rather, Statewide only disputes that after April 1, 2005, it should not be required to pay over the full net premium of \$941,878.55 due Cascade because it has claims against Cascade. These claims are asserted as an offset against premium due Cascade for alleged adjustments under the 1999 Agreement and 2003 Settlement Agreement, and for alleged additional operating expenses under the 2004 Agreement.

G. Statewide's Proofs of Claim for Additional Expenses Under the 2004 Agreement.

Under the Plan of Liquidation, the deadline for the filing of Proofs of Claim with the Receiver was March 4, 2006. CP 1014. Statewide filed six (6) Proofs of Claim with the Receiver, identified as POC Nos. 3594 through 3599. All six Proofs of Claim were based on an alleged "breach of contract" of the 2004 Agreement. CP 112-76. One of Statewide's Proofs of Claim was for more than \$1 million for alleged expenses, including additional operating expenses claimed to have been incurred under the 2004 Agreement. CP 121. These additional expenses are the same ones Statewide now asserts to use as an offset to reduce the net premium amount due Cascade for April through December, 2005. CP 861:20-26; CP 873-80.

As to Statewide's six Proofs of Claim, the Receiver issued his Initial Determination on May 10, 2011, denying each of them. CP 882-97. The denial as to the additional expenses was based on several grounds, including that the language of the 2004 Agreement expressly prohibited such expense claims against Cascade, and that Statewide, not Cascade, was responsible for payment of expenses in connection with marketing, producing,

underwriting and servicing, including data processing. CP 894:3-12. Statewide objected to the Initial Determination denial of its claims. CP 178-91. The Receiver petitioned the superior court for approval of his Determination. CP 192-261. Statewide submitted its objections to the court. CP 265-84. After the hearing, on January 6, 2012, the superior court entered an Order Confirming the Receiver's Final Determination Denying Claims of Statewide General Insurance Agency, Inc. CP 322-23. Statewide did not appeal from that final order denying its six Proofs of Claim.

H. The Receiver's Adversary Claim Against Statewide and Mr. Matar.

On April 23, 2007, the Receiver filed this Adversary Claim against Statewide to recover premiums due to Cascade. CP 10. Following the final adjudication of Statewide's six Proofs of Claim, the Receiver filed a motion for summary judgment in this Adversary Claim. CP 324. At Statewide's request, the court continued the hearing to permit additional discovery. On February 19, 2013, Statewide filed its opposition to the Receiver's summary judgment motion. CP 829.

At the same time Statewide filed its opposition to summary judgment, it also filed a Motion for Leave to File and Serve

Amended Answer. CP 1106-21. In the motion to amend, Statewide sought to add the affirmative defense of “business compulsion,” claiming that the 2003 Settlement Agreement was entered under duress and is void, and that money paid to Cascade pursuant to the 2003 Settlement Agreement should be used as an offset against the premium amount due Cascade for April through December, 2005. CP 1106-08. Statewide also sought to amend to add the claims of scrivener’s error, mutual mistake and reformation regarding Article 2.4 of the 2004 Agreement. Statewide argued that Article 2.4, which details how Statewide’s commissions are to be adjusted based on the loss ratio of the policies it sold, was erroneously revised, unbeknownst to Statewide. The court denied the motion to amend. CP 935-36. Statewide did not appeal from or assign error on appeal to the denial of its motion to amend. CP 991.

The Receiver’s Motion for Summary Judgment was heard on March 1, 2013. The Receiver noted that its motion only addressed premium amounts due under the 2004 Agreement. CP 324:21-25. The Receiver further stipulated that its Adversary Claim was only for premium amounts due under the 2004 Agreement, and any remaining amounts Statewide still owed Cascade under the 2003

Settlement Agreement were not being pursued and could be dismissed.¹ VRP 19.

The superior court properly concluded that the amounts claimed by Statewide are impermissible offsets and cannot reduce the net premium amount due Cascade for the April through December, 2005, time period. CP 931. The superior court correctly ruled that any alleged offsets could only be properly addressed through the Proof of Claim process in the receivership. CP 932-33. Finally, the superior court concluded that any revision to the loss ratio provision in the 2004 Agreement failed to create a genuine issue of material fact because Statewide failed to demonstrate how the alleged revision impacted the net premium amount of \$941,878.55 due for the April through December, 2005, time period. CP 934-35.

The superior court properly concluded that Statewide failed to present evidence to create any genuine issue of material fact, and that considering all facts in the light most favorable to the nonmoving party, Statewide and Mr. Matar were obligated to Cascade in the amount of \$941,878.55 for improperly withheld

¹ As noted above, under the 2003 Settlement Agreement, Statewide was to pay a total of \$230,000 and allowed to make periodic payments. A small balance remained.

premiums. Statewide filed motions for reconsideration and to expand the record on summary judgment, both of which were denied. This timely appeal ensued.

IV. ARGUMENT

A. Standard of Review.

Statewide appeals the order granting summary judgment to the Receiver on his Adversary Claim. Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled by law to prevail. CR 56(c). A “material fact” is a fact upon which the outcome of the litigation depends, in whole or in part. *Barrie v. Hosts of Am., Inc.*, 94 Wn.2d 640, 642, 618 P.2d 96 (1980). When reviewing a grant of summary judgment, the appellate court engages in the same inquiry as the trial court, considering all facts and inferences in the light most favorable to the nonmoving party and reviewing questions of law *de novo*. *Bishop v. Miche*, 137 Wn.2d 518, 523, 973 P.2d 465 (1999). The appellate court may sustain the trial court’s judgment upon any theory established in the pleadings and supported by the proof. *Schaaf v. Highfield*, 127 Wn.2d 17, 20-21, 896 P.2d 665 (1995). In short, summary judgment should be granted if from all the evidence

reasonable minds cannot differ. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Reviewing the facts in the light most favorable to the nonmoving party, the superior court properly rejected Statewide's attempt to demand offsets for alleged expenses and pre-2004 adjustments contrary to the contract language and receivership law, and which can only be raised in the Proof of Claim process. It also properly rejected Statewide's attempt to manufacture a genuine issue of material fact on issues that are not relevant to the Receiver's Adversary Claim. Further, as to the alleged additional expenses under the 2004 Agreement, Statewide cannot attempt to relitigate its denied Proofs of Claim to assert an offset for the same expenses already rejected by the court and the subject of a final order. Last, Statewide should not be permitted to attempt to create an issue of fact by raising new claims and allegations for the first time on appeal. Therefore, the order granting summary judgment should be affirmed.

B. No Material Issue of Fact Exists Concerning the Net Premium Amount Due for April Through December, 2005.

Considering the evidence in the light most favorable to Statewide, and as determined by the superior court, it is an

undisputed fact that Statewide owed Cascade \$941,878.55 in net premium for the period April through December, 2005. The court properly relied on the Declaration of Ms. Barbara Huang, expert accountant for Cascade, which clearly sets forth the methodology and basis of her calculations as to the net premium amount due for April through December, 2005. CP 426-48.

Ms. Huang's calculation and opinion as to the amount due is based on the Monthly Production Reports created by Statewide and submitted to Cascade. CP 427. Ms. Huang followed the language of the 2004 Agreement to calculate the fees and commissions as compensation for Statewide which it was entitled to withhold, and used the information from Statewide's own reports to determine the net premium amount due Cascade. Statewide does not and cannot dispute its own calculations, or the veracity of its Monthly Production Reports. In fact, Statewide does not assert that the figure of \$941,878.55 was improperly calculated.

It is also undisputed that Statewide stopped sending the net premium amount due Cascade as of the production period starting April 1, 2005. CP 426:8-24; CP 427:11-24; CP 428; CP 441; CP

443.² Statewide has admitted that beginning with premiums due for April 2005, it started retaining larger amounts than it was contractually entitled to deduct under the 2004 Agreement. Appellants' Opening Brief at 17, 25. Statewide claimed at one point that additional sums were withheld because it disputed the terms of the 2003 Settlement Agreement. Statewide conceded at oral argument that "certain amounts that were withheld during '05 were withheld for incorrect reasons," but then concluded that "[t]he reasons that Statewide withheld money during 2005 is irrelevant." VRP 34. Despite the shifting rationale offered by Statewide for withholding premiums from Cascade, the undisputed facts demonstrate that Statewide intentionally withheld premium trust funds due Cascade for the production period of April through December, 2005.

Statewide's real contention in response to this Adversary Claim is not that \$941,878.55 is incorrect under the terms of the 2004 Agreement, but rather, that the \$941,878.55 should be reduced based on its various alleged claims against Cascade. For the reasons stated below, the superior court properly rejected

² See also the summary of Ms. Huang's detailed testimony and citations at CP 858, fn. 2.

Statewide's arguments that it is entitled to offset or reduce the net premium amount due Cascade.

C. The Superior Court Properly Rejected Statewide's Proposed Offsets Which are Prohibited by the 2004 Agreement and by the Insurance Code.

The unambiguous language of the 2004 Agreement imposes a fiduciary obligation on Statewide as to premium funds and expressly prohibits any offset of premiums due Cascade. A contract must be enforced according to its plain terms. *See Lehrer v. DSHS*, 101 Wn. App. 509, 515, 5 P.3d 722 (2000) (citing *McDonald v. State Farm Fire & Cas. Co.*, 119 Wn.2d 724, 733, 837 P.2d 1000 (1992)) ("If the [contract] language is clear and unambiguous, the court must enforce the contract as written; it may not modify the contract or create ambiguity where none exists."). Neither Statewide nor Mr. Matar has alleged that the language of the contract is ambiguous and it is not. Thus, the contract must be enforced according to its plain terms.

1. The plain language of the 2004 Agreement prohibits the offset of premiums held in trust and in a fiduciary capacity.

Article 9.3(a) of the 2004 Agreement provides that premiums received by Statewide and those due Cascade are "trust funds" and that Statewide is conclusively presumed to be a "fiduciary" as to

such premium trust funds. CP 395. Under the 2004 Agreement, Statewide expressly waived any “right it may have to assert any counterclaim, cross-claim, or set-off” in any action or proceeding to collect premium trust funds. CP 395. In addition, the 2004 Agreement provides that Statewide’s right to bring an action to recover claims it may have “shall not delay, hinder, or defeat” Cascade’s right to recover such premium trust funds. CP 395.³ Therefore, under the plain terms of the 2004 Agreement, Cascade is entitled to collect the entire net premium amount due, without any offset by Statewide.

In addition, as a fiduciary, Statewide is obligated to put Cascade’s financial interests ahead of its own. *Cummings v. Guardianship Services of Seattle*, 128 Wn. App. 742, 755 n.33, 110 P.3d 796 (2005) (“A fiduciary is a person with a duty to act primarily for the benefit of another.”); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 741, 935 P.2d 628 (1997). Statewide held all premium due for April through December, 2005, in a fiduciary capacity under the express terms of the 2004 Agreement, and per the clear terms of that agreement could not

³ Further, Recital B of the 2004 Agreement expressly acknowledges that the 1999 Agreement was “terminated by mutual consent on December 31, 2003.” CP 377.

offset against them for its alleged claims. This is also consistent with the basic tenets of insurance law and the requirements of the Insurance Code applicable to those licensed in Washington. See RCW 48.17.480(3) (premium funds received by an insurance producer and owed to another are received in a fiduciary capacity).

Statewide is strictly prohibited from withholding and attempting to offset the premium funds held in trust on behalf of Cascade. The superior court properly held that the Receiver of Cascade is entitled to judgment for the full \$941,878.55 in net premiums due under the 2004 Agreement, without any offset.

2. The plain language of the 2004 Agreement prohibits offsets for Statewide's alleged additional expenses.

In addition to prohibiting offsets against trust fund premiums for pre-2004 alleged claims, the plain language of the 2004 Agreement expressly prohibited Statewide from reducing or offsetting premiums for the alleged expenses it asserts it incurred in operations under the 2004 Agreement. Article 4 of that agreement plainly required Statewide, not Cascade, to pay for its own expenses in connection with marketing, producing, underwriting and servicing, including data processing. CP 387 (Article 4.1(c) and (d)); CP 894:3-12. Therefore, the superior court correctly

concluded that the 2004 Agreement precludes offsets against the net premium due, both for Statewide's additional expenses and for its claims concerning the 1999 Agreement or the 2003 Settlement Agreement.

3. The only reductions permitted by the 2004 Agreement or offsets permitted by the Insurance Code are the provisional commissions and fees already deducted to arrive at the net premium amount due.

The receivership statutes permit only limited offsets against amounts due the receivership estate for "mutual debts and credits." RCW 48.31.290(1). However, even contractual offsets may not be permitted if it would result in payment to one who cannot prove a valid claim against the receivership estate. See RCW 48.31.290(2). See also *Grode v. Mut. Fire, Marine & Inland Ins. Co.*, 132 Pa. Cmwlt. 196, 209, 572 A.2d 798, 804 (1990) aff'd in part, remanded in part sub nom; *Foster v. Mut. Fire, Marine & Inland Ins. Co.*, 531 Pa. 598, 614 A.2d 1086 (1992) ("contractual terms are not sacrosanct when an insurance company is insolvent."). And as a general matter, premiums due to an insurer cannot be offset by an insurance producer during a receivership. RCW 48.31.141(1)(a).

The only recognized "mutual debts and credits" permitted under the 2004 Agreement are the authorized deductions for

provisional commissions expressly allowed in Article 3.2(a). CP 384. Per the terms of the 2004 Agreement, once the gross premium amount is calculated, the provisional commission and authorized fees are deducted from that amount, resulting in a net premium. This is the net premium that Statewide should have transmitted to Cascade. The net premium of \$941,878.55 is the amount due Cascade after offsetting mutual debts and credits permitted under the 2004 Agreement, and as allowed by RCW 48.31.290(1).

Statewide's contention that its alleged claims arising prior to 2004 are permissible "mutual debts and credits" offsets under RCW 48.31.290 is misplaced. Statewide's unilateral claims arising under the terminated 1999 Agreement or the 2003 Agreement are not "mutual" debts or credits with regard to the amounts due for April through December, 2005, under the 2004 Agreement. Moreover, because Statewide has not demonstrated that it has a valid Proof of Claim in the receivership for its proposed offset amounts of any kind, it cannot demonstrate that it is entitled "to share as a claimant in the assets of the insurer" as to such claims. RCW 48.31.290(2).

Statewide asserts that the Receiver "admits that Statewide has a valid claim" and therefore an offset is permitted. Appellants'

Opening Brief at 24 (citing to VRP 45-46). This argument misconstrues the Receiver's comments and should be rejected. At oral argument, the Receiver's counsel stated:

If they think there was \$205,000 somewhere sitting at Cascade that they deserve, they need to file a Proof of Claim with the Insurance Commissioner in the receivership. They can still file one. It will be late. They will go to the bottom of the priority, but they can still file for anything under that 2003 agreement, but it cannot defeat, set off, or reduce the amount due under the 2004 agreement.

VRP 45-46. Acknowledging the ability to file a late claim does not equate to an admission that any such claim is valid, or that such claim is a mutual debt or credit under RCW 48.31.290(1). In fact, as to the claimed additional expenses, Statewide's six Proofs of Claim were denied, confirmed by the superior court and not appealed by Statewide.

The only appropriate mutual debt or credit is the amount of the provisional commissions and fees that the Receiver has subtracted to arrive at the amount of \$941,878.55 in net premium due. By withholding more than what was authorized by the 2004 Agreement, Statewide has interfered with the statutory priority for payment of approved claims in order to pay itself before the higher priority classes of creditors as set out in Washington's Insurance

Code. The superior court correctly refused to allow any other offsets sought by Statewide, and properly entered judgment.

D. The Superior Court Properly Rejected Statewide's Claims Which Can Only be Addressed Through the Receivership's Proof of Claim Process.

Receivership proceedings under the Insurance Code are designed for the protection of policyholders, claimants, and the general public. *Kueckelhan v. Fed. Old Line Ins. Co.*, 69 Wn.2d 392, 405, 418 P.2d 443 (1966). The assets of the insurance company are to be marshaled by the Receiver, protected and controlled. Any claim by a potential creditor against those assets must be filed as a Proof of Claim. RCW 48.31.310 (1). Only approved claims may be paid and all payments must adhere to the statutory priority classification system for distribution. RCW 48.31.280. All approved claims in the first priority class must be paid in full before the next class is entitled to payment, and so forth. No claim may circumvent the statutory priority classes through the use of equitable remedies. See RCW 48.31.280.

In determining that the Receiver was entitled to judgment for the amount of \$941,878.55 for improperly withheld net premium amounts due for the period of April through December, 2005, the superior court appropriately limited the claims and defenses it could

consider to those directly affecting the premium due during that specific time period. The court appropriately rejected claims or defenses that traced back to Statewide's operations under the 1999 Agreement or the 2003 Settlement Agreement, because those distinct agreements had no bearing on the amount of premium due for the period of April through December, 2005, and held by Statewide as a fiduciary under the 2004 Agreement.

1. Statewide's claim for offset of additional expenses is barred by operation of the doctrine of *res judicata*.

The superior court properly rejected expense claims that had already been denied in the receivership's Proof of Claim process and upheld by the court. The doctrines of *res judicata* and collateral estoppel prevent a person from relitigating claims and issues already determined by a court, where such person had an opportunity to fully and fairly present his case. See *Henderson v. Bardahl, Int'l Corp.*, 72 Wn.2d 109, 115, 431 P.2d 961 (1967); *Davis v. Nielson*, 9 Wn. App. 864, 874, 515 P.2d 995 (1973).

Statewide filed Proof of Claim No. 3599, for more than \$1 million in alleged expenses, including operational expenses under the 2004 Agreement. CP 121; CP 861; CP 878-80. Each of Statewide's six Proofs of Claim, including No. 3599, was fully

adjudicated and denied. CP 882-97. After notice to Statewide and consideration of its objections, the superior court confirmed the Receiver's denials in its Order Confirming Final Determination Denying Claims of Statewide General Insurance Agency, Inc., entered January 6, 2012. CP 889-90.

The Receiver's determination confirmed by the court concluded that the 2004 Agreement superseded the 1999 Agreement. CP 888:2-3. It also found that the expenses Statewide claimed are prohibited by Article 8 of the 2004 Agreement. CP 893:20-21. It concluded that the 2004 Agreement, Article 4.1(d), expressly bars recovery for expenses incurred by Statewide in connection with marketing, producing, underwriting and servicing the policies, including data processing. CP 894:3-13.

Statewide did not appeal from the superior court's order confirming the Receiver's denials of its six Proofs of Claim. Therefore, Statewide is estopped from claiming that those expenses that were fully adjudicated and denied can now be advanced in this Adversary Claim to offset premium amounts due. The denials of the six Proofs of Claim are binding and final. Statewide had a full and fair opportunity to present its case and its

claims were denied. It cannot pursue any claim for these additional expenses again.

- 2. Statewide's remaining claims arising under the 1999 and 2003 Agreements may only be pursued as Proofs of Claim in the receivership process, and even if approved would constitute late-filed claims.**

Because Cascade is in receivership, Statewide's claims regarding the 1999 Agreement or the 2003 Settlement Agreement can only be pursued through the statutory Proof of Claim process. RCW 48.31.310(1). Given that Statewide did file six Proofs of Claim, it was clearly on notice and knowledgeable with the Proof of Claim process. However, Statewide did not file a Proof of Claim for any amounts it now claims it is owed under the 1999 Agreement or the 2003 Settlement Agreement. Even if Statewide now filed Proofs of Claim for amounts arising from pre-2004 matters and even if such claims were approved by the Receiver, they would constitute late-filed claims under RCW 48.31.280(7). Late-filed claims are in statutory Class 7 for payment purposes, below nearly all other creditors' claims. RCW 48.31.280(7). Late-filed claims would be paid last in the receivership proceedings – not first as an offset as Statewide contends.

Premium amounts due Cascade under the 2004 Agreement for the April through December, 2005, time period are an asset owned by the insurer, Cascade. See *also*, RCW 48.31.141(1)(a). Attempts to claim against that asset in the receivership of Cascade on the basis of the pre-2004 agreements may only be done through the Proof of Claim process and paid in order of the statutory priorities. This was the holding of the superior court, and correctly interprets and implements the public policy set out in the Insurance Code whereby assets are marshaled and creditors' approved claims are paid according to the priorities set forth in RCW 48.31.280. Therefore, the superior court properly refused to consider Statewide's alleged claims arising from pre-2004 conduct which was not governed by the 2004 Agreement.

E. Arguments Challenging the Formation of the Contracts Should Not be Allowed to be Raised for the First Time on Appeal.

In its opening brief, for the first time Statewide alleges that the 2003 Settlement Agreement (which it refers to as the 2003 promissory note), as well as Mr. Matar's personal guaranty for payment of premiums due Cascade under the 2004 Agreement, are void due to lack of consideration. These new arguments should not

be permitted to be raised for the first time on appeal. RAP 2.5(a).⁴ *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999) (“Under Rule 2.5(a) of the Rules of Appellate Procedure . . . , appellate courts will generally not consider issues raised for the first time on appeal.”); *Hoflin v. Ocean Shores*, 121 Wn.2d 113, 130-31, 847 P.2d 428 (1993) (in reviewing order of summary judgment, the Court declined to consider issue raised by petitioner for the first time on appeal when petitioner failed to establish an exception under RAP 2.5(a)).

This rule “reflects a policy of encouraging the efficient use of judicial resources.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Trial courts should be given an opportunity to correct errors at the trial level. *Id.* Similarly, “opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal.” *In re Det. of Audett*, 158 Wn.2d 712, 726, 147 P.3d 982 (2006) (quoting 2A KARL B. TEGLAND, WASH. PRAC.: RULES PRAC. RAP 2.5(1), at 192 (6th ed. 2004)). “[I]t was

⁴ RAP 2.5(a) states in part: “The appellate court may refuse to review any claim of error which was not raised in the trial court.”

the obligation of the parties to draw the trial court's attention to errors, issues, and theories, or be foreclosed from relying upon them on appeal." *Id.* at 725-26.

In the superior court, Statewide's defense to the Adversary Claim focused on one question: what offsets or reductions apply to the net premium amount due Cascade for April through December, 2005? Now, a new argument is raised on appeal that Mr. Matar's personal guaranty for payment of premium trust funds under the 2004 Agreement is not supported by consideration and is therefore void. However, this defense and claim was not set forth in the Answer to Adversary Claim, CP 103-08, or even in Statewide's recent motion to amend the answer. CP 1106-21. It was not raised below in opposition to summary judgment.

Statewide has offered no explanation as to why it failed to raise this issue below, or why it should be permitted to do so now. While RAP 2.5(a) allows exceptions to this rule in limited circumstances, Statewide and Mr. Matar have neither addressed nor established how this new argument satisfies one of the exceptions found in RAP 2.5(a). None of the cases cited by Statewide stand for the proposition that an untested and unsupported allegation that a contract lacks consideration is

sufficient to defeat summary judgment when raised for the first time on appeal. Appellants' Brief at 27-29. Those cases cited are basic black letter law on the issue of consideration, but not one deals with raising the issue for the first time on appeal.

The belated claim of lack of consideration for the guaranty by Mr. Matar of the premium trust funds due under the 2004 Agreement should be rejected. There is no evidence presented to support this claim. Instead, the undisputed facts in the record show that Mr. Matar not only signed the personal guaranty for the 2004 Agreement, CP 420-21, but that he also signed a personal guaranty of performance by Statewide under the 1999 Agreement. CP 356. Further, the body of the 2004 Agreement recites that a personal guaranty is required. CP 396. This same requirement of a personal guaranty is also recited in the earlier version of the 2004 Agreement, prior to any revision of unrelated sections, that Mr. Matar and Statewide claim to have relied upon. CP 533. The undisputed evidence in the record supports the conclusion that Mr. Matar's personal guaranty was a condition of any and all agreements with Cascade whereby Statewide would collect and hold premium funds for Cascade. Statewide's new attempt on

appeal to defeat summary judgment by suggesting that the personal guaranty lacked consideration should be rejected.

Statewide also asserts that “the principals who ran Cascade . . . are frauds” and “based on the actions of Cascade’s principals, it appears the guaranty was fraudulently induced.” Appellants’ Opening Brief at 8. This is a mere allegation that is not supported by any evidence. Fraud must be pleaded with particularity. CR 9(b). “Particularly requires that the pleading apprise the defendant of the facts that give rise to the allegation of fraud.” *Adams v. King Cnty.*, 164 Wn. 2d 640, 662, 192 P.3d 891, 902 (2008), citing *Pedersen v. Bibioff*, 64 Wash.App. 710, 721, 828 P.2d 1113 (1992) and *Harstad v. Frol*, 41 Wn.App. 294, 301-02, 704 P.2d 638 (1985). In addition, “Each element of fraud must be established by ‘clear, cogent and convincing evidence.’ *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194, 204 (1996). The elements of fraud that must be pleaded with particularity and proven by clear, cogent and convincing evidence are:

- (1) representation of an existing fact;
- (2) materiality;
- (3) falsity;
- (4) the speaker's knowledge of its falsity;
- (5) intent of the speaker that it should be acted upon by the plaintiff;
- (6) plaintiff's ignorance of its falsity;
- (7) plaintiff's reliance on the truth of the representation;
- (8) plaintiff's right to rely upon it; and
- (9) damages suffered by the plaintiff.

Id. Statewide has made no such showing.

The Statewide agreements were signed on behalf of Cascade by Harold Anderson. Statewide cited no evidence, either at the trial court or in this appeal, to support the basic element of a fraud claim—falsity—in Mr. Anderson’s actions or communications with Statewide.⁵ Rather, the evidence indicates that a personal guaranty was required in 1999 and in 2004, was signed by Mr. Matar in 1999 and again in 2004, and was the standard of operation between Cascade and Statewide. Finally, if Statewide truly has evidence of fraud, it must pursue that claim against Cascade through the receivership’s Proof of Claim process.

F. Statewide’s Rejected and Unsupported Loss Ratio “Revision” Argument Does Not Create Any Issue of Material Fact as to the Net Premium Amount Due for April Through December, 2005.

The superior court properly rejected Statewide’s argument that because the loss ratio provision in the 2004 Agreement was revised without its knowledge, the net premium amount due is not accurate. The Receiver’s Adversary Claim is limited to the amount

⁵ Statewide simply asserts that individuals associated with Cascade have been found guilty of fraudulent and deceitful acts, but has presented no evidence of any connection between the Cascade/Statewide agreements and the wrongful acts of unrelated persons who were found to also owe significant premium amounts to Cascade. CP 865.

of net premium due to Cascade from April through December, 2005. While the 2004 Agreement allowed Statewide to retain provisional commissions and certain fees on a monthly basis from premium paid to Cascade, it did not permit Statewide to retain any other amounts. At the end of each calendar year, the parties were to make adjustments to the total provisional commissions and fees retained by Statewide. These adjustments would be based on the loss ratio of the business written by Cascade (i.e., how much Cascade paid out in claims for the policies sold by Statewide). Articles 2.3 and 2.4 of the 2004 Agreement provide that the difference between the provisional and final commission based on the loss ratio calculations for each annual period shall be paid after demand within forty-five (45) days, and that no deficits or surplus may be carried over from year to year. CP 383.

Statewide alleged that Article 2.4 of the 2004 Agreement was amended without its knowledge or agreement. Therefore, it argues there is an issue of fact as to the actual amount of the final commission amount owed to Statewide under the loss ratio provision for both years 2004 and 2005.

The superior court found that any concern regarding the proper loss ratio adjustment for year 2004 was not relevant to the

time period at issue in the Receiver's claim, April through December, 2005.⁶ The court further found that regardless of Statewide's knowledge of the allegedly revised provision, Statewide was required under the 2004 Agreement to perform all the accounting functions and maintain records for premiums, fees, adjustments, and commissions. And at no time while it was operating under that agreement in 2004 or 2005, did Statewide challenge or question the accuracy or validity of the alleged revised loss ratio provision. Further, as the superior court noted, Statewide admits it did not timely challenge the calculations provided by the Receiver and its accounting expert, Ms. Huang, in June 2006, as to the net premiums due for the April through December, 2005 time period. CP 971:11-12. Statewide failed to timely raise any issue concerning the loss ratio provision.

In fact, Statewide's conduct belies the claim that it was unaware of a change in the loss ratio provision of the 2004 Agreement. From the date of the revised document, May 2004, Statewide operated under that language making all the calculations for net premium due Cascade. Statewide even attached the

⁶ As discussed above, the 2004 Agreement prohibited any carry-over from one year to the next, so any loss ratio correction for calendar year 2004 would not impact calendar year 2005. CP 383.

revised 2004 Agreement with the loss ratio provision it now questions to its Proofs of Claim for expenses. CP 122-64. It was Statewide's contractual obligation to create and maintain the accounting records, to account to Cascade for the premiums and commissions under the 2004 Agreement, and to demand payment by Cascade within a specified time period after the end of each calendar year if any such payment was claimed due Statewide.

The record is clear that Statewide did not make any demand for any additional or final commissions for calendar year 2004. Regardless, any such demand would not carry over to calendar year 2005 under the express contract terms. CP 383. The record is also clear that Statewide did not make any demand for any additional or final commissions for calendar year 2005. Statewide has presented no evidence of any such demand. Consequently, the loss ratio provision, revised or not, has not come into play and cannot impact the amount of the net premium due Cascade for the April through December, 2005 time period.

Any claim now (in 2013) that the loss ratio provision, if not revised, would have resulted in a different amount due, is either irrelevant or simply too late. The trial court correctly reached this conclusion using the following rationale:

Even if, as Mr. Matar asserts, Statewide had no knowledge, understanding, or appreciation of the significance of the altered “loss ratio” language of Article 2.4 at the time of the change in 2004, such significance, if any, to the \$941,879.55 demand, would have been identified by Statewide in 2006 if it had been diligent as required by the 2004 Agreement. In other words, it is reasonable to assume that had Statewide calculated its own loss ratio adjustment (for the calendar year 2005) in 2006, it would have identified the alleged defect in the language – *if* the two versions of the language led to different results. Because the record indicates no protest on this basis from Statewide in 2006 as to the calculations sent by Ms. Huang, then either the disputed language makes no difference to the \$941,879.55 figure, or Statewide failed to diligently review the demand by the Receiver. If the former, then the loss ratio language dispute is irrelevant. If the latter, then Defendants have waived their objection.

CP 934:19-27; CP 935:1-2.

Statewide attempted to create an issue of fact concerning the loss ratio language through Jennifer Sims, a claimed “expert,” to testify that the amounts owed to Cascade are disputed. CP 444-455. However, Ms. Sims’ opinion was insufficient to raise a genuine issue of material fact concerning the loss ratio provision of the 2004 Agreement, or the net premiums due for the period of April through December, 2005.

First, Ms. Sims’ testimony largely focused on Statewide’s claims under the 1999 Agreement and the 2003 Settlement

Agreement. Because these claims fall outside of the timeframe relevant to the Receiver's Adversary Claim, and no offset is permissible under the contract language or the Insurance Code, the court properly deemed these portions of Ms. Sims' declaration irrelevant. Similarly, Ms. Sims' opinion concerning the final commissions for year-end 2004 had no bearing on the total net premiums due for April through December, 2005.

The only portion of Ms. Sims' opinion that did relate to the April through December, 2005 time frame was her statement that she had "incomplete data" to evaluate the 2005 year-end commission adjustment, CP 454:13-14, despite the fact that Statewide was responsible for creating and maintaining all the premium accounting records and reports and had more than seven (7) years to perform a calculation. Even in opposition to the Receiver's motion for summary judgment, Statewide still did not present evidence as to what the final 2005 year-end commissions would have been under either the original or revised loss ratio provision, or what its impact would be on the amount due for the April through December, 2005 time period. As the superior court noted, Statewide's expert offered no explanation as to why she lacked sufficient information to calculate the 2005 loss ratio, even

though she had sufficient information to calculate the 2004 loss ratio. CP 935.

Statewide attempts to characterize the opinions offered by its expert and Cascade's expert, Ms. Huang, as a "battle of the experts" to try to create a factual dispute that cannot be resolved on summary judgment. Contrary to Statewide's contention, however, the superior court did not weigh the credibility or opinions of the experts. Rather, the superior court correctly noted that "unless a *material* issue of fact is raised by an expert opinion, its existence alone does not defeat summary judgment." CP 931. Statewide failed to present sufficient evidence demonstrating the impact the revised loss ratio provision had on the net premium amount due Cascade. Because Statewide's expert presented no evidence that the alleged revision had any impact on the amount of net premium amount due for the relevant time period at issue, her testimony failed to raise a genuine issue of material fact that could preclude summary judgment.

Further, as noted above, the Receiver's expert, Ms. Huang, relied on the reports and figures provided directly by Statewide in arriving at her uncontested opinion that the net premiums due for April through December, 2005 are \$941,878.55. CP 425-28. Ms.

Sims' opinions did not provide any basis to challenge Ms. Huang's calculation and conclusion. Although Statewide attempts to undermine Ms. Huang's opinions by contending she lacked knowledge of amounts due under the 1999 Agreement or the 2003 Agreement (Appellants' Brief at 37-38), those dates are irrelevant on the question of what is the net premium amount due for April through December, 2005, under the 2004 Agreement. That was the question at issue in the Receiver's Adversary Claim against Statewide. Because the superior court correctly rejected Statewide's attempts to offset the premiums due for April through December, 2005, based on alleged claims that arose under previous contracts, Ms. Huang's lack of personal knowledge concerning those unrelated claims or prior accounting does not create a genuine issue of material fact.

V. CONCLUSION

Based on the clear contract language and receivership statutes, Statewide had no right to withhold any amount of the net premium amount due Cascade for the April through December, 2005 time period. By improperly withholding premium funds, Statewide unilaterally circumvented the strict statutory priority for distribution of estate assets in order to pay itself first ahead of other

classes of approved creditor claims which are entitled to higher priority under Washington's Insurance Code. The superior court properly found such withholdings to be impermissible under the terms of the 2004 agreement and the requirements of the Insurance Code.

The superior court properly limited its review to the time period addressed in the Receiver's Adversary Claim. Based on Statewide's own Monthly Production Reports and its own calculations of the net premium amount due Cascade for April through December, 2005, the court properly determined that the Receiver is entitled to summary judgment against Statewide and Mr. Matar in the amount of \$941,878.55. The issues and claims raised by Statewide do not create any genuine issue of material fact sufficient to overturn the superior court's grant of summary judgment. Summary judgment for the Receiver should be affirmed.

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Respectfully submitted this 6th day of September, 2013.

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CERTIFICATE OF SERVICE

I certify that on the 6th day of September, 2013, I caused to be delivered a copy of the document to which this Certificate is attached to the attorney(s) of record in the manner indicated below:

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DATED this 6th day of September, 2013.

By s/Natalie J. Leth

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