

FILED

JUL 19 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297438

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

IN RE RAPID SETTLEMENTS, LTD.'S APPLICATION FOR
APPROVAL OF TRANSFER OF STRUCTURED SETTLEMENT
PAYMENT RIGHTS

RSL-3B-IL, LTD.,

Intervenor/Appellant

v.

SYMETRA LIFE INSURANCE COMPANY and
SYMETRA ASSIGNED BENEFITS SERVICES COMPANY,

Respondents.

BRIEF OF APPELLANT RSL-3B-IL, LTD.

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. 3B Never Appeared in Either of the Underlying Matters, And the Trial Court Erred in Making 3B Responsible For Liquidating Marketing’s Obligation.....	2
B. The Trial Court Erred in Allowing Symetra to Utilize a Summary Procedure that Failed to Afford 3B Due Process	4
C. The Trial Court Erred by Granting Symetra’s Request For a Set-Off Hearing Without Requiring Symetra to Produce Admissible Evidence	7
II. ASSIGNMENT OF ERROR & ISSUES	10
III. STATEMENT OF FACTS	12
A. The Transfer Order Designated 3B as the Irrevocable Beneficiary of an Unconditional Right to Receive Annuity Proceeds from Symetra.....	12
B. The King County Court Held Liquidating Marketing, But Not 3B, Liable for Attorney’s Fees Under the SSPA	16
C. Symetra Went to Texas to Enforce its Judgment.....	17
D. Symetra Belatedly Pursued a Set-Off Where the Obligations Disprove Mutuality on their Face.....	18
IV. DISPOSITION IN THE TRIAL COURT.....	21
V. ARGUMENT	22
A. Different Standards of Review Apply on Appeal	22

B.	The Adjudicatory Process Picked by Symetra Failed To Afford 3B Due Process.....	24
1.	Symetra Left 3B Out of the Process	24
2.	Due Process Required Symetra to Play by the Rules.	25
3.	3B Complained about Due Process from the Outset	27
C.	Symetra Failed to Carry its Threshold Burden of Proving the Doctrine of Alter Ego.....	27
1.	The Rush to Judgment Unduly Prejudiced 3B.....	27
2.	There Were Gaping Holes in Symetra’s Purported Proof of Alter Ego.....	29
3.	The Trial Court Applied an Incorrect Standard for Alter Ego	32
D.	The Trial Court Improperly Ordered at Set-Off Where Neither Party Owed Each Other Anything	36
E.	The Trial Court Merged Two Texas Limited Partnerships Into One in Violation of the Texas Limited Partnership Act....	38
F.	Symetra Violated the Full Faith and Credit Clause by Enforcing in Washington a Judgment Against a Texas Resident.....	42
G.	Texas Law Fully Exempts the Annuity Benefits Seized by Symetra via the Equitable Remedy of Set-Off	44
VI.	ATTORNEY’S FEES ON APPEAL	48
VII.	CONCLUSION.....	48

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<i>Adkinson v. Digby</i> , 99 Wn.2d 206 (1983).....	27
<i>Asshauer v. Wells Fargo Foothill</i> , 263 S.W.3d 468 (Tex. App. – Dallas 2008, pet. denied).....	39, 40
<i>Baker v. GMC</i> , 522 U.S. 222 (1998).....	42
<i>Bernal v. Am. Honda Motor Co.</i> , 87 Wn.2d 406 (1976).....	32
<i>Canfield v. Orso (In re Orso)</i> , 283 F.3d 686 (5th Cir. 2002).....	46
<i>Caulley v. Caulley</i> , 806 S.W.2d 795 (Tex. 1991).....	47
<i>Citizens Bank v. Strumpf</i> , 516 U.S. 16 (1995).....	36
<i>Cole v. Cunningham</i> , 133 U.S. 107 (1890).....	43
<i>Critzer v. Oban</i> , 52 Wn.2d 446 (1958).....	28
<i>Deno v. Standard Furniture Co.</i> , 190 Wn. 1 (1937).....	29
<i>Dix v. ICT Group, Inc.</i> , 160 Wn.2d 826 (2007).....	23
<i>Fisher Props., Inc. v. Arden-Mayfair, Inc.</i> , 106 Wn.2d 826 (1986).....	48
<i>Frigidaire Sales Corp. v. Union Props, Inc.</i> , 88 Wn.2d 400 (1977)	33, 34, 36
<i>Goldberg v. Kelly</i> , 397 U.S. 254 (1970).....	31
<i>Grayson v. Nordic Constr. Co.</i> , 92 Wn.2d 548 (1979).....	23, 31, 33, 34
<i>Hatch v. Turner</i> , 193 S.W.2d 668 (Tex. 1946).....	44
<i>Hickman v. Hickman</i> , 234 S.W.2d 410 (Tex. 1950).....	45, 46

<i>In re Alexander</i> , 227 B.R. 658 (Bankr. N.D. Tex. 1998).....	46
<i>In re Estate of Tibbits</i> , 9 Wn.2d 415 (1941)	22
<i>In re Marriage of Caven</i> , 136 Wn.2d 800 (1998).....	23
<i>Johnson v. City of Aberdeen</i> , 147 Wn. 482 (1928).....	37
<i>Jones v. Stebbins</i> , 122 Wn.2d 471 (1984).....	41
<i>Meisel v. M&N Modern Hydraulic Press Co.</i> , 97 Wn.2d 403 (1982)	33, 35
<i>M'Elmoyle v. Cohen</i> , 38 U.S. 312 (1839).....	43
<i>Minton v. Ralston Purina Co.</i> , 146 Wn.2d 385 (2002).....	35
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	25
<i>Nelson v. Adams USA, Inc.</i> , 529 U.S. 460 (2000).....	25, 26
<i>Olympic Forest Prods., Inc. v. Chaussee</i> , 82 Wn.2d 418 (1973)	25
<i>Reichlin v. First Nat'l Bank</i> , 184 Wn. 304 (1935).....	37
<i>Rogerson Hiller Corp. v. Port of Port Angeles</i> , 96 Wn. App. 918 (1999)	23
<i>Sommer v. Yakima Motor Coach Co.</i> , 174 Wn. 638 (1933)	34
<i>Sorenson v. Pyeatt</i> , 158 Wn.2d 523 (2006)	22
<i>TCAP Corp. v. Gervin</i> , 163 Wn.2d 645 (2008)	23, 38
<i>Truckweld Equip. Co. v. Olson</i> , 26 Wn. App. 638 (1980).....	22, 28, 35
<i>Weiss v. Glemp</i> , 127 Wn.2d 726 (1995)	26
<i>Wichert v. Cardwell</i> , 117 Wn.2d 148 (1991).....	25
 <u>STATUTES AND COURT RULES</u>	
CR 1	26

CR 4	26, 27
CR 12	27
CR 56	31
CR 60(b)	21
ER 401	29, 30
ER 602	30
RAP 2.5(a)	41
RAP 18.1	48
RCW 4.28	24
RCW Ch. 19.205	1, 12
TEX. BUS. CODE ANN. §§ 153 (Vernon 2007)	40
TEX. BUS. ORGS. CODE ANN. §§ 153	40
TEX. INS. CODE ANN. § 21.42 (Vernon 2005)	44, 45
TEX. INS. CODE ANN. § 1108.051 (Vernon 2009)	11, 44, 45, 46
Tex. Revised Limited Partnership Act	40, 42
<u>OTHER AUTHORITIES</u>	
Black’s Law Dictionary 830 (6th ed. 1990)	38
RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 99 (1988)	42
U.S. Constitution Full Faith and Credit Clause	<i>passim</i>
U.S. CONST. Art. IV, § 1	42

Washington Structured Settlement Protection Act*passim*

I. INTRODUCTION

This matter arises from an action under RCW Ch. 19.205, to approve the transfer of a single future annuity payment. Following the statutory procedure, Liquidating Marketing, Ltd., formerly known as Rapid Settlements, Ltd. (collectively “Liquidating Marketing”) applied for Court approval of that transfer. Also following the statutory procedure, Liquidating Marketing provided Symetra Life Insurance Company and Symetra Assigned Benefits Services Company (“Symetra”) notice of the action. Such notice was necessary because Symetra is the annuity company that is obligated to make the annuity payment when it comes due – on September 2, 2012.¹

On May 15, 2005, the Benton County Superior Court signed an Order approving the transfer (“Transfer Order”). The Transfer Order “unconditionally” obligated Symetra to make the payment to RSL-3B-IL, Ltd. (“3B”). The Transfer Order directed payment to 3B because Liquidating Marketing, through the transfer process, irrevocably assigned all rights and interests to 3B. Symetra signed off on and approved the Transfer Order, knowing it would have to pay 3B the annuity proceeds.

¹ The Court should bear in mind that the annuity payment at issue has not yet come due. In fact, the payment comes due more than a year from now.

The Transfer Order was not appealed, and it remained unchanged until June 2010, when Symetra moved to modify the five-year-old and final Order. Symetra's motion sought permission to withhold the September 2012 payment to 3B, as an off-set for monies owed by Liquidating Marketing. Symetra did not initiate a new action and did not issue or serve anyone with process, least of all 3B. 3B moved to intervene to protect its property rights and opposed set-off under the severe time restrictions imposed by the Trial Court – the entire process, from motion to conclusion, took just over a month.

The hardships resulted when the Benton County Superior Court denied 3B's request for additional time, basic discovery, and an evidentiary hearing. Instead, a summary adjudication occurred, even though the annuity payment was not due for more than two years. The Benton County Superior Court entered an order granting Symetra's motion to modify the 2005 Transfer Order ("Set-Off Order"). 3B appealed after the Trial Court denied its motion for reconsideration.

A. 3B NEVER APPEARED IN EITHER OF THE UNDERLYING MATTERS, AND THE TRIAL COURT ERRED IN MAKING 3B RESPONSIBLE FOR LIQUIDATING MARKETING'S OBLIGATION.

3B is a Texas limited partnership; its first involvement in this matter came by way of its intervention in Symetra's effort to modify the Transfer Order. 3B appeals the Set-Off Order, because it impermissibly

saddles 3B with a judgment debt owed by a separate and distinct Texas limited partnership – namely Liquidating Marketing.

In 2008, the King County Superior Court entered a judgment for \$39,287.04 against Liquidating Marketing and in favor of Symetra. That judgment cannot bind 3B because 3B was not a party to that separate litigation, thereby precluding any suggestion that the King County Superior Court exercised jurisdiction over 3B or sought to burden 3B with its judgment.

Nonetheless, Symetra moved to modify the 2005 Transfer Order by having the Trial Court order a set off of the King County judgment against Liquidating Marketing. Symetra sought such equitable relief despite the Transfer Order's plain language, which approved the unconditional transfer of annuity benefits to 3B. To effect the transfer, the Transfer Order required Symetra to make payment to 3B in Texas on September 2, 2012. That set-off improperly made 3B answer for Liquidating Marketing's judgment debt.

Liquidating Marketing petitioned the Benton County Superior Court for the Transfer Order, but it did not represent 3B's interests in the transfer proceeding. Nor did 3B ever appear on its own behalf in the transfer case. 3B remained a stranger to the litigation until forced to intervene by Symetra's motion to modify the Transfer Order.

3B had nothing to do with Liquidating Marketing's obligation to Symetra. Yet the Trial Court granted, over 3B's objections, Symetra's motion to modify. To reach this result, the Trial Court applied (in 2010) an alter ego doctrine retroactively to judgments rendered years before. The Trial Court's error is highlighted by the fact that Symetra did not plead alter ego in its motion to modify – the only “pleading” that was before the Trial Court. Nor is there any basis in fact or in law compelling 3B to answer for Liquidating Marketing's debt. Therefore, 3B respectfully asks the Court of Appeals to reverse the Trial Court's Set-Off Order.

B. THE TRIAL COURT ERRED IN ALLOWING SYMETRA TO UTILIZE A SUMMARY PROCEDURE THAT FAILED TO AFFORD 3B DUE PROCESS.

The Transfer Order dates back to May 2005, yet Symetra took no action until June 2010. And when Symetra filed its motion in June 2010, it suddenly deemed time to be of the essence. Symetra's motion sought equitable relief in the form of a set-off, but Symetra had slept on its rights for years. Symetra obtained its remedy not against Liquidating Marketing, but against 3B, an innocent third party to which the Transfer Order granted an unconditional right to payment. As the legal vehicle for seeking a set-off, Symetra chose a “motion to modify” the Transfer Order. However, that Order had become final and non-appealable in June 2005. (CP 112-20). Symetra appears to have targeted the annuity proceeds in its

custody, control, or possession to eliminate the difficulties posed by trying to collect its judgment against Liquidating Marketing in Texas.

Symetra gave Liquidating Marketing, **but not 3B**, a mere ten-day's notice of the "hearing" on its "motion to modify." (CP 380) Although Symetra had previously "acknowledged" (in writing) that 3B owned the irrevocable right to the annuity proceeds, Symetra failed to provide 3B with any notice of its motion to modify. (CP 380-83, 420) Moreover, Symetra never filed a suit against 3B to establish its set-off claim. (CP 403, 406). However, such a suit is no more than due process demands.

The record, therefore, contains none of the usual indicia for bringing a claim for affirmative relief. Symetra filed no complaint naming 3B as a respondent. (CP 403, 406) Nor did Symetra issue a summons to bring Texas-based 3B before a Washington Court. (*Id.*) In fact, Symetra never even sought leave to file an amended complaint in the transfer proceeding, which would have allowed 3B a reasonable time to respond and the ability to conduct discovery. (*See Id.*) Finally, Symetra never served 3B with process to comport with traditional notions of fair play and substantial justice. Due process demands much more when it comes to an action that threatens to strip a party of vested property rights. (*See CP 501-02; VRP at 15-17*)

As a precaution, 3B intervened to protect its interests. 3B objected to the fatal defects in service and procedure. (CP 390, 403, 406) Notwithstanding obvious due process violations, or perhaps because of them, 3B faced a rush to judgment. The Trial Court summarily adjudicated the set-off issue even though 3B, never before a party, requested more time, basic discovery, detailed fact finding, and an evidentiary hearing. (CP 403, 406, 484, 501-02)

The needless hurry is inexplicable because the annuity payment at issue will not be paid until **September 2012**. More to the point, Symetra had waited five years before it saw the need to modify the Transfer Order. There was ample time to allow 3B to fully develop its evidence and defenses in response to an equitable remedy that required Symetra to come into Court with the cleanest of hands.

No urgency demanded expedited relief. Rather, this matter warranted meaningful notice, meaningful discovery, a meaningful response time, and a meaningful hearing. The Trial Court erred in allowing Symetra to rush this matter to resolution and in denying 3B's request for a full and fair hearing. The Court of Appeals should, therefore, reverse the Trial Court's Set-Off Order.

C. THE TRIAL COURT ERRED BY GRANTING SYMETRA'S REQUEST FOR A SET-OFF HEARING WITHOUT REQUIRING SYMETRA TO PRODUCE ADMISSIBLE EVIDENCE.

3B moved to intervene and responded to Symetra's motion to modify. 3B responded, in part, by seeking more time to defend itself. (CP 390) Curiously, Symetra opposed 3B's motion to intervene even though Symetra knew the Transfer Order imposed an "unconditional" obligation on Symetra to pay 3B, rather than Liquidating Marketing. (CP 394, 484-87) Symetra likewise knew that it had previously submitted a written acknowledgement of its payment obligation to 3B and stated it "will comply" with the Transfer Order. (CP 487, 409-20, 515-42) Through its motion to modify, Symetra reneged on its prior written acknowledgment of its obligations under the Transfer Order. (CP 420, 486)

Implicitly denying 3B's request for a meaningful hearing, the Superior Court held a brief summary hearing, on July 9, 2010. (VRP at 1) Not a single witness took the stand. No witness offered admissible evidence to prove that one Texas business (3B) purportedly acted as the alter ego for another (Liquidating Marketing). Symetra's entire claim depends on Symetra's alter ego theory, for without it, no mutual demands bind Symetra and 3B.² (CP 402-05, 496-510)

² The set-off relationships appear as a triangle with Symetra sitting atop the point in the middle and Liquidating Marketing and 3B representing the other two vertices.

Symetra aims to close the mutuality gap with its alter ego theory. (CP 402-05, 496-510) For its alter ego theory to succeed, Symetra needed to secure a summary adjudication. Only through a summary hearing without discovery, without evidence, and without process, could Symetra elide the unmistakable holes in its claim, and obtain unjustified relief that prejudiced 3B.

The Superior Court accepted, over 3B's objections, the *ipse dixit* of Symetra's arguments on alter ego. (*See* VRP at 16-17) To reach that result, the Superior Court had to disregard the only credible and firsthand testimony offered in the proceedings, which came from 3B's corporate counsel and its President. (CP 409-20, 515-42) Each testified that 3B and Liquidating Marketing are separate and distinct Texas limited partnerships. (CP 409-20, 494-510, 515-42) Nothing in the record contradicted 3B's evidence; all the evidence demonstrated that 3B and Liquidating Marketing maintained strict adherence to the requisite formalities and statutory reporting requirements. (CP 409-66, 511-19)

The Trial Court wrongly assigned 3B's uncontroverted evidence no weight. To prefer incompetent testimony from a witness without personal knowledge over competent testimony from witnesses with personal

Liquidating Marketing owes Symetra under the King County judgment whereas Symetra owes 3B under the Transfer Order. But 3B owes Symetra absolutely nothing at all.

knowledge was error and was inconsistent with basic evidentiary principles.

The summary nature of the hearing prevented 3B from confronting and cross-examining Symetra's sole witness – who was Symetra's own trial attorney. The Superior Court also rejected 3B's requests for due process in the form of (i) the chance to take discovery **as a new party** to the litigation; and (ii) an evidentiary hearing to probe the fact-intensive and dispositive issue of alter ego. Ruling from the bench, the Superior Court held that Liquidating Marketing and 3B “are one in the same.” (VRP at 20) The Court then granted Symetra's motion for set-off. (*Id.*).

In addition, Symetra offered no evidence to blur the bright line drawn by Texas law that keeps limited partnerships separate and distinct. No evidence supports the finding, and the Trial Court's conclusion in Symetra's favor constitutes an abuse of discretion.

3B respectfully asks the Court of Appeals to reverse the Trial Court's modification of the Transfer Order. More than a year remains before Symetra must make the annuity payment. If Symetra believes that 3B should be liable for Liquidating Marketing's debts, 3B can always seek to enforce its judgment in Texas – the proper forum for doing so. The procedure chosen by Symetra, however, violates basic notions of fair play

and substantial justice. It denied 3B the due process rights to meaningful notice and a meaningful opportunity to respond and be heard.

II. ASSIGNMENT OF ERROR & ISSUES

1.1 **Error.** The Trial Court erred in setting off the judgment debt owed by Liquidating Marketing against the annuity proceeds owed to 3B, where the Transfer Order made 3B the “irrevocable beneficiary” of the annuity payment and “unconditionally” obligated Symetra to make that payment to 3B.

1.2 Issues Pertaining to Error.

A. Whether the Trial Court erred in granting Symetra’s requested set-off where no mutual obligations ran between Symetra and 3B?

B. Whether the Trial Court erred in holding 3B liable for a judgment debt owed by Liquidating Marketing where Texas law rejects alter ego and piercing the corporate veil as grounds for disregarding the limited partnership form?

C. Whether the Trial Court erred in holding 3B liable for a judgment debt owed by Liquidating Marketing where the Texas statutory scheme for limited partnerships holds only the general partner liable for a limited partnership’s debts, and where the undisputed evidence established that 3B is not the general partner for Liquidating Marketing?

D. Whether the Trial Court erred in disregarding the limited partnership form that separates 3B and Liquidating Marketing where Symetra produced no admissible evidence to establish that the two limited partnerships operate as one and the same entity, under an alter ego theory?

E. Whether the Trial Court erred in setting off a judgment debt owed by Liquidating Marketing against the Transfer Order, which “unconditionally” obligates Symetra to remit the annuity proceeds to 3B as the “irrevocable beneficiary” where the payment was to be made in Texas and where Section 1108.051 of the Texas Insurance Code “fully exempts” such annuity benefits from a creditor’s collection efforts?

F. Whether the Full Faith and Credit Clause of the U.S. Constitution protects 3B from Symetra’s unlawful collection attempts in Washington that bypassed the procedures, methods, and exemptions established by Texas law?

G. Whether the Trial Court erred by denying 3B due process by summarily adjudicating the fact-intensive inquiry of alter ego denying 3B’s request for a meaningful opportunity to discover the basis for Symetra’s claim and develop its defenses on the merits?

III. STATEMENT OF FACTS

A. THE TRANSFER ORDER DESIGNATED 3B AS THE IRREVOCABLE BENEFICIARY OF AN UNCONDITIONAL RIGHT TO RECEIVE ANNUITY PROCEEDS FROM SYMETRA.

On May 12, 2005, the Trial Court approved, under the Washington Structured Settlement Protection Act (“SSPA”), an unconditional transfer of structured settlement annuity proceeds to 3B as the “irrevocable beneficiary.” (CP 409-20) Those annuity proceeds come from an annuity owned and issued by Symetra that funded a structured settlement to Nicolas Reihls, who had previously settled a separate personal injury suit (“Reihls Annuity”). (CP 54-106, 121-22, 409-20) The SSPA defines Mr. Reihls as the “payee” in this transaction because he transferred the structured settlement payment to 3B “for consideration.” RCW 19.205.010(8),(18). In approving the transfer, the Transfer Order expressly designates 3B as the “transferee” under the Act’s statutory definition: 3B is the one “*acquiring . . . structured settlement payment rights through a transfer.*” *Id.* § 19.205.010(21) (emphasis added).

Liquidating Marketing petitioned the Trial Court to approve, under the SSPA, the transfer of an annuity benefit from Mr. Reihls to 3B. (CP 54-106) Liquidating Marketing operated as a marketing company that, for a fee, located and identified annuity streams for purchase by third parties, including 3B. (CP 409-10) Both Liquidating Marketing and 3B existed as

Texas limited partnerships that were located at the same address in Houston, Texas – 5051 Westheimer, Suite 1875, Houston, Texas 77056-5604. (CP 421-66) As of late 2008, Liquidating Marketing had wound down its affairs, while 3B continues to transact business. (CP 410, 517, 519)

In petitioning the Trial Court to approve the SSPA transfer, Liquidating Marketing reserved the right to assign its interests “to another person or entity which, in such event, will be included in the order approving transfer of structured settlement payment rights.” (CP 57, 60) The Amended Transfer Agreement, which was approved after having been signed by Mr. Reihls and provided to Symetra, dictates the effect of such an assignment that covers:

any portion of its right, title, and interest in and to this Agreement, the Settlement Agreement, the Annuity, and the Assigned Payments without the consent of any other person. If and when [Liquidating Marketing] assigns this Agreement and following notice of such, all references to Rapid Settlements in this Agreement shall be read and understood to refer only to Rapid Settlements’ assignee and Rapid Settlements shall be, to the extent of such assignment, fully discharged from any liability hereunder.

(CP 82-83) Before the transfer hearing took place, Liquidating Marketing “conveyed to 3B all right, title and interest to purchase the \$60,000 annuity payment due in 2012.” (CP 517) Therefore, 3B owned and held all rights to the 2012 annuity payment. (CP 515-19)

The Transfer Order confirms and effectuates the assignment, by Liquidating Marketing (referred to as RSL or Rapid Settlements in the transfer papers) to 3B, of all “right, title, and interest” to the “Annuity and the Assigned Payments.” (CP 107-11) Under the Transfer Order, Symetra must “unconditionally” make the \$60,000 payment to 3B in Houston, Texas, when those annuity proceeds come due on September 2, 2012. (*Id.*) The Transfer Order (i) expressly designated 3B as the “transferee” of the structured settlement payment (as the SSPA defines that key term); and (ii) identified 3B as the “irrevocable beneficiary” of the September 2, 2012 annuity proceeds. (CP 108-10)

Symetra’s attorney signed off on the Transfer Order, signifying the Order had been “Reviewed and Approved by” Symetra. (CP 110) The Order’s explicit “approval” by Symetra gave it actual knowledge of Liquidating Marketing’s assignment of all its interests to 3B. Symetra’s documented knowledge that 3B is the SSPA “transferee,” therefore, dates back to the May 2005 Transfer Order. When no interested party appealed, the Transfer Order became final and non-appealable. Finality attached.

The Transfer Order itself makes clear that 3B is the only SSPA “transferee.”³ (CP 107-11) (CP 108) It is “ORDERED, ADJUDGED, AND DECREED that the Assigned Payments shall be made payable to

³ In the Transfer Order, 3B is “herein sometimes referred to as “Transferee.”

and delivered to Transferee at the following address: 5051 Westheimer, Suite 1875, Houston, Texas 77056-5604.” (CP 108-09) The Trial Court “ORDERED, ADJUDGED, AND DECREED that [Symetra] shall change the designated beneficiary under the Annuity for the Assigned Payments to [3B] irrevocably . . .” (CP 109) Per the Order, Symetra’s “formal acknowledgment [of the transfer to 3B] shall include, without limitation, an acknowledgment that the Assigned Payments shall be unconditionally made to [3B] at 5051 Westheimer, Suite 1875, Houston, Texas 77056-5604, and that [3B] has been made the irrevocable beneficiary of the Assigned Payments.” (CP 109-10)

The Transfer Order required Symetra to deliver a formal acknowledgment of its obligations, and the Order required that acknowledgement to be directed solely to 3B. (CP 110, 409-30) On July 14, 2005, Symetra sent that formal “acknowledgment” letter; in it, Symetra agreed, without reservation, to deliver payment to 3B and only 3B in Houston, Texas, thereby representing to 3B that:

Symetra Life Insurance Company received an Order Approving Transfer of Structured Settlement Payment Rights on May 26, 2005 and will comply. Per the terms of the order, the benefit due September 2, 2012 will be redirected to:

RSL-3B-IL, Ltd.
Post Oak Tower, The Galleria
5051 Westheimer, Suite 1875
Houston, Texas 77056-5604.

(CP 420)

Although the Transfer Order names 3B as the transferee, 3B never appeared or otherwise participated as a party in the transfer proceeding. (CP 483-90) The record verifies that Washington Courts have approved these routine transfers to 3B (and other entities) after similar assignments by Liquidating Marketing, which were made in the ordinary course of its former business. (CP 285-379) Symetra knew how the annuity transfer was to work, and it acknowledged the same.

B. THE KING COUNTY COURT HELD LIQUIDATING MARKETING, BUT NOT 3B, LIABLE FOR ATTORNEY'S FEES UNDER THE SSPA.

Liquidating Marketing sought Court approval (in the King County Superior Court) for a separate transfer of annuity proceeds then owed to William S. Thompson. (CP 121-23, 169-75) Like the Reihls matter, Symetra served as the Thompson annuity issuer and obligor. (*Id.*) Symetra objected to the proposed transfer, and the King County Court dismissed Liquidating Marketing's application. (*Id.*) 3B never appeared as a party in the unsuccessful transfer proceeding.

Afterward, Symetra pursued a claim for attorney's fees against Liquidating Marketing, **but not 3B**, in the King County Court, alleging a failure to comply with the SSPA. (CP 159-216) 3B did not appear in that

proceeding or contest Symetra's application for fees. (*Id.*) Symetra neither sought nor obtained a judgment for attorney's fees against 3B. The only party adverse to Symetra was Liquidating Marketing.

The King County Superior Court awarded Symetra attorney's fees and rendered judgment solely against Liquidating Marketing. (CP 159-66) Liquidating Marketing appealed, and the Court of Appeals affirmed. (CP 159-216) Following the appeal, the King County Superior Court rendered a final judgment (adding additional fees to the prior judgment) against Liquidating Marketing. (CP 159-62) That final judgment was in a principal amount of \$30,674.81. (*Id.*) Again, that final judgment only binds Liquidating Marketing, not 3B.

C. SYMETRA WENT TO TEXAS TO ENFORCE ITS JUDGMENT.

Symetra "domesticated" the King County judgment against Liquidating Marketing in the limited partnership's "home state of Texas." (CP 123) Symetra's attempt to garnish a Liquidating Marketing bank account in Houston, Texas failed because the targeted account held no funds belonging to that entity. (CP 123, 515-16) 3B does not and never did commingle its funds with Liquidating Marketing. (CP 515-16) Stewart A. Feldman, 3B's President, testified by declaration that 3B has always maintained a separate limited partnership existence distinct from Liquidating Marketing. (CP 516-17, 519) 3B holds separate bank

accounts, keeps separate accounting records, and employs separate personnel. (CP 516)

Other than the single garnishment action, Symetra's only Texas collection efforts were to serve some skeletal written discovery on Liquidating Marketing. Symetra pursued no other collection alternatives under Texas law. (CP 228-31) This brief foray to Texas ended in early 2009, and Symetra refocused its efforts in Washington. (CP 124)

D. SYMETRA BELATEDLY PURSUED A SET-OFF WHERE THE OBLIGATIONS DISPROVE MUTUALITY ON THEIR FACE.

In June 2010, Symetra brought a motion to enforce its judgment against Liquidating Marketing by attempting to recapture the September 2, 2012 annuity payment that Symetra had been "unconditionally" ordered to remit to 3B. (CP 121-24) However, rather than attempting to enforce its King County judgment in King County, Symetra asked the Benton County Superior Court to modify the five year old Transfer Order. (*Id.*) The Benton County Court had closed its file five years beforehand when it issued its final and non-appealable Transfer Order.

Symetra's motion to modify asked the Benton County Superior Court to set off the judgment debt owed by Liquidating Marketing against the Reih's Annuity proceeds that Symetra "unconditionally" held for 3B's benefit. (CP 112-20) The Transfer Order and Symetra's own written

acknowledgment “unconditionally” obligated Symetra to pay 3B, not Liquidating Marketing. (CP 107, 420) On their face, the two obligations do not match: Liquidating Marketing owes Symetra, but Symetra owes 3B. Nonetheless, Symetra moved forward with its set-off claim.

A mutuality gap exists. Indeed, the “Statement of the Issue” in Symetra’s motion to modify tries to cover up the discrepancy by substituting “Liquidating Marketing” for “3B” as the designated recipient under the Reih’s Annuity:

Whether Symetra is entitled to an equitable setoff against [Liquidating Marketing] where Symetra obtained a Judgment against [Liquidating Marketing] under the Thompson SSPA Order and [Liquidating Marketing] is entitled to payment under the Reih’s SSPA Order from Symetra?

(CP 116) (emphasis added)

The “issue,” as posed by Symetra, attempts to renegotiate and restructure not just the transfer agreement, but also the Transfer Order, which had been approved by Symetra. (CP 107-11, 54-106) In paying Mr. Reih’s for the annuity’s transfer, 3B relied on the Transfer Order and Symetra’s representations in its “acknowledgment letter.” (CP 515-19, 531)

Symetra’s “issue” also seeks to pierce, go behind, parse, or rewrite the Transfer Order. As proof, Symetra claims:

Rapid (as the Transferee in both the Thompson and Reihls matters) and Symetra (the Annuity Issuer and Annuity Owner under the same) also operated in the same capacity in both matters. Because the parties acted in the same capacity in both matters, a setoff is the only manner in which to avoid the absurdity of making Symetra pay [Liquidating Marketing] under this Court's order when [Liquidating Marketing] is indebted to Symetra under the Thompson Judgment.

(CP 118) The Transfer Order's plain language refutes Symetra's attempt to recast the transfer as an obligation owed to Liquidating Marketing. (CP 107-11). Symetra's obligation was to 3B, and 3B owed Symetra nothing.

In filing a motion to modify the five-year-old Transfer Order, Symetra never served 3B with process or otherwise gave 3B any notice. On the contrary, Symetra sent copies of its papers to Liquidating Marketing's former counsel in the prior King County litigation. (CP 120, 380; VRP at 15) Such notice may have made sense if Symetra had gone back to the King County Court to enforce its judgment against Liquidating Marketing, but that is not how Symetra elected to proceed, and it afforded no notice to 3B – the only entity who would suffer by Symetra's requested set off.

Instead, Symetra elected to move to modify the Transfer Order. Liquidating Marketing was represented in the underlying transfer case by different lawyers than the ones to whom Symetra sent notice of its motion. Inexplicably, Symetra never notified the lawyer who represented

Liquidating Marketing in the original Benton County transfer proceeding. (CP 120, 380) Critically, Symetra never justified or explained its decision not to initiate a proper suit with proper pleadings and proper service of process to provide 3B with proper notice that would have provided a meaningful opportunity to respond and to be heard.

IV. DISPOSITION IN THE TRIAL COURT

Symetra moved to “modify” the final and non-appealable Transfer Order in Benton County, under Rule 60(b), citing only “equitable” grounds. CR 60(b). (CP 112-20) 3B sought to intervene in the Benton County action because it had never before appeared as a party in the underlying transfer proceeding or in the King County matter. Oddly, Symetra opposed 3B’s motion to intervene, despite 3B’s need as the interested party to defend itself and its rights to payment as the annuity’s “irrevocable beneficiary.” (*See* CP 390-400, 420) The Trial Court granted 3B’s opposed motion to intervene at the summary hearing, which took place on July 9, 2010. (VRP at 4)

Reopening the case after five years, the Trial Court took up Symetra’s motion, held a summary hearing on the fact-intensive issue of alter ego, and ruled from the bench that Liquidating Marketing and 3B “are one in the same.” (CP 491-93; VRP at 4-20) This finding appears to turn on alter ego. The Trial Court later signed an Order granting

Symetra's motion to modify the Transfer Order. (CP 491-93) 3B asked the Trial Court to reconsider, providing additional declarations from 3B's president and Liquidating Marketing's accountant plus documentary evidence. (CP 496-542) The motion to reconsider demonstrates how the alter ego finding violates Washington case law on alter ego. (CP 496-504) The Trial Court denied that motion, and this appeal ensued. (CP 543-51)

V. ARGUMENT

A. DIFFERENT STANDARDS OF REVIEW APPLY ON APPEAL.

The remedy of set-off springs from equity and places the burden of proof on Symetra. *See In re Estate of Tibbits*, 9 Wn.2d 415, 418, 423 (1941). The alter ego doctrine for piercing the corporate veil likewise sounds in equity. *Truckweld Equip. Co. v. Olson*, 26 Wn. App. 638, 643 (1980). The Court ordinarily tests "the authority of a Trial Court to fashion equitable remedies under an abuse of discretion standard." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531 (2006). However, the Trial Court was only permitted to exercise its discretion to grant such "extraordinary forms of relief" if equity and applicable law entitled Symetra to the relief that it sought. *Id.* Neither law nor equity entitled Symetra to a set off.

The alter ego doctrine implicates a unique standard of review. The Court reviews the factual grounds underlying the equitable remedy for substantial evidence and the legal conclusions drawn by the Trial Court *de*

novo. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 924 (1999), *review denied*, 140 Wn.2d 1010 (2000). The Court of Appeals must reverse the alter ego finding made by the Trial Court because, as 3B demonstrates below, no substantial evidence supports it. *See Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 553 (1979). The Trial Court also misapplied the alter ego doctrine in finding that Liquidating Marketing and 3B “are one in the same.” (VRP at 20)

This appeal also requires the Court to construe various statutory schemes, one of which the Trial Court cited to reach its decision – the SSPA. (VRP at 20) Statutory construction presents questions of law, which are reviewed *de novo*. *TCAP Corp. v. Gervin*, 163 Wn.2d 645, 650 (2008). In the face of a *de novo* review, the Trial Court can exercise no discretion in interpreting any applicable statute. *See In re Marriage of Caven*, 136 Wn.2d 800, 806, 810 (1998).

The Court owes the Trial Court no deference in deciding questions of law, which always trigger *de novo* review. *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833-34 (2007). To base the alter ego finding on “untenable grounds” or to reach a “manifestly unreasonable” decision gives rise to an abuse of discretion. *Id.* at 833. The Trial Court abused its discretion here by ignoring Texas law, misapplying Washington law, and otherwise analyzing the law incorrectly. *See Id.* “If the Trial Court’s

ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis, it necessarily abuses its discretion.” *Id.*

B. THE ADJUDICATORY PROCESS PICKED BY SYMETRA FAILED TO AFFORD 3B DUE PROCESS.

1. *Symetra Left 3B Out of the Process.*

The Trial Court deprived 3B of its due process right to litigate its defenses in a full and fair trial on the merits after service of process required by law. Similarly abridging this profound right, Symetra opted to push a summary process that sidestepped due process and unjustly held 3B liable for Liquidating Marketing’s debt. The one true and fair course of action demanded full compliance with due process. Yet, the process below failed to afford 3B with due process.

Above all, no original or amended complaint added 3B as a party to the underlying suit. Even worse, Symetra’s motion to modify – the operative “pleading” that initiated the post-judgment action and sought the remedy of set-off – neither named 3B as a party nor alleged alter ego as the basis for holding 3B liable. (CP 112-20) The Trial Court granted that very motion, however, in awarding Symetra a set-off. (CP 491-93) Symetra also failed to comply with Washington law requiring service of process in order to add 3B as a new party to the suit: no summons issued, and no one served 3B with process. *See* RCW 4.28.080(10).

2. Due Process Required Symetra to Play by the Rules.

Washington's Rules of Civil Procedure and statutes governing service of process codify due process. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465-67 (2000) (FRCP "are designed to further the due process of law that the Constitution guarantees."); *Wichert v. Cardwell*, 117 Wn.2d 148, 151 (1991) ("The purpose of statutes which prescribe the methods of service of process is to provide due process."). While an elastic concept, due process insists on timely, adequate, and meaningful notice that secures a meaningful opportunity to respond and be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice, reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Id.* at 314.

The Trial Court denied 3B the fundamental due process protection of a thorough and meaningful "hearing appropriate to the nature of the case." *See Id.; Olympic Forest Prods., Inc. v. Chaussee*, 82 Wn.2d 418, 422 (1973). The "nature of the case" pivots on taking away, under the guise of alter ego, annuity proceeds that belong to 3B, thereby entitling Symetra to make a preferential payment to itself. To deprive 3B of a

vested property right, in such a summary fashion, violates due process because neither the King County Court nor the Trial Court had previously adjudged 3B to be liable to Symetra. And no Washington Court has ever adjudicated 3B to be the alter ego of Liquidating Marketing.

3B never appeared as a party in either the King or Benton County suits. Nor did Symetra sue 3B in this enforcement action by filing an original complaint or any amended pleading that names 3B as a respondent. *See Nelson*, 529 U.S. at 465-67. “Indeed, no such pleading was ever actually composed and filed in court.” *Id.* at 466. Worse still, Symetra never served 3B with process as mandated by Washington state statutes. *See Weiss v. Glemp*, 127 Wn.2d 726, 734 (1995) (demanding compliance with statutory service requirements beyond the safeguards imposed by due process); *see also* CR 4. Put simply, Symetra disobeyed the most basic rules for bringing suit.

The rules governing litigation exist for all those who come into Court, but especially for an out-of-state respondent, like 3B. *See* CR 1. Symetra never even served 3B with a summons that attached its motion to modify. The motion to modify itself omits 3B as a party and alter ego as a ground for recovering against 3B. “Beyond doubt, however, a prospective party cannot fairly be required to answer an amended pleading not yet permitted, framed, and served.” *Nelson*, 529 U.S. at 467. The Trial

Court's Set-Off Order holding 3B liable as Liquidating Marketing's alter ego does not comport with the due process guarantees of service of process, notice, the opportunity to respond, and the responsive deadlines that ensure the right to be heard. *See Id.* at 465-67, 469.

3. 3B Complained about Due Process from the Outset.

3B received constitutionally infirm notice of the enforcement action, and it appeared in the Trial Court as a precaution. (CP 390-93) *See* CR 4(a)(3), 4(d)(5). 3B immediately opposed the motion to modify judgment by contesting Symetra's failure to issue a summons, serve a summons, or otherwise comport with due process. (CP 403, 406) *See* CR 4(d)(5), 12(b)(4) (defense of insufficiency of process), 12(b)(5) (defense of insufficiency of service of process). 3B timely objected to Symetra's failure to comply with the due process guarantee of meaningful notice that springs from service of process. *See Adkinson v. Digby*, 99 Wn.2d 206, 209-10 (1983). "The notice of appearance does not preclude [3B] from challenging the insufficient service of process."

C. SYMETRA FAILED TO CARRY ITS THRESHOLD BURDEN OF PROVING THE DOCTRINE OF ALTER EGO.

1. The Rush to Judgment Unduly Prejudiced 3B.

Symetra ambushed 3B in the Trial Court and still failed to prove up a *prima facie* case of alter ego. The burden falls on Symetra to

establish that 3B acts as the alter ego of a separate Texas business entity, Liquidating Marketing, and *vice versa*. See *Critzer v. Oban*, 52 Wn.2d 446, 452 (1958). Disregarding the limited partnership form of each of these entities poses a fact question for the trier of fact. See *Truckweld Equip. Co.*, 26 Wn. App. at 643 (piercing the corporate veil frames a fact question). Washington Courts reserve the equitable remedy of alter ego only for truly “exceptional circumstances” involving fraud or manifest injustice, neither of which Symetra attempts to prove here. See *Id.* at 644.

Symetra presented this fact-intensive inquiry in summary fashion, not in a full-blown trial on the merits, much less a jury trial. 3B objected to no avail. (CP 403, 406) Yet Washington juries or trial judges ordinarily decide this fact question in a trial on the merits with live testimony. See *Critzer*, 52 Wn.2d at 448 (witnesses testified live and by deposition). The Trial Court’s Set-Off Order was an extraordinary order that was entered without process and improperly stripped 3B of vested property rights.

To adjudicate the dispositive issue of alter ego, Symetra selected a streamlined procedure that was less entailed than an ordinary summary judgment, relying only on declarations and exhibits thereto. To that end, both sides offered evidence that arguably raises conflicts on the material fact issue of alter ego, although Symetra’s evidence lacks any probative

value. A jury must decide the dispositive issue of alter ego when the proof raises such a disputed fact question. *See Deno v. Standard Furniture Co.*, 190 Wn. 1, 2, 8-10 (1937) (reversing motion for directed verdict where conflicting evidence raised a fact question on alter ego). The rush to judgment against 3B abolished the usual protections afforded by summary judgment practice, requiring the Court of Appeals to reverse the Trial Court's Set-Off Order *See Id.*

2. There Were Gaping Holes in Symetra's Purported Proof of Alter Ego.

Besides denying 3B the right to a full and fair adjudication, the Trial Court compounded the harm when it gave no weight to 3B's uncontroverted evidence disproving alter ego. 3B introduced undisputed evidence from witnesses with firsthand knowledge who swore that 3B operated as a Texas limited partnership separate and distinct from Liquidating Marketing. (CP 409-20, 511-14, 515-42)

Symetra attempted to counter this firsthand testimony with the incompetent declaration of its own trial attorney. That declaration relies not on personal knowledge, but on information gleaned from other sources, about which counsel also lacked first hand knowledge. *See ER 401-02, 602.* 3B objected to this irrelevant testimony from an interested witness, but the Trial Court implicitly overruled 3B's objection and relied

on Symetra's arguments, rather than 3B's admissible evidence. (VPR at 17; CP 496-510)

Counsel did no more than repeat the content of attached documents, regarding the limited partnership structures for 3B and Liquidating Marketing. The best evidence rule entitles the limited partnership records to speak for themselves without any adulteration or editorialization.

Symetra's counsel's declaration, which was Symetra's sole evidence on alter ego, failed to establish that it was based upon personal knowledge. Of course, the concept of personal knowledge works the other way around. The attached documents do not, themselves, support the evidentiary weight that Symetra attributes to them. Nor can Symetra fill in the gaps with argument masquerading as evidence. However, that is precisely what occurred here. This acute lack of personal knowledge exemplifies surmise, speculation, conclusory opinion, *ipse dixit*, and subjective belief, none of which qualify as admissible testimony. ER 401-02, 602.

"A witness may not testify to a matter unless evidence is introduced sufficient to support *a finding* that the witness has personal knowledge of the matter." ER 602 (emphasis added). The Trial Court could make no such "finding" regarding Symetra's sole "proof" of alter

ego. Even worse, Symetra relies on “the truth” of allegations urged by parties other than Symetra in litigation that took place in Texas. (*See* CP 121-25). To adjudicate the alter ego issue, via incompetent declarations, denied 3B the fundamental due process right to confront and cross-examine Symetra’s witnesses. *See Goldberg v. Kelly*, 397 U.S. 254, 268-70 (1970).

The evidence presented by Symetra fails the litmus test imposed by CR 56 for motions for judgment judgment, which in many respects is analogous to Symetra’s chosen procedure. Rule 56(e) demands that a declarant in a summary judgment proceeding testify using personal knowledge and set forth admissible facts. *See* CR 56(e). Symetra never came close to clearing that threshold by using the bare assertions and subjective belief expressed by its interested witness.

The Court of Appeals should render judgment that Symetra take nothing on its set-off remedy and vacate the Set-Off Order because no substantial evidence supports the Trial Court’s finding of alter ego. *See Grayson*, 92 Wn.2d at 553. Symetra chose the playing field and must play by the rules it invoked. Those rules dictate that Symetra’s motion must fail because Symetra failed to prove alter ego.

In the alternative, the Court should remand the case to the Trial Court in the interests of justice and instruct that Trial Court to (i) Order

Symetra to file appropriate pleadings naming 3B as a party; (ii) Order Symetra to serve 3B with process; (iii) allow the parties to conduct adequate discovery, and (iv) hold a full and fair trial on the merits to resolve the alter ego and set-off issues. To remand the case to the Trial Court for further proceedings allows the parties to fully develop their evidence and try the case on the correct legal theories. *See Bernal v. Am. Honda Motor Co.*, 87 Wn.2d 406, 414 (1976).

3. ***The Trial Court Applied an Incorrect Standard for Alter Ego.***

Fundamental fairness precluded Symetra from abridging 3B's rights by holding it summarily liable for the judgment debt owed by Liquidating Marketing, a separate and distinct Texas limited partnership. Symetra could prevail only because the Trial Court, over 3B's specific objection, dispensed with a full trial on the merits to adjudicate the alter ego issue. Symetra gets to collect, **from 3B**, its judgment against **Liquidating Marketing** without ever having to obtain a jury finding that disregards the organization and operation of the business entities as distinct Texas limited partnerships.

At a hearing where no witness testified, the Trial Court concluded: "I do think [3B and Liquidating Marketing] are one in the same . . . based on the information submitted with the attachments to the declaration of the

attorney, and I also believe the statutes and the agreement that – the transfer agreement all point to the fact that [Liquidating Marketing] is the transferee, so I'll sign an order to that effect.” (VRP at 20) The Trial Court reached this “belief” in spite of the only testimony that came from witnesses with firsthand knowledge – 3B's President and its attorney, and Liquidating Marketing's controller. The ruling's practical effect affords Symetra the right to enforce and collect its King County judgment not against Liquidating Marketing, but against 3B, and not in Texas, but in Washington.

The Court should reverse the Trial Court's Order because no evidence entitled the Trial Court to disregard the limited partnership form. *See Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 409 (1982); *Grayson*, 92 Wn.2d at 553. The alter ego theory only applies when “the corporate entity has been disregarded by the principals themselves so that there is such a unity of ownership and interest that the separateness of the corporation has ceased to exist.” *Grayson*, 92 Wn.2d at 553.

As in Texas, “limited partnerships are a statutory form of business organization, and parties creating a limited partnership must follow the statutory requirements.” *Frigidaire Sales Corp. v. Union Props., Inc.*, 88 Wn.2d 400, 402 (1977). Liquidating Marketing and 3B dutifully filed their

paperwork, certificates of limited partnership, and “periodic reports” with the Texas Secretary of State. (CP 421-66) So did the general partner for each of these limited partnerships. (*Id.*) This undisputed evidence gathered by Symetra definitively disproves alter ego. “There was no evidence in this case that corporate records of formalities were not kept,” which, standing alone, forecloses a finding of alter ego. *Grayson*, 92 Wn.2d at 553.

Nor does any evidence prove that Liquidating Marketing and 3B commingled their funds or merged their separate limited partnership identities. *See Sommer v. Yakima Motor Coach Co.*, 174 Wn. 638, 653-59 (1933). The uncontroverted evidence from witnesses with firsthand knowledge proves the very opposite beyond any dispute. 3B kept separate bank accounts, maintained separate accounting records, and employed separate personnel. (CP 516) All the evidence in the record confirms that 3B and Liquidating Marketing remained “separate and distinct” juridical entities. (CP 409-11, 515-19)

No other basis cited by Symetra supports disregarding the limited partnership barrier. Not a shred of evidence demonstrates that Liquidating Marketing and 3B ever acted in any capacity other than as limited partnerships. *See Frigidaire Sales Corp.*, 88 Wn.2d at 405-06. Symetra knew from the outset that Liquidating Marketing and 3B existed as

distinct limited partnerships and could not have been misled by their business activities. *See Id.*; *Truckweld Equip. Co.*, 26 Wn. App. at 644-45. While Symetra says that “unity” of ownership and common headquarters purportedly merge the two entities, the Washington Supreme Court rejects these very indicia as badges of alter ego. *See Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 399 (2002).

Finally, Symetra suggests that its inability to collect the King County judgment from Liquidating Marketing in 2008 proves its alter ego theory in 2010. Liquidating Marketing wound down its affairs and ceased doing business in 2008, and no legal principle warrants the quantum leap made by Symetra that Liquidating Marketing did so to perpetrate a fraud on its creditors. (CP 467-74, 515-19) For a limited partnership to wind down its affairs neither violates the law nor offends public policy. The State Supreme Court has previously rejected Symetra’s excuse as grounds for taking the extraordinary step of finding alter ego: “Separate corporate entities should not be disregarded solely because one cannot meet its obligations. The absence of an adequate remedy alone does not establish corporate misconduct.” *Meisel*, 97 Wn.2d at 410-11.

The alleged “undercapitalization” of Liquidating Marketing hardly advances Symetra’s case any, because Liquidating Marketing’s accountant refutes this naked accusation: “The accounting books and records reflect

that Liquidating Marketing received capitalization in excess of \$500,000.00.” (CP 511) *See Frigidaire Sales Corp.*, 88 Wn.2d at 404-05. That capitalization suffices.

In short, no substantial evidence supports the Trial Court’s decision to pierce the limited partnership form, thereby resulting in an abuse of discretion. At Symetra’s urging, the Trial Court misapplied Washington law on the alter ego doctrine and abused its discretion.

D. THE TRIAL COURT IMPROPERLY ORDERED A SET-OFF WHERE NEITHER PARTY OWED EACH OTHER ANYTHING.

The set-off here could occur only by disregarding the distinct limited partnership form that shields 3B. The Trial Court set off a judgment debt owed solely by Liquidating Marketing to Symetra against an obligation Symetra “unconditionally” owes to 3B as “irrevocable beneficiary” of the Reih’s annuity. 3B owes, and never owed, Symetra anything. Nor can 3B be made to answer for Liquidating Marketing’s debt under Texas law. On the face of it, the same parties do not owe each other mutual obligations, and the essential element for a set-off fails. The Trial Court abused its discretion in setting off the nonreciprocal obligations.

For the equitable remedy of set-off to work, A must owe B and B must owe A to extinguish the common debt. *See Citizens Bank v. Strumpf*,

516 U.S. 16, 17 (1995). In stark contrast, the Set-Off Order does away with the need for mutual obligations by creating the fiction that (i) A (Symetra) owes B (3B); and (ii) C (Liquidating Marketing) owes A (Symetra) because; (iii) B and C allegedly act as “one in the same.” This artifice must exist for Symetra to conjure up mutual demands.

Yet the presence of different parties – two distinct Texas limited partnerships – destroys the fiction and the right to set-off. *See Johnson v. City of Aberdeen*, 147 Wn. 482, 485 (1928). The right to set-off arises only if a suit filed by 3B on its claim to recover the Reih's Annuity would entitle Symetra to counter-sue for a mutual debt owed directly to Symetra by 3B. *See Id.* Put another way, Symetra must be able to “execute” on a judgment against 3B to assert the right of set-off here. *See Reichlin v. First Nat'l Bank*, 184 Wn. 304, 314 (1935). No such judgment binds 3B, which was not even a party to the King County litigation. 3B in turn owes no obligation to Symetra.

“To be the subject of set-off a judgment must be one for money, which may be enforced by execution.” *Id.* Symetra produced no evidence that it ever attempted to “enforce by execution” its King County judgment against anyone other than Liquidating Marketing, let alone 3B. All of the evidence in the record shows that Symetra properly sought – albeit with a

minimum of effort – to execute on Liquidating Marketing’s assets in Texas. (CP 121-25)

Yet the Trial Court excused Symetra from following the mandatory procedure whereby a Washington judgment creditor must go to the forum state (Texas) of an out-of-state judgment debtor (3B) to collect. *Cf. TCAP Corp.*, 163 Wn.2d at 650-52. Allowing Symetra to collect in-state violates the Full Faith and Credit Clause. The Court should vacate the order below because a mutuality gap precludes any set-off as reinforced by the Full Faith and Credit Clause.

E. THE TRIAL COURT MERGED TWO TEXAS LIMITED PARTNERSHIPS INTO ONE IN VIOLATION OF THE TEXAS LIMITED PARTNERSHIP ACT.

The set-off deprives 3B of its vested property rights in derogation of Texas law – a defense 3B could have raised if the Trial Court had not rushed to judgment in a summary proceeding. The May 12, 2005 Transfer Order requires Symetra “unconditionally” to make the \$60,000 payment to 3B **in Texas** as the “irrevocable beneficiary” of the Reih’s Annuity. These words carry precise legal meanings Symetra cannot alter.

“Unconditional” means “not limited or affected by any condition,” while “irrevocable” means “that which cannot be revoked or recalled.” BLACK’S LAW DICTIONARY 830, 1524 (6th ed. 1990). The unconditional right to payment irrevocably belongs to 3B as a separate asset. 3B’s asset

is not intermingled with anything that may belong to Liquidating Marketing (or any other entity). Yet the Trial Court summarily found that 3B and Liquidating Marketing “are one in the same,” citing the SSPA “statutes,” the “transfer agreement,” and other unspecified “information.” (VRP at 20)

The Trial Court misapprehends the pervasive nature and strength of the Texas connections that anchor the Reihls transaction in Texas. The situs of payment to 3B lies in Texas. (CP 515-42) On the flip side, Texas-based 3B issued its check to Mr. Reihls to pay him in full for the transfer of the Annuity proceeds, which are due in September 2012. (*Id.*)

The transfer agreement originated in Texas as did the business transaction involving Mr. Reihls. 3B operates as a Texas limited partnership that purposefully structures its activities to ground them in Texas. (CP 78-83) **Symetra agreed to make payment to 3B in Houston, Texas.** (CP 420) To anchor the Reihls transaction in Texas in turn implicates Texas limited partnership laws.

The Trial Court erred by “piercing the corporate veil” of two Texas limited partnerships that maintain their own separate legal identity. In Texas, 3B can never act as the alter ego of Liquidating Marketing or *vice versa*. When it comes to a limited partnership’s liability, Texas law rejects the theories of alter ego or piercing the corporate veil. *Asshauer v. Wells*

Fargo Foothill, 263 S.W.3d 468, 474 (Tex. App. – Dallas 2008, pet. denied). Neither doctrine applies to Texas limited partnerships. *Id.*

The Texas Legislature created limited partnerships by statute and intentionally altered the liability scheme for them. *Id.* Instead, the Texas Revised Limited Partnership Act holds only the general partner liable for a limited partnership's debts and other obligations. *Id.*; see TEX. BUS. ORGS. CODE ANN. §§ 153.102-153.103 (Vernon 2007). No veil exists for Symetra to pierce. *Asshauer*, 263 S.W.3d at 474. Nor can 3B be made to answer for Liquidating Marketing's debts. The Texas Act does away with the fiction of alter ego.

Absent its alter ego or veil piercing theories, Symetra loses on the merits. *See Id.* The Texas Revised Limited Partnership Act carves out no exceptions for Symetra. *See Id.* The general partner alone bears all responsibility for any judgment debt owed by Liquidating Marketing to Symetra. *See* TEX. BUS. ORGS. CODE ANN. §§ 153.102-153.103 (Vernon 2007). Texas law refuses to hold a limited partner liable on an alter ego theory or one limited partnership liable for another limited partnership's debts. **Such liability always falls at the feet of the general partner by statute.** *See Asshauer*, 263 S.W.3d at 474.

The undisputed evidence *adduced by Symetra* undercuts its alter ego claim because the Texas Secretary of State's records confirm that

Rapid Management Corp., not 3B, serves as the general partner for Liquidating Marketing. (CP 421-42) Thus, Symetra improperly enforced a judgment against a Texas limited partnership (Liquidating Marketing) by holding an entity other than its general partner liable (3B instead of Rapid Management Corp.).

The Trial Court misapplied the law by allowing Symetra to accomplish in Washington what it could never do in Texas – pierce the corporate veil against not one, but two Texas limited partnerships. To hold one Texas limited partnership liable for the debt of another means the Trial Court abused its discretion.

This legal principle, which is embedded in Texas limited partnership law, strikes at the very heart of Symetra's requested remedy. 3B disputed the alter ego theory below, mostly by citing Washington case law rather than Texas law. (CP 496-510) Be that as it may, Washington law entitles 3B to raise the settled Texas rule on appeal because such a defense altogether defeats Symetra's right to maintain its claim for set-off. *See Jones v. Stebbins*, 122 Wn.2d 471, 479 (1984); *see also* RAP 2.5(a). The Court should, in the interest of judicial economy, reverse the set-off and render judgment that Symetra take nothing.

In the alternative, the Court should give the Trial Court the first opportunity to consider Texas law that forecloses Symetra's set-off theory.

Texas law repudiates the doctrines of alter ego and veil-piercing as the exclusive grounds for creating mutual demands with 3B. The Trial Court should resolve this dispositive issue in the first instance. To this end, the Court should remand to give the Trial Court adequate time to address the merits of such a decisive legal issue after Symetra properly pleads a case against 3B – should it elect to do so.

F. SYMETRA VIOLATED THE FULL FAITH AND CREDIT CLAUSE BY ENFORCING IN WASHINGTON A JUDGMENT AGAINST A TEXAS RESIDENT.

The Full Faith and Credit Clause requires the Court to honor Texas law because Symetra is trying to accomplish, in its home state of Washington, what Texas law forbids: to collect a judgment from a Texas limited partnership using veil-piercing concepts foreclosed by the Texas Revised Limited Partnership Act. *See* U.S. CONST. Art. IV, § 1. To enforce its judgment against Liquidating Marketing, Symetra must go to Texas and follow its collections laws that bind judgment creditors. *See Baker v. GMC*, 522 U.S. 222, 235 (1998); RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 99, 100 cmt. b (1988). No exceptions exist. Thus, Texas law controls the availability of any enforcement remedy as restricted by the state statutes governing limited partnerships and exempt assets.

Symetra must, therefore, enforce its judgment against Liquidating Marketing, and it must do so in Texas. “To give it the force of a judgment in another state, it must be made a judgment there; and can only be executed in the latter as its laws may permit. It must be conceded that the judgment of a state Court cannot be enforced out of the state by execution issued within it.” *M’Elmoyle v. Cohen*, 38 U.S. 312, 325 (1839). Symetra then abandoned its attempts to collect the King County judgment in Texas despite the constitutional imprimatur of the Full Faith and Credit Clause.

The Trial Court, on the other hand, violated the Full Faith and Credit Clause when it “issued execution” within the State on a Washington judgment Symetra must enforce against Liquidating Marketing in Texas. *See Cole v. Cunningham*, 133 U.S. 107, 112 (1890). By seizing the Reih’s Annuity benefits that were unconditionally due 3B in Texas, the Trial Court crossed a Constitutional barrier. The Trial Court improperly expanded Symetra’s rights to enforce the King County judgment over those afforded by the *lex fori* of Texas. *See Id.* This unlawful enforcement action bypasses Texas limited partnership laws, which apply here to nullify Symetra’s attempt to collect a debt on alter ego grounds.

G. TEXAS LAW FULLY EXEMPTS THE ANNUITY BENEFITS SEIZED BY SYMETRA VIA THE EQUITABLE REMEDY OF SET-OFF.

Finally, Symetra got away with another end-run around Texas law by misusing the equitable remedy of set-off to seize the Reih's Annuity benefits. An unambiguous Texas statute – Section 1108.051 of the Texas Insurance Code – “fully exempts” annuity benefits, like those at issue in this matter, from the reach of judgment creditors like Symetra. *See* TEX. INS. CODE ANN. § 1108.051 (Vernon 2009). Section 1108.051 of the Texas Insurance Code bars Symetra from “seizing” the annuity benefits through “any legal or equitable process or by operation of law,” even to pay off the King County judgment. *See Id.* Symetra and the Trial Court must honor this exemption statute under the Full Faith and Credit Clause.

This Texas exemption statute comes as no surprise to Symetra, which is an admitted insurance carrier in Texas and regulated by the State. The State of Texas, by licensing Symetra as an annuity issuer, charges it with knowledge of all applicable laws in transactions that affect Texas residents. *See* TEX. INS. CODE ANN. § 21.42 (Vernon 2005). Texas law, therefore, becomes part and parcel of Symetra’s Court-ordered obligation to pay 3B, a Texas limited partnership, the Reih's Annuity in Houston, Texas. *See Hatch v. Turner*, 193 S.W.2d 668, 670 (Tex. 1946).

In its acknowledgment letter dated July 14, 2005, Symetra agreed it would only pay the annuity funds to 3B in Texas. (CP 420) The acknowledgment effectuates 3B's rights as the "irrevocable beneficiary" under the SSPA and Transfer Order. In paying the structured settlement annuitant (Mr. Reihhs) in full, 3B relied to its detriment on Symetra's agreement to comply with the SSPA and Transfer Order. (CP 515-42) This payment, in turn, vested 3B's rights as the "irrevocable beneficiary" in Texas and under Texas law.

Symetra knew from the very beginning that 3B, a Texas limited partnership, would receive the Reihhs Annuity proceeds. Such a payment to a Texas resident implicates Texas law. *See* TEX. INS. CODE ANN. § 21.42 (Vernon 2005). The Set-Off Order authorizing Symetra to take the exempt annuity proceeds away from 3B violates not only Texas Insurance Code Section 1108.051, but also Texas public policy, which calls for a liberal construction of and the upholding of the State's exemption laws. *See Hickman v. Hickman*, 234 S.W.2d 410, 413-14 (Tex. 1950).

Thus, Symetra, which specializes in issuing annuities, sought to avoid the impact of Section 1108.051 of the Texas Insurance Code. *See* TEX. INS. CODE ANN. § 1108.051 (Vernon 2009). Section 1108.051 places the Reihhs Annuity benefits off-limits to any collection attempt pursued by Symetra, whether for set-off, attachment, execution, or other

seizure. *Id.* The expansive exemption inures to 3B's benefit as the designated and irrevocable beneficiary of the Reih's Annuity proceeds per the Transfer Order. *See Id.*; *In re Alexander*, 227 B.R. 658, 660-61 (Bankr. N.D. Tex. 1998); *accord Canfield v. Orso (In re Orso)*, 283 F.3d 686, 692-95 (5th Cir. 2002) (en banc). Section 1108.051 inescapably binds Symetra as a Texas admitted insurance carrier that is paying an annuity to a Texas resident, 3B. Moreover, the exemption statute would equally apply even if Symetra had to pay Liquidating Marketing because it too is a Texas resident.

The Texas Legislature has enacted strict exemption laws that shelter the assets of Texas judgment debtors from collection attempts. The State's public policy demands that Courts liberally construe those exemption laws, which are far more expansive than the protections afforded by Washington's scheme. *See Hickman*, 234 S.W.2d at 413-14. Rather than restrict a Texas exemption's meaning and effect, the Court should expand its reach. *Id.*

Given this strong public policy, Texas law states an overpowering case for applying Texas' exemption under the Full Faith and Credit Clause. After all, the Full Faith and Credit Clause mandates that Symetra must comply with Texas law in seeking to enforce and satisfy its Washington judgment. This remains true even where application of the

Texas exemption would eliminate Symetra's right to recover. *See Caulley v. Caulley*, 806 S.W.2d 795, 796-9 (Tex. 1991) (applying Texas exemption laws to protect a judgment debtor's wages from execution seeking to enforce a foreign judgment).

3B intervened below to defend itself against the set-off proceedings, despite Symetra's failure to serve 3B with process or otherwise give 3B meaningful notice and an opportunity to be fully heard in a far-off forum. In abbreviated proceedings that lasted but a month, 3B did not raise the bar of the Texas exemption statute that safeguards its rights in the annuity. 3B asks the Court to consider this dispositive issue because, had Symetra sought the identical relief from a Texas court where 3B resides, the Texas statute would control. Moreover, this issue of Texas based exemptions is exactly the type of issue that a full and complete hearing would have raised, vetted and resolved.

The Court should reverse and render judgment that Symetra take nothing on its purported right of set-off. In the alternative, the Court should remand the case to the Trial Court so it can consider the effect of the Texas exemption statute. A remand affords the parties the opportunity to develop and present this legal issue to the Trial Court, once proper pleadings are on file naming 3B as a party.

VI. ATTORNEY'S FEES ON APPEAL

Pursuant to RAP 18.1(a), reasonable attorneys' fees may be recovered on appeal where provided for by the underlying law. In Washington, attorneys' fees are recoverable if authorized by a statute, contract, or by a recognized basis in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50 (1986). Symetra sought and utilized the Trial Court's equity jurisdiction to deny 3B basic due process protections and to strip 3B of vested property interests. Symetra's misuse of equity should be remedied by the Court of Appeals, and 3B should be entitled to recover its attorneys' fees in order to be made whole.

VII. CONCLUSION

In the Trial Court, Symetra succeeded in obtaining extraordinary relief on an unnecessarily foreshortened time table. That rush to judgment resulted in a Set-Off Order that is inconsistent with due process and is inconsistent with mandatory Texas exemption laws. Had 3B received notice from the outset that Symetra intended to use an alter ego theory to seek its offset, 3B could have defeated any recovery with substantive defenses available under Texas law. 3B was prejudiced in this regard. 3B, therefore, respectfully asks the Court of Appeals to reverse the Trial Court's Order. At a bare minimum, the Court should reverse and remand this matter for a full trial on its merits.

DATED, this 19th day of July, 2011.

WITHERSPOON· KELLEY, P.S.



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CERTIFICATE OF SERVICE

On the July 19, 2011, I caused to be served a true and correct copy of the within document described as APPELLANT RSL-3B-IL, LTD.'S ERRATA AND CORRECTED BRIEF to be served on all interested parties to this action as follows:

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JANET L. FERRELL