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Nos. 56879-5-I, 58825-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

ROOSEVELT, LLC, and STEINVALL CONSTRUCTION, INC.,
Third-Party Plaintiff and Third-Party Defendant/Appellants,

v.

GRATEFUL SIDING, INC., et al.
Third-Party Defendant/Respondents.

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2/5/07

COLONIAL DEVELOPMENT, LLC,
Defendant/Appellant,

v.

EMILY LANE TOWNHOMES CONDOMINIUM OWNERS' ASS'N.,
Plaintiff/Respondent/Cross-Appellant.

CHADWICK FARMS OWNERS ASS'N,
Plaintiff/Appellant,

v.

FHC, LLC,
Defendant/Third-Party Plaintiff/Respondent/Cross-Appellant,

v.

AMERICA 1ST ROOFING & BUILDERS, INC., et al.,
Third-Party Defendants/Cross-Respondents.

BRIEF OF AMICUS CURIAE WASHINGTON STATE
TRIAL LAWYERS ASSOCIATION FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which now operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress. WSTLA Foundation submits this amicus curiae brief at the request of the Court. See Letter of Commissioner William H. Ellis, November 22, 2006.

II. BACKGROUND

These cases involve, *inter alia*, interpretation and application of the Limited Liability Company Act, Ch. 25.15 RCW. Effective June 7, 2006, the Washington State Legislature enacted SB 6531 to provide a three-year survival period for claims against limited liability companies (hereafter LLCs). See Laws of 2006, ch. 325 §1 (codified as RCW 25.15.303). This statute provides:

The dissolution of a limited liability company does not take away or impair any remedy available against that limited liability company, its managers, or its members for any right or claim existing, or any liability incurred at any time, whether prior to or after dissolution, unless an action or other proceeding thereon is not commenced within three years after the effective date of dissolution. Such an action or proceeding against the limited liability company may be defended by the limited liability company in its own name.

RCW 25.15.303.

This provision was enacted at the same time as a similar amendment to the Business Corporations Act, Ch. 23B.14 RCW, SSB 6596, which provides a maximum three-year survival period for claims against corporations. See Laws of 2006, ch. 52 §17 (codified as RCW 23B.14.340; eff. June 7, 2006).¹ Legislative history relating to both survival statutes notes that they were passed in order to address the result in this Court's opinion in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 126 Wn.App. 285, 295-96, 108 P.3d 818, *review granted*, 155 Wn.2d 1024 (2005), in which the Court held that, in the absence of a survival statute, claims against a corporation arising after the dissolution of the corporation abate. See House Bill Report, SB 6531, at 3; House Bill Report, SSB 6596, at 7.

While these cases were pending, and after oral argument in Roosevelt LLC, et al. v. Grateful Siding, Inc., et al., the Supreme Court issued its decision in Ballard Square, affirming dismissal of the plaintiffs' claims, but on different grounds. See Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 158 Wn.2d 603, 146 P.3d 914 (2006). In particular, the Supreme Court held that claims arising after dissolution of a

¹ RCW 23B.14.340 provides a two-year survival period for claims against corporations dissolved prior to June 7, 2006, and a three-year period for claims against corporations dissolved on or after this date. The statute is reproduced in the Appendix for the convenience of the Court.

In the interest of avoiding duplication and burdening the Court with a lengthy Appendix, WSTLA Foundation has not reproduced ch. 25.15 RCW, though various provisions are cited in this brief, nor the legislative history to current RCW 25.15.303, which is appended to several of the parties' briefs. See RAP 10.4(c); RAP 10.3(d). WSTLA Foundation will supplement the Appendix with these materials should the Court request.

corporation did not abate, but were not addressed in former RCW 23B.14.340 and were thus subject to the otherwise applicable statute of limitations. Id., 158 Wn.2d at 614-15. However, it also held that the 2006 amendment to RCW 23B.15.340 applied retroactively to bar the claims, as they were brought more than two years after dissolution. Id. at 616-19.

By letter of Commissioner Ellis, dated November 22, 2006, the Court requested amicus curiae briefing from several organizations, including WSTLA [Foundation]. The Court subsequently allowed until February 1, 2007 for the filing of such amicus curiae briefs. See notation ruling of Commissioner William H. Ellis, December 14, 2006.

III. QUESTIONS PRESENTED

Per Commissioner Ellis's letter of November 22, 2006, the Court has asked for amicus briefs addressing the following issues:

1. The applicability, if any, of Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., [158 Wn.2d 603, 146 P.3d 914 (2006),] to limited liability companies;
2. What remedies are available after dissolution under RCW 25.15.303 and whether the section applies only to actions against a limited liability company, rather than actions by a limited liability company;
3. Whether a certificate of cancellation means something more than a dissolution, and, in particular, the effect of the following language in RCW 25.15.295(2):
Upon dissolution of a limited liability company and until the filing of a certificate of cancellation as provided in RCW 25.15.080, the persons winding up the limited liability company's affairs may, in the name of, and for and on behalf of, the limited liability company, prosecute and defend suits, whether civil, criminal, or administrative, gradually settle and close the limited liability company's business, dispose of and convey the limited liability company's property, discharge or

make reasonable provision for the limited liability company's liabilities, and distribute to the members any remaining assets of the limited liability company. (Emphasis added).

4. What is the retroactive effect, if any, of the 2006 amendments to RCW 25.15.303, and what the amendments mean in the context of a certificate of cancellation;
5. Whether the common law has any application to limited liability companies, and, if so, how the common law applies.

IV. SUMMARY OF ARGUMENT

The Court's resolution of the questions presented should be guided by the text of relevant provisions in the Limited Liability Company Act, ch. 25.15 RCW, and by the Supreme Court's analysis of similar provisions in the Business Corporations Act, ch. 23B.14 RCW, in Ballard Square, supra.

Ballard Square is applicable and supports retroactive application of RCW 25.15.303.

Ballard Square is applicable insofar as it concerns a survival provision analogous to RCW 25.15.303 in purpose and effect. It is significant that both survival provisions were enacted by the Legislature in tandem, with the intent, in part, of addressing the result in this Court's decision in Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 126 Wn. App. 285, 108 P.3d 818, *review granted*, 155 Wn.2d 1024 (2005).

Just as the Supreme Court determined that the survival provision regarding corporations in RCW 23B.14.340 applies retroactively and does not impact vested rights, so too should RCW 25.15.303 generally be given

retroactive effect. The absence of express language indicating retroactivity is not dispositive, because the statute's remedial (and possibly curative) purpose supports retroactive application. Though apparently not implicated in these cases, one limitation on this is with respect to accrued causes of action, in situations in which retroactive application would result in denying a remedy to a claimant. The "no vested rights" analysis in Ballard Square is not applicable to LLCs in such situations because, unlike corporations, LLCs share characteristics of common law partnerships, and it cannot be said categorically that claims against the members of a LLC would abate at common law, in the absence of a survival statute.

RCW 25.15.303 preserves remedies against a dissolved LLC, without regard to the issuance of a "certificate of cancellation."

RCW 25.15.303 provides a three-year period for bringing claims against a dissolved LLC, thus preserving remedies for claims against a LLC arising both before and after dissolution. By its plain language, the survival period in RCW 25.15.303 applies only to claims *against* a dissolved LLC, which the LLC may *defend* in its own name. It does not preserve a LLC's right to pursue claims post-dissolution.

The survival period in RCW 25.15.303 applies to a dissolved LLC, without regard to whether, or when, a "certificate of cancellation" is issued pursuant to RCW 25.15.080. The winding up period identified in RCW 25.15.295 should not be read as limiting the duration of the survival period, based upon when a LLC is cancelled. Such a reading would render RCW 25.15.303 inoperative, insofar as it would make survival of

claims turn, not upon the express survival period, but upon the actions of the LLC, allowing it to avoid civil liability simply by filing a certificate of cancellation. This would be contrary to the recognized purpose of RCW 25.15.303 to remove an incentive for LLCs to act in bad faith, and to preserve remedies available to those injured by the acts of LLCs.

V. ARGUMENT

A. **The Supreme Court's Analysis In *Ballard Square* Is Applicable To Resolution Of Key Issues In These Cases To The Extent The Survival Statutes In The Business Corporations Act And The LLC Act Are Similar In Purpose And Effect (In response to Questions 1 & 5).**

The Court's analysis of key issues in these cases, including the proper interpretation of RCW 25.15.303 and its retroactive application, should be guided by the Supreme Court's analysis in Ballard Square. The statute at issue there, RCW 23B.14.340 is closely analogous to RCW 25.15.303 in both purpose and effect. Indeed, it has been recognized that the statutes were enacted in tandem; they were sponsored by two of the same legislators, passed the Senate on the same day, were signed into law on the same day, and became effective on the same day. See Emily Lane Amicus Br. (in No. 56879-5-1) at 11; see also House Bill Report, SB 6531, at 3 (noting similar amendment to Business Corporations Act in SSB 6596).

SSB 6596 involved comprehensive changes to the Business Corporations Act, including the amendment to the survival provision in RCW 23B.14.340. SB 6531 involved a single change to the LLC Act, and the House Bill Report states that a comprehensive review of the LLC act

by the Washington State Bar Association is in progress. See id. In conjunction with SSB 6596, SB 6531 was recognized as a “step in the right direction” in response to this Court’s decision in Ballard Square. See id.; see also Senate Bill Report, SB 6531, at 1; House Bill Report, SSB 6596, at 7 (noting testimony in support of SSB 6596 addressed decisions including “Ballard Square last year, which was very well reasoned but reached a nonsensical result: if you dissolve a corporation, a claim arising after dissolution has nowhere to go”);²

Given the affinity between the two provisions, the Supreme Court’s analysis of RCW 23B.14.340 should inform this Court’s analysis of RCW 25.15.303. In particular, like RCW 23B.14.340, RCW 25.15.303 is a “survival” statute, insofar as it preserves remedies against a LLC for a definite period after dissolution. See Ballard Square, 158 Wn.2d at 609; see also Ballard Square, 126 Wn.App. at 289 (describing survival statutes in context of Business Corporations Act, and noting that all states have adopted a corporate survival statute). A survival statute is to be distinguished from a statute delineating the authority of the directors of a corporation or the managers of a LLC to “wind up” its affairs. Id.; compare RCW 25.15.303 with RCW 25.15.295. In particular, a survival statute speaks specifically to claims involving a dissolved corporation or LLC, and enables it to sue or be sued “independent of its winding up activities.” Ballard Square, 126 Wn.App. at 289 (footnote omitted); see

² The result was “nonsensical” because of the shortcomings in the existing statute, a problem this Court encouraged the Legislature to resolve. See Ballard Square, 126 Wn.App. at 296.

also Ballard Square, 158 Wn.2d at 609 (noting survival statute exists “apart from the winding up process”). The two types of statutes typically co-exist. See id. Accordingly, they should be read in harmony with each other, in a manner that respects the purpose and effect of each. See generally State v. Chapman, 140 Wn.2d 436, 448, 998 P.2d 282 (noting related statutes must be read *in pari materia*), *cert. denied*, 531 U.S. 984 (2000).

The distinction between survival provisions and winding up provisions recognized in Ballard Square is confirmed by the legislative history to RCW 25.15.303. The Legislature had in mind statutory provisions pertaining to the winding up of a dissolved LLC at the time it enacted RCW 25.15.303, to specifically address the ability of individuals to bring claims against the LLC within three years of dissolution. The Senate Bill Report notes the winding up provision (in RCW 25.15.310(2)) requiring a dissolved LLC to pay or make provision to pay all claims and obligations known to it. See Senate Bill Report, SB 6531, at 1. The House Bill Report separately addresses winding up issues under the heading “Certificate of Cancellation,” and survival of claims under the heading “Preservation of Remedies.” See House Bill Report, SB 6531, at 2. Under the latter heading, the House Bill Report notes the “implicit recognition of the preservation of at least an already filed claim during the wind up period following dissolution” (in RCW 25.15.295(2)). Id. Significantly, this report recognizes the absence of a “provision regarding

the preservation of claims following cancellation of the certificate of formation,” in contrast to the survival provision in the Business Corporations Act, and identifies the parallel amendments to both the LLC Act and the Business Corporations Act providing for a three-year survival period applicable to both pre- and post-dissolution claims. Id. at 3. The clear import of the discussion in the House Bill Report is that the purpose of RCW 25.15.303 is to address the survival of claims issue, independent of the wind up provisions.

The text of RCW 25.15.303 reflects this purpose. Similar to RCW 23B.14.340, it contains its own provision allowing a dissolved LLC to defend an action that survives under the section in its own name, without the need to incorporate wind up provisions defining the actions that managers or members of a dissolved LLC can take in the name of the LLC. This Court should construe RCW 25.15.303 in accord with the analysis in Ballard Square, to give effect to its language and purpose.³

One caveat in adopting the Ballard Square analysis should be noted. Ballard Square is not a perfect fit, because corporations are wholly creatures of statute, with their rights and liabilities governed by ch. 23B.14 RCW and not the common law. See Ballard Square, 158 Wn.2d at 610 (noting “the statutes in the Washington Business Corporations Act have replaced the common law rule in its entirety”). In contrast, LLCs are a relatively new construct, the unique nature of which partakes of both

³ The additional significance of the “certificate of cancellation” in the LLC Act is addressed infra, Section D

corporations and general partnerships. Compare RCW 25.15.005 (LLC definitions) with RCW 25.05.005(6) (definition of partnership); see also House Bill Report, SB 6531, at 1-2. Notably, RCW 25.15.800(1) states that the rule of strict construction applicable to statutes in derogation of the common law does not apply to the LLC Act, suggesting relevant common law may be considered in conjunction with the act.

Emily Lane Townhomes Condominium Owners' Association urges the Court to question the premise that, absent the survival provision in RCW 25.15.303, claims against a LLC would abate. See Emily Lane Amicus Br. (in No. 56879-5-1) at 7-9; Emily Lane Br. at 26-29.⁴ WSTLA Foundation concurs. The extent to which there is any relevant common law analogue in support of claims against LLC members following dissolution (including cancellation) of a LLC is an open question. LLCs have attributes of both corporations and partnerships. At common law, claims against partnership members could be asserted, either jointly or jointly and severally. See Warren v. Rickles, 129 Wash. 443, 447-48, 225 Pac. 422 (1924). Thus, the analysis with respect to any vested rights of a claimant against a dissolved LLC may be different from the analysis of the association's claims in Ballard Square, which was premised on the common law rule that, absent a specific statute providing otherwise, claims against a corporation abated upon its dissolution. See Ballard Square, 158 Wn.2d at 610-12; see also RCW 23B.14.050(2)(e),(f)

⁴ Emily Lane is both a party in Colonial Dev., LLC v. Emily Lane Townhomes Condo. Owners Ass'n, No. 58825-7-1, and amicus curiae in Roosevelt LLC & Steinvall Constr. Co. v. Grateful Siding, Inc., et al., No. 56879-5-1.

(removing common law abatement rule). With this caveat, Ballard Square nonetheless provides valuable guidance in interpreting RCW 25.15.303 and in understanding its retroactive application, discussed infra, Section B.

B. RCW 25.15.303 Applies Retroactively, Where Such Application Does Not Impair A Vested Right By Denying A Remedy For An Already Accrued Common Law or Contractual Claim (In response to Question 4, part i).

The Court's Question 4 has two parts, the first of which is addressed in this section. The effect of RCW 25.15.303 in the context of a "certificate of cancellation," part ii of the Court's question, is addressed infra, Section D.

RCW 25.15.303 should be applied retroactively to preserve claims against a LLC that are brought within three years from the effective date of dissolution. Though statutes are generally presumed to operate prospectively, a provision will be given retroactive effect if the Legislature so intended, *or* if the provision is clearly curative *or* remedial, provided that retroactive application does not otherwise impair any vested or constitutional right. See 1000 Virginia Ltd. P'ship. v. Vertecs Corp., 158 Wn.2d 566, 584, 146 P.3d 423 (2006); Ballard Square, 158 Wn.2d at 617-18. In Ballard Square, the Supreme Court held that RCW 23B.14.340 applied retroactively because the Legislature plainly intended retroactive application, and this did not impair any vested rights. See 158 Wn.2d at 617-19. The Court referenced but did not address the alternate bases for retroactivity, where a statute is curative or remedial in nature, underscoring that only one basis for retroactive application of a statute

need be present in a given case. See id. at 617; see also 1000 Virginia, 158 Wn.2d at 584 (stating criteria for retroactivity in the disjunctive: legislative intent, curative or remedial).

As with RCW 23B.14.340, retroactive application of RCW 25.15.303 is appropriate, but for a different reason. Under the test articulated in Ballard Square, this statute is remedial in nature: “A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right.” 158 Wn.2d at 617 (quoting 1000 Virginia at 586 (in turn quoting Miebach v. Colasurdo, 102 Wn.2d 170, 181, 685 P.2d 1074 (1984)). A survival statute is remedial, in that it governs the timeframe for bringing claims, but does not otherwise affect the parties’ substantive rights or obligations. See id. at 609-10. More basically, it is remedial because it preserves remedies. See id.; see also Emily Lane Amicus Br. at 22-27.⁵

Given the remedial nature of RCW 25.15.303, it is not significant that the statute contains no express language indicating the Legislature’s intent that it be applied retroactively. The Supreme Court in Ballard Square found an expression of such intent in RCW 23B.14.340, because that statute contains phase-in language preserving the former two-year

⁵ Alternatively, RCW 25.15.303 may also be viewed as curative, insofar as it makes explicit the preservation of claims upon dissolution of a LLC, which the Legislature recognized was at least implicitly indicated in other provisions of the LLC Act. See House Bill Report, SB 6531, at 2. If RCW 25.15.303 is regarded as correcting an ambiguity or gap in the act, particularly when the Legislature noted dissatisfaction with the result that would otherwise obtain, then it is retroactive on this basis. See id. at 2-3; Senate Bill Report, SB 6531, at 1; see also Emily Lane Amicus Br. at 22-27.

survival period with respect to corporations dissolved prior to its effective date, June 7, 2006, while applying a new three-year period to corporations dissolved on or after that date. See 158 Wn.2d at 616-17. This statutory language supported retroactive application of RCW 23B.14.340, but the Court certainly did not suggest that the statute would not be retroactive in the absence of such language.

Accordingly, RCW 25.15.303 should apply retroactively. As in Ballard Square, the retroactive application of RCW 25.15.303 does not impair any vested or constitutional right in these cases. Generally, no party has a vested right in any rule of abatement of claims or any provision establishing a particular survival period. See Ballard Square at 618-19; 1000 Virginia at 587 & n.10. In contrast, an injured party does have a vested right in the preservation of an accrued cause of action that is grounded in the common law or contract. See 1000 Virginia at 587; Ballard Square at 618-19. The Supreme Court's analysis of the association's claims against the dissolved corporation in Ballard Square rested on the fact that they were only authorized by statute, as all claims would have abated under the common law absent the provisions of the Business Corporations Act. See Ballard Square at 618-19. As noted in Section A, this analysis may not apply in the context of a dissolved LLC. At any rate, in these cases it appears that the claims asserted against the

LLCs are preserved under a retroactive application of RCW 25.15.303, and no vested rights are at stake.⁶

C. RCW 25.15.303 Provides For The Survival Of Claims Against A Dissolved LLC, But Does Not Expand The Right Of A LLC To Pursue Claims Post-Dissolution (In response to Question 2).

While a survival statute may address claims both by and against a person or entity, by its plain language RCW 25.15.303 applies only to claims “against” a dissolved LLC, its managers or members. It further provides that such claims may be “*defended* by the limited liability company in its own name.” RCW 25.15.303 (emphasis added). In this regard, section 303 parallels the Business Corporations Act survival statute. See RCW 23B.14.340 (providing that corporate dissolution “shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders...,” which may be “defended by the corporation in its corporate name”). As noted previously, the Legislature passed RCW 25.15.303 at the same time it amended RCW 23B.14.340, indicating a purpose to preserve for three years from dissolution remedies

⁶ Emily Lane notes in support of retroactive application of RCW 25.15.303 that LLCs have no vested right in existing limitations on recovery against them, in part because “[n]o one may rely on a mere common law rule, but must expect that it might be changed by the Legislature.” Emily Lane Amicus Br. at 21. This statement is too broad. WSTLA Foundation submits that certain common law substantive remedies existing at the time the state constitution was adopted cannot be altered, absent provision for a substitute remedy or based on an overpowering public necessity. See *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 651 & n.5, 771 P.2d 711, 780 P.2d 260 (1989) (explaining substitute remedy justification in workers’ compensation scheme); see also *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980) (abolishing alienation of affections claim based on public policy); but see *Condominium Ass’n v. Apartment Sales Corp.*, 101 Wn.App. 923, 933-37, 6 P.3d 74 (2000) (discussing but not adopting a state constitution-based right to a remedy), *affirmed*, 144 Wn.2d 570, 581-82, 29 P.3d 1249 (2001) (same).

for individuals with claims against corporations or LLCs, whether arising before or after dissolution. See Senate Bill Report, SB 6531; House Bill Report, SB 6531; Final Bill Report, SB 6531. The legislative history makes no mention of any intended effect of RCW 25.15.303 on the ability of a LLC to prosecute, rather than defend against, a claim.

Other provisions in ch. 25.15 RCW address the limited right of a LLC to prosecute an action after dissolution. See RCW 25.15.295(2) (noting persons winding up dissolved LLC “may, in the name of, and for and on behalf of, the [LLC], prosecute and defend suits, whether civil, criminal, or administrative”); FHC Cross-Appellant Br. at 4 (stating “[t]he sole statute that permits post dissolution activities by a limited liability company is RCW 25.15.295(2)”; see also RCW 25.15.285(3) (providing administratively dissolved LLC “may not carry on any business except as necessary to wind up and liquidate its business affairs.”) Under these provisions, once the wind up period is completed, neither a dissolved LLC nor its managers or members may bring an action on its behalf.

The Court should give effect to the language and purpose of RCW 25.15.303 by holding that it preserves for three years from dissolution remedies for individuals with claims *against* a dissolved LLC, but has no effect on the ability of a dissolved LLC to prosecute an action.

D. Whether A Dissolved LLC Is Cancelled Has No Effect Upon Operation Of RCW 25.15.303, Because The Survival Period Dates From Dissolution Irrespective Of Cancellation (In response to Questions 3 & 4, part ii).

One argument raised in these cases is that the three-year survival period in RCW 25.15.303 does not apply once a dissolved LLC's certificate of formation is cancelled. See e.g. FHC Resp. Reply Br./Open. Stmt. at 11-13; FHC Cross-Appellant Reply Br. at 5-6; cf. Tile Tech. Roofing Co. Br. at 13 (arguing that no action by or against LLC is permitted after certificate of cancellation is filed).⁷ The argument appears to be that claims against a dissolved LLC abate upon "cancellation," as the LLC ceases to exist, and because RCW 25.15.303 speaks only to "dissolution," it does not preserve claims against a cancelled LLC. See e.g. FHC Cross-Appellant Reply Br. at 5-6. This argument misapprehends the significance of cancellation under the LLC Act, and should be rejected.

Cancellation of a LLC's certificate of formation is part of the procedure involved in finalizing the dissolution of a LLC. RCW 25.15.080 provides for the filing of a certificate of cancellation "upon the dissolution and the completion of winding up of a limited liability company" In some instances, a LLC may be administratively dissolved, and if it does not take timely steps toward reinstatement its

⁷ The Court's questions 3 & 4 refer to a "certificate of cancellation." Chapter 25.15 RCW uses this term. see e.g. RCW 25.15.080 & .295(2), and also speaks of cancellation of a certificate of formation. see e.g. RCW 25.15.290(4). WSTLA Foundation understands that the same concept is intended in either phrasing.

certificate of formation is cancelled by the Secretary of State. See RCW 25.15.290(4); see also RCW 25.15.270(6); RCW 25.15.280-.285.

While cancellation marks the end of a LLC as a separate legal entity under RCW 25.15.070(2)(c), this should not be viewed as having any significance in terms of abating claims against a LLC or its managers or members. Other provisions in ch. 25.15 RCW plainly anticipate that a LLC must respond to legal action even after dissolution procedures, including cancellation, are complete. Indeed, a LLC's registered agent, authorized to accept service on behalf of the LLC, remains in place. See RCW 25.15.285(4); cf. RCW 25.15.335(1) (providing "cancellation does not terminate the authority of the secretary of state to accept service of process on the foreign limited liability company with respect to causes of action arising out of the doing of business in this state.")

Perhaps the best evidence that cancellation does not result in abatement of claims against a LLC is found in the merger provisions of ch. 25.15 RCW. When a merger involving a LLC takes place, RCW 25.15.410(1)(d) provides that any pending action against a merged entity may be "continued as if the merger did not occur" This is true notwithstanding that the "separate existence of [a merged LLC] ceases," RCW 25.15.410(1)(a), and its certificate of formation is thereby cancelled. See RCW 25.15.080. Such provisions would be meaningless if cancellation resulted in the abatement of any pending claims.

RCW 25.15.303 directly addresses the survival of claims against a LLC. The three-year survival period dates from the effective date of dissolution -- irrespective of when a certificate of cancellation is issued. *In this regard it is significant that a cancelled LLC is necessarily also a dissolved LLC.* It is simply a dissolved LLC that has completed the process of dissolution, either by winding up the affairs of the LLC or by failing to apply for reinstatement during the specified period. See RCW 25.15.270, .290, .295. The use of the terms, “dissolution” and “cancellation” reflects that dissolution is not instantaneous, but involves a period of time during which the managers or members of a LLC retain limited authority to act in its name. Thus, RCW 25.15.295(2) speaks, not to any legal effect of a certificate of cancellation, but to the authority of “the persons winding up the limited liability company’s affairs.”

In contrast, RCW 25.15.303 does address the legal effect of dissolution with respect to claims against a LLC, *viz.* “[t]he dissolution of a limited liability company does not take away or impair any remedy... .” Even if it were appropriate to read RCW 25.15.295(2) as generally terminating the right of persons winding up a LLC to “prosecute or defend suits” in the name of the LLC upon the filing of a certificate of cancellation, this provision must give way to the more specific preservation of rights under RCW 25.15.303. The statute contains its own separate authorization for a dissolved LLC to defend against an action commenced within three years after the effective date of

dissolution. See RCW 25.15.303 (“such an action or proceeding against a limited liability company may be defended by the limited liability company in its own name”); see generally Estate of Black, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (noting more specific statute prevails over general statute).

Moreover, if the issuance of a certificate of cancellation defeats the survival of claims, then RCW 25.15.303 is meaningless. The clear purpose of the statute is to provide a definite three-year period for the survival of claims, and thus “remove[] an incentive for LLCs to act in bad faith.” Senate Bill Report, SB 6531, at 1. This definite period means nothing if it can be circumvented by a LLC that quickly files a certificate of cancellation. (For that matter, a LLC that takes no action would escape liability after two years, under the administrative cancellation provision in RCW 25.15.290(4). See also RCW 25.15.270(6) (providing for administrative dissolution)).

RCW 25.15.303 should be read in a manner that respects its purpose. It was passed in recognition that the “implicit” preservation of some claims during the wind up period under RCW 25.15.295(2) left a gap, and that, in the absence of section 303, “there is no provision regarding the preservation of claims following cancellation of the certificate of formation.” House Bill Report, SB 6531, at 2-3. The statute fills this recognized gap when it is read according to its plain terms -

as providing a three-year survival period dating from the date of a LLC's *dissolution*, without regard to the date of its cancellation.

VI. CONCLUSION

WSTLA Foundation respectfully requests that the Court consider the above analysis in answering the questions posed.

DATED this 1st day of February, 2007.


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On Behalf of WSTLA Foundation

APPENDIX

RCW 23B.14.340

The dissolution of a corporation either (1) by the filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006 or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name.

[2006 c 52 §17, eff. June 7, 2006; 1995 c 47 §5; 1990 c 178 §6; 1989 c 165 §167]