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STATE OF WASHINGTON

2001 SEP 25 P 2:53

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Court of Appeals No. 25947-1-III

**SUPREME COURT OF THE STATE OF WASHINGTON**

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WASHINGTON MOTORSPORTS LTD.,  
by and through Barry W. Davidson,  
in his capacity as Receiver and as Acting Managing General Partner,  
Plaintiff/Respondent,

v.

LARRY D. WYATT,  
Defendant/Petitioner, and

LEMASTER & DANIELS, P.L.L.C.,  
a Washington limited liability company, and JANE DOE WYATT,  
Defendants.

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WML'S RESPONSE TO WYATT'S  
MOTION FOR DISCRETIONARY REVIEW

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## **I. IDENTITY OF RESPONDENT**

Respondent is Washington Motorsports, Ltd. ("WML"), a Washington Limited Partnership, acting by and through Barry W. Davidson, in his capacity as its Court-appointed Receiver and Acting Managing General Partner (the "Receiver").

## **II. DECISION**

Petitioner Larry D. Wyatt ("Wyatt") has moved for discretionary review by this Court of the Order Denying Motion to Modify, entered by Judge John A. Schultheis, Acting Chief Judge, Division III Court of Appeals, No. 25947-1-III, on August 3, 2007. That Order is attached as Exhibit A to Wyatt's Motion for Discretionary Review to this Court.

## **III. ISSUES PRESENTED BY WYATT'S MOTION FOR DISCRETIONARY REVIEW**

The issues presented by Wyatt's Motion for Discretionary Review are as follows:

1. In light of the legislative intent of the new omnibus Receivership Statute to create a "comprehensive, streamlined, and cost-effective" Receivership case procedure (*see* notes to RCW 7.60.005) and the accompanying, specific statutory mandate that all cases brought by or against a Receiver are to be "adjunct" to the Main Receivership Case and referred to the same judge who is assigned to the Main Receivership Case,

was it obvious error for the Court of Appeals to follow the mandate of the new statute and uphold the Trial Court's denial of a motion for change of judge made by a defendant sued by the Receiver in such an "adjunct" case?

2. Where the new Receivership Statute (RCW 7.60.190(2)) mandates that all cases by or against a Receiver be referred to the judge assigned to the Main Receivership Case, was it obvious error for the Court of Appeals to uphold the Trial Court's decision to not transfer both the Adjunct Case and the long-pending, complex Main Receivership Case to another judge, where Wyatt's motion below did not request a change of judge in the Main Receivership Case, and the defendant (Spokane Raceway Park, Inc.), the creditors, and the hundreds of persons in interest in the Main Receivership Case had received no notice or opportunity to be heard on the issue?

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

The Main Receivership Case was initially commenced by certain of several hundred limited partners of WML against WML's then general partner, Spokane Raceway Park, Inc. ("SRP")<sup>1</sup> on October 30, 2003 under

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<sup>1</sup> SRP filed a Chapter 11 bankruptcy in August 2006. After a limited lift stay order was obtained by the WML Receiver in the SRP Bankruptcy Court, the Main Receivership Case proceeding resumed. SRP

Spokane County Cause No. 03-2-06856-4. Judge Austin has presided over the Main Receivership Case since its inception. *See* Finding of Fact ("FF") 1, Order Denying Motion for Change of Trial Judge (hereafter "Order"), attached as Exhibit B to Wyatt's Motion for Discretionary Review to the Court of Appeals, filed March 16, 2007.

On July 1, 2005, Barry W. Davidson was appointed as the General Receiver and Acting Managing General Partner of WML. *Id.* at FF 9.<sup>2</sup>

Wyatt is an employee of LeMaster & Daniels ("L&D"). L&D had been the accountant for WML since approximately 1980. *See* Complaint, attached as Exhibit A to Wyatt's Motion for Discretionary Review to the Court of Appeals, filed March 16, 2007.

Wyatt and L&D specially appeared in and actively participated in the Main Receivership Case since at least as early as February of 2004. They have filed objections and briefs, have been allowed to make oral arguments, and sought or opposed several of the numerous discretionary orders that have been made in that case.

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is participating in the Main Receivership Case through its Chapter 11 Bankruptcy Trustee, Attorney John D. Munding.

<sup>2</sup> The derivative plaintiffs' claims on behalf of WML against SRP have been taken over for direct prosecution by the WML Receiver on behalf of WML.

Specifically, on February 6, 2004, Wyatt and L&D, through their counsel, Lukins & Annis, P.S., filed a Special Notice of Appearance in the Main Receivership Case. *See* Order, FF 2.<sup>3</sup>

On December 23, 2004, Plaintiffs in the Main Receivership Case moved to compel the production of documents by L&D pursuant to a Subpoena Duces Tecum. *Id.* at FF 3.

On December 30, 2004, L&D's counsel filed a Declaration in Response to Motion to Compel in the Main Receivership Case. *Id.* at FF 4. On [April 22], 2005, Wyatt and L&D filed an Objection to Third Subpoena Duces Tecum for Records Deposition of L&D in the Main Receivership Case. *Id.* at FF 5.<sup>4</sup>

On May 5, 2005, a Second Motion to Compel was filed in the Main Receivership Case against L&D regarding additional documents and another Subpoena Duces Tecum served upon it in the Main Receivership Case. *Id.* at FF 6. On May 9, 2005, L&D filed a Response Brief and supporting Declaration from its counsel in the Main Receivership Case. *Id.* at FF 7.

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<sup>3</sup> In Judge Austin's Order, he took judicial notice of all the contents of the court file and the proceedings which occurred before him in the Main Receivership Case. *See* Order.

<sup>4</sup> The Finding of Fact contains a typo that was not objected to before entry. The Finding lists the date as May 4, 2006, but the correct date was April 22, 2006.

On May 10, 2005, L&D's counsel appeared in person and argued in opposition to Plaintiffs' Motion to Compel in the Main Receivership Case. *Id.* at FF 8. The court granted Plaintiffs' Second Motion to Compel. *Id.*

After Mr. Davidson was appointed as Receiver of WML, L&D and Wyatt did not withdraw their Special Notice of Appearance in the Main Receivership Case. *Id.* at FF 10. Neither sought a change of judge in the Main Receivership Case. Instead, L&D submitted a Proof of Claim against WML to the Receiver in the Main Receivership Case, dated September 9, 2005. The "Declaration of Larry Wyatt in Support of Proof of Claim by L&D," under the caption of the Main Receivership Case, was attached in support of the Proof of Claim. *Id.* at FF 11.

On December 28, 2005, L&D filed a response to the Receiver's Interim Report filed in the Main Receivership Case. *Id.* at FF 12.

On February 3, 2006, WML, through its Receiver, Mr. Davidson, filed this accounting malpractice case against Wyatt and L&D (Spokane County Superior Court Cause No. 06-2-00566-4) (hereafter the "Adjunct Case") as an adjunct case to the Main Receivership Case. *Id.* at FF 13. The caption properly reflected the cause numbers of both the Adjunct Case and the Main Receivership Case. *See* Complaint, attached as Exhibit A to Wyatt's Motion for Discretionary Review to the Court of

Appeals, filed March 16, 2007. The Adjunct Case was initially assigned to Judge Neal Q. Rielly, but was reassigned to Judge Robert D. Austin, pursuant to RCW 7.60.160, as a case adjunct to the Main Receivership Case. *Id.* at FF 14.

After the Adjunct Case was filed, L&D filed in the Main Receivership Case on February 17, 2006, a Memorandum in Opposition to Motion for Order Authorizing Employment of Reed & Giesa, P.S., and Esler, Stephens & Buckley as attorneys for the Receiver, and subsequently appeared and presented oral argument to Judge Austin in the Main Receivership Case in opposition to the employment of the Receiver's counsel. *Id.* at FF 15.

After the Adjunct Case was assigned to Judge Austin, Wyatt filed a Motion for Change of Judge pursuant to RCW 4.12.050 on May 4, 2006. *See Order*, at FF 16. Neither the motion nor its caption made any reference to the Main Receivership Case. *See Motion for Change of Judge* attached as Exhibit F to Wyatt's Motion for Discretionary Review to the Court of Appeals, filed March 16, 2007.

Wyatt's motion sought a change of judge only in the Adjunct Case—it **did not** request a change of judge in the Main Receivership Case. *Id.* Wyatt's motion was served **only** upon the Receiver and his counsel in the Adjunct Case and not upon the defendant (SRP) in the Main

Receivership Case or upon WML's creditors or the several hundred other persons in interest (the hundreds of WML's limited partners) in the Main Receivership Case. *Id.* Thus, none of those parties, creditors, or other persons in interest were given notice or opportunity to be heard on the issue of whether the judge presiding over the Main Receivership Case should be changed because of Wyatt's motion.

Although Judge Austin had made no discretionary rulings in the Adjunct Case at the time of Wyatt's Motion for Change of Judge, he had made numerous discretionary rulings in the Main Receivership Case after the Defendants had jointly filed a Special Notice of Appearance. *See* Order, at FF 17. Many of these Orders had been opposed in both oral and written argument by Wyatt.

The Receiver opposed the Motion for Change of Judge in this Adjunct Case, and a hearing was held. *Id.* at FF 18. On June 30, 2006, Judge Austin issued a Memorandum Opinion denying Wyatt's Motion for Change of Judge. Since then the court has made numerous other rulings in the Main Receivership Case concerning a wide variety of matters and disputes, has begun a series of hearings, and has entered rulings involving, among other things, the adjudication of the Receiver's objections to numerous claims of ownership of partnership units by certain parties in

furtherance of the discharge of the Receiver's court-ordered duty to create an accurate WML partnership register which SRP had failed to maintain.<sup>5</sup>

On February 9, 2007, Judge Austin entered the written Order Denying Motion for Change of Judge, which Order was the subject of Wyatt's Motion for Discretionary Review to the Court of Appeals and his Motion to Modify Commissioner's Ruling.<sup>6</sup> Wyatt filed a Notice of Discretionary Review only in the Adjunct Case. He did not file a Notice of Discretionary Review in the Main Receivership Case seeking review of any Order entered or not entered in that case.

On May 29, 2007, Commissioner Bromme denied Wyatt's Motion for Discretionary Review on the bases contained in his Ruling entered that same date. On or about June 24, 2007, Wyatt filed a Motion to Modify Commissioner's Ruling. On August 3, 2007, Court of Appeals Acting Chief Judge, John A. Schultheis, entered an Order Denying Motion to Modify Commissioner's Ruling. That Order is the subject of Wyatt's Motion for Discretionary Review to this Court.

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<sup>5</sup> The Main Receivership Case is extremely complex, and, to date, well over 850 docket entries have been made.

<sup>6</sup> As a matter of context, this Court should be made aware that Wyatt's Motion for Discretionary Review is one of six appeals to Division III of Judge Austin's interlocutory orders related to the WML Receivership proceedings. *See* Div. Three Nos. 24102-5-III, 24373-8-III, 25947-1-III, 26331-1-III, 26334-7-III, and an appeal for which a case number has not yet been assigned.

## V. ARGUMENT

Wyatt contends that the Court of Appeals' denial of his Motion to Modify Commissioner's Ruling was obvious error. Specifically, Wyatt argues that the judge assignment provisions of the new Receivership Statute, RCW 7.60.160(2), are not in conflict with the change-of-judge provisions of RCW 4.12.050. As such, Wyatt argues that it was obvious error for the Court to resolve the "conflict" between both statutes by giving precedence to the new Receivership Statute, even though the Trial Court's decision was in accord with black letter rules of statutory construction. Wyatt also argues that it was obvious error to not "harmonize" the two statutes by not only ordering a change of judge in the Adjunct Case but also by ordering a change of judge in the separate, long-pending, complex Main Receivership Case.

The Court of Appeals did not commit obvious error by denying Wyatt's Motion to Modify Commissioner's Ruling because, among other things: (1) the recently enacted Receivership Statute (RCW 7.60.160(2) (2004)) mandates that all cases by or against a receiver are to be adjunct to the main receivership case and referred to the same judge assigned to the main case, and this provision, in light of the express legislative intent of the new statute to create "compliance, streamlined, and cost-effective" receivership procedures, supersedes the conflicting provisions of RCW

4.12.050 (1941) providing for a right to a change of judge in cases generally; and (2) Wyatt's motion in the Trial Court did not ask for a change of the judge in the Main Receivership Case, it was not filed in the Main Receivership Case, and the parties, creditors, and other persons in interest in the Main Receivership Case were not provided notice or an opportunity to be heard on the issue.

**A. A Conflict Exists Between the Two Statutes, and That Conflict Was Correctly Resolved under Black Letter Principles of Statutory Construction.**

Enacted over 65 years ago (in 1941), RCW 4.12.050 provides:

Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge; PROVIDED, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, . . . AND PROVIDED FURTHER, That no party or attorney shall be permitted to make more than one such application in any action or proceeding under this section and RCW 4.12.040.

The new Receivership Statute (RCW 7.60, *et seq.*) was enacted only three years ago (in 2004). The stated legislative purpose of this new omnibus statute is found in the notes following RCW 7.60.005 which state: "The purpose of this statute is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in

which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein."

One of the new comprehensive, streamlined, cost-effective procedures of the Receivership Statute mandates that all suits by or against a Receiver be presided over by the same judge who is presiding over the Receivership case. Now, all suits by or against a Receiver are "adjunct" to the main case and are to be referred to the same judge assigned to the main case. Specifically, pursuant to RCW 7.60.160(2), any litigation by or against the Receiver is "adjunct to the receivership case . . . . [and] shall be referred to the judge, if any, assigned to the receivership case."

It is clear that the Legislature intended that all disputes involving a receiver or a receivership be presided over by the same judge without exception. This conclusion is further supported by reading the Receivership Act as a whole. Some of the more relevant provisions thereof are RCW 7.60.005(1), (3), (8), (9), (10), and (11), RCW 7.60.055, RCW 7.60.060, RCW 7.60.160(1) & (2), and RCW 7.60.190(1), (2), and (7), and WML respectfully refers this Court to those provisions.

First, it is elementary and long-established black letter law that the court's primary duty in construing a statute is to ascertain and give effect to the intent of the Legislature. *State v. Rhodes*, 58 Wn. App. 913, 919 (1990). Second, the Legislature does not enact superfluous statutes. *Smith*

*v. Whatcom County District Court*, 147 Wn.2d 98, 110 (2002). Third, statutes should be read as a whole. *Jones v. Sisters of Providence in Washington, Inc.*, 140 Wn.2d 112, 116 (2000). Fourth, a statute should be construed so as to make it purposeful and effective rather than futile and meaningless. *Steele ex rel. Gorton*, 85 Wn.2d 585, 590-91 (1975). Fifth, a later-adopted statute controls over an earlier-adopted statute if they are in conflict. *Wright v. Miller*, 93 Wn. App. 189, 198 (1998).

When the new Receivership Act is construed by these black letter rules, as the courts below did, it is clear that, contrary to Wyatt's argument, the comprehensive, streamlined, and cost-effective scheme of the Receivership Act is in direct conflict with the older, statutory scheme of RCW 4.12.050 that would otherwise give any number of plaintiffs or defendants in any number of adjunct cases the ability to change the judge, as a matter of right, in the adjunct cases, or in the main receivership case, or both.

To the extent statutes are in conflict, a specific statute controls over a general statute covering the same subject matter. *See State v. Cain*, 28 Wn. App. 462, 465 (1981). Further, courts should avoid construing a statute in a manner which results in unlikely, strange, or absurd consequences. *State v. Contreras*, 124 Wn.2d 741, 747 (1994).

If every defendant in every adjunct suit (potentially limitless) brought by a receiver (regardless of size, complexity, or number of separate adjunct suits or the number of separate defendants in such suits) could obtain a change of judge in the adjunct case by filing a motion under RCW 4.12.050 (and also thereby effect a change of judge in the main receivership case), the legislative purposes of the new omnibus Receivership Statute would be stood on their head. The specific "same judge" language of the Receivership Statute would be meaningless, and absurd results would obtain.

Further, complex receivership cases such as WML's can involve numerous parties, literally hundreds of persons in interest, creditors, owners, etc., and involve an essentially unlimited number of potential adjunct cases brought by or against the receiver. If each person who sues or is sued by the receiver in an adjunct case can affidavit the judge under RCW 4.12.050 notwithstanding the omnibus scheme of the new Act, then the same presiding judge and exclusive jurisdiction provisions of the new scheme would not be given effect and would be nullities. As a practical matter, there would not be enough judges in the entire state available to handle large receivership cases. Such would be the absurd, yet logical, result of accepting Wyatt's arguments. Such an absurd result would clearly not give effect to the comprehensive, streamlined, cost-effective

proceedings presided over by the same judge as intended by the Legislature.

The case of *LeMon v. Butler*, 112 Wn.2d 193 (1989) is instructive. The LeMons, husband and wife, argued that because they were each parties, each had independent rights to file affidavits of prejudice under RCW 4.12.050. 112 Wn.2d at 202. The court analyzed whether each co-plaintiff could file an affidavit of prejudice. Just like in this case, the court had to consider the language of the statute in light of the practical realities to discern the intent of the Legislature in such a circumstance. In *LeMon*, the court refused to read the statute as allowing all parties in a case the separate right to affidavit a judge (even though that is literally how the statute reads), finding that such an interpretation of the statute would mean "scores of judges could be disqualified in a single case. The Legislature would not have intended that result." *Id.* at 203 That is precisely the case at bar.

RCW 7.60.160 allows a receiver to sue or be sued by any number of parties in proceedings adjunct to a receivership case at any given time. If each party sued by or suing the receiver were allowed to file an affidavit of prejudice consistent with RCW 4.12.050, each would presumably be entitled to remove a judge from the receivership case. This would result in absurd consequences, meaning "scores of judges could be disqualified in a

single case." *See id.* Surely, just as in *LeMon*, this is not the result contemplated by the Legislature.

In the Trial Court's Memorandum Opinion, Judge Austin acknowledged the absurd result of the position advocated by Wyatt. *See* Memorandum Opinion, attached as Exhibit H to the Petitioner's Appendix to his Motion for Discretionary Review to this Court. Specifically, Judge Austin stated in relevant part:

This new [receivership case administration] process appears to recognize that receiverships can be very complex in legal theories and management and may involve many different parties. Affording, as a matter of right, a different judge for each potential claimant may exhaust judicial resources, cause inconsistent results, time delays and create chaos instead of efficient administration of justice as contemplated by the new statute.

....

.... Here, Lemaster and Daniels and Wyatt have filed a claim in the receivership. This court will have to rule on the merits of that claim. I may rule to grant the claim only to have an inconsistent result if another court ruled to deny the merits of the claim and grant the receiver judgment. This scenario points out the wisdom of 7.60.160. Another scenario might be this court[']s ruling and that of another court might be the same, but to reach that point both sides would need to present the same evidence twice. This is not judicial economy.

The Order similarly recognize the absurdity of the result of Wyatt's argument.

7. Under the circumstances of this case, granting a change of judge would lead to a waste of judicial resources and may lead to inconsistent results. For example, and without limitation, this Court will have to rule on the merits of the Proof of Claim that LeMaster & Daniels submitted against WML in the Main Receivership Case. The factual and legal issues involved in the Proof of Claim that LeMaster & Daniels submitted to the Receiver against WML in the Main Receivership Case will be decided in the main case. Those issues overlap and are intertwined with and inseparable from the issues involved in WML's claims for relief pled against LeMaster & Daniels and Wyatt in this Adjunct Case as well as the issues involved in the counterclaims for relief asserted by these Defendants against WML in this Adjunct Case. Another court may come to a ruling on the merits of the claims and counterclaims in this Adjunct Case that would be inconsistent with the rulings of this Court on the Proof of Claim submitted by LeMaster & Daniels in the Main Receivership Case if the Adjunct Case were assigned to another judge. Even if another court came to the same result, judicial economy would not be achieved because both parties would have to present the same evidence twice.

8. Affording, as a matter of right, a different judge for each potential claimant may exhaust judicial resources, cause inconsistent results, time delays, and create chaos instead of efficient administration of justice as contemplated by the new receivership statute.

*See* Order, Conclusions of Law 7 and 8.

Clearly, the Court of Appeals has not committed obvious error.<sup>7</sup>

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<sup>7</sup> This is especially apparent when Wyatt's appearance and participation in the Main Receivership Case is considered. While it is true

**B. It Was Not Obvious Error for the Court of Appeals to Refuse to Order a Change of Judges in both the Adjunct Case and in the Main Receivership Case Since Wyatt's Motion in the Trial Court Did Not Even Request Such Extraordinary Relief.**

Implicitly recognizing the inherent conflict between the new, specific, omnibus, same-presiding-judge scheme and legislative intent of the Receivership Act and the non-specific change-of-judge scheme in cases generally of the older RCW 4.12.050,<sup>8</sup> Wyatt contends that the Court of Appeals committed obvious error by not "harmonizing" the two statutes by *sua sponte* ordering a change of judge in both the Adjunct Case and the Main Receivership Case. In addition to the fact that such a ruling would have stood the new omnibus receivership case administration

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that he was not formally joined as a party, he did appear and argue for and against discretionary orders. He argues now that he did not have a right to affidavit the court in the Main Receivership Case citing case law for the proposition that a witness cannot affidavit a judge. Wyatt participated in the main case much more than a mere witness participates in a case. He filed a Notice of Special Appearance, and by arguing for and against orders and getting a bite at the apple, he actively participated like a litigant even though he was and is not a formally named party in that case. However, the issues of if, when, and to what extent Wyatt may have had any right to affidavit the judge in the Main Receivership Case before the entry of discretionary rulings that he was allowed to argue about, are not properly before this Court now. Those issues are purely academic, and any opinion on them would be merely advisory since Wyatt did not preserve the issue for review. He never moved for a change of judge in the Main Receivership Case, and that case is not properly before the Court in this Motion for Discretionary Review.

<sup>8</sup> See Section V.A., *supra*, for further discussion of why this conflict prevents Wyatt from seeking change of judge.

scheme on its head, Wyatt cannot base any appeal on the failure to grant this extraordinary relief since his motion in the Adjunct case below did not request it, he did not file any motion in the Main Receivership Case, no one in the Main Receivership Case was given notice or any opportunity to be heard on the issue, and Wyatt did not file a notice of discretionary review in that case.

CR 7(b)(1) is clear. It requires all motions to set forth the relief or order sought. Wyatt's motion below sought a change of judge **only** in the Adjunct Case. Indeed, the motion did not even acknowledge or refer to the Main Receivership Case. *See* Motion, Certificate and Order for Change of Judge, attached as Exhibit F to Wyatt's Motion for Discretionary Review to the Court of Appeals, filed March 16, 2007.

In addition, it is clear from the Certificate of Service attached to Wyatt's motion that the motion was only served upon the Receiver and his counsel in the Adjunct Case. Wyatt gave no notice to SRP, the Defendant in the Main Receivership Case, or to the creditors or hundreds of persons in interest (the WML limited partners), and they were not afforded any opportunity to be heard on the issue. Clearly, the Court of Appeals (and the Trial Court) did not commit obvious error by not ordering a change of judge in the Main Receivership Case.

## VI. CONCLUSION

For the foregoing reasons, Wyatt's Motion for Discretionary Review should be denied.

DATED this 24<sup>th</sup> day of September, 2007.

REED & GIESA, P.S.



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his capacity as Receiver and Acting  
General Partner

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STATE OF WASHINGTON

CERTIFICATE OF SERVICE

2007 SEP 25 P 2: 54

I hereby certify that on the 24<sup>th</sup> day of September, 2007, I caused a true and correct copy of the foregoing document to be served upon the parties as indicated below.

CLERK

*Carole A Kasper*  
Carole A. Kasper

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