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SUPREME COURT No. 86293-1

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**SUPREME COURT
OF THE STATE OF WASHINGTON**

CEDAR RIVER WATER AND SEWER DISTRICT;
and SOOS CREEK WATER AND SEWER DISTRICT,

Plaintiffs/Appellants,

vs.

KING COUNTY, *et al.*,

Defendants/Respondents.

**KING COUNTY'S RESPONSE TO APPELLANTS' STATEMENT
OF GROUNDS FOR DIRECT REVIEW**

Timothy G. Leyh, WSBA #14853
Randall Thomsen, WSBA #25310
Katherine Kennedy, WSBA #15117
Danielson Harrigan Leyh & Tollefson, LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104
(206) 623-1700

ORIGINAL

I. Summary of Response

Direct review is not warranted in this case. The only “ground” invoked by Appellant Sewer and Water Districts (“the Districts”) under RAP 4.2(a)(4) is “a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.”¹ But the rulings challenged by the Districts merely represent the application of well-settled law to unique, complicated facts, involving events that occurred years ago.

The Districts’ contention that “urgent” public issues are presented requiring “prompt and ultimate determination,” is belied by the fact that they challenge a 2005 payment to Snohomish County to mitigate adverse impacts of the Brightwater sewage treatment facility (the construction of which is now nearly complete); a fee imposed since 2003 by King County for the issuance of certain bonds; a 2005 reimbursement to a company displaced by Brightwater, StockPot Soups, for relocation expenses; and a program, the “Culver Fund,” that has paid for water quality improvement activities since the 1980’s. The Districts provide no legitimate reason for bypassing the Court of Appeals. They simply disagree with the trial court’s rulings after extensive proceedings and exhaustive analysis.

The trial court rigorously analyzed the Districts’ claims over three years, on 13 summary judgment motions and after a six-week trial. At trial, the court heard the testimony of 29 witnesses and admitted 342

¹ The Districts also argue that their appeal presents “issues of first impression” — an assertion that not only is incorrect, but is not a basis for direct review under RAP 4.2(a).

exhibits. The Supreme Court gives trial courts “great deference on issues of fact based upon trial testimony” *Yousoufian v. Office of Ron Sims*, 165 Wn.2d 439, 463, 200 P.3d 232 (2009) (Chambers J., concurring).²

After trial, the court heard two rounds of argument on draft Findings and Conclusions, and memorialized its rulings in 37 pages. The trial court carefully reviewed each challenged expenditure of King County’s Wastewater Treatment Division (“WTD”) and, with a single exception,³ concluded that they were appropriate under the Agreements for Sewage Disposal (“the Contracts”) and authorized by applicable law.

The Districts argue that the trial court’s rulings are inconsistent with the “nexus” analysis in *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 743 P.2d 792 (1987) and the *Okeson* line of cases.⁴ But as the trial court correctly held in its Findings and Conclusions, the nexus requirement applies only where a utility relies on its implied authority, not where a municipal corporation such as King County has express authority, contractual or statutory or both, to engage in the conduct that the Districts challenge.⁵ The fact that direct review was granted in *Okeson* involving issues of implied authority has no bearing on the propriety of direct review

² *Mandate recalled, aff’d as modified on o’tr grds*, 168 Wn.2d 444, 229 P.3d 735 (2010).

³ Of \$200 million in claims asserted by the Districts, the trial court entered judgment in their favor only on their challenge to a \$2 million payment to StockPot Soups to mitigate local job losses. King County has appealed that ruling to Division II.

⁴ The Districts’ attorneys were also the attorneys for plaintiffs in the *Okeson* cases.

⁵ Findings of Fact and Conclusions of Law (Tab F to Appellants’ Statement of Grounds for Direct Review) (“Appellants’ Statement”) at 13, ¶ 51.

in this case where implied authority is not at issue. Moreover, even if a nexus requirement applied, the court found that it was satisfied in the circumstances of this case, with the exception of part of one claim.⁶

King County has filed its own appeal in the Court of Appeals. Both parties' appeals should be heard there in the normal course.

II. Absence of Grounds for Direct Review

A. Snohomish County Mitigation Claim⁷

The Districts have identified no grounds for direct review of the trial court's rulings regarding King County's agreement to pay Snohomish County up to \$70 million for particular projects to mitigate impacts of the Brightwater facility on Snohomish County residents and neighborhoods. The rulings do not present a "fundamental and urgent issue of broad public import requiring prompt and ultimate determination."

In the early 2000's, King County sought to locate Brightwater, a new \$2 billion sewage treatment facility, in unincorporated Snohomish County. Local residents and Snohomish County officials strongly opposed the siting and insisted on extensive mitigation of odor, noise, dust, traffic, public safety, and habitat impacts.

The Snohomish County Code authorized Snohomish County to require mitigation that would "compensate for the impact[s] by . . .

⁶ See footnote 3.

⁷ King County also incorporates by reference Snohomish County's Response to Appellants' Statement of Grounds for Direct Review.

providing substitute resources or environments.” In May 2005, the Thurston County Superior Court ruled that while Snohomish County could not prohibit outright the siting of Brightwater, Snohomish County could “impose reasonable conditions on the essential public facilities and may require reasonable mitigation in their development.”⁸ Snohomish County and King County disputed what was “reasonable mitigation.” Their comprehensive Settlement Agreement in 2005 resolved that question, along with seven administrative appeals and lawsuits related to Brightwater, and allowed construction of the facility to proceed.

The trial court properly rejected the Districts’ argument that the mitigation was improper because it was not included in the Brightwater Environmental Impact Statement (“EIS”). The County offered undisputed testimony that the EIS did describe the Brightwater impacts and potential mitigation measures. Moreover, SEPA does not dictate a particular substantive result,⁹ and the absence of discussion of a particular mitigation project does not preclude a local government from requiring it under its permitting authority. In fact, the Brightwater EIS expressly recognized that “permitting agencies may request measures to address specific impacts that are different from the measures proposed in the Final EIS.”

⁸ King County eventually would require 115 different permits from Snohomish County for Brightwater.

⁹ *Glasser v. City of Seattle*, 139 Wn. App. 728, 742, 162 P.3d 1134 (2007); see also *Save Our Rural Env’t v. Snohomish County*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983) (characterizing SEPA as a procedural statute ensuring that environmental impacts and alternatives are considered, rather than a statute designed to usurp local decision-making or to require a particular result).

The trial court dismissed the Districts' Brightwater mitigation claims in two steps on summary judgment. First, it held that their challenge to the 2005 Settlement and Development Agreement was time-barred as a "land use" decision under the Land Use Petition Act ("LUPA").¹⁰ Later, after additional motions and argument, the court dismissed the Districts' claims that the mitigation breached the Agreements for Sewage Disposal ("the Contracts"). The Contracts authorized King County, in calculating the sewage disposal charge, to include all costs of "all of the facilities to be constructed . . . as part of the Comprehensive Plan." The Comprehensive Plan (now the Regional Wastewater Services Plan, or "RWSP") required King County to construct Brightwater and to mitigate its impacts. *See* KCC 28.86.140. Snohomish County required the mitigation before it would issue construction permits. The mitigation was a cost of Brightwater that sewer ratepayers were obligated to pay.

The court also held that King County was legally authorized to pay for the Snohomish County mitigation from the Water Quality Fund ("WQF"), comprised largely of sewer revenues. For purposes of summary judgment, the court assumed a nexus requirement and found the requirement satisfied. The court ultimately held in its Findings and Conclusions that the "nexus" implied-authority requirement from the

¹⁰ Plaintiffs raised their challenge more than two years after the settlement occurred and the final decision was made by the Snohomish County Hearings Examiner.

Okeson cases did not apply because King County was expressly authorized, by Contract and statute, to make the subject expenditures.¹¹ Nothing about this claim requires direct review by this Court.

B. Reclaimed Water Claim

King County built a pipeline system at Brightwater to recycle and dispose of reclaimed water generated during the wastewater treatment process. Like biosolids, reclaimed water is a byproduct of the treatment process, and is generated in huge quantities. The undisputed evidence was that if wastewater were not reclaimed, Brightwater's operation would significantly increase effluent discharges into Puget Sound, which the State's regulators opposed. This would potentially jeopardize the County's Aquatic Lands Outfall Easement from the State.

The Districts argue that King County's "design, construction and operation of a reclaimed water system are ultra vires and illegal" because they amount to a "water utility" under RCW 36.94, and King County is not statutorily authorized to operate a "water utility." But the relevant statute governing distribution and handling of reclaimed water is the Reclaimed Water Act, RCW 90.46, not RCW 36.94. The Reclaimed Water Act authorizes King County to distribute reclaimed water as a byproduct of sewage treatment.¹² RCW 36.94 applies to potable drinking

¹¹ See Findings of Fact and Conclusions of Law (Tab F to Appellants' Statement) at 13-14, ¶¶ 51-52

¹² Furthermore, the Water Pollution Control Act, RCW 90.48.112, required that King County develop a Facilities Plan for Brightwater that "include[s] consideration of

water, not the non-potable reclaimed water generated at Brightwater for purposes such as irrigation.

Not only is King County statutorily authorized to use and dispose of reclaimed water, but the Contracts permit the expenditures to be charged to ratepayers. The reclaimed water system is part of the "facilities" constructed "as part of the Comprehensive Plan," within the language of the Contracts. The trial court, in granting summary judgment for the County, orally ruled:

Nobody disagrees that getting the sewerage into the system is part of the sewerage system as a whole, so why isn't getting the water out of it part of the sewerage system as a whole? They can't just hold the water. And even if the decision is to dump it into Puget Sound, it's still part of the system to get rid of the water. So, it seems to me that all of this is appropriately undertaken by King County in the process of operating a sewerage system, and that system includes the distribution of reclaimed water, and that then leads me to the conclusion that the motion for summary judgment should be granted in favor of the defendants.¹³

This common sense and well-supported ruling does not present an "urgent" issue of "broad public import" warranting direct review.

C. StockPot Soups Claims

StockPot Soups is a large Snohomish County employer displaced by construction of Brightwater. The Districts challenge King County's payment to StockPot under a 2005 Settlement Agreement for (1)

opportunities for the use of reclaimed water as defined by RCW 90.46.010." The Department of Ecology approved the Plan including its reclaimed water elements.

¹³ Verbatim Report of Proceedings (2/5/10) at 49.

relocation expenses that the County was required to reimburse StockPot under RCW 8.26.035 and WAC 468-100-301(7)(p); and (2) a \$2 million “job retention” payment the County made to StockPot pursuant to a Snohomish County ordinance. The trial court correctly held that all relocation expense reimbursements to StockPot were capital costs of constructing Brightwater, properly charged to sewer ratepayers under the Contracts. It held for the Districts on the “job retention” claim; the County is appealing that ruling in Division II.

Between 2002 and 2004, King County and StockPot were embroiled in a dispute regarding whether King County would condemn the StockPot property for Brightwater, and the appropriate reimbursement under the Washington Relocation Assistance Act and regulations. Under the 2005 Settlement Agreement, the County reimbursed \$15,534,650 that StockPot paid for “substitute personal property,” as authorized by law.¹⁴

Three years later, the Districts contested the settlement, alleging that the County’s reimbursement was excessive because the County refused to pay StockPot as much if it moved outside the Puget Sound region. The evidence at trial, however, was that the two different reimbursement amounts agreed to by the County and StockPot for the

¹⁴ See *Union Elevator & Warehouse Co., Inc. v. State*, 144 Wn. App. 593, 602, 183 P.3d 1097 (2008) (reimbursement for substitute personal property to displaced entity proper where it was not feasible for the entity to move its equipment).

“Local Option” versus the “Non-Local Option,” respectively, had a reasonable and legitimate basis.¹⁵ The trial court correctly held:

The difference in the amounts that the County would pay StockPot under the Local versus the Non-Local Option was reasonable and reflected, in part, the County’s desire to create a disincentive for StockPot to relocate non-locally.¹⁶

The court found that StockPot documented its relocation expenses to the County by providing detailed invoices showing its actual expenditures.¹⁷ In fact, the County paid less than StockPot’s actual relocation costs.¹⁸

Like the other claims on which the Districts seek direct review, the StockPot rulings involve no urgent issues of “broad public import.”

D. Culver Fund Claim

After King County merged with the Municipality of Metropolitan Seattle (“Metro”) in 1992, it continued Metro’s programs to improve water quality in regional water bodies through the so-called “Culver Fund.” Metro’s enabling statute, RCW 35.58.200(1), authorized Metro (and subsequently King County) to engage in “water quality

¹⁵ StockPot would have suffered serious business losses if it were shut down for longer than three days, requiring that StockPot have a new facility ready to open when it closed its existing plant. Findings of Fact and Conclusions of Law (Tab F to Appellants’ Statement) at 17-18, ¶¶ 69-70. But the County reasoned that if StockPot moved non-locally, it already would have had a business plan to move out of the area for reasons independent of Brightwater, and the 72-hour turnaround—with the reimbursement for substitute personal property—was not necessary. *Id.* at 18, ¶ 71. The trial court found that the County’s position was justified, given (among other evidence) threats by StockPot to move out of the area. *Id.* at 18-19, ¶ 72.

¹⁶ Findings of Fact and Conclusions of Law (Tab F to Appellants’ Statement) at 24, ¶ 97.

¹⁷ Findings of Fact and Conclusions of Law (Tab F to Appellants’ Statement) at 21, ¶ 82.

¹⁸ Findings of Fact and Conclusions of Law (Tab F to Appellants’ Statement) at 21, ¶ 82.

improvement” activities as part of “water pollution abatement.”¹⁹ The County limits Culver Fund expenditures to 1.5% of the annual operating budget of WTD — about 18 cents on the average monthly sewer bill.

Since the 1980s, the Culver Fund has been used for projects like reducing non-point source pollution, fertilizers, and pesticides that flow into sewage treatment facilities, and projects to improve the quality of the receiving waters, which avoid additional regulatory requirements and the need for new treatment facilities. Public education about water-quality impacts of various activities is an important focus of the Culver Fund.

The Districts argue that the Culver Fund’s “water quality improvement projects [are] unrelated to sewage disposal,” ignoring the uncontradicted testimony of multiple witnesses at trial. The evidence was that 53 percent of the water treated by WTD in its sewage facilities is storm water or groundwater,²⁰ and thus the quality and quantity of storm water and groundwater flows into the system are directly related to sewage treatment. The court ruled:

[U]ltimately, I think the test really comes down to this: Is wastewater treatment a broad enough concept to include water quality? What we have here with regard to sewage treatment in relation to water quality is an integrated system where water quality inextricably is linked

¹⁹ The statute also allows the County “[t]o fix rates and charges for the use of metropolitan water pollution abatement facilities, and to expend the moneys so collected for authorized water pollution abatement activities” including water quality improvement. RCW 35.58.200(3).

²⁰ Verbatim Report of Proceedings (3/15/11) at 9.

with wastewater. The science is advancing. The statutory and administrative requirements are advancing. The law is and ought to be flexible enough to recognize the connection, and the component agencies need to recognize the reality, as well. I'm convinced that the Culver projects are not a raid on the water quality fund but are an identifiable benefit to the quality of water in the region and are necessary to the operation of the wastewater treatment system.²¹

The trial court made these rulings on the fact-intensive Culver claim after hearing the testimony of multiple witnesses at trial. Its factual findings must be accorded "great deference," and direct review denied.

E. Overhead Allocation Claims

The Districts challenge the County's allocations of a proportionate share of the cost of centralized government administrative expenses to WTD. King County centralizes functions to streamline its operations and minimize costs. Central branches of government perform policy and administrative tasks for WTD, freeing WTD from performing them itself at greater cost.

The evidence at trial was that WTD directly benefits from these centralized services. The King County Executive, County Council, and their staffs oversee WTD's multi-billion-dollar capital program; participate in regional committees resulting from the County's assumption of Metro's water pollution abatement functions; annually review WTD's \$100 million-plus operating budget; establish sewage disposal and

²¹ Verbatim Report of Proceedings (3/15/11) at 10.

capacity charge rates for hundreds of thousands of ratepayers; and deal with other issues involved in operating a large and complicated enterprise such as WTD.

The cost allocations are authorized by state law,²² the King County Code,²³ and financial policies in the RWSP that were approved by the Districts.²⁴ The County's allocation methodology was recommended by an independent accounting firm, Deloitte & Touche. The trial court found that the methodology used by the County is reasonable and consistent with all relevant accounting standards.

The Districts' claim relies entirely on a State Auditor report criticizing King County's allocation of certain centralized expenses to WTD because of the alleged lack of sufficient documentation of benefit to WTD. But the undisputed evidence at trial was that the State Auditor ignored the County's offers of documentation. Moreover, the Districts' witness from the Auditor's Office admitted that he did not know whether, if he had reviewed more documentation, the allocation to WTD would have gone up or down.

²² RCW 43.09.210 (requiring that all services rendered by one department be paid for at true and full value by the department receiving the services); *see Smith v. Spokane County*, 89 Wn. App. 340, 359-60, 948 P.2d 1301 (1997) (county authorized to use fees collected under Aquifer Protection Act for "administrative and operational expenses").

²³ KCC 4.04.045 provides in pertinent part that "[e]stimated overhead charges shall be calculated in a fair and consistent manner, utilizing a methodology which best matches the estimated cost of the services provided to the actual overhead charge."

²⁴ KCC 28.86.160-FP-9 (Financial Policy 9) provides that "general government overhead" may be charged to the wastewater system, using a methodology that "provides for the equitable distribution of overhead costs throughout county government."

The Districts argue that this Court should review the issue of whether a county bears the burden of proving that allocations reflect actual benefit to the utility. Plaintiffs cite no authority for their remarkable assertion that the normal burden of proof should be reversed. But the trial court held that even if the County had that burden, it had satisfied it.

[P]laintiff has not shown that the method used by the County was not fair, was not consistent, was not a best match when all things are considered. And even if it's not the plaintiff's burden to show that, I believe that the defendant has established those elements or the totality of the evidence does establish those elements.²⁵

Because King County prevailed even if the Districts' burden argument were correct, the issue does not warrant direct review.

F. Credit Enhancement Fee Claim

King County issues two types of bonds to finance WTD capital projects: revenue bonds secured by sewer revenues, and limited tax general obligation ("LTGO") bonds secured by the County's full faith and credit if sewer revenues are insufficient to pay the bonds. LTGO bonds have a lower interest rate than revenue bonds, reflecting their lower risk to bondholders. In 2003, the County began charging WTD and other County departments a "credit enhancement fee" for LTGO bonds issued on their behalf,

²⁵ Verbatim Report of Proceedings (3/15/11) at 21.

in the amount of one-half the difference in financing costs between revenue and LTGO bonds. The County's guarantee saves WTD and its ratepayers millions even after payment of the fee.

The Districts argue that this fee is not related to "any actual expenses incurred for WTD," but the trial court accepted the County's un rebutted evidence to the contrary. Economist Dr. Alan Hess testified (and the trial court found) that when the County issues a LTGO bond instead of a revenue bond, the County's total debt increases, resulting in a higher interest rate paid by the County on subsequent bond issuances. The County's guarantee also increases the risk that the County's credit rating will be downgraded, and consumes some of the County's limited debt capacity. The court concluded that the credit enhancement fee, in fact, may be too low, since the fee is only one-half of the spread between the interest rates of a LTGO bond and a revenue bond.

G. Claim for Breach of Fiduciary/Trust Duties

Finally, the Districts challenge the trial court's ruling that King County owes no trust or fiduciary obligations to the agencies with whom it has Contracts. The trial court correctly concluded on summary judgment under settled law that there was no basis for a trust or fiduciary duty in the Contracts or the statutes governing the

County's wastewater treatment activities. *See Retired Pub. Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) (director of Department of Retirement Systems not a fiduciary where the governing statutes did not evince such legislative intent).

The Districts do not even attempt to demonstrate that the trust/fiduciary duty ruling warrants direct review, and it does not.

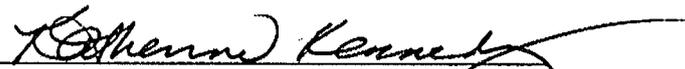
III. Conclusion

The Districts have established no basis for direct review. Their appeal should proceed in the normal course through the Court of Appeals, along with the County's cross-appeal.

DATED this 11th day of August, 2011.

DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

By



Timothy G. Leyh, WSBA #14858
Randall T. Thomsen, WSBA #25310
Katherine Kennedy, WSBA #15117
Special Deputy Prosecuting Attorneys for
Defendant King County

KING COUNTY PROSECUTING ATTORNEY
CIVIL DIVISION

William Blakney, WSBA #16734
Verna P. Bromley, WSBA #24703
Senior Deputy Prosecuting Attorneys
for Defendant King County

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To: Linda Bledsoe
Cc: djurca@helsell.com; William.blakney@kingcounty.gov; Verna.Bromley@kingcounty.gov; tseder@co.snohomish.wa.us; hillary.evans@co.snohomish.wa.us; amaron@scblaw.com; smissall@scblaw.com; smissall@scblaw.com; Chris@kenyondisend.com; Bob@kenyondisend.com; Shelley@kenyondisend.com; dheid@auburnwa.gov; czakrzewski@bellevuewa.gov; rkaseguma@insleebest.com; jmilne@insleebest.com; efrimodt@insleebest.com; wtanaka@omwlaw.com; jhaney@omwlaw.com; zlell@omwlaw.com; blawler@sociuslaw.com; jhaney@omwlaw.com; kkomoto@ci.kent.wa.us; wevans@ci.kirkland.wa.us; Katie.knight@mercergov.org; kww@williamspsc.com; al@hendricksb.com; joe@hendricksb.com; lwarren@rentonwa.gov; Gregory.narver@seattle.gov; laura.weeks@muckleshoot.nsn.us; dcaley@adorno.com; cdrabuan@msn.com; mleen@insleebest.com; cdrabuan@msn.com; jims@atg.wa.gov; jburt@helsell.com; gbennett@co.snohomish.wa.us; officeservices@scblaw.com; kathys@kenyondisend.com; jrg@williamspsc.com; gzak@omwlaw.com; Tim Leyh; Randall Thomsen; Katherine Kennedy; Sara Ziegenbein; Susie Clifford
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Cc: djurca@helsell.com; William.blakney@kingcounty.gov; Verna.Bromley@kingcounty.gov; tseder@co.snohomish.wa.us; hillary.evans@co.snohomish.wa.us; amaron@scblaw.com; smissall@scblaw.com; smissall@scblaw.com; Chris@kenyondisend.com; Bob@kenyondisend.com; Shelley@kenyondisend.com; dheid@auburnwa.gov; czakrzewski@bellevuewa.gov; rkaseguma@insleebest.com; jmilne@insleebest.com; efrimodt@insleebest.com; wtanaka@omwlaw.com; jhaney@omwlaw.com; zlell@omwlaw.com; blawler@sociuslaw.com; jhaney@omwlaw.com; kkomoto@ci.kent.wa.us; wevans@ci.kirkland.wa.us; Katie.knight@mercergov.org; kww@williamspsc.com; al@hendricksb.com; joe@hendricksb.com; lwarren@rentonwa.gov; Gregory.narver@seattle.gov; laura.weeks@muckleshoot.nsn.us; dcaley@adorno.com; cdrabuan@msn.com; mleen@insleebest.com; cdrabuan@msn.com; jims@atg.wa.gov; jburt@helsell.com; gbennett@co.snohomish.wa.us; officeservices@scblaw.com; kathys@kenyondisend.com; jrg@williamspsc.com; gzak@omwlaw.com; Tim Leyh; Randall Thomsen; Katherine Kennedy; Sara Ziegenbein; Susie Clifford

Subject: Cedar River Water and Sewer District v. King County, et al. - King County's Response to Appellants' Statement of Grounds for Direct Review

Dear Clerk: We are attaching King County's Response to Appellants' Statement of Grounds for Direct Review, along with our certificate of service.

Supreme Court No. 86293-1
Filed by: Katherine Kennedy, WSBA #15117
Danielson Harrigan Leyh & Tollefson
206-623-1700
katherinek@dhl.com

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Linda Bledsoe
Assistant to Tim Leyh and Katherine Kennedy
206-623-1700
lindab@dhl.com
Danielson Harrigan Leyh & Tollefson LLP
999 Third Avenue, Suite 4400
Seattle, WA 98104

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