

NO. 71792-8-I

COURT OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

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THE BASEBALL CLUB OF TACOMA, LLC, a  
Washington limited liability company,

*Plaintiff-Respondent,*

v.

SDL BASEBALL PARTNERS, LLC, a Nevada limited  
liability company, ROBERT J. SCHLEGEL, and ROBERT  
K. SCHLEGEL,

*Defendants/Third-Party Plaintiffs-Appellants,*

and

MIKAL THOMSEN, and AARON ARTMAN.

*Third-Party Defendants-Respondents.*

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ON APPEAL FROM KING COUNTY SUPERIOR COURT  
(Honorable Barbara Linde)

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**APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

This case illustrates why, as this Court recently held, Washington's anti-SLAPP statute was not intended to be applied to lawsuits concerning private contractual matters.

The claims, counterclaims, and third-party claims in this lawsuit involve a contract dispute between the current and former owners of the Tacoma Rainiers, a professional baseball team managed and operated under a franchise granted by Minor League Baseball and the Pacific Coast League. In March 2011, The Baseball Club of Tacoma, LLC ("TBCOT") purchased the baseball team from SDL Baseball Partners, LLC ("SDL"), pursuant to a Minor League Baseball Franchise Purchase Agreement entered into by TBCOT, SDL, and SDL's principals, Robert J. Schlegel and Robert K. Schlegel.

The sale of the baseball team was not an all-cash deal. TBCOT's obligation to pay SDL several million dollars of the purchase price was spread out over several years, in the form of "earn-out" payments based on a percentage of future team earnings.

In July 2012, TBCOT initiated this suit against SDL and the Schlegels, alleging that, in connection with the sale, SDL and the Schlegels made material misrepresentations of fact regarding the financial statements of the team. TBCOT asserted claims for breach of contract,

breach of implied duty of good faith and fair dealing, fraud and fraud in the inducement, and negligent misrepresentation. Essentially, TBCOT claims that it paid too much for the baseball team, based on the allegedly misrepresented financial statements.

SDL and the Schlegels asserted counterclaims against TBCOT, and third-party claims against Mikal Thomsen (TBCOT's Chief Executive Officer) and Aaron Artman (the team's President). These claims asserted that TBCOT and the third-party defendants have intentionally operated the team and reported financial information in such a manner as to avoid honoring their contractual obligation to pay SDL its annual earn-out payments. SDL and the Schlegels also assert that TBCOT's pursuit of its claims in this lawsuit is part of an overall scheme to avoid paying the earn-out. The counterclaims and third-party claims sought monetary damages and declaratory relief.

TBCOT and the third-party defendants filed a "special motion to strike" the counterclaims and third-party claims pursuant to Washington's anti-SLAPP<sup>1</sup> statute, RCW 4.24.525. They contended that the claims were filed based on the fact that TBCOT had filed a lawsuit, and thus were

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<sup>1</sup> "SLAPP" is the established shorthand for "Strategic Lawsuits Against Public Participation."

intended to interfere with their constitutional right to petition the government for the redress of grievances.

The trial court granted the anti-SLAPP motion and dismissed the counterclaims and third-party claims. The court also awarded the moving parties statutory attorneys' fees and a statutory penalty of \$30,000 (\$10,000 each to TBCOT and the two third-party defendants). SDL and the Schlegels appealed, pursuant to the expedited appeal provision in the anti-SLAPP statute.

This Court should reverse. To determine whether a cause of action falls within the scope of the anti-SLAPP statute, the court must decide whether the claim targets activity involving public participation and petition. The court must focus on the principal thrust or gravamen of the claim. A defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the challenged claim contains some collateral allusions to petitioning activity by the defendant. Here, the principal thrust of the counterclaims and third-party claims was to recover monetary damages arising from TBCOT's and the third-party defendants' actions to avoid paying the contractual earn-out payments to SDL. The claims were not based on, or retaliation for, the filing of TBCOT's initial complaint. Indeed, as the trial court itself acknowledged

during oral argument, the claims could have been asserted entirely independently of TBCOT's lawsuit.

In enacting the anti-SLAPP statute, the Washington Legislature sought to strike a balance between the rights of persons to file lawsuits (or, as here, counterclaims) and to trial by jury, on one hand, and the rights of persons to participate in matters of public concern, on the other. The trial court upset that balance here, when it denied SDL and the Schlegels their day in court to vindicate their private contractual rights. If the trial court's error is allowed to stand, there will be a chilling effect on the right of parties to file counterclaims.

## **II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL**

### **A. Assignments of Error.**

Defendants and Appellants SDL Baseball Partners, LLC, Robert J. Schlegel, and Robert K. Schlegel make the following assignments of error:

1. The trial court erred in entering its "Order Granting Plaintiff's and Third Party Defendants' Special Motion to Strike Pursuant to RCW 4.24.525" dated March 14, 2014.
2. The trial court erred in entering its "Order Awarding Reasonable Attorneys' Fees to The Baseball Club of Tacoma, LLC, Mikal Thomsen, and Aaron Artman" dated April 7, 2014.

### **B. Statement of Issues.**

The following issues pertain to the assignments of error:

1. ***The Anti-SLAPP Statute in the Context of Private Contract Disputes.*** In a private lawsuit involving claims of breach of contract and fraud, can a plaintiff/counterclaim defendant take advantage of Washington’s Anti-SLAPP statute (RCW 4.24.525) to prevent the defendants from pursuing otherwise proper counterclaims where: (a) the principal thrust or gravamen of the counterclaims involves breach of contract and fraud; (b) the counterclaims make only collateral allusions to petitioning activity by the counterclaim defendant; and (c) the counterclaims could have been asserted independently of plaintiff’s claims in a separate lawsuit had the plaintiff never brought an action at all? (Assignment of Error No. 1)
2. ***Standing of the Third-Party Defendants.*** Do the third-party defendants have standing under Washington’s Anti-SLAPP statute where they did not engage in any petitioning activity? (Assignment of Error No. 1)
3. ***Attorneys Fee Order.*** If the trial court erred in granting plaintiff’s and third-party defendants’ special motion to strike, should the court’s order granting attorneys’ fees also be reversed? (Assignment of Error No. 2)

### **III. STATEMENT OF THE CASE**

#### **A. The Purchase and Sale of the Tacoma Rainiers.**

In 2006, SDL Baseball Partners, LLC (“SDL”) purchased the Tacoma Rainiers, a Minor League baseball team that is part of the Pacific Coast League (the “Team”). CP 200-201 (Declaration of Robert J. Schlegel, ¶ 2). SDL is owned and controlled by Robert J. Schlegel and his son, Robert “Kirby” Schlegel (the “Schlegels”). CP 201 (Schlegel Declaration, ¶ 2). Third-party defendant Aaron Artman (“Artman”) served as the President of the Team under the Schlegels’ ownership and

was in charge of management and Team operations. *Id.* (Schlegel Declaration, ¶ 3). Artman has extensive management experience and was closely involved in all aspects of the Team, including the preparation of financial statements and reports. *Id.* (Schlegel Declaration, ¶ 5).

In 2010, the Schlegels decided to sell the Team and certain associated assets, including the concessions business in Cheney Stadium, where the Team played. *Id.* (Schlegel Declaration, ¶ 3); CP 2, 5 (Complaint, ¶¶ 1, 16); CP 104, 105 (Amended Answer, ¶¶ 1, 16). Third-party defendant Mikal Thomsen (“Thomsen”) and The Baseball Club of Tacoma, LLC (“TBCOT”), led by Thomsen, expressed interest in purchasing the Team and, as a result, the parties began negotiating a sale. CP 201 (Schlegel Declaration, ¶ 3). Ultimately, the parties executed a Minor League Baseball Franchise Purchase Agreement, dated January 31, 2011 (the “Purchase Agreement”), and TBCOT acquired the Team and associated assets as of March 31, 2011. *Id.*; CP 2, 5 (Complaint, ¶¶ 1, 18, 19); CP 104, 105 (Amended Answer, ¶¶ 1, 18, 19). TBCOT retained Artman as President of the Team after the sale. CP 201 (Schlegel Declaration, ¶ 3).

**B. TBCOT Receives Full and Complete Access to the Team’s Financial Records Prior to the Sale.**

Thomsen is a sophisticated businessman. He was one of the founders of Western Wireless (of which he was President), which was

later sold to Deutsche Telekom and today is known as T-Mobile USA, one of the largest wireless companies in the world. CP 201 (Schlegel Declaration, ¶ 4). He is a sports team owner with years of experience in buying, owning, and managing professional sports teams, such as the Seattle SuperSonics. *Id.*

During the parties' negotiations for the purchase and sale of the Team, which lasted several months, TBCOT, Thomsen, and their agents received full access to the Team's financial statements and reports. *Id.* (Schlegel Declaration, ¶ 6). Moreover, TBCOT engaged the law firm of Perkins Coie, a firm that holds itself out as having extensive experience representing sports teams, to perform due diligence and advise TBCOT on the sale. *Id.* From January through March 2011, before the closing of the sale of the Team, TBCOT's advisors were permitted to remain on site to monitor the Team's day-to-day operations and financial performance. CP 201-202 (Schlegel Declaration, ¶ 7). Thomsen and TBCOT had the opportunity to conduct unrestricted due diligence and investigation into the Team's finances and operations and to examine every record they desired. Thomsen and his advisors worked directly with SDL's bookkeeper, and with Artman, to learn about the business, the operations and finances of the Team before purchasing it. *Id.* They also ran their own pro formas to project future performance, and created their own

finance plan for the Team. By the time TBCOT decided to purchase the Team, TBCOT had not only had complete access to all financial records of the Team, but it had also participated in managing the Team. *Id.*

**C. The Parties Negotiate an “Earn-Out” for a Substantial Part of the Purchase Price.**

During the parties’ negotiations, TBCOT made it clear to the Schlegels that it valued and was buying the Team based on comparable sales of other teams, not on the cash flow for the Team or any multiple thereof. CP 202 (Schlegel Declaration, ¶ 8). The Schlegels contend that TBCOT purchased the Team for less than the Team was worth at the time of sale and far less than the Team is worth now. Moreover, TBCOT negotiated an even better deal by spreading the obligation to pay several million dollars of the purchase price from future earnings over several years. *Id.*

The sale of the Team was not an all-cash transaction. Under Article I, Section 1.3(c)(i) of the Purchase Agreement, part of the purchase price for the Team consisted of four annual (or five, if extended pursuant to Clause B) “earn-out” payments in an amount equal to 23.75% of the “EBITDA” (Earnings Before Interest, Taxes, Depreciation and Amortization) of the Team for the preceding fiscal year. *Id.* (Schlegel Declaration, ¶ 9). However, before an earn-out payment would be made

to SDL, certain deductions are applied and only the earn-out amount in excess of the deductions must be paid. *Id.*

**D. TBCOT Begins to Complain, and Refuses to Pay Earn-Out.**

When the Team did not perform as well as TBCOT, Thomsen, and Artman projected, they began to complain for the first time that they were misled about the Team's finances, and they refused to pay any earn-out. CP 203 (Schlegel Declaration, ¶ 11). Purportedly, the aggregate earn-out amounts have never exceeded the deductions, so TBCOT has never made an earn-out payment to SDL. CP 202 (Schlegel Declaration, ¶ 9). TBCOT and the third-party defendants also began to claim, for the first time, that they had actually selected the purchase price for the Team based on a multiple of EBITDA. However, while EBITDA may be a factor in calculating the earn-out payments owed to SDL, it was never discussed between the parties as a factor in determining a purchase price. CP 203 (Schlegel Declaration, ¶ 11). TBCOT, Thomsen, and Artman also began complaining that the financial statements for the Team were not prepared in conformance with GAAP (Generally Accepted Accounting Principles) and were not audited. However, the Purchase Agreement itself notes that the December 2010 financials were not in accordance with GAAP, and the third-party defendants acknowledged prior to the purchase that the financials were not audited even though they had an opportunity to audit

them. *Id.* (Schlegel Declaration, ¶ 12). Artman – whom TBCOT and Thomsen retained as the Team’s President – oversaw and assisted with the preparation of and was responsible for the Team’s financials that TBCOT and Thomsen received prior to the purchase. *Id.*

**E. TBCOT Files Suit.**

On July 24, 2012, TBCOT filed its Complaint against SDL and the Schlegels. CP 1-20. The Complaint alleged claims for: Breach of Contract; Breach of Implied Duty of Good Faith and Fair Dealing; Fraud and Fraud in the Inducement; and Negligent Misrepresentation. CP 16-18. Essentially, TBCOT claimed that the defendants intentionally and knowingly made false statements of material fact to TBCOT (or concealed and failed to disclose material facts) regarding the Team’s financial statements, which caused TBCOT to overvalue and pay too much for the Team. CP 2-3 (Complaint, ¶¶ 2-4).

**F. SDL and the Schlegels File Their Counterclaims and Third-Party Claims.**

On September 16, 2013, SDL and the Schlegels filed their Amended Answer, Affirmative Defenses, Counterclaims, and Third-Party Claims. CP 103-123. Their counterclaims and third-party claims allege that TBCOT, Thomsen, and Artman manufactured their complaints about the Team’s finances and value in order to avoid paying SDL the earn-out as required by the Purchase Agreement. CP 118 (Counterclaims and

Third-Party Claims, ¶ 16). They allege further that the decision not to pay any earn-out to SDL was made after a series of events occurred, outside of the defendants' control, which adversely impacted the Team's revenue. These included: (a) rainier-than-expected weather during the first season after TBCOT bought the Team, resulting in lower than expected ticket sales; (b) a "naming rights" deal that never came to fruition; and (c) a former bank sponsor that did not renew its sponsorship. CP 116-117 (Counterclaims and Third-Party Claims, ¶ 11). As Mr. Schlegel stated:

Third Party Defendants knew the financial condition of the Team before and after TBCOT purchased the Team. Third Party Defendants are sophisticated business people with particular experience in sports team operations and know how to generate earnings or defer them. They also know that an "earn-out" payment structure like the one here for payments to SDL Partners is completely dependent on how Third Party Defendants operate the Team and report financial information. Third Party Defendants have operated the Team in a manner, and raised baseless complaints, to avoid honoring their contractual obligations to pay SDL Partners the "earn-out" for the Team.

CP 203-204 (Schlegel Declaration, ¶ 13). The counterclaims and third-party claims asserted include breach of contract, fraud, negligent misrepresentation, civil conspiracy, and conversion. CP 120-122 (Counterclaims and Third-Party Claims, ¶¶ 26-40). SDL and the Schlegels seek monetary damages on their counterclaims in an amount to be proven at trial. CP 122.

**G. The Special Motion to Strike.**

On February 14, 2014 – some five months after the defendants filed their claims – TBCOT and third-party defendants Thomsen and Artman filed a “special motion to strike” the defendants’ counterclaims and third-party claims pursuant to RCW 4.24.525, Washington’s anti-SLAPP statute. CP 164-185. They asserted that “Defendants’ counterclaims and third-party claims are based entirely on TBCOT’s filing of this lawsuit against Defendants ...” and are intended to punish TBCOT for “exercising its constitutional right in a judicial proceeding.” CP 169, 170 (Motion to Strike, at 1, 2). SDL and the Schlegels opposed the motion to strike, noting that the principal thrust of the counterclaims and third-party claims was not to retaliate against TBCOT but to recover monetary damages arising from TBCOT’s and the third-party defendants’ actions to avoid paying the contractual earn-out payments to SDL. CP 190-191.

On March 14, 2014, the trial court heard oral argument on the motion to strike. During the hearing, the court acknowledged that SDL and the Schlegels could have asserted their counterclaims and third-party claims independently in a separate lawsuit, had TBCOT never filed suit at all. VRP, at p. 13 (lines 2-8). Nevertheless, the court granted the motion to strike and dismissed each of the counterclaims and third-party claims

with prejudice. CP 219-221. The court also awarded statutory damages in the amount of \$10,000 each to TBCOT, Thomsen, and Artman, as well as reasonable attorneys' fees and costs. CP 220. On April 7, 2014, the trial court supplemented its prior rulings by awarding TBCOT and the third-party defendants attorneys' fees in the amount of \$21, 232. CP 273-274. SDL and the Schlegels timely appealed. CP 258-264; 277-287.

#### IV. STANDARD OF REVIEW

The Court reviews the grant or denial of an anti-SLAPP motion *de novo*. *Alaska Structures, Inc. v. Hedlund*, \_\_\_ Wn. App. \_\_\_, 323 P.3d 1082, 1085 (¶9) (2014) (footnote citation omitted).

#### V. ARGUMENT

**A. The Anti-SLAPP Statute Does Not Apply Where the Principal Thrust or Gravamen of the Claim is to Seek Damages for Breach of Contract and Fraud, Notwithstanding that the Claim Also Makes Collateral Allusions to Protected Activity.**

A Strategic Lawsuit Against Public Participation (“SLAPP”) is a baseless lawsuit whose goal is to silence speakers and discourage public discourse. Bruce E.H. Johnson & Sarah K. Duran, *A View From the First Amendment Trenches: Washington State’s New Protections for Public Discourse and Democracy*, 87 Wash. L. Rev. 495, 496-497 (2012). A SLAPP lawsuit is typically a civil claim or counterclaim asserted against individuals or organizations based on their communications to government or speech regarding an issue of public interest or concern. *Id.* at 502.

Washington’s anti-SLAPP statute, RCW 4.24.525, like others around the country, was enacted to prevent this chilling of a citizen’s legitimate right to free speech. *Spratt v. Toft*, \_\_\_ Wn. App. \_\_\_, 324 P.3d 707, 712 (¶16) (2014). In the preamble to the statute, the Washington Legislature stated that “[i]t is concerned about lawsuits *brought primarily to chill* the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” LAWS OF 2010, ch. 118, § 1(a) (emphasis added).<sup>2</sup>

A party that is the target of a SLAPP suit may bring a special motion to strike “any claim that is based on an action involving public participation and petition.” RCW 4.24.525(4)(a). The purpose of the special motion to strike is to establish a method for “speedy adjudication” of SLAPP suits. LAWS OF 2010, ch. 118, § 2(b). Accordingly, the statute provides that the special motion to strike “may be filed within sixty days” of the service of the most recent complaint or, in the court’s discretion, at any later time upon terms it deems proper. RCW 4.24.525(5)(a). In this case, TBCOT and the third-party defendants waited five months before bringing their anti-SLAPP motion.

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<sup>2</sup> Under our state’s plain meaning rule of statutory interpretation, legislative statements of purpose are an element to be considered in determining legislative intent. *G-P Gypsum Corp. v. Dept. of Revenue*, 169 Wn.2d 304, 310, 237 P.3d 256 (2010) (“[A]n enacted statement of legislative purpose is included in a plain reading of a statute (citing *C.J.C. v. Corp. of Catholic Bishop*, 138 Wn.2d 699, 712–14, 985 P.2d 262 (1999) (plurality opinion)).

In ruling on an anti-SLAPP motion, a court follows a two-step process. First, the party moving to strike the claim has the initial burden of showing by a preponderance of the evidence that the claim targets activity involving public participation and petition as defined in RCW 4.24.525(2). *Spratt v. Toft*, 323 P.3d at 711 (¶14) (footnote citation omitted). In other words, the moving party “must make an initial prima facie showing that the claimant’s suit arises from an act in furtherance of the right of petition or free speech in connection with a matter of public concern.” *Id.* at 709 (¶1). If the movant does not meet that threshold burden, the anti-SLAPP motion should be denied. *Alaska Structures, Inc. v. Hedlund*, 323 P.3d at 1083 (¶1). Second, if the moving party meets that burden, the burden then shifts to the responding party “to establish by clear and convincing evidence a probability of prevailing on the claim.” *Spratt*, 324 P.3d 711, quoting RCW 4.24.525(4)(b). If the responding party meets its burden, the court shall deny the motion. RCW 4.24.525(4)(b).

In this case, TBCOT and the third-party defendants failed to meet their initial burden to make a prima facie showing that SDL’s claims arise from an act in furtherance of the right of petition or free speech in connection with a matter of public concern. As this Court has stated: “[A] defendant in an ordinary private dispute cannot take advantage of the

anti-SLAPP statute simply because the complaint *contains some references* to speech or petitioning activity by the defendant.” *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 71, 316 P.3d 1119, *rev. granted*, 180 Wn.2d 1009, \_\_\_ P.3d \_\_\_ (2014), quoting *Martinez v. Metabolife Intern., Inc.*, 113 Cal.App.4th 181, 188, 6 Cal.Rptr.3d 494 (Cal. App. 2003).<sup>3</sup> As this Court has made clear:

It is the ***principal thrust or gravamen*** of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, ***collateral allusions*** to protected activity should not subject the cause of action to the anti-SLAPP statute.

*Id.*, at 72 (quoting *Martinez*, 113 Cal.App.4th at 188) (emphasis added). *Accord*, *Alaska Structures, Inc. v. Hedlund*, 323 P.3d at 1083 (¶1) (reversing grant of anti-SLAPP motion) (“The gravamen of the complaint is ... whether the parties’ contract was violated. Because this is a private contractual matter, the anti-SLAPP statute does not apply”).<sup>4</sup>

This is precisely the case here. This is an “ordinary private dispute,” a “private contractual matter” in which the “principal thrust,” the

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<sup>3</sup> Because Washington’s anti-SLAPP law is modeled on California’s anti-SLAPP Act, California cases may be considered as persuasive authority when interpreting RCW 4.24.525. *Dillon*, 179 Wn. App. at 69, n. 21.

<sup>4</sup> The “principal thrust” test is consistent with the Legislature’s express statement of legislative purpose, in which the Legislature stated that it was “concerned about lawsuits brought *primarily* to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” Laws of 2010, ch. 118, § 1(a) (emphasis added).

“gravamen” of both TBCOT’s claims and SDL’s counterclaims is whether the parties’ contract has been violated. SDL’s allegations referring to TBCOT’s “complaints” are, at most, “collateral allusions” incidental to SDL’s causes of action, which are based on nonprotected activity (*i.e.*, TBCOT’s squeezing SDL out of its rightful earn-out payments by, for example, operating the team in a manner that effectively denies such payments). *See, e.g.*, Amended Answer, Affirmative Defenses, Counterclaims, and Third-Party Claims, at ¶ 28. CP 120.

TBCOT did not meet its initial burden of proving that SDL’s claims were based on an act in furtherance of the right of petition or free speech merely by showing that SDL’s claims were filed *after* TBCOT’s claims, or that SDL’s claims somehow relate to TBCOT’s claims. If such a showing met the burden under the anti-SLAPP statute, every plaintiff would be able to prevent every counterclaim merely by filing a motion to strike under the anti-SLAPP statute. Instead, “the petitioning activity must actually give rise to and be *the* basis for the asserted liability.” *Dillon*, 179 Wn. App. at 82, citing *Equilon Enters. v. Consumer Cause, Inc.*, 29 Cal.4th 53, 66, 52 P.3d 685 (2002), in turn quoting *ComputerX-press, Inc. v. Jackson*, 93 Cal.App.4th 993, 1003, 113 Cal.Rptr.2d 625 (Cal. App. 2001) (“[T]he act underlying the plaintiff’s cause or the act which forms the basis for the plaintiff’s cause of action must *itself have* been an act in

furtherance of the right of petition or free speech” (emphasis in the original)).

The case of *City of Alhambra v. D’Ausilio*, 193 Cal.App.4th 1301, 123 Cal. Rptr. 3d 142 (Cal. App. 2011) is instructive. There, the court upheld an order denying a special motion to strike, stating:

“[T]he mere fact that an action was filed *after* protected activity took place does not mean the action arose *from* that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been ‘triggered’ by protected activity does not entail that it is one arising from such. In the anti-SLAPP context, the critical consideration is whether the cause of action is based on the defendant’s protected free speech or petitioning activity.” (*Navellier v. Sletten* [(2002)] 29 Cal.4th [82,] 89 [124 Cal. Rptr. 2d 530, 52 P.3d 703], citing [*City of Cotati v. Cashman* (2002)] 29 Cal.4th [69,] 76-78 [124 Cal. Rptr. 2d 519, 52 P.3d 695].) “The anti-SLAPP statute cannot be read to mean that ‘any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under [the California anti-SLAPP statute], whether or not the claim is based on conduct in exercise of those rights.’” (*Cotati, supra*, at p. 77.)

*Alhambra*, 123 Cal. Rptr. 3d at 147 (emphasis added in part). Similarly, here, the mere fact that SDL asserted counterclaims after TBCOT filed suit does not mean that SDL’s claims are “based on” TBCOT’s protected activity. To hold otherwise would mean that all counterclaims are subject to a motion to strike under the anti-SLAPP statute.

TBCOT argued to the trial court that SDL’s claims are similar to the allegations in *Albergo v. Immunosyn Corp.*, 2011 WL 197580 (S.D. Cal. Jan. 20, 2011), which attacked conduct that the court held to be

protected under California’s anti-SLAPP statute. CP 212-13 (TBCOT’s briefing, citing and discussing *Albergo*). In that case, the plaintiffs alleged they were fraudulently induced to invest in the stock of a start-up company, Immunosyn Corporation. They filed suit for, among other things, fraud and fraud in the inducement. *Id.*, \*1. The defendants filed counterclaims for, among other things, fraud. *Id.* On plaintiff’s motion to strike under California’s anti-SLAPP statute, the court held that the fraud counterclaim was based on protected activity. The court noted that the damages flowing from the alleged fraud were “caused by” the complaint’s assertion. *Id.*, \*6. Therefore, the court reasoned, the plaintiffs were being sued because of the claims they filed in the federal court. In fact, **but for** the federal lawsuit, the defendants’ fraud claim would have no basis. *Id.*

This case is clearly distinguishable from *Albergo*. With the exception of SDL’s voluntarily-dismissed claim under RCW 4.84.185 (alleging TBCOT’s fraud claim is frivolous),<sup>5</sup> SDL’s claims for damages are not premised on the fact that TBCOT filed a complaint. Rather, SDL’s claims seek recovery of damages caused by TBCOT’s and third-party defendants’ out-of-court actions designed to avoid paying SDL its earn-out payments under the parties’ Purchase Agreement. SDL could have

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<sup>5</sup> SDL decided to voluntarily dismiss its second claim for relief (frivolous claim under RCW 4.84.185), but reserved the right to seek relief under that statute after trial. CP 190, at fn. 2.

filed these claims against TBCOT and the third-party defendants *independently* of whether TBCOT had filed a lawsuit. Both the trial court and TBCOT's counsel acknowledged this fact. VRP, at p. 13 (lines 2-17); and p. 14 (lines 2-4).

Two recent decisions by this Court – one holding that the anti-SLAPP statute applied and one holding that it did not – provide a useful framework for analyzing the issue. In *Davis v. Cox*, \_\_\_ Wn. App. \_\_\_, 325 P.3d 255 (2014), this Court reiterated that, to determine whether a pleaded cause of action falls within the scope of the anti-SLAPP statute, the trial court must focus on the principal thrust or gravamen of the claim. 325 P.3d at 261 (¶1). This Court further observed that “[a] consideration of the relief sought by the party asserting the cause of action can be a determinative factor when resolving this question.” *Id.* *Cox* involved a resolution approving a boycott of Israeli-made products and financial investments, adopted by the board of directors of the Olympia Food Co-Op, a nonprofit corporation (the “Co-Op”). *Id.* (¶2). The plaintiffs – members of the Co-Op – filed a derivative suit on behalf of the Co-Op against 16 current and former board members, challenging the boycott; the plaintiffs sought a declaratory judgment that the boycott was void, permanent injunctive relief preventing its enforcement, and monetary damages from all 16 defendants. *Id.* at 262 (¶4).

The defendant directors filed – and the trial court granted – a special motion to strike the plaintiffs’ complaint under the anti-SLAPP statute. *Id.* at 262-63 (¶¶ 5-7). In granting the motion, the trial court ruled that the directors had shown by a preponderance of evidence that their approval of the boycott fit within the anti-SLAPP statute’s category of “any other lawful conduct in ... furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern or in furtherance of the exercise of the constitutional right of petition.” *Id.* at 263 (¶7) (quoting RCW 4.24.525(2)(e)) (edit’s this Court’s). The court also found that the plaintiffs had failed to establish by clear and convincing evidence a probability of prevailing on their claims. *Id.*

This Court affirmed the trial court’s decision. With regard to the first prong of the anti-SLAPP inquiry (whether the claim targets activity involving public participation and petition), this Court stated:

In seeking to identify the principal thrust or gravamen of the Members’ claim, ***it is instructive to look to the remedy sought.*** One remedy the Members sought was permanent injunctive relief. In essence, the Members sought to have the court permanently enjoin the Directors from continuing the boycott. Because the nonviolent elements of boycotts are protected by the First Amendment, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 915, 102 S. Ct. 3409, 73 L. Ed 2d 1215 (1982), ***the Members’ desired remedy reveals that the principal thrust of their suit is to make the Directors cease engaging in activity protected by the First Amendment. This is of great significance in resolving the question presented.***

*Id.* at 254-65 (¶15) (emphasis added). This Court concluded that the trial court correctly determined that the defendant directors had established that the plaintiffs' claims targeted activity involving public participation and petition. *Id.* at 265 (¶¶ 16-19).

Unlike the situation in *Cox*, the remedy sought in this case does not seek to prevent TBCOT and the third-party defendants from engaging in protected activity. Rather, SDL seeks monetary damages for their failure to pay SDL its earn-out payments.

In another recent case, *Alaska Structures, Inc. v. Hedlund (supra)*, this Court once again considered the moving party's initial burden on an anti-SLAPP motion. In that case the defendant, Hedlund, a former employee of the plaintiff corporation ("AKS"), had made several critical postings about AKS on an Internet jobsite forum (a resource for job seekers); Hedlund claimed that he made his comments in order to provide an accurate picture of AKS to prospective employees. 323 P.3d at 1083 (¶2). Focusing on one of Hedlund's postings, regarding the company's security measures, AKS sued Hedlund for breaching a confidentiality agreement. *Id.* at 1083-84 (¶¶ 2-4). Hedlund moved to dismiss the claim under the anti-SLAPP statute, arguing that he was sued as a result of his postings to a web site, which is a public forum. *Id.* at 1084 (¶4). The trial court ruled that the anti-SLAPP statute applied and that AKS was unable

to show that its claim for violation of the confidentiality agreement had merit; pursuant to the statute, the court awarded Hedlund his attorney fees and a \$10,000 penalty. *Id.* (¶5).

This Court reversed, holding that “[b]ecause this is a private contractual matter, the anti-SLAPP statute does not apply.” *Id.* at 1083 (¶1). This Court stated:

We must adhere to the legislature’s policy that the purpose of the anti-SLAPP statute is to strike a balance between the right of the person to file a lawsuit and that person’s right to a jury trial and the rights of people to participate in “matters of public concern.” On these facts that balance leads us to the conclusion that the postings cannot be deemed protected activity. This is particularly true where the complaint alleges Hedlund voluntarily limited his right to speak freely by signing a confidentiality agreement. ***The issue here is a simple contractual issue – whether or not Hedlund violated a contract he signed with his former employer.***

*Id.* at 1087-88 (¶17) (emphasis added).

Just as in *Hedlund*, this case involves a private contractual dispute to which the anti-SLAPP statute does not apply. Any doubts on this score are easily settled simply by considering SDL’s counterclaims without the collateral allusions to TBCOT’s lawsuit. Attached as the sole appendix to this brief is copy of SDL’s counterclaims, marked by striking through those allusions (found at CP 118, lines 8-11). As the Court can readily see, the deletion of those allusions leaves the gravamen of the counterclaims unchanged -- confirming that this matter is truly a private contractual dispute, to which the anti-SLAPP statute does not apply.

**B. The Trial Court Erred By Awarding Anti-SLAPP Damages to the Third-Party Defendants Since They Did Not Engage in Any Petitioning Activity.**

The trial court awarded statutory damages of \$10,000 each to third-party defendants Mikal Thomsen and Aaron Artman. But those parties had no standing under the anti-SLAPP statute because they were first brought into this action as third-party defendants. They did not bring the initial complaint with TBCOT and therefore cannot show that SDL retaliated against them for any act of petitioning. TBCOT itself acknowledged this in in a prior filing, stating: “the ... third-party defendants did not bring any complaints whatsoever against Defendants.” Plaintiff’s Opposition to Defendants’ Motion to Amend, at p. 6. CP 90.

At the hearing on the anti-SLAPP motion, however, counsel for TBCOT and the third-party defendants argued that statutory damages were appropriate for the third-party defendants because they were one and the same with TBCOT: “[T]hey [third-party defendants] **are** The Baseball Club of Tacoma ... they **are** the baseball club....” VRP, at p. 24 (lines 20-23) (emphasis added). Yet, in TBCOT’s memorandum in support of its anti-SLAPP motion, TBCOT took precisely the opposite position:

Defendants’ third-party claims against Mr. Thomsen and Mr. Artman must fail for the simple reason that Defendants’ claims arise from alleged conduct of *TBCOT* and any alleged liability cannot pierce the corporate veil to Mr. Thomsen and Mr. Artman.... Here, Defendants’ claims arise from TBCOT’s filing of the lawsuit.... And Defendants’ specific allegations against Mr.

Thomsen and Mr. Artman relate to alleged conduct or failure to act by TBCOT, not Mr. Thomsen and Mr. Artman – conduct that is addressed in the Purchase Agreement signed by the Defendants and TBCOT, *not* by Mr. Thomsen or Mr. Artman individually.

CP 175 (emphasis in the original).

The third-party defendants cannot have it both ways. They are either one and the same with TBCOT (in which case the trial court should have made only a single \$10,000 award) or they are separate and independent parties (in which case, since they did not engage in any petitioning activity, they are not entitled to separate \$10,000 awards). The trial court erred in awarding statutory damages to Messrs. Thomsen and Artman.

**C. The Trial Court's Award of Attorneys' Fees Should Be Reversed.**

The trial court also awarded TBCOT and the third-party defendants attorneys' fees in the amount of \$21,232. CP 273-274. The only basis for this award was that they prevailed on their special motion to strike under the anti-SLAPP statute. See RCW 4.24.525(6)(a)(i). Because the trial court's anti-SLAPP ruling was erroneous, so too was the court's order awarding attorneys' fees. The order awarding fees should be reversed.

**VI. CONCLUSION**

The principal thrust or gravamen of SDL's counterclaims and third-party claims is that TBCOT and the third-party defendants have been trying to squeeze SDL out of its earn-out payments, not that TBCOT filed a complaint. SDL and the Schlegels are entitled to their day in court on these claims.

This Court should reverse the trial court's orders and remand the case for further proceedings.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2014.

**ATER WYNNE LLP**

**CARNEY BADLEY SPELLMAN, P.S.**

By: MBK #14405 for  
Stephen J. Kennedy, WSBA No. 14405

By: Michael B. King  
Michael B. King, WSBA No. 14405

*Attorneys for Appellants*

# **APPENDIX**

## **A**

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*The Honorable Barbara Linde*

KING COUNTY

SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 12-2-25136-3 SEA

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SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

Case No. 12-2-25136-3 SEA

THE BASEBALL CLUB OF TACOMA, LLC, a  
Washington limited liability company,

Plaintiff/Counterclaim  
Defendants,

v.

SDL BASEBALL PARTNERS, LLC, a Nevada  
limited liability company, ROBERT J.  
SCHLEGEL, and ROBERT K. SCHLEGEL,

Defendants/Counterclaimant.

**AMENDED ANSWER, AFFIRMATIVE  
DEFENSES, COUNTERCLAIMS AND  
THIRD PARTY CLAIMS**

SDL BASEBALL PARTNERS, LLC, a Nevada  
limited liability company, ROBERT J.  
SCHLEGEL, and ROBERT K. SCHLEGEL,

Third-Party Plaintiffs,

v.

MIKAL THOMSEN and AARON ARTMAN,

Third-Party Defendants.

Defendants SDL Baseball Partners, LLC (“SDL Partners”), Robert J. Schlegel (“Bob Schlegel”), and Robert K. Schlegel (“Kirby Schlegel”) (collectively referred to herein as “SDL”). for their Answer, Affirmative Defenses, Counterclaims and Third Party Claims to the plaintiff’s Complaint dated July 24, 2012 (the “Complaint”) state and allege as follows:

ANSWER

Headings: To the extent that the subheadings A through K of the Complaint purport to allege facts requiring a response, SDL denies each and every allegation set forth therein.

1. Answering Paragraph 1 of the Complaint, SDL admits the allegations set forth therein, except that: SDL denies that the Purchase Agreement was a “Major” League Baseball Franchise Purchase Agreement; and SDL denies that “all” of the assets were sold.

2. Answering Paragraph 2 of the Complaint, SDL denies each and every allegation set forth therein.

3. Answering Paragraph 3 of the Complaint, SDL denies each and every allegation set forth therein.

4. Answering Paragraph 4 of the Complaint, SDL denies each and every allegation set forth therein.

5. Answering Paragraph 5 of the Complaint, SDL admits that plaintiff TBCOT is a Washington limited liability company. SDL lacks knowledge or information sufficient to form a belief as to the veracity of the remaining allegations set forth in Paragraph 5, and therefore denies the same.

6. Answering Paragraph 6 of the Complaint, SDL admits the allegations set forth therein.

7. Answering Paragraph 7 of the Complaint, SDL admits the allegations set forth therein.

8. Answering Paragraph 8 of the Complaint, SDL admits the allegations set forth in the first sentence thereof. SDL denies that Robert K. Schlegel is “managing member” of SDL and states affirmatively that Robert K. Schlegel is a member and a manager of SDL.

9. Answering Paragraph 9 of the Complaint, SDL admits the allegations set forth therein.

10. Answering Paragraph 10 of the Complaint, SDL admits the allegations set forth therein.

1           11.     Answering Paragraph 11 of the Complaint, SDL admits that the Court has  
2 personal jurisdiction over the defendants but denies that the defendants caused any injury.  
3 Except as expressly admitted, SDL denies each and every remaining allegation in Paragraph 11.

4           12.     Answering Paragraph 12 of the Complaint, SDL admits the allegations set forth  
5 therein.

6           13.     Answering Paragraph 13 of the Complaint, SDL admits the allegations set forth  
7 therein.

8           14.     Answering Paragraph 14 of the Complaint, SDL admits the allegations set forth  
9 therein.

10          15.     Answering Paragraph 15 of the Complaint, SDL admits the allegations set forth  
11 therein.

12          16.     Answering Paragraph 16 of the Complaint, SDL admits the allegations set forth  
13 therein.

14          17.     Answering Paragraph 17 of the Complaint, SDL admits that the Purchase  
15 Agreement contains certain representations. Except as expressly admitted, SDL denies each and  
16 every remaining allegation in Paragraph 17.

17          18.     Answering Paragraph 18 of the Complaint, SDL admits the allegations set forth  
18 therein.

19          19.     Answering Paragraph 19 of the Complaint, SDL admits the allegations set forth  
20 therein.

21          20.     Answering Paragraph 20 of the Complaint, SDL admits that it marketed the  
22 Businesses, and states that the Purchase Agreement sets forth the entire agreement between the  
23 parties thereto. Except as expressly admitted, SDL denies each and every remaining allegation  
24 in Paragraph 20.

25          21.     Answering Paragraph 21 of the Complaint, SDL denies each and every allegation  
26 set forth therein. SDL states that the Purchase Agreement sets forth the entire agreement  
27 between the parties thereto.

1           22.     Answering Paragraph 22 of the Complaint, SDL admits that it forecasted that the  
2 new stadium would be an improvement and a net positive for the Businesses, but denies that any  
3 representations were made. Except as expressly admitted, SDL denies each and every remaining  
4 allegation in Paragraph 22.

5           23.     Answering Paragraph 23 of the Complaint, SDL states that it lacks knowledge or  
6 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
7 therefore denies the same.

8           24.     Answering Paragraph 24 of the Complaint, SDL states that it lacks knowledge or  
9 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
10 therefore denies the same.

11          25.     Answering Paragraph 25 of the Complaint, SDL admits that all parties were  
12 aware that distributions were made, admits that the buyers wanted to recoup these distributions,  
13 and states that it was agreed that the monies would be recouped through the earn-out provision.  
14 Except as expressly admitted, SDL denies each and every remaining allegation in Paragraph 25.

15          26.     Answering Paragraph 26 of the Complaint, SDL denies each and every allegation  
16 set forth therein. In any event, SDL states that the distributions had nothing to do with  
17 operations, and TBCOT was not “persuaded to permit” the distributions because they had  
18 already occurred.

19          27.     Answering Paragraph 27 of the Complaint, SDL states that it lacks knowledge or  
20 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
21 therefore denies the same.

22          28.     Answering Paragraph 28 of the Complaint, SDL states that it lacks knowledge or  
23 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
24 therefore denies the same. SDL states further that if tax returns had been required, it would have  
25 been set forth in the representations negotiated by the parties; in any event, since the LLCs were  
26 flow-through entities, the tax returns were largely irrelevant.

27          29.     Answering Paragraph 29 of the Complaint, SDL admits that there are certain

1 representations and warranties set forth in the Purchase Agreement, which speak for themselves.  
2 SDL lacks knowledge or information sufficient to form a belief as to the veracity of the  
3 remaining allegations set forth in Paragraph 29, and therefore denies the same.

4 30. Answering Paragraph 30 of the Complaint, SDL admits that the paragraph sets  
5 forth an accurate partial quotation from Appendix A, ¶ 5 of the Purchase Agreement. Except as  
6 expressly admitted, SDL denies each and every remaining allegation in Paragraph 30.

7 31. Answering Paragraph 31 of the Complaint, SDL admits that the paragraph sets  
8 forth an accurate quotation from Appendix A, ¶ 23 of the Purchase Agreement.

9 32. Answering Paragraph 32 of the Complaint, SDL admits that the paragraph sets  
10 forth an accurate quotation of Section 6.1(a) of the Purchase Agreement, and denies that the  
11 paragraph sets forth an accurate quotation of Section 6.1(d) of the Purchase Agreement. Except  
12 as expressly admitted, SDL denies each and every remaining allegation in Paragraph 32.

13 33. Answering Paragraph 33 of the Complaint, SDL admits that it had an opportunity  
14 to provide exceptions and corrections. SDL admits that the second sentence of Paragraph 33 is  
15 generally true, except to the extent shown in the disclosure schedule. Except as expressly  
16 admitted, SDL denies each and every remaining allegation in Paragraph 33.

17 34. Answering Paragraph 34 of the Complaint, SDL admits only that it provided  
18 financial statements for fiscal years 2007, 2008, 2009, and 2010, as well as the balance sheet for  
19 the quarter ending December 31, 2010, and made representations only with regard to what was  
20 attached to the Purchase Agreement. SDL denies the allegation that the financial statements  
21 were represented to be “accurate”; rather, the financial statements were represented to be  
22 consistent with the books and records of the Businesses, prepared in conformity to GAAP  
23 consistently applied, and fairly represented the financial position of the Businesses. Except as  
24 expressly admitted, SDL denies each and every remaining allegation in Paragraph 34.

25 35. Answering Paragraph 35 of the Complaint, SDL admits that there are certain  
26 representations set forth in the Purchase Agreement, which speak for themselves. Except as  
27 expressly admitted, SDL denies each and every remaining allegation in Paragraph 35.

1           36.     Answering Paragraph 36 of the Complaint, SDL denies each and every allegation  
2 set forth therein.

3           37.     Answering Paragraph 37 of the Complaint, SDI states that it lacks knowledge or  
4 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
5 therefore denies the same.

6           38.     Answering Paragraph 38 of the Complaint, SDL states that it lacks knowledge or  
7 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
8 therefore denies the same.

9           39.     Answering Paragraph 39 of the Complaint, SDL states that it lacks knowledge or  
10 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
11 therefore denies the same.

12          40.     Answering Paragraph 40 of the Complaint, SDL states that it lacks knowledge or  
13 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
14 therefore denies the same.

15          41.     Answering Paragraph 41 of the Complaint, SDL states that it lacks knowledge or  
16 information sufficient to form a belief as to the veracity of the allegation regarding a forecast of  
17 EBITDA amounts and therefore denies the same. SDI denies any implied allegation that it  
18 made representations or warranties of EBITDA amounts; SDL's representations are set forth in  
19 the Purchase Agreement, which constitutes the entire agreement of the parties.

20          42.     Answering Paragraph 42 of the Complaint, SDL admits that it calculated certain  
21 budgeted revenues and expenses, but states that SDL's representations are set forth in the  
22 Purchase Agreement, which constitutes the entire agreement of the parties. Except as expressly  
23 admitted, SDL denies each and every remaining allegation in Paragraph 42.

24          43.     Answering Paragraph 43 of the Complaint, SDL admits that it owned and  
25 continued to operate the Businesses during the first six months of the fiscal year prior to closing,  
26 but subject to the restrictions set forth in the Purchase Agreement. SDL admits that this was a  
27 period when minimal revenue was earned because no games were held in Cheney Stadium.

1           44.     Answering Paragraph 44 of the Complaint, SDL states that it lacks knowledge or  
2 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
3 therefore denies the same.

4           45.     Answering Paragraph 45 of the Complaint, SDL states that it lacks knowledge or  
5 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
6 therefore denies the same.

7           46.     Answering Paragraph 46 of the Complaint, SDL states that it lacks knowledge or  
8 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
9 therefore denies the same.

10          47.     Answering Paragraph 47 of the Complaint, SDL states that it lacks knowledge or  
11 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
12 therefore denies the same.

13          48.     Answering Paragraph 48 of the Complaint, SDL states that it lacks knowledge or  
14 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
15 therefore denies the same.

16          49.     Answering Paragraph 49 of the Complaint, SDL denies each and every allegation  
17 set forth therein.

18          50.     Answering Paragraph 50 of the Complaint, SDL admits that there are certain  
19 representations set forth in the Purchase Agreement, which speak for themselves. Except as  
20 expressly admitted, SDL denies each and every remaining allegation in Paragraph 50.

21          51.     Answering Paragraph 51 of the Complaint, SDL denies each and every allegation  
22 set forth therein.

23          52.     Answering Paragraph 52 of the Complaint, SDL states that it lacks knowledge or  
24 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
25 therefore denies the same.

26          53.     Answering Paragraph 53 of the Complaint, SDL states that it lacks knowledge or  
27 information sufficient to form a belief as to the veracity of the allegations set forth therein, and

1 therefore denies the same.

2 54. Answering Paragraph 54 of the Complaint, SDL admits that it made no  
3 representations regarding EBITDA numbers; rather, SDL provided financial statements which  
4 speak for themselves.

5 55. Answering Paragraph 55 of the Complaint, SDL denies each and every allegation  
6 set forth therein.

7 56. Answering Paragraph 56 of the Complaint, SDI. denies each and every allegation  
8 set forth therein.

9 57. Answering Paragraph 57 of the Complaint, SDL admits that an audit was  
10 performed, but denies that the audit confirmed that any accounting “practices” were improper.  
11 SDL states further that the audit speaks for itself as to its conclusions, that the audit is being  
12 contested, and that the audit is still ongoing. Except as expressly admitted, SDL denies each and  
13 every remaining allegation in Paragraph 57.

14 58. Answering Paragraph 58 of the Complaint, SDL states that the audit speaks for  
15 itself as to its conclusions, that the audit is being contested, and that the audit is still ongoing.  
16 Except as expressly admitted, SDL denies each and every remaining allegation in Paragraph 58.

17 59. Answering Paragraph 59 of the Complaint, SDL states that it lacks knowledge or  
18 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
19 therefore denies the same.

20 60. Answering Paragraph 60 of the Complaint, SDL denies each and every allegation  
21 set forth therein.

22 61. Answering Paragraph 61 of the Complaint, SDL denies each and every allegation  
23 set forth therein.

24 62. Answering Paragraph 62 of the Complaint, SDL denies each and every allegation  
25 set forth therein.

26 63. Answering Paragraph 63 of the Complaint, SDL states that it lacks knowledge or  
27 information sufficient to form a belief as to the veracity of the allegations set forth therein, and

1 therefore denies the same.

2 64. Answering Paragraph 64 of the Complaint, SDL denies each and every allegation  
3 set forth therein.

4 65. Answering Paragraph 65 of the Complaint, SDL states that the earn-out  
5 provisions of the Purchase Agreement speak for themselves. Except as expressly admitted, SDL  
6 denies each and every remaining allegation in Paragraph 65.

7 66. Answering Paragraph 66 of the Complaint, SDL denies each and every allegation  
8 set forth therein.

9 67. Answering Paragraph 67 of the Complaint, SDL admits the first sentence thereof,  
10 and states that the terms of the Purchase Agreement speak for themselves. Except as expressly  
11 admitted, SDL denies each and every remaining allegation in Paragraph 67.

12 68. Answering Paragraph 68 of the Complaint, SDL denies each and every allegation  
13 set forth therein.

14 69. Answering Paragraph 69 of the Complaint, SDL denies each and every allegation  
15 set forth therein.

16 70. Answering Paragraph 70 of the Complaint, SDL states that the terms of the  
17 Purchase Agreement speak for themselves. Except as expressly admitted, SDL denies each and  
18 every remaining allegation in Paragraph 70.

19 71. Answering Paragraph 71 of the Complaint, SDL denies that the paragraph sets  
20 forth an accurate partial quotation from Section 7.2 of the Purchase Agreement. SDL denies  
21 each and every remaining allegation in Paragraph 71.

22 72. Answering Paragraph 72 of the Complaint, SDL admits that it received the report  
23 on or about January 20, 2012.

24 73. Answering Paragraph 73 of the Complaint, SDL admits the allegations set forth  
25 therein.

26 74. Answering Paragraph 74 of the Complaint, SDL admits the allegations set forth  
27 therein.

1           75.    Answering Paragraph 75 of the Complaint, SDL admits the allegations set forth  
2 therein

3           76.    Answering Paragraph 76 of the Complaint, SDL admits that it declined to engage  
4 in mediation or arbitration prior to the filing of this action, but denies that it failed to make any  
5 attempt to resolve this dispute. In fact, SDL offered to rescind and unwind the Purchase  
6 Agreement transaction and to buy the team back from the Plaintiff.

7           77.    Answering Paragraph 77 of the Complaint, SDL repeats and realleges its answers  
8 to paragraphs 1 through 76 above as if set forth herein.

9           78.    Answering Paragraph 78 of the Complaint, SDL states that the terms of the  
10 Purchase Agreement speak for themselves. Except as expressly admitted, SDL denies each and  
11 every remaining allegation in Paragraph 78.

12          79.    Answering Paragraph 79 of the Complaint, SDL denies each and every allegation  
13 set forth therein.

14          80.    Answering Paragraph 80 of the Complaint, SDL admits that the Purchase  
15 Agreement is valid and enforceable against the parties.

16          81.    Answering Paragraph 81 of the Complaint, SDL states that it lacks knowledge or  
17 information sufficient to form a belief as to the veracity of the allegations set forth therein, and  
18 therefore denies the same. SDL states further that, in any event, TBCOT's obligations under the  
19 Purchase Agreement are ongoing.

20          82.    Answering Paragraph 82 of the Complaint, SDL denies each and every allegation  
21 set forth therein.

22          83.    Answering Paragraph 83 of the Complaint, SDL repeats and realleges its answers  
23 to paragraphs 1 through 82 above as if set forth herein.

24          84.    Answering Paragraph 84 of the Complaint, SDL states that this paragraph  
25 purports to state a conclusion of law to which no response is required.

26          85.    Answering Paragraph 85 of the Complaint, SDL denies each and every allegation  
27 set forth therein.

1           86.     Answering Paragraph 86 of the Complaint, SDL denies each and every allegation  
2 set forth therein.

3           87.     Answering Paragraph 87 of the Complaint, SDL denies each and every allegation  
4 set forth therein.

5           88.     Answering Paragraph 88 of the Complaint, SDL repeats and realleges its answers  
6 to paragraphs 1 through 87 above as if set forth herein.

7           89.     Answering Paragraph 89 of the Complaint, SDL denies each and every allegation  
8 set forth therein.

9           90.     Answering Paragraph 90 of the Complaint, SDL denies each and every allegation  
10 set forth therein.

11          91.     Answering Paragraph 91 of the Complaint, SDL denies each and every allegation  
12 set forth therein.

13          92.     Answering Paragraph 92 of the Complaint, SDL denies each and every allegation  
14 set forth therein.

15          93.     Answering Paragraph 93 of the Complaint, SDI repeats and realleges its answers  
16 set forth in paragraphs 1 through 92 as if set forth herein.

17          94.     Answering Paragraph 94 of the Complaint, SDL denies each and every allegation  
18 set forth therein.

19          95.     Answering Paragraph 95 of the Complaint, SDL denies each and every allegation  
20 set forth therein.

21          96.     Answering Paragraph 96 of the Complaint, SDI denies each and every allegation  
22 set forth therein.

23          97.     Answering Paragraph 97 of the Complaint, SDL denies each and every allegation  
24 set forth therein.

25          98.     Answering Paragraph 98 of the Complaint, SDL denies each and every allegation  
26 set forth therein.

**AFFIRMATIVE DEFENSES**

1  
2 By way of further answer, and for their affirmative defenses, and without waiver of any  
3 issues that may be raised hereafter regarding allocation of the burden of proof, defendants  
4 affirmatively asserts the following defenses:

- 5 1. The Complaint fails to state a claim upon which relief can be granted.
- 6 2. Some or all of plaintiff's alleged claims are barred under the doctrines of estoppel,  
7 waiver and laches.
- 8 3. The Complaint fails to plead fraud with particularity as required by Civil Rule  
9 9(b).
- 10 4. Plaintiff has failed to mitigate their alleged damages.
- 11 5. Plaintiff and/or its agents, representatives, or consultants were contributorily  
12 negligent or otherwise comparatively at fault, and any damages which might otherwise be  
13 awarded to plaintiffs must be barred or reduced accordingly.
- 14 6. Plaintiff's alleged tort damages are barred under the economic loss doctrine.
- 15 7. Plaintiff's alleged damages were not proximately caused by any acts or omissions  
16 of the defendants.
- 17 8. To the extent plaintiff's claims are based on alleged representations or warranties  
18 not expressly set forth in the Purchase Agreement, they are barred under the parol evidence rule  
19 and Section 9.2 ("Entire Agreements and Modification") of the Purchase Agreement.
- 20 9. Plaintiff's alleged damages are barred under the doctrine of ratification.
- 21 10. Plaintiff's alleged damages for non-payment of the excise taxes are barred by the  
22 doctrine of payment. Said taxes were paid to TBCOT on April 22, 2013 in the amount of  
23 \$317,330.
- 24 11. Defendants have tendered an offer to rescind the contract and remain able and  
25 willing to do so.
- 26 12. The defendants reserve the right to amend their answer to assert additional  
27

1 affirmative defenses as may appear warranted based on further investigation and discovery

2 **COUNTERCLAIMS AND THIRD PARTY CLAIMS**

3 For their counterclaims against the plaintiff and third party claims against Thomsen and  
4 Artman, the defendants allege as follows:

5 **THIRD PARTY DEFENDANTS**

6 1. Mikal Thomsen (“Thomsen”) is an individual residing in the State of Washington  
7 who may be served at 719 96th Ave SE Bellevue, Washington, 98004 or wherever else he may  
8 be found.

9 2. Aaron Artman (“Artman”) is an individual residing in the State of Washington  
10 who may be served at 715 N 9th St Tacoma, Washington, 98403 or wherever else he may be  
11 found.

12 3. The Baseball Club of Tacoma, LLC (“TBCOT”), a Washington limited liability  
13 company, has appeared herein.

14 **JURISDICTION AND VENUE**

15 4. This Court has subject matter jurisdiction over Third Party Defendants pursuant to  
16 the Washington Constitution, art. IV, § 6, and RCW 2.08.010, because the amount in controversy  
17 exceeds \$300.

18 5. Personal jurisdiction over each Third Party Defendant is also vested in this Court  
19 pursuant to RCW 4.28.185 because each transacted business in Washington, directed activities  
20 that occurred in Washington, are residents of Washington and caused injury in Washington.

21 6. Venue is proper in this Court pursuant to RCW 4.12.025(1) and Article 9.9 of the  
22 Purchase Agreement referred to herein.

23 **STATEMENT OF FACTS**

24 7. In 2006, SDL Partners purchased the Tacoma Rainiers (the “Team”), a Minor  
25 League Baseball Team that is part of the Pacific Coast League. SDL Partners is owned and/or  
26 controlled by the Schlegel Defendants.

27 8. The Schlegels decided in 2010 to sell the Team and certain associated assets and

1 began marketing the sale of the Team. TBCOT and Thomsen expressed interest in purchasing  
2 the Team, and the parties began negotiating said sale. Artman was the President of the Team  
3 under the Schlegels' management and was rehired and retained by TBCOT and Thomsen as the  
4 President after the sale. Ultimately, TBCOT purchased the Team and executed that certain  
5 Minor League Baseball Franchise Purchase Agreement dated January 31, 2011 (the "Purchase  
6 Agreement").

7 9. Thomsen is a sophisticated businessman and sports team owner with years of  
8 experience in buying, owning and managing professional sports teams. Artman has extensive  
9 experience in managing and marketing the Team as well. During the parties' negotiations for  
10 SDL Partners to sell the Team to TBCOT, the Third Party Defendants were given full access to  
11 the Team's financials, something Artman already had. Thomsen and TBCOT were given the  
12 opportunity and tools to conduct whatever level of due diligence and investigation into the Team  
13 as they wanted to do, and they in fact did do their own investigation. Third Party Defendants ran  
14 their own pro formas and created their own finance plan for the Team. TBCOT bought the Team  
15 based on comparable sales of other teams, not on cash flow for the Team or any multiples  
16 thereof, making the financials of the Team irrelevant to the purchase price.

17 10. When TBCOT decided to buy the Team, it did so with full knowledge of the  
18 Team's financial condition. Further, because of the global economy conditions in 2010 when  
19 TBCOT bought the Team, TBCOT got a good deal on the Team, and it got an even better deal  
20 when it was able to spread some of the purchase price over time through an earn-out provision in  
21 the Purchase Agreement. The Team is now worth significantly more than it was when it was  
22 sold.

23 11. After purchasing the Team, a series of events occurred, which were out of  
24 Defendants' control entirely, that adversely impacted the Team's revenue. It is clear that Third  
25 Party Defendants made several assumptions (and assumed the risk for these assumptions) in  
26 calculating the value of the Team to them. Such assumptions included (a) a certain number of  
27 ticket sales and good weather to support such sales; (b) Artman thought he had secured a naming

1 rights deal, which would be a financial benefit and bring revenue to TBCOT; and, (c) Third Party  
2 Defendants believed that a bank that had previously sponsored the team would continue to do so.  
3 As luck would have it, the weather was rainier than expected the first season after TBCOT  
4 bought the Team, resulting in lower than expected ticket sales; the naming rights deal never  
5 came to fruition; and, the bank sponsor did not renew its sponsorship, all of which lead to  
6 reduced revenue for the Team and all of which are out of Defendants' control. These, along with  
7 other risks, like labor issues, increased taxes, and poor team performance, are risks that a ball  
8 team owner takes when it buys a team.

9 12. Additionally, on information and belief, the investors who invested in TBCOT  
10 have changed or experienced changes in their situations as well, which in turn is putting more  
11 pressure on Thomsen and the other Third Party Defendants to produce additional revenue by  
12 squeezing SDL Partners out of its rightful earn-out.

13 13. When the Team did not make as much money as Third Party Defendants  
14 expected, they began to complain that they were misled about the Team's finances, something  
15 Defendants wholly deny. Third Party Defendants began complaining that they reached the  
16 purchase price for the Team based on a factor of EBITDA (Earnings Before Interest, Taxes,  
17 Depreciation and Amortization) and that Defendants' marketing materials for the Team included  
18 higher EBITDA calculations. In reality, while EBITDA may have been a factor in calculation of  
19 the earn-out, EBITDA was not a factor in the parties' negotiations of the purchase price, and  
20 nothing in the Purchase Agreement states that EBITDA was used in determining the "purchase  
21 price" for the Team.

22 14. After purchasing the Team, Third Party Defendants also began complaining that  
23 the financials for the Team were not audited. Again, there is nothing in the Purchase Agreement  
24 that required the financials to be audited or in accordance with GAAP, and TBCOT bought the  
25 Team with full knowledge and disclosure that the financials were not audited or prepared in  
26 accordance with GAAP. In fact, Artman (whom TBCOT and Thomsen have kept as the Team's  
27 president) assisted with and had intimate knowledge of the financial information that TBCOT

1 and Thomsen received.

2 15. Further, Third Party Defendants were represented by Isaac Wells, who also  
3 performed financial projections and reviews of financial information related to the Team for  
4 them, and Stewart Landefeld of the law firm of Perkins Coie, a law firm with extensive  
5 experience in the sale and purchase of sports teams. In short, Third Party Defendants had a very  
6 experienced and sophisticated team of business and legal professionals performing due diligence  
7 on the Team before TBCOT purchased it.

8 16. ~~Upon information and belief, Third Party Defendants have manufactured their~~  
9 ~~complaints about the Team's finances and value in order to avoid paying Defendants the earn-out~~  
10 ~~as required by the Purchase Agreement. Third Party Defendants' claims are part of a scheme~~  
11 ~~orchestrated in order to set up Defendants and avoid paying the earn-out altogether. After all, the~~  
12 "Purchase Price," as that term is defined in the Purchase Agreement was established using  
13 comparative sales of other minor league baseball teams before Third Party Defendants looked at  
14 the Team's financials, and even after their review and analysis of the financials, the purchase  
15 price never changed.

16 17. Further, Third Party Defendants could have required that the Team's financials be  
17 audited prior to the purchase, but they elected not to do so as part of their scheme to shift liability  
18 for any discrepancies in the financials to Defendants and to give them a handy basis for not  
19 paying the earn-out as agreed. Third Party Defendants are trying to recoup some of the losses  
20 and/or reduced revenue they experienced as a result of the risks they assumed by not paying SDL  
21 Partners the earn-out.

22 18. Third Party Defendants made a number of representations to Defendants, and  
23 Defendants relied on those representations when they decided to turn down other potential  
24 buyers and sell the Team to TBCOT. Obviously, Third Party Defendants represented that SDL  
25 Partners would receive the earn-out on the terms set forth in the Purchase Agreement. Had  
26 Defendants known that Third Party Defendants never really ever intended to pay the earn-out,  
27 they would not have sold the Team to TBCOT. Third Party Defendants also represented and

1 Defendants expected that Third Party Defendants would run the Team well and deal with them in  
2 good faith and fairly. Defendants also relied on Third Party Defendants' representations that  
3 they would market the Team in order to promote ticket sales, but instead Third Party Defendants  
4 reduced the Team's marketing budget and efforts.

5 19. Now that the Third Party Defendants have experienced a rainy season with lower  
6 than expected ticket sales, had investor strife within their own organization and made the  
7 decision to reduce marketing efforts, they want to blame Defendants for the decisions they made,  
8 risks they assumed and circumstances wholly out of Defendants' control. In short, Third Party  
9 Defendants want to use Defendants as scapegoats with their investors, and they made sure when  
10 they bought the Team that they structured the deal in a way that would allow them the  
11 opportunity and means to do just that.

12 **FIRST COUNTERCLAIM**  
13 **(Declaratory Judgment, RCW 7.24.010 et seq.)**

14 20. Pursuant to Civil Rule 10(c), defendants adopt and incorporate herein by  
15 reference the following paragraphs from plaintiff's Complaint and the defendants' answers  
16 thereto: 1, 5-9, and 12.

17 21. A dispute exists between the parties with regard to the remedy available to the  
18 plaintiff, if any, under the Purchase Agreement. Defendants contend that the plaintiff's sole and  
19 exclusive remedy – if any – for the alleged breaches described in the Complaint is set forth in  
20 Article VII of the Purchase Agreement ("Indemnification; Remedies"). Plaintiff, on the other  
21 hand, claims that its remedy is not so limited.

22 22. A declaratory judgment by this Court will remove the uncertainty regarding the  
23 scope of plaintiff's remedy under the Purchase Agreement.

24 23. Defendants are entitled to a declaratory judgment that the plaintiff's sole and  
25 exclusive remedy – if any – for the alleged breaches described in the Complaint is set forth in  
26 Article VII of the Purchase Agreement ("Indemnification; Remedies").  
27

**SECOND COUNTERCLAIM**  
**(Frivolous CLAIM; RCW 4.84.185)**

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2           24.     The Third Cause of Action set forth in plaintiff's Complaint (Fraud and Fraud in  
3 the Inducement) is frivolous and advanced without reasonable cause.

4           25.     Pursuant to RCW 4.84.185, upon dismissal of plaintiff's Third Cause of Action,  
5 defendants are entitled to an award of their reasonable expenses, including fees of attorneys,  
6 incurred in opposing the claim.

**THIRD COUNTERCLAIM**  
**(Breach of Duty of Good Faith and Fair Dealing)**

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8  
9           26.     A duty of good faith and fair dealing is implied in every contract, including the  
10 parties' Purchase Agreement. The duty requires the parties to cooperate with each other so that  
11 each may obtain the full benefit of performance.

12           27.     Under Article I, Section 1.3(c)(i) of the Purchase Agreement, as additional  
13 consideration for the sale of the assets, defendant SDL Baseball Partners, LLC is entitled to four  
14 annual (or five, if extended pursuant to Clause B) "earn-out" payments in an amount equal to  
15 twenty-three and three-quarters percent (23.75%) of the EBITDA (Earnings Before Interest,  
16 Taxes, Depreciation and Amortization) of the Acquired Business for the preceding fiscal year.

17           28.     The plaintiff has breached its duty of good faith and fair dealing by operating the  
18 Acquired Business in a manner that effectively denies any additional earn-out consideration to  
19 defendant SDL Baseball Partners, LLC. The plaintiff has done this by, among other things: (a)  
20 significantly reducing marketing investments (by almost 50% in fiscal year 2012, as compared to  
21 fiscal year 2011); and (b) making a distribution to its members in excess of \$1 million instead of  
22 spending to attract new customers to the stadium, including high-paying special events for the  
23 "dark" away-game periods (such as Chamber of Commerce events, service club meetings,  
24 corporate meetings, Rotary and Optimist Clubs, weddings, family reunions and similar events).

25           29.     As a direct and proximate result of the plaintiff's breach of its duty of good faith  
26 and fair dealing, defendants have suffered – and are entitled to recover from plaintiff – damages  
27 in an amount to be proven at the time of trial.

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**FOURTH COUNTERCLAIM**  
**(Fraud, Fraud in the Inducement, Fraud by Omission)**

30. Third Party Defendants committed fraud to the detriment of Defendants by making material misrepresentations and omissions to Defendants as set forth herein above

31. When Third Party Defendants made the above misrepresentations and omissions, they knew that the misrepresentations were false and the omissions material, or they made said misrepresentations and omissions recklessly and as a positive assertion, but without any knowledge of the truth of the misrepresentations.

32. Third Party Defendants made the above misrepresentations and material omissions with the intention that Defendants rely and act upon them. Defendants acted in reasonable reliance on Third Party Defendants' misrepresentations and omissions. Third Party Defendants' conduct constitutes fraud, fraud by nondisclosure and fraud by omission.

33. Accordingly, Third Party Defendants' actions have caused Defendants actual, consequential, incidental, and special damages in excess of the minimum jurisdictional limits of this court for which they hereby sue.

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**FIFTH COUNTERCLAIM**  
**(Negligent Misrepresentation)**

34. Third Party Defendants negligently misrepresented the matters detailed above in multiple transactions in which they had a pecuniary interest. These Third Party Defendants provided the false information for the guidance of Defendants in their business decisions, and Third Party Defendants did not exercise reasonable care or competence in obtaining or communicating the information to Defendants.

35. Defendants have suffered pecuniary loss by justifiably relying on the representations and omissions of the Third Party Defendants.

36. Accordingly, Defendants suffered actual, consequential, incidental, and special damages in excess of the minimum jurisdictional limits of this Court for which they hereby sue.

1 **SIXTH COUNTERCLAIM**  
2 **(Civil Conspiracy)**

3 37. Third Party Defendants acted in concert and conspired together to commit the  
4 tortious acts described herein. Accordingly, Third Party Defendants should be held jointly and  
5 severally liable for any damages awarded to Defendants as a result of this lawsuit.

6 **SEVENTH COUNTERCLAIM**  
7 **(Conversion)**

8 38. Defendants had an ownership interest in the Team, the earn-out and other assets.

9 39. Third Party Defendants, by taking and/or wrongfully transferring the assets,  
10 wrongfully and with malice exercised dominion and control over Defendants' assets.

11 40. Third Party Defendants' self-dealing acts and seizures of Defendants' property,  
12 without lawful justification, amount to a conversion, for which Defendants suffered actual,  
13 incidental, consequential and special damages in excess of the minimum jurisdictional limits of  
14 the Court for which they hereby sue.

15 **REQUEST FOR RELIEF**

16 WHEREFORE, having stated their answer, affirmative defenses, and counterclaims, the  
17 defendants pray for relief as follows:

18 1. That the plaintiffs' Complaint herein be dismissed in its entirety and with  
19 prejudice;

20 2. That the Court enter a declaratory judgment in favor of the defendants, declaring  
21 that the plaintiff's sole and exclusive remedy – if any – for the alleged breaches described in the  
22 Complaint is set forth in Article VII of the Purchase Agreement (“Indemnification; Remedies”);

23 3. That the defendants be awarded damages on their third through Seventh  
24 counterclaims in an amount proven at the time of trial;

25 4. That defendants be awarded their reasonable attorneys' fees and costs incurred in  
26 defending this action, to the fullest extent allowed by contract or by law, including but not  
27 limited to RCW 4.28.185 and RCW 4.84.185; and

1 5. For such other relief as the Court deems just and appropriate.

2 DATED this 16<sup>th</sup> day of September, 2013.

3 ATER WYNNE LLP

4 By: s/Stephen J. Kennedy

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25 Admitted *Pro Hac Vice*

26 Attorneys for Defendants

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

THE BASEBALL CLUB OF  
TACOMA, LLC,

Respondents,

v.

SDL BASEBALL PARTNERS, LLC,  
a Nevada limited liability company,  
ROBERT J. SCHLEGEL, and  
ROBERT K. SCHLEGEL,

Appellants.

NO. 71792-8-I

CERTIFICATE OF SERVICE

RECEIVED  
COURT OF APPEALS  
DIVISION ONE  
JUN 30 2014

**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused true and correct copies of *Appellants' Opening Brief, Declaration of Service* and *Verbatim Report of Proceedings* to be served on the below-listed attorney(s) of record by the method(s) indicated:

Email and first-class United States mail, postage prepaid, to the following:

Carrie M. Hobbs  
Angela R. Jones  
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ATER WYNNE LLP  
601 Union Street, Suite 1501  
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DATED this 30<sup>th</sup> day of June, 2014.

Patti Saiden  
Patti Saiden, Legal Assistant