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SUPREME COURT OF THE STATE OF WASHINGTON

TILLMAN CARR, individually; CAL FARRER and JENELL FARRER, a marital community; KUO-YING FRENZEL, individually; JULIE GANAS, individually; WILLIAM B. MINAGLIA, individually; DARRYL and ROSE HUDSON, a marital community; KEITH PETERSON, individually; KATHRYN DEBERNARDI, individually; KATHERINE MEADE, individually; ROB and SHARA COFFMAN, a marital community; and PAMELA SMITH, individually,

Appellants,

v.

THE STATE OF WASHINGTON by and through the WASHINGTON STATE LIQUOR CONTROL BOARD, a board of the State of Washington and the WASHINGTON STATE DEPARTMENT OF REVENUE, a department of the State of Washington,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Initiative 1183 privatized liquor sales and distribution in Washington. The voters approved Initiative 1183 in November 2011, after narrowly rejecting two other liquor privatization measures in 2010. Appellants are a small group of former contract liquor store managers ("Store Owners") who sold liquor on behalf of the Washington State Liquor Control Board ("Board") under the pre-Initiative 1183 state-run system. In June 2011, they entered into five-year contracts with the Board to operate contract liquor stores. Each contract provided that the parties could terminate the contracts by mutual agreement or that the Board could terminate the contract on seven days' notice if the Board's authority to sell liquor was withdrawn. Initiative 1183 withdrew the Board's authority, effective June 1, 2012.

After Initiative 1183 passed, the Board took steps to complete the transition from the state-run liquor store system to a privatized system. Most of the Store Owners accepted the Board's offer to change the expiration date of their contracts to May 31, 2012. All of the Store Owners agreed to buy the inventory of state-owned liquor remaining in their stores as of that date. When Initiative 1183 became fully effective in June 2012, all of the Store Owners who desired to remain in business were

equipped with the proper licenses and inventory that they could sell as private licensed spirits retailers under the new system.

After several months of operating under the new system, the Store Owners sued the Board and the Washington State Department of Revenue ("Department") for damages they allegedly suffered as a result of Initiative 1183 and its implementation. On cross-motions for summary judgment, the Thurston County Superior Court dismissed the Store Owners' complaint, correctly concluding that the Board did not breach its contracts with the Store Owners, that Initiative 1183 did not impermissibly impair those contracts or take property of the Store Owners, that Initiative 1183 did not create an implied cause of action allowing the Store Owners to sue the state for damages, and that the Department did not violate Section 303 of Initiative 1183.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Board breach its contracts with the Store Owners, when the contracts were terminated according to their own terms?

2. Did Initiative 1183 impermissibly impair the contracts between the Board and the Store Owners in violation of the state and federal constitutions, when the contracts were terminated according to

their own terms and the Store Owners were operating in a heavily-regulated industry?

3. Did the Store Owners have any enforceable property right under their contracts that was taken without just compensation in violation of the state and federal constitutions, when the contracts were terminated according to their own terms and the Store Owners had only a unilateral expectation that the voters would not withdraw the Board's authority to perform?

4. Did Initiative 1183 impliedly create a private cause of action for damages against the state, where no language in the statute directs compensation to former contract liquor store managers?

5. Did the Department violate Section 303 of Initiative 1183, which required it to develop rules and procedures to address constitutional claims of impaired contracts, where an agency has no authority to adjudicate constitutional claims, and the Department advised all former contract liquor store managers of their right to bring such claims in superior court?

III. STATEMENT OF THE CASE

A. Liquor Regulation In Washington Before 2012

States have the police power to regulate the sale of intoxicating liquors within their borders. *E.g.*, *Bartemeyer v. Iowa*, 85 U.S. 129, 132,

21 L. Ed. 929, 930, 18 Wall. 129 (1874) (liquor regulation was always "considered as falling within the police regulations of the States"); *Lewer v. Cornelius*, 72 Wash. 124, 132, 129 P. 911, 914 (1913) ("to regulate the sale and use of intoxicating liquors is now among the universally recognized powers of the state governments"). Washington has exercised that power from the time of statehood. *See* Laws of 1889-90, ch. 7, § 5, at 222 (authorizing cities to regulate the sale of liquor).

For a time, the 18th Amendment to the United States Constitution prohibited the sale of intoxicating liquors nationwide. In 1933, the 21st Amendment repealed the 18th Amendment, reaffirming states' preexisting police power to regulate liquor within their borders. *See Ajax v. Gregory*, 177 Wash. 465, 469, 32 P.2d 560, 562 (1934).

Washington responded to the 21st Amendment by adopting the Washington State Liquor Act. Laws of 1933, Ex. Sess., ch. 62 (codified as amended at Title 66 RCW) (hereinafter the "1933 Act"). The 1933 Act established a comprehensive scheme for regulating the distribution, sale, and consumption of liquor in Washington. *See generally Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 278 P.3d 632 (2012) (hereinafter "*WASAVP*"); *Ajax*, 177 Wash. at 467-69.

The 1933 Act authorized the Board to establish state-operated liquor stores and "to appoint in incorporated cities and towns, in which no

state liquor store is located, liquor vendors" to sell liquor on behalf of the Board.[1] Laws of 1933, Ex. Sess., ch. 62, § 69.a (codified as amended at RCW 66.08.050(2) (2010)). At first, these "liquor vendors" were state employees. 1961 Op. Att'y Gen. No. 21. After new pension and tax laws changed their status to independent contractors, the Legislature changed their title to "contract liquor store managers." Laws of 2005, ch. 151. Contract liquor store managers operated "contract liquor stores," private businesses that sold liquor on behalf of the Board through contracts between the contract liquor store manager and the Board. RCW 66.04.010(11) (2010). These contracts were similar to consignment contracts in that the Board owned the liquor until it was purchased by a customer. *See, e.g.*, Clerk's Papers (CP) 154 at ¶ 7.22(A). Contract liquor stores were subject to the general control, management, and supervision of the Board and were paid a commission as compensation for services. RCW 66.08.026, .050(2) (2010).

B. Initiative 1183 And the Store Owners' Contracts

A few years before Initiative 1183 appeared on the ballot, liquor privatization advocates lobbied the Legislature to change the state-

[1] Under RCW 66.04.010(25), the term "liquor" includes beer, wine, and distilled "spirits" or hard liquor. Before June 2012, only the Board could sell packaged spirits, but the law allowed private parties to sell and distribute beer and wine under regulation by the Board. *See generally WASAVP*, 174 Wn.2d at 647-48.

operated system of liquor distribution and retail sales to a privately-operated system. Several liquor privatization bills were introduced during the 2010 legislative session, but none advanced. *See*, *e.g.*, S.B. 6204, 61st Leg., Reg. Sess. (Wash. 2010). In addition, two liquor privatization initiatives were presented to Washington voters in the 2010 general election.[2] Both of the 2010 initiatives, which would have eliminated the Board's authority to sell liquor, failed to pass. *See* CP 754-55. Several more liquor privatization bills were introduced during the 2011 legislative session. On May 26, 2011, a third liquor privatization initiative, Initiative 1183, was filed in the Office of the Secretary of State. *See* Laws of 2012, ch. 2, at 199 (initiative filed on May 26, 2011).[3] Initiative 1183 was approved by the voters and enacted into law on November 8, 2011.

After Initiative 1183 was filed with the Secretary of State in May 2011, but before it was enacted in November 2011, the Board entered into contracts for the operation of contract liquor stores with each appellant Store Owner. *See* CP 126-489. All of the contracts were substantially the same. Section D of each contract provided that "[t]he initial period of

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[2] Initiatives 1100 and 1105 can be viewed through the 2010 online Voters' Guide available on the Washington Secretary of State's website at https://weiapplets.sos.wa.gov/MyVote/OnlineVotersGuide/Measures?electionId=37&countyCode=xx&ismyVote=False (last visited May 29, 2014).

[3] Excerpts from Initiative 1183 as it appears in the 2012 session laws are attached as Appendix A. Excerpts from Initiative 1183, as codified in Title 66 RCW, are attached as Appendix B.

performance under this Contract will be from June 30, 2011 through June 30, 2016." CP 135, 168, 201, 234, 267, 301, 334, 367, 400, 433, 466. Each contract included a set of general terms and conditions. *See, e.g.*, CP 138-154 (Exhibit A to contract between the Board and Appellant Tillman Carr, setting out "General Terms and Conditions" of the contract).

Part 6 of the general terms and conditions was entitled "Contract Termination." *See, e.g.*, CP 146-150. Paragraph 6.5 allowed for termination of the contract by mutual agreement. *E.g.*, CP 148. Paragraph 6.9 of each contract provided for termination of the contract if the Board's authority to sell or distribute distilled spirits or other liquor was withdrawn or otherwise limited. *See, e.g.*, CP 149. Specifically, each contract provided:

> ***6.9 TERMINATION FOR WITHDRAWAL OF AUTHORITY***
> In the event that the WSLCB's authority to perform any of its duties relating to this Contract is withdrawn, reduced, or limited in any way after the commencement of this Contract and prior to normal completion, the WSLCB may terminate this Contract, in whole or in part, by seven (7) calendar day's written notice to Contractor. Contractor shall have no right of appeal when this clause is exercised by the WSLCB.

CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480.

Initiative 1183 withdrew the Board's authority to sell liquor through existing contract liquor stores, such as those managed by the Store

Owners, as of June 1, 2012. Laws of 2012, ch. 2, § 102(2), (6)(a) (codified at RCW 66.24.620(2), (6)(a)). The initiative also withdrew the Board's authority to appoint new contract liquor stores as of December 8, 2011. Laws of 2012, ch. 2, § 107 (amending RCW 66.08.050 by deleting subsections (1) through (4) and renumbering remaining sections; the Board's authority to appoint new contract liquor stores was withdrawn when former RCW 66.08.050(2) was deleted).

The primary purpose of Initiative 1183 was to get the state government out of the business of selling liquor. *WASAVP*, 174 Wn.2d at 649-50; Laws of 2012, ch. 2, § 101. It created new "spirits distributor licenses" authorizing private businesses to sell distilled spirits at wholesale, and "spirits retail licenses" for private retailers. RCW 66.24.055 (spirits distributor license); RCW 66.24.630 (spirits retail license). The law permitted newly licensed spirits distributors to begin selling spirits on March 1, 2012, and permitted newly licensed spirits retailers to begin selling spirits on June 1, 2012. RCW 66.24.620(1). Initiative 1183 required the Board to "refrain from purchase, sale, or distribution of liquor" after May 31, 2012. RCW 66.24.620(2). After that date, only persons licensed as spirits retailers could sell packaged distilled spirits to consumers. *See* RCW 66.24.620(1), (2); RCW 66.44.090. A "grandfathering" provision permitted contract liquor stores to qualify for

the new spirits retail licenses without meeting some of the criteria required of other license applicants. RCW 66.24.630(3)(c).

Initiative 1183 required the Board to "complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing" by June 1, 2012. RCW 66.24.620(6)(a). In completing the transition, the Board was to employ "just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits." RCW 66.24.620(6)(b). The Board had contracts with approximately 160 contract liquor store managers when Initiative 1183 was enacted.[4] *See* App. Br. at 7. Section 303 of the initiative directed the Department of Revenue to develop rules and procedures "to address claims that this act unconstitutionally impairs any contract with the state." Laws of 2012, ch. 2, § 303 (codified as a note to RCW 66.24.620).

The Board began the orderly transition to the new system immediately after the election. In January 2012, as part of the orderly transition, it sent a proposed Contract Amendment to each Store Owner "to amend Contractual requirements in response to the business impacts of

[4] This number does not include the business agreements that the Board had with Indian Tribes under former WAC 314-37-010, and it does not include contracts with military exchanges under Title 48 of the Code of Federal Regulations.

Initiative 1183." CP 494-512. The Contract Amendment contained several proposed changes to the Store Owners' contracts, including a proposal to change the contract expiration date to May 31, 2012. CP 495, 497, 499, 501, 503, 505, 508, 510, 512. Most of the Appellants agreed to the changes and signed and returned the Contract Amendment. *See* CP 494-512. Only Appellants Tillman Carr and Cal and Jenell Farrer did not. *See* CP 490-93 (Tillman Carr emails regarding contract amendment).

Initiative 1183 directed the Board to dispose of its assets "with the objective of depleting all inventory of liquor by May 31, 2012." RCW 66.24.620(3). To accomplish that objective, Initiative 1183 authorized the Board to "sell liquor to spirits licensees." *Id.* Accordingly, in April 2012, the Board provided each Store Owner with a proposed agreement specifying the terms under which they could purchase the state-owned liquor in the stores they managed at a reduced price if they wished to continue selling distilled spirits as private licensed spirits retailers. *See* CP 513-557 (April 2012 agreements), CP 753-54 (Farrer declaration describing reduced price for purchasing state-owned liquor).

As required by Initiative 1183, the Board closed all state liquor stores and stopped selling liquor as of June 1, 2012. CP 595, 597. In addition, on August 30, 2012, the Department of Revenue issued a Special Notice to the public stating that it lacked the authority to decide

constitutional claims and would not proceed with official rule making under the Administrative Procedure Act. Instead, the Special Notice specified the procedures for addressing such claims. Specifically, the Special Notice explained: "[I]n all cases of alleged constitutional impairment of contract related to I-1183," the claimant should "file its claim directly with a court of competent jurisdiction." CP 112.

In November 2012, the Store Owners sued the Board and the Department for damages they allegedly suffered as a result of Initiative 1183 and its implementation. CP 33-52; *see* CP 2. On cross-motions for summary judgment, the Thurston County Superior Court rejected all of the Store Owners' claims and entered a final judgment dismissing the complaint with prejudice. CP 824-27. This appeal followed.

IV. ARGUMENT IN RESPONSE

The Court should affirm the superior court's summary judgment order of dismissal because the Board did not breach, and Initiative 1183 did not substantially impair, the Store Owners' contracts. The contracts were terminated according to their own terms, which provided for termination if the Board lost its authority to sell and distribute liquor or by mutual termination. Initiative 1183, which had been filed with the Secretary of State at the time the Store Owners entered into the contracts, withdrew the Board's authority to sell liquor. Thereafter, nine of the Store

Owners' contracts were amended by a mutual agreement changing the termination date to May 31, 2012. The Board then terminated the remaining two Store Owners' contracts. The contracts were neither breached nor impaired.

Additionally, Initiative 1183 did not constitute a taking of the Store Owners' property under the United States or Washington Constitutions. Given the termination clauses in their contracts and the aggressive attempts to privatize liquor, the Store Owners did not have an enforceable right to or expectation of continued benefits. Nor did RCW 66.24.620 create a cause of action for damages because no language in Initiative 1183 directed compensation to former contract liquor store managers.

Finally, the Department did not violate Section 303 of the initiative when it declined to develop rules to address claims that the initiative unconstitutionally impairs contracts with the state because administrative agencies are not authorized to adjudicate the constitutionality of statutes. Instead, the Department properly instructed parties to file such claims directly with a court of competent jurisdiction. The Court should affirm.

A. Standard of Review

This Court reviews summary judgments de novo. *E.g.*, *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695, 698 (2009). Under Civil Rule 56(c), a summary judgment "shall be rendered forthwith" if the

materials before the court "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." A "material" fact is one that affects the outcome of the litigation; disputes about facts that do not affect the outcome do not preclude summary judgment. *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965, 969 (2012); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202, 211 (1986) (interpreting Fed. R. Civ. P. 56).

Here, the superior court properly concluded that the Board and the Department were entitled to a judgment as a matter of law and properly dismissed all of the Store Owners' claims.

B. The Superior Court Correctly Ruled That the Liquor Control Board Did Not Breach Its Contracts With the Store Owners Because the Contracts Were Lawfully Terminated According To Their Terms

In the proceedings before the trial court, the Store Owners initially alleged that the Board breached its contracts with them by "unilaterally" terminating the contracts on May 31, 2012. CP 38 (Second Am. Compl. ¶ 25); CP 565 (Carr declaration in support of Store Owners' motion for summary judgment). Later, the Store Owners contended, as they do now, that the date of the alleged breach was December 8, 2011, when Initiative

1183 took effect. App. Br. at 41-42;[5] CP 138 (Store Owners' response to state's motion for summary judgment). According to the Store Owners, the sovereign "State" breached and terminated their contracts on that date by enacting the initiative. App. Br. at 7, 13, 41-43. That contention is simply wrong as a matter of fact and law.

The voter-approved change from the former state-controlled liquor distribution system to the current private licensee system did not result in a breach of any contract between the Board and the Store Owners. Instead, the change in the law prohibited the Board from selling liquor, which, in turn, triggered a clause in the contracts permitting the Board to terminate on seven days' notice. CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480. Consequently, the contracts were terminated according to the express agreement of the parties, specifically the "Termination for Withdrawal of Authority" clause in Paragraph 6.9 of each contract.

In addition, all but two of the Store Owners agreed to a Contract Amendment that expressly changed the termination date of the contracts to May 31, 2012. CP 495, 497, 499, 501, 503, 505, 508, 510, 512. For those Store Owners, their contracts were also terminated in accordance with Paragraph 6.5, which allowed for termination by mutual agreement.

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[5] The Store Owners argue that the effective date was either "12/11/11" or "12/8/11." App. Br. at 41-42. The actual effective date was "the thirtieth day after the election at which it is approved." Wash. Const. art. II, § 1(d). The thirtieth day after the November 8, 2011 general election was December 8, 2011.

1. The contracts with all of the Store Owners were lawfully terminated in accordance with Paragraph 6.9 of the contracts' General Terms and Conditions

While nine of the 11 Store Owners mutually agreed to accelerate the termination date of their contracts to May 31, 2012, from June 30, 2016, all of the Store Owners' contracts provided for termination by the Board if the Board's authority to sell liquor were subsequently withdrawn.

Initiative 1183 did not terminate the Store Owners' contracts, as the Store Owners now claim. App. Br. at 41. Instead, it directed the Board to "complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012." RCW 66.24.620(6)(a). The Board accomplished that requirement, in part, by exercising its rights under the terms of its contracts with the Store Owners. At the time the contracts were being finalized, Initiative 1183 had already been filed with the Secretary of State, and liquor privatization measures had recently been on the ballot. Thus, not surprisingly, the contracts anticipated that the Board's authority to sell liquor through contract liquor stores could be withdrawn. Specifically, Paragraph 6.9 of each contract provided, "in the event that the WSLCB's authority to perform any of its duties relating to this Contracts is withdrawn . . . the WSLCB may terminate this Contract,

in whole or in part, by seven (7) calendar day's written notice to Contractor." CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480.

Initiative 1183 withdrew the Board's authority to sell liquor through contract liquor stores after May 31, 2012. RCW 66.24.620(2). In April 2012, the Board gave the required seven days' notice of termination by providing to each of the Store Owners a proposed agreement specifying the terms under which the Store Owners could purchase the inventory in their stores as of May 31. CP 513-554. Paragraph G of the April 2012 agreements specified that the Store Owners could continue selling liquor for the Board after May 31, 2012, only if a court enjoined implementation of Initiative 1183. CP 516, 520, 524, 528, 533, 537, 541, 545, 549, 553, 557. All of the Store Owners agreed to these terms. CP 513-554. On May 31, 2012, this Court determined that Initiative 1183 did not violate article II, section 19 of the Washington Constitution. *WASAVP*, 174 Wn.2d at 646, 665. The Court did not enjoin implementation, and retail liquor sales under the new privatized system began the next day.

The Store Owners apparently argue that only a repeal of the 21st Amendment to the United States Constitution could "withdraw" the Board's authority within the meaning of Paragraph 6.9. App. Brf. at 7; *see* CP 575-76 (Pls.' Mem. Supp. Mot. Partial Summ. J.). However, the 21st Amendment is not the source of the State's authority to regulate liquor

sales within its boundaries. States have always had that authority as part of their sovereign police powers. *See Rice v. Rehner*, 463 U.S. 713, 724, 103 S. Ct. 3291, 3298, 77 L. Ed. 2d 961, 973 (1983) (California's interest in liquor traffic within its borders "is independent of the authority conferred on the States by the Twenty-First Amendment"); *Bartemeyer*, 85 U.S. (18 Wall.) at 132, 21 L. Ed. at 930. Here, Washington voters exercised those powers by enacting Initiative 1183.

The Board properly terminated the Store Owners' contracts in accordance with the parties' agreement in Paragraph 6.9 of the original contracts. There was no breach, and the superior court correctly granted summary judgment to the Respondents on that issue. CP 819, 837, 855.

2. Nine of the Store Owners' contracts were lawfully terminated by mutual agreement under Paragraph 6.5 of the General Terms and Conditions

Paragraph 6.5 of the general terms and conditions in each of the Store Owners' contracts provided that "[t]he WSLCB and the Contractor may terminate this Contract in whole or in part, at any time, by mutual agreement." CP 148, 181, 214, 247, 280, 314, 347, 380, 413, 446, 479. In January 2012, after Initiative 1183 passed, nine of the Store Owners signed a Contract Amendment that expressly amended the terms "to reflect a contract expiration date of May 31, 2012, unless extended by the Board in writing, or terminated prior to May 31, 2012 pursuant to sections

6.2, or 6.4 through 6.9 of the Contract." CP 495, 497, 499, 501, 503, 505, 508, 510, 512. In addition, the Contract Amendment recited that the "changes authorized are within the scope of the original contract." *Id.* According to Paragraph 4.5 of the general terms and conditions of each original contract, "[a]ny written commitment by Contractor within the scope of this Contract shall be binding upon Contractor." CP 176, 209, 275, 309, 342, 375, 408, 441, 474.

The words used in the Contract and the Contract Amendment clearly show that the parties intended the contracts to expire on May 31, 2012. There was no breach when the Board ceased performance after that date, because that was the termination date expressly agreed to by the parties, as the superior court recognized. CP 819, 837, 855.

According to the Store Owners, however, the Contract Amendment was a "post-breach" amendment for which there was no consideration. They contend that their contracts with the Board had already been terminated because the "State" breached the contracts by enacting Initiative 1183. App. Br. at 11, 13, 42-43. The Store Owners are incorrect. Their contracts were with the Board, a state agency, not the sovereign State.[6] CP 127, 160, 193, 226, 259, 293, 326, 359, 392, 425,

[6] The sovereign State of Washington is a party to some contracts, such as interstate compacts. An example is the Columbia River Gorge Compact between Washington and Oregon. *See* Ch. 43.97 RCW; 16 U.S.C. § 544c.

458; *see also* CP 50 (Second Am. Compl ¶ 67) (alleging that the Store Owners had contracts "with the Liquor Control Board"). As an administrative agency created by statute, the Board may exercise only those powers conferred by the legislature, which do not include the power to enact legislation. *Anderson, Leech & Morse, Inc. v. Wash. State Liquor Control Bd.*, 89 Wn.2d 688, 694, 575 P.2d 221, 225 (1978). Washington voters, not the Board, enacted Initiative 1183. The Store Owners' contracts were with the Board, not the voters. The contracts contained no promise that the voters would not change the law.

Moreover, there was consideration for the Contract Amendment. In exchange for the Store Owners' agreement to change the termination date, the Board surrendered some of its rights under the contracts by agreeing to the following:

- Permitting the Store Owners to store liquor they bought from private distributors at off-site locations. Under Section 102(1) of Initiative 1183, sales by licensed private spirits distributors became legal on March 1, 2012. The Contract Amendment allowed the Store Owners to acquire inventory before sales by licensed spirits retailers became legal on June 1, 2012. The original contracts did not allow the Store Owners to store any liquor at off-site locations. *See, e.g.*, CP 174, 175 (¶¶ 2.6, 2.10).

- Permitting the Store Owners to solicit accounts from restaurants and nightclubs, so that they could compete with licensed private spirits distributors. The original contracts prohibited such solicitation. *See, e.g.*, CP 174 (¶ 2.4).
- Permitting the Store Owners to deliver liquor to restaurants and nightclubs, so that they could compete with licensed private spirits distributors. The original contracts prohibited such deliveries. *See, e.g.*, CP 175 (¶ 2.10).
- Permitting the Store Owners to terminate the contract on 30 days' notice if they wished to discontinue liquor sales. The original contracts required 180 days' notice. *See, e.g.*, CP 181 (¶ 6.4).

CP 495, 497, 499, 501, 503, 505, 508, 510, 512; *see* CP 707. Reciprocal surrender of contractual rights is sufficient consideration for a contract amendment. *Rosellini v. Banchero*, 83 Wn.2d 268, 272, 517 P.2d 955, 958 (1974). This Court should reject the Store Owners' argument that there was no consideration for the Contract Amendment in this case.

Alternatively, the Store Owners assert that the Contract Amendment was unconscionable and unenforceable. App. Br. at 42-43. To evaluate that assertion, the Court should consider the circumstances when the Store Owners entered into the original contracts in June 2011. *See Jeffery v. Weintraub*, 32 Wn. App. 536, 544, 648 P.2d 914, 919-20

(1982). The Store Owners knew or should have known there had been recent liquor privatization efforts. *See* CP 754-55; App. Br. at 12. The possibility that a new law could withdraw the Board's authority to sell liquor through contract liquor stores was foreseen and provided for in the contracts, specifically in Paragraph 6.9 of the general terms and conditions. CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480. The Store Owners have never contended that they were forced to sign the June 2011 contracts, and they knowingly accepted the risks. The fact that those risks materialized a few months later did not make the Contract Amendment unconscionable.

3. The Store Owners' alleged subjective reliance on the original contract term creates no issue as to any material fact

The Store Owners contend that they made financial investments in reliance on the original contract expiration date. App. Br. at 5-6, 8-9, 12, 20, 22-23, 41. In some cases, those investments were made years before the 2011 contracts were even executed. CP 610-12, 631, 639. The Store Owners' alleged subjective intent is not supported by the express contract language, however. Paragraph 6.9 of the general terms and conditions of each contract permitted the Board to terminate the contract on seven days' notice if the Board's authority to perform was withdrawn "after the

commencement of this Contract and prior to normal completion." CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480.

Where, as here, the parties' intent can be determined from the actual words used in the contract, subjective intent is irrelevant. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262, 267 (2005). The Store Owners' alleged subjective intent that the contracts would remain in effect until 2016 creates no issue as to any "material" fact under CR 56. Based on the express language of the contracts and the other undisputed evidence in the record, there was no breach when the Board ceased performance after May 31, 2012. The contracts were lawfully terminated according to their terms, and the superior court properly dismissed the Store Owners' breach of contract claim. CP 819, 837, 855.

C. The Superior Court Correctly Ruled That Initiative 1183 Did Not Substantially Impair the Contracts Between the Store Owners and the Liquor Control Board

The Store Owners contend that Initiative 1183 impaired their contractual relationships with the Board in violation of article I, section 23 of the Washington Constitution, and article I, section 10 of the United States Constitution. App. Br. at 37. Initiative 1183 is presumed to be constitutional. *WASAVP*, 174 Wn.2d at 654. A party seeking to invalidate an initiative on constitutional grounds must establish that the provision is

unconstitutional beyond a reasonable doubt. *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762, 780 (2000). The Store Owners have not met that burden.

The state and federal constitutional provisions forbidding the passage of state laws that impair the obligation of contracts are substantially similar and are given the same effect. *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23, 38 (1993). Under either provision, the court uses a three-part test to determine if a law has unconstitutionally impaired a public contract: (1) does a contract exist? (2) does the legislation substantially impair the contract? and (3) if there is substantial impairment, is it reasonable and necessary to serve a public purpose? *Caritas Servs., Inc. v. Dep't of Social & Health Servs.*, 123 Wn.2d 391, 403, 869 P.2d 28, 35 (1994); *accord Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430, 436, 438 (8th Cir. 2007). The superior court properly applied that test and concluded that Initiative 1183 did not substantially impair the contracts.

Here, the Store Owners had contracts with the Board. As discussed above, and as the superior court held, those contracts were lawfully terminated under their own terms. Thus, Initiative 1183 did not "impair" the contracts at all. The superior court proceeded to the next step in the analysis, however, and correctly held that Initiative 1183 did not

substantially impair the Store Owners' contracts with the Board. CP 816-17, 834-35, 852-53.

Whether a contract has been substantially impaired depends on the extent to which the parties' reasonable contract expectations have been disrupted. *See Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 416, 105 S. Ct. 697, 707, 74 L. Ed. 2d 569, 584 (1983); *Hawkeye*, 486 F.3d at 437-38. In determining what expectations are reasonable, the court may consider whether the complaining party was operating in a heavily regulated industry. *Hawkeye*, 486 F.3d at 438. "[A] party who enters into a contract regarding an activity 'already regulated in the particular to which he now objects' is deemed to have contracted 'subject to further legislation upon the same topic.'" *Margola*, 121 Wn.2d at 653 (citation omitted); *see Caritas*, 123 Wn.2d at 405 (suggesting in dictum that "parties contracting in a heavily regulated industry may be imputed to expect prospective regulatory changes").

The liquor business has always been heavily regulated by states, including Washington. *See, e.g.*, *Rice*, 463 U.S. at 724, 103 S. Ct. at 3298, 77 L. Ed. 2d at 973; *Bartemeyer*, 85 U.S. (18 Wall.) at 132, 21 L. Ed. at 930; *Ajax*, 177 Wash. at 469-70. Before Initiative 1183, the state controlled all sales of packaged spirits, and determined the number and location of all stores that sold distilled spirits. RCW 66.08.050(1), (2)

(2010). Contract liquor stores were subject to close regulation by the Board. *See* RCW 66.08.050(2) (2010).

The Eighth Circuit considered similar facts in *Hawkeye Commodity Promotions, Inc. v. Vilsack*, 486 F.3d 430 (8th Cir. 2007), concluding that a change in law in a heavily regulated industry did not substantially impair the plaintiff's contracts. In 2005, Hawkeye secured a license from the Iowa Lottery Authority to operate that state's video lottery game, and installed numerous machines under five-year contracts. *Id.* at 435. In 2006, the Iowa Legislature banned the video lottery game. *Id.* at 436. The Eighth Circuit held that, because gambling was heavily-regulated, and because Hawkeye's contracts were expressly subject to state law, the legislation did not substantially impair the contracts. *Id.* at 438.

Here, when the Store Owners' contracts took effect in June 2011, the Store Owners knew that liquor privatization measures had recently been on the ballot. CP 754-55. In addition, Initiative 1183 had already been filed with the Secretary of State. Laws of 2012, ch. 2, at 199. Paragraph 6.9 of the general terms and conditions of each contract gave the Board the right to terminate if its authority to perform was withdrawn or otherwise "limited in any way after the commencement" of the contract. CP 149, 182, 215, 248, 281, 315, 348, 381, 414, 447, 480. The Store

Owners had no reasonable expectation that the contracts were guaranteed to last five years. As the superior court recognized, "[t]his is a well-regulated industry for which further legislation was not only possible, but was probable and foreseeable." CP 817, 835, 853. Thus, Initiative 1183 did not substantially impair the Store Owners' contracts with the Board. CP 818, 836, 854.

Even if there was any impairment, it was reasonable and necessary to serve a public purpose. A purpose of Initiative 1183 was to "[g]et the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages." Laws of 2012, ch. 2, § 101(2)(b). The Board could not accomplish that purpose without terminating its contracts with contract liquor store managers such as the Store Owners.

Finally, even if the Store Owners could meet their burden of proving beyond a reasonable doubt that Initiative 1183 violated the state and federal Contract Clauses, they would not be entitled to money damages. Article I, section 23 of the Washington Constitution provides that "[n]o . . . law impairing the obligations of contracts shall ever be *passed*," and article I, section 10 of the United States Constitution

provides that "[n]o state shall . . . *pass* any . . . law impairing the obligation of contracts." (Emphasis added.) Thus, the proper remedy for a violation of the state and federal Contracts Clauses would be to declare the legislation unconstitutional—effectively repealing the law—rather than the payment of money damages as asserted by the Store Owners. *See Pierce County v. State*, 159 Wn.2d 16, 62-63, 148 P.3d 1002, 1027-28 (2006) (Sanders, J., dissenting) (damages is the remedy for breach, not for impairment); *see generally* Michael L. Zigler, *Takings Law and the Contract Clause: A Takings Law Approach to Legislative Modification of Public Contracts*, 36 Stan. L. Rev. 1447, 1462, 1476-77 (1984) (Contract Clause of U.S. Constitution does not authorize courts to award damages).

Because the Store Owners sought only money damages in their complaint, their "impairment of contract" cause of action failed to state a claim upon which the requested relief could be granted. CP 51-52. This provides an alternative basis for affirming the superior court's judgment dismissing the Store Owners' impairment of contract claim. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027, 1031 (1989) ("an appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof").

D. The Superior Court Correctly Ruled That Initiative 1183 Did Not Take the Store Owners' Private Property Without Just Compensation

The Store Owners contend that Initiative 1183, or the Board acting under its authority, took their property without just compensation. App. Br. at 35-37; CP 51 (Second Am. Compl. ¶¶ 71-76). The "property" they claim was taken was their asserted interest in the original contract expiration date of June 30, 2016. CP 38-41, CP 51 (Second Am. Compl. ¶¶ 25, 28, 31, 32, 71-76), CP 117-119; *see* CP 565, 611, 632. They are mistaken.

Article I, Section 16 of the Washington Constitution provides that "No private property shall be taken or damaged for public or private use without just compensation." The Takings Clause of the United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V.[7] To state a claim upon which relief can be granted under either clause, a plaintiff must allege a compensable property interest.

A contract can be a property interest under the Takings Clause, but only if it establishes a present and enforceable right more substantial in nature than a mere unilateral expectation of continued benefits. *E.g.*,

[7] The Fifth Amendment Takings Clause applies to the states through the Fourteenth Amendment. *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897).

Clear Channel Outdoor v. Seattle Popular Monorail Auth., 136 Wn. App. 781, 784, 150 P.3d 649, 650 (2007); *Hawkeye*, 486 F.3d at 440; *see also Envtl. Control, Inc. v. City of Santa Fe*, 131 N.M. 450, 455, 38 P.3d 891, 896 (N.M. Ct. App. 2001) (company's expectation that it could continue to haul city garbage under contract that permitted city to terminate at will was not a compensable property interest).

Here, the Store Owners' contracts contained no promise that the original expiration date of June 30, 2016, would not change. When they signed the contracts, the Store Owners knew that liquor privatization measures had recently been on the ballot. CP 754-55. When the contracts went into effect on June 30, 2011, Initiative 1183 had already been filed with the Secretary of State. Laws of 2012, ch. 2, at 199. The possibility that the Board might lose the authority to perform was foreseen and provided for in a contract provision giving the Board the right to terminate if that happened. CP 149, 182, 215, 248, 281, 315, 348, 381, 447, 480. After Initiative 1183 passed, the Board used agreed-upon procedures in the contracts to secure the agreement of most of the Store Owners to change the expiration date from 2016 to 2012. CP 181, 214, 280, 314, 347, 380, 413, 446, 479, 495, 497, 499, 501, 503, 505, 508, 510, 512. The contracts were lawfully terminated on May 31, 2012, according to their

terms. The Store Owners had no enforceable right that the contracts would continue until 2016.

The Store Owners failed to identify a compensable property interest under the Takings Clause of either the state or federal constitutions. The superior court correctly held that the Store Owners had no enforceable right that their contracts with the Board would continue until 2016, and properly dismissed their Takings claim. CP 819-20, 837-38, 855-56. This Court should affirm.

E. The Superior Court Correctly Ruled That RCW 66.24.620 Does Not Impliedly Create a Cause of Action for Damages

The people enacted Initiative 1183 to "[g]et the state government out of the commercial business of distributing, selling, and promoting the sale of liquor." Laws of 2012, ch. 2, § 101(2)(b). Section 102 of the initiative, codified at RCW 66.24.620, directed the Board to take the actions needed to complete the transition by June 1, 2012. It provides, in relevant part:

> (5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.
>
> (6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

> (b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

The Store Owners alleged in their Complaint that the Board violated RCW 66.24.620, and that they were entitled to damages as a result. CP 49 (Second Am. Compl. ¶¶ 60-61). After carefully considering the language of the statute, the superior court correctly ruled that the voters did not intend RCW 66.24.620 to create a cause of action for damages. CP 817-18, 835-36, 853-54.

Washington courts use a three part test to determine whether a statute impliedly creates a private cause of action for damages: (1) Is the Plaintiff within the class for whose especial benefit the statute was enacted?, (2) does the legislative intent, explicitly or implicitly, support creating or denying a remedy?, and (3) is implying a remedy consistent with the underlying purpose of the legislation? *Braam ex rel. Braam v. State*, 150 Wn.2d 689, 711, 81 P.3d 851, 863 (2003); *see Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 171 Wn.2d 736, 753-54, 257 P.3d 586, 594 (2011) (no implied cause of action against employer under

Initiative 692); *see generally* Restatement (Second) of Torts § 874A (1979). Application of this test is a question of law for the court. *See Braam*, 150 Wn.2d at 711.

The superior court concluded, and Respondents do not dispute, that the Store Owners are "nonemployee liquor store operators" who "are within the class of entities intended to benefit from" RCW 66.24.620. CP 818, 836, 854. Nothing in Initiative 1183 suggests, however, that the voters intended to create an "Alleviate Harm Fund" to be paid over to the Store Owners to insure them against the potential economic effects of the legislation, as the Store Owners now claim. App. Br. at 2, 16-30. The superior court properly concluded that implying a right to sue for damages is not consistent with the underlying purpose of the legislation. CP 820, 838, 856.

1. The plain language of RCW 66.24.620 directed the Board to deposit sales proceeds into the liquor revolving fund and use some of those funds toward measures to avert harm to interests of contractors

As the Store Owners recognize, App. Br. at 16, statutory interpretation begins with the statute's plain meaning. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892, 897 (2011). Plain meaning "is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is

found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007, 1010 (2009).

The Store Owners improperly focus on a few words in RCW 66.24.620—the section that addressed the mechanics of the transition to the privatized system—to support their argument that the voters intended to set up a special fund for the Store Owners, and thus a private cause of action for damages. App. Br. at 1, 8, 18-23, 28-29. However, the plain language of the statute does not support their argument.

RCW 66.24.620(5) and (6)(a) directed the Board to sell all assets of state liquor stores and distribution centers, and to complete the transition from the state-controlled system to the private licensee system, by June 1, 2012. RCW 66.24.620(5) directed how the revenues from the asset sales were to be used. It mandated that the asset sales proceeds, "net of . . . transition costs authorized by this section," were to be deposited into the liquor revolving fund, a pre-existing fund whose uses are specified by statute.[8] *See generally WASAVP*, 174 Wn.2d at 648-49. According to the Store Owners, however, the "accumulated" revenues from these asset sales, $66 million, were to be set aside in a mandatory fund to insure the

[8] The liquor revolving fund is created in RCW 66.08.170 under the custody of the state treasurer. Provisions governing its use and distribution are in RCW 66.08.026 and RCW 66.08.170 through RCW 66.08.240.

Store Owners against any economic losses from Initiative 1183. App. Br. at 8-10, 28-30. That is plainly not what the statute says. RCW 66.24.620(5) says nothing about creating a new, mandatory "Alleviate Harm Fund" for the Store Owners.

The Store Owners point to a few words in the next subsection, RCW 66.24.620(6)(b), as authority for their proposed "Alleviate Harm Fund." RCW 66.24.620(6)(b) provided that the transition to the private licensee system "must include, without limitation, a provision for applying operating and asset sale revenues of the board to *just and reasonable measures* to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts . . . ." (emphasis added).

Citing no authority, the Store Owners urge that the words "just and reasonable" in RCW 66.24.620(2)(b) are "terms typically associated with the concept of compensation." App. Br. at 29. The statute does not say that the Board is to provide just and reasonable *compensation*, however. It says that the Board is to employ just and reasonable *measures*. The word "measures" suggests any number of actions, including non-monetary. Statutes must be interpreted so that all the language is given effect. *E.g.*, *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256, 258 (2010). This Court should reject the Store Owners' attempt to

read the word "measures" out of RCW 66.24.620(6)(b) and the word "compensation" into it.

The Store Owners further insist that the words "avert harm" in RCW 66.24.620(2)(b) imposed on the Board a mandatory duty to pay them money, and thereby created an implied right to sue for non-payment. App. Br. at 2, 18-24. Again, that is not what the statute says. Instead, it authorized and directed the Board to apply available revenues to "just and reasonable measures to avert harm to interests" of certain groups that had contracts with the Board. It did not specify any particular "just and reasonable measures," leaving that up to the Board.

According to the Store Owners, the word "must" and "without limitation" in RCW 66.24.620(6)(b) required the creation of a fund from which the State "must" pay "operating and asset sale revenues" to the Store Owners "without limitation." App. Br. at 18, 28. The more natural reading of those words in their context, however, is that while the statute required the Board to use some of the sales proceeds to avert harm to the interests of the Store Owners and other contractors, the Board's discretion to select and employ "just and reasonable measures" during the transition was "without limitation." RCW 66.24.620 says nothing about creating an "Alleviate Harm Fund."

2. When viewed in the context of the entire statutory scheme, it is clear the initiative did not create a private cause of action

When the language is viewed in context and in light of the statutory scheme as a whole, there is no evidence that the voters intended to create a private cause of action for the Store Owners.

Initiative 1183 as a whole contained 45 sections, divided among three parts. Section 101 described the policies of the Initiative and listed 15 goals that the initiative would accomplish. Laws of 2012, ch. 2, § 101(2) (codified as a note to RCW 66.24.620). Not one of the 15 goals mentioned a compensatory fund for former contract liquor store managers such as the Store Owners.

All of the other sections of Initiative 1183 focused on getting the state out of the liquor business and promptly setting up a new privatized system. Section 102 addressed the mechanics of the transition from the state-controlled system of liquor sales to the private licensee system during the period from voter approval in November 2011 to June 1, 2012. Sections 103 through 105 created new licenses and fees, and Section 106 addressed taxes. Section 107 amended the powers of the Board by, among other things, deleting its authority to appoint contract liquor stores or to establish state liquor stores and warehouses. Other sections in the

Initiative amended or repealed existing statutes to align them with the new privatized system. *See generally WASAVP*, 174 Wn.2d at 647-51.

The phrase "without limitation" found in RCW 66.24.620(6)(b) appears in ten other places in Initiative 1183.[9] One of them is RCW 66.24.620(3), which directed the Board to dispose of its liquor assets during the transition period:

> The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including *without limitation* goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(Emphasis added.) Again, the most natural reading of the phrase "without limitation" in the context where it is used is that the Board had discretion to do what was needed to dispose of its assets by June 1, 2012. Here, the Store Owners seek to turn the "without limitation" language on its head to impose a strict limitation on the Board's discretion, contrary to the statutory language. App. Br. at 25. The superior court properly rejected

[9] "Without limitation" also appears in RCW 66.24.055, 66.24.360, 66.24.630, 66.28.180, 66.28.190, and 66.28.330. It also appears in two other sections of Title 66 RCW that were not affected by Initiative 1183, RCW 66.24.010 and 66.24.230. None of these sections supports the Store Owners' argument.

their attempt to do that. This Court should also reject the Store Owners' strained reading of the initiative.

The Store Owners argue that the "interests" referred to in RCW 66.24.620(6)(b) are the profits they would have earned under their contracts with the Board had the state-controlled system remained in place. App. Br. at 22-23. As the superior court recognized, however, the focus of Initiative 1183 "was not on fulfilling the expectations of existing contract liquor stores." CP 820, 838, 856. It was on getting the state out of the liquor business. RCW 66.24.620(6)(b) speaks of "interests . . . under then existing contracts for supply by the board of distilled spirits," and issuance of a spirits retail license "to the holder of such interest." The "interests" of which the Store Owners were "the holders" under "then existing contracts" provided for early termination if the Board's authority to perform was withdrawn. *See, e.g.*, CP 149 at ¶ 6.9. RCW 66.24.630 created a new "spirits retail license" that authorized its holders to begin retail sales of liquor on June 1, 2012. The most natural reading of RCW 66.24.620(6)(b) together with RCW 66.24.630 is that the Board was to provide assistance to contract liquor store managers in phasing out their contracts and getting them set up as spirits retail licensees so they could continue in business as private licensed retailers of distilled spirits. That is

what the Board did. *See* App. Br. at 28-30; CP 494-557, 706-08, 818, 836, 854.

The Store Owners also argue that Section 303 of Initiative 1183 supports their claim that the voters intended to create a special fund for their benefit. App. Br. at 18-19. Section 303 provides:

> The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

The Store Owners apparently view the "revenues based on spirits licensing and sales" described in Section 303 to be the same "money fund" from which they contend they are to be compensated under RCW 66.24.620(6)(b). That is not what the statute says. First, Section 303 does not mention contract liquor stores or either of the other groups mentioned in RCW 66.24.620(6)(b). Second, Section 303 specifies revenues "based on spirits licensing and sale under this act" as the source of compensation for impairment of contract claims. Those revenues are different from the "operating and asset sale revenues" mentioned in RCW 66.24.620. Spirits licensing fees are described in RCW 66.24.630 and RCW 66.24.055. They are new fees associated with the new licenses created by Initiative 1183. They are not the same as the revenues from the

sale of state liquor store assets under RCW 66.24.620. Section 303 does not support the Store Owners' interpretation of RCW 66.24.620(6)(b) or that the initiative created a private cause of action for the Store Owners.

3. The voters pamphlet shows no intent to create a private cause of action

If a statute passed by initiative is ambiguous, the voters pamphlet may provide extrinsic evidence of the voters' intent. *Roe v. TeleTech*, 171 Wn.2d at 752. No party contends that Initiative 1183 is ambiguous, nor did the superior court find any ambiguity. In any event, the voters pamphlet does not support the Store Owners.[10]

The Fiscal Impact Statement in the voters pamphlet contained an estimate of the "one-time" costs the Board would pay from the liquor revolving fund in completing the transition from the state-controlled liquor sales system to the private licensee system. It estimated that "final audits of each state and contract liquor store," including those managed by the Store Owners, would cost $1.9 million. It estimated at $11.8 million the costs associated with lay-offs of state employees. By contrast, nothing in the Fiscal Impact Statement or elsewhere in the voters pamphlet said

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[10] A portion of the fiscal impact statement from the voters pamphlet appears in the record at CP 598. The ballot title, explanatory statement, fiscal impact statement, and arguments for and against Initiative 1183 from the voters pamphlet are available at https://wei.sos.wa.gov/agency/osos/en/press_and_research/PreviousElections/2011/general/Pages/2011Gen-OVG.aspx (last visited May 29, 2014).

anything about payments to contract liquor store managers such as the Store Owners.

All of the above evidence supports the superior court's conclusion that the voters did not intend to allow the Store Owners to sue the State if the Store Owners believed that the Board's harm-aversion measures were not "just and reasonable" under RCW 66.24.620(6)(v). CP 818, 836, 854. The superior court correctly ruled that RCW 66.24.620 does not impliedly create a cause of action for damages, and this Court should affirm.

F. The Superior Court Correctly Ruled That the Department of Revenue Did Not Violate Section 303 of Initiative 1183

Section 303 of Initiative 1183 specified that the Department of Revenue "must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid." On August 30, 2012, the Department issued a Special Notice to the public stating that it lacked the authority to decide constitutional claims and would not proceed with rule making. CP 112. The Special Notice explained the procedures for addressing a claim that Initiative 1183 unconstitutionally impaired a contract: "The Department's instruction in all cases of alleged constitutional impairment of contract related to I-1183 is for the claimant to file its claim directly with a court of competent jurisdiction." CP 112.

The Store Owners followed the Department's instruction by filing their Complaint alleging impairment of contract. CP 48. Nevertheless, the Store Owners alleged that the Department had violated Section 303 by not providing instructions in the form of an official rule, and they sought damages for the alleged violation. CP 49-50 (Second Am. Compl. ¶¶ 62-65).

The superior court properly ruled that the Department did not violate Section 303. CP 819, 837, 855. As the court recognized, administrative agencies do not have the authority to adjudicate the constitutionality of a statute, because only the courts have that power. *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379, 381 (1974); *see Nor-Pac Enters., Inc. v. Dep't of Licensing*, 129 Wn. App. 556, 562 n.9 & n.10, 119 P.3d 889, 891 n.9 & n.10 (2005) (noting administrative law judge's conclusion that she lacked authority to determine constitutionality of statute of limitations in RCW 82.38.170). The Department of Revenue could not lawfully or effectively address claims that Initiative 1183 unconstitutionally impairs any contract, and the development of rules would be futile and a disservice to taxpayers. Moreover, the superior court recognized that the Department's action did not harm the Store Owners in any way because the court was addressing their impairment of

contract claim, through the procedure that the Department had identified in its Special Notice. CP 819, 837, 855.

Instead, the Store Owners appear to argue that Section 303 creates a cause of action for *damages* against the Department of Revenue. App. Br. at 31-35; *see* CP 49-50 (Second Am. Compl. ¶ 62-65). The Court should reject this novel argument. Nothing in the language of Initiative 1183 suggests that the law was intended to create a private cause of action for damages for a failure to adopt administrative rules. Such a cause of action would be unprecedented in Washington, and one would expect a strong and express indication that the voters intended such a result. No such indication is present here.

In its Special Notice, the Department specified the "procedures to address claims that [Initiative 1183] unconstitutionally impairs any contract with the state" in accordance with Section 303. The Store Owners followed those procedures. This Court should affirm the superior court's judgment that the Department did not violate Section 303 of Initiative 1183.

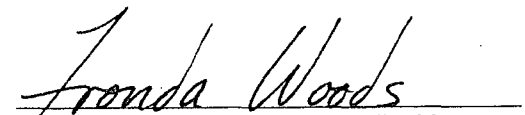
V. CONCLUSION

The superior court properly granted summary judgment to the Liquor Control Board and the Department of Revenue on all claims, and

properly dismissed the Store Owners' complaint. The Store Owners have identified no error in the superior court's ruling. This Court should affirm.

RESPECTFULLY SUBMITTED this 5th day of June, 2014.

ROBERT W. FERGUSON
Attorney General of Washington



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I, Bibi Shairulla, certify that I served a copy of this document, Brief of Respondents with Appendices A and B, on counsel for appellants via electronic mail and U.S. Mail, postage prepaid, at the addresses below stated:

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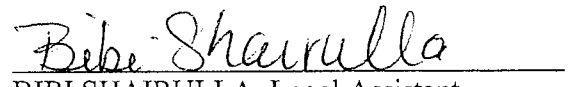
I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of June, 2014, at Olympia, WA.



BIBI SHAIRULLA, Legal Assistant

NEW SECTION. **Sec. 306.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 307.** This act takes effect sixty days from its enactment by the people.

NEW SECTION. **Sec. 308.** This act may be known and cited as the restoring quality home care initiative.

Originally filed in Office of Secretary of State April 21, 2011.

Approved by the People of the State of Washington in the General Election on November 8, 2011.

CHAPTER 2

[Initiative 1183]

LIQUOR SALES—PRIVATIZATION

AN ACT Relating to liquor; amending RCW 66.24.360, 82.08.150, 66.08.050, 66.08.060, 66.20.010, 66.20.160, 66.24.310, 66.24.380, 66.28.030, 66.24.540, 66.24.590, 66.28.060, 66.28.070, 66.28.170, 66.28.180, 66.28.190, 66.28.280, 66.04.010, 43.19.19054, 66.08.020, 66.08.026, 66.08.030, 66.24.145, 66.24.160, 66.32.010, 66.44.120, 66.44.150, 66.44.340, 19.126.010, and 19.126.040; reenacting and amending RCW 66.28.040 and 19.126.020; adding new sections to chapter 66.24 RCW; adding new sections to chapter 66.28 RCW; creating new sections; repealing RCW 66.08.070, 66.08.075, 66.08.160, 66.08.165, 66.08.166, 66.08.167, 66.08.220, 66.08.235, 66.16.010, 66.16.040, 66.16.041, 66.16.050, 66.16.060, 66.16.070, 66.16.100, 66.16.110, 66.16.120, and 66.28.045; contingently repealing ESSB 5942, 2011 1st sp.s. c ... ss 1 through 10; and providing an effective date.

Be it enacted by the People of the State of Washington:

PART I
LICENSED SALE OF SPIRITS

NEW SECTION. **Sec. 101.** (1) The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

(2) This initiative will:

(a) Privatize and modernize wholesale distribution and retail sales of liquor in Washington state in a manner that will reduce state government costs and provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor;

(b) Get the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages;

(c) Authorize the state to auction off its existing state liquor distribution and state liquor store facilities and equipment;

APPENDIX A

(d) Allow a private distributor of alcohol to get a license to distribute liquor if that distributor meets the requirements set by the Washington state liquor control board and is approved for a license by the board and create provisions to promote investments by private distributors;

(e) Require private distributors who get licenses to distribute liquor to pay ten percent of their gross spirits revenues to the state during the first two years and five percent of their gross spirits revenues to the state after the first two years;

(f) Allow for a limited number of retail stores to sell liquor if they meet public safety requirements set by this initiative and the liquor control board;

(g) Require that a retail store must have ten thousand square feet or more of fully enclosed retail space within a single structure in order to get a license to sell liquor, with limited exceptions;

(h) Require a retail store to demonstrate to state regulators that it can effectively prevent sales of alcohol to minors in order to get a license to sell liquor;

(i) Ensure that local communities have input before a liquor license can be issued to a local retailer or distributor and maintain all local zoning requirements and authority related to the location of liquor stores;

(j) Require private retailers who get licenses to sell liquor to pay seventeen percent of their gross spirits revenues to the state;

(k) Maintain the current distribution of liquor revenues to local governments and dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state;

(l) Make the standard fines and license suspension penalties for selling liquor to minors twice as strong as the existing fines and penalties for selling beer or wine to minors;

(m) Make requirements for training and supervision of employees selling spirits at retail more stringent than what is now required for sales of beer and wine;

(n) Update the current law on wine distribution to allow wine distributors and wineries to give volume discounts on the wholesale price of wine to retail stores and restaurants; and

(o) Allow retailers and restaurants to distribute wine to their own stores from a central warehouse.

NEW SECTION. **Sec. 102.** A new section is added to chapter 66.24 RCW to read as follows:

(1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for spirits licenses on file with the board on or before sixty days from the effective date of this section.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by this act.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other

assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW 82.08.150.

NEW SECTION. **Sec. 103.** A new section is added to chapter 66.24 RCW to read as follows:

(1) There is a spirits retail license to: Sell spirits in original containers to consumers for consumption off the licensed premises and to permit holders; sell spirits in original containers to retailers licensed to sell spirits for consumption on the premises, for resale at their licensed premises according to the terms of their licenses, although no single sale may exceed twenty-four liters, unless the sale is by a licensee that was a contract liquor store manager of a contract liquor store at the location of its spirits retail licensed premises from which it makes such sales; and export spirits.

(2) For the purposes of this title, a spirits retail license is a retail license, and a sale by a spirits retailer is a retail sale only if not for resale. Nothing in this title authorizes sales by on-sale licensees to other retail licensees. The board must establish by rule an obligation of on-sale spirits retailers to:

(a) Maintain a schedule by stock-keeping unit of all their purchases of spirits from spirits retail licensees, indicating the identity of the seller and the quantities purchased; and

(b) Provide, not more frequently than quarterly, a report for each scheduled item containing the identity of the purchasing on-premise licensee and the quantities of that scheduled item purchased since any preceding report to:

(i) A distributor authorized by the distiller to distribute a scheduled item in the on-sale licensee's geographic area; or

(ii) A distiller acting as distributor of the scheduled item in the area.

(3)(a) Except as otherwise provided in subsection (c) of this section, the board may issue spirits retail licenses only for premises comprising at least ten thousand square feet of fully enclosed retail space within a single structure, including storerooms and other interior auxiliary areas but excluding covered or fenced exterior areas, whether or not attached to the structure, and only to applicants that the board determines will maintain systems for inventory management, employee training, employee supervision, and physical security of the product substantially as effective as those of stores currently operated by the board with respect to preventing sales to or pilferage by underage or inebriated persons.

(b) License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing grocery premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits retail licenses.

(c) The board may not deny a spirits retail license to an otherwise qualified contract liquor store at its contract location or to the holder of former state liquor store operating rights sold at auction under section 102 of this act on the grounds of location, nature, or size of the premises to be licensed. The board shall not deny a spirits retail license to applicants that are not contract liquor stores or operating rights holders on the grounds of the size of the premises to be licensed, if such applicant is otherwise qualified and the board determines that:

(i) There is no retail spirits license holder in the trade area that the applicant proposes to serve;

(ii) The applicant meets, or upon licensure will meet, the operational requirements established by the board by rule; and

(iii) The licensee has not committed more than one public safety violation within the three years preceding application.

(d) A retailer authorized to sell spirits for consumption on or off the licensed premises may accept delivery of spirits at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which the retailer may deliver to its own licensed premises and, pursuant to sales permitted under subsection (1) of this section:

(i) To other retailer premises licensed to sell spirits for consumption on the licensed premises;

(ii) To other registered facilities; or

(iii) To lawful purchasers outside the state. The facilities may be registered and utilized by associations, cooperatives, or comparable groups of retailers, including at least one retailer licensed to sell spirits.

(4) Each spirits retail licensee must pay to the board, for deposit into the liquor revolving fund, a license issuance fee equivalent to seventeen percent of all spirits sales revenues under the license, exclusive of taxes collected by the licensee and of sales of items on which a license fee payable under this section has otherwise been incurred. The board must establish rules setting forth the timing of such payments and reporting of sales dollar volume by the licensee, with payments required quarterly in arrears. The first payment is due October 1, 2012.

(5) In addition to the payment required under subsection (4) of this section, each licensee must pay an annual license renewal fee of one hundred sixty-six dollars. The board must periodically review and adjust the renewal fee as may be required to maintain it as comparable to annual license renewal fees for licenses to sell beer and wine not for consumption on the licensed premises. If required by law at the time, any increase of the annual renewal fee becomes effective only upon ratification by the legislature.

(6) As a condition to receiving and renewing a retail spirits license the licensee must provide training as prescribed by the board by rule for individuals who sell spirits or who manage others who sell spirits regarding compliance with laws and regulations regarding sale of spirits, including without limitation the prohibitions against sale of spirits to individuals who are underage or visibly intoxicated. The training must be provided before the individual first engages in the sale of spirits and must be renewed at least every five years. The licensee must maintain records documenting the nature and frequency of the training provided. An employee training program is presumptively sufficient if it incorporates a "responsible vendor program" promulgated by the board.

(7) The maximum penalties prescribed by the board in WAC 314-29-020 through 314-29-040 relating to fines and suspensions are doubled for violations relating to the sale of spirits by retail spirits licensees.

(8)(a) The board must promulgate regulations concerning the adoption and administration of a compliance training program for spirits retail licensees, to be known as a "responsible vendor program," to reduce underage drinking, encourage licensees to adopt specific best practices to prevent sales to minors, and provide licensees with an incentive to give their employees on-going training in responsible alcohol sales and service.

(b) Licensees who join the responsible vendor program under this section and maintain all of the program's requirements are not subject to the doubling of penalties provided in this section for a single violation in any period of twelve calendar months.

(c) The responsible vendor program must be free, voluntary, and self-monitoring.

(d) To participate in the responsible vendor program, licensees must submit an application form to the board. If the application establishes that the licensee meets the qualifications to join the program, the board must send the licensee a membership certificate.

(e) A licensee participating in the responsible vendor program must at a minimum:

(i) Provide on-going training to employees;

(ii) Accept only certain forms of identification for alcohol sales;

(iii) Adopt policies on alcohol sales and checking identification;

(iv) Post specific signs in the business; and

(v) Keep records verifying compliance with the program's requirements.

Sec. 104. RCW 66.24.360 and 2011 c 119 s 203 are each amended to read as follows:

(1) There ((~~shall be~~)) is a ((~~beer and/or wine retailer's license to be designated as a~~)) grocery store license to sell wine and/or beer, including without limitation strong beer((~~, and/or wine~~)) at retail in ((~~bottles, cans, and~~)) original containers, not to be consumed upon the premises where sold((~~, at any store other than the state liquor stores~~)).

((~~(1)~~)) (2) There is a wine retailer reseller endorsement of a grocery store license, to sell wine at retail in original containers to retailers licensed to sell wine for consumption on the premises, for resale at their licensed premises according to the terms of the license. However, no single sale may exceed twenty-four liters, unless the sale is made by a licensee that was a contract liquor store manager of a contract-operated liquor store at the location from which such sales are made. For the purposes of this title, a grocery store license is a retail license, and a sale by a grocery store licensee with a reseller endorsement is a retail sale only if not for resale.

(3) Licensees obtaining a written endorsement from the board may also sell malt liquor in kegs or other containers capable of holding less than five and one-half gallons of liquid.

((~~(2)~~)) (4) The annual fee for the grocery store license is one hundred fifty dollars for each store.

((~~(3)~~)) (5) The annual fee for the wine retailer reseller endorsement is one hundred sixty-six dollars for each store.

(6) The board ((~~shall~~)) must issue a restricted grocery store license authorizing the licensee to sell beer and only table wine, if the board finds upon issuance or renewal of the license that the sale of strong beer or fortified wine would be against the public interest. In determining the public interest, the board ((~~shall~~)) must consider at least the following factors:

(a) The likelihood that the applicant will sell strong beer or fortified wine to persons who are intoxicated;

(b) Law enforcement problems in the vicinity of the applicant's establishment that may arise from persons purchasing strong beer or fortified wine at the establishment; and

(c) Whether the sale of strong beer or fortified wine would be detrimental to or inconsistent with a government-operated or funded alcohol treatment or detoxification program in the area.

If the board receives no evidence or objection that the sale of strong beer or fortified wine would be against the public interest, it ((~~shall~~)) must issue or renew the license without restriction, as applicable. The burden of establishing that the sale of strong beer or fortified wine by the licensee would be against the public interest is on those persons objecting.

((~~(4)~~)) (7) Licensees holding a grocery store license must maintain a minimum three thousand dollar inventory of food products for human consumption, not including pop, beer, strong beer, or wine.

((~~(5)~~)) (8) A grocery store licensee with a wine retailer reseller endorsement may accept delivery of wine at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which it may deliver to its own licensed premises and, pursuant to sales permitted by this title, to other licensed premises, to other registered facilities, or to lawful purchasers outside the state. Facilities may be registered and utilized by associations, cooperatives, or comparable groups of grocery store licensees.

(9) Upon approval by the board, the grocery store licensee may also receive an endorsement to permit the international export of beer, strong beer, and wine.

(a) Any beer, strong beer, or wine sold under this endorsement must have been purchased from a licensed beer or wine distributor licensed to do business within the state of Washington.

(b) Any beer, strong beer, and wine sold under this endorsement must be intended for consumption outside the state of Washington and the United States and appropriate records must be maintained by the licensee.

(c) Any beer, strong beer, or wine sold under this ((~~license~~)) endorsement must be sold at a price no less than the acquisition price paid by the holder of the license.

(d) The annual cost of this endorsement is five hundred dollars and is in addition to the license fees paid by the licensee for a grocery store license.

((~~(6)~~)) (10) A grocery store licensee holding a snack bar license under RCW 66.24.350 may receive an endorsement to allow the sale of confections containing more than one percent but not more than ten percent alcohol by weight to persons twenty-one years of age or older.

NEW SECTION. **Sec. 105.** A new section is added to chapter 66.24 RCW to read as follows:

(1) There is a license for spirits distributors to (a) sell spirits purchased from manufacturers, distillers, or suppliers including, without limitation, licensed Washington distilleries, licensed spirits importers, other Washington spirits distributors, or suppliers of foreign spirits located outside of the United States, to spirits retailers including, without limitation, spirits retail licensees, special occasion license holders, interstate common carrier license holders, restaurant spirits retailer license holders, spirits, beer, and wine private club license holders, hotel license holders, sports entertainment facility license holders, and spirits, beer, and wine nightclub license holders, and to other spirits distributors; and (b) export the same from the state.

(2) By January 1, 2012, the board must issue spirits distributor licenses to all applicants who, upon the effective date of this section, have the right to purchase spirits from a spirits manufacturer, spirits distiller, or other spirits supplier for resale in the state, or are agents of such supplier authorized to sell to licensees in the state, unless the board determines that issuance of a license to such applicant is not in the public interest.

(3)(a) As limited by (b) of this subsection and subject to (c) of this subsection, each spirits distributor licensee must pay to the board for deposit into the liquor revolving fund, a license issuance fee calculated as follows:

(i) In each of the first two years of licensure, ten percent of the total revenue from all the licensee's sales of spirits made during the year for which the fee is due, respectively; and

(ii) In the third year of licensure and each year thereafter, five percent of the total revenue from all the licensee's sales of spirits made during the year for which the fee is due, respectively.

(b) The fee required under this subsection (3) is calculated only on sales of items which the licensee was the first spirits distributor in the state to have received:

(i) In the case of spirits manufactured in the state, from the distiller; or

(ii) In the case of spirits manufactured outside the state, from an authorized out-of-state supplier.

(c) By March 31, 2013, all persons holding spirits distributor licenses on or before March 31, 2013, must have paid collectively one hundred fifty million dollars or more in spirits distributor license fees. If the collective payment through March 31, 2013, totals less than one hundred fifty million dollars, the board must, according to rules adopted by the board for the purpose, collect by May 31, 2013, as additional spirits distributor license fees the difference between one hundred fifty million dollars and the actual receipts, allocated among persons holding spirits distributor licenses at any time on or before March 31, 2013, ratably according to their spirits sales made during calendar year 2012. Any amount by which such payments exceed one hundred fifty million dollars by March 31, 2013, must be credited to future license issuance fee obligations of spirits distributor licensees according to rules adopted by the board.

(d) A retail licensee selling for resale must pay a distributor license fee under the terms and conditions in this section on resales of spirits the licensee has purchased on which no other distributor license fee has been paid. The board must establish rules setting forth the frequency and timing of such payments and reporting of sales dollar volume by the licensee, with payments due quarterly in arrears.

(e) No spirits inventory may be subject to calculation of more than a single spirits distributor license issuance fee.

(4) In addition to the payment set forth in subsection (3) of this section, each spirits distributor licensee renewing its annual license must pay an annual license renewal fee of one thousand three hundred twenty dollars for each licensed location.

(5) There is no minimum facility size or capacity for spirits distributor licenses, and no limit on the number of such licenses issued to qualified applicants. License applicants must provide physical security of the product that is substantially as effective as the physical security of the distribution facilities currently operated by the board with respect to preventing pilferage. License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing distributor premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits distributor licenses.

Sec. 106. RCW 82.08.150 and 2009 c 479 s 65 are each amended to read as follows:

(1) There is levied and ((~~shall be~~)) collected a tax upon each retail sale of spirits in the original package at the rate of fifteen percent of the selling price((~~. The tax imposed in this subsection shall apply to all such sales including sales by the Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees~~)).

(2) There is levied and ((~~shall be~~)) collected a tax upon each sale of spirits in the original package at the rate of ten percent of the selling price on sales by ((~~Washington state liquor stores and agencies to spirits, beer, and wine restaurant licensees~~)) a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to restaurant spirits retailers.

(3) There is levied and ((~~shall be~~)) collected an additional tax upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits in the original package by a licensee of the board at the rate of one dollar and seventy-two cents per liter. ((~~The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.~~))

(4) An additional tax is imposed equal to fourteen percent multiplied by the taxes payable under subsections (1), (2), and (3) of this section.

(5) An additional tax is imposed upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits in the original package by a licensee of the board at the rate of seven cents per liter. ((~~The additional tax imposed in this subsection shall apply to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees.~~)) All revenues collected during any month from this additional tax ((~~shall~~)) must be deposited in the state general fund by the twenty-fifth day of the following month.

(6)(a) An additional tax is imposed upon retail sale of spirits in the original package at the rate of ((~~one and seven-tenths percent of the selling price through June 30, 1995, two and six-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and~~)) three and four-tenths percent of the selling price ((~~thereafter. This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees~~)).

(b) An additional tax is imposed upon retail sale of spirits in the original package to a restaurant spirits retailer at the rate of ((~~one and one-tenth percent of the selling price through June 30, 1995, one and seven-tenths percent of the selling price for the period July 1, 1995, through June 30, 1997, and~~)) two and three-tenths percent of the selling price ((~~thereafter. This additional tax applies to all such sales to spirits, beer, and wine restaurant licensees~~)).

(c) An additional tax is imposed upon each ((~~retail~~)) sale of spirits in the original package by a spirits distributor licensee or other licensee acting as a spirits distributor pursuant to Title 66 RCW to a restaurant spirits retailer and upon each retail sale of spirits in the original package by a licensee of the board at the rate of ((~~twenty cents per liter through June 30, 1995, thirty cents per liter for the period July 1, 1995, through June 30, 1997, and~~)) forty-one cents per liter

((~~thereafter. This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, and including sales to spirits, beer, and wine restaurant licensees~~)).

(d) All revenues collected during any month from additional taxes under this subsection ((~~shall~~)) must be deposited in the state general fund by the twenty-fifth day of the following month.

(7)(a) An additional tax is imposed upon each retail sale of spirits in the original package at the rate of one dollar and thirty-three cents per liter. ((~~This additional tax applies to all such sales including sales by Washington state liquor stores and agencies, but excluding sales to spirits, beer, and wine restaurant licensees.~~))

(b) All revenues collected during any month from additional taxes under this subsection ((~~shall~~)) must be deposited by the twenty-fifth day of the following month into the general fund.

(8) The tax imposed in RCW 82.08.020 ((~~shall~~)) does not apply to sales of spirits in the original package.

(9) The taxes imposed in this section ((~~shall~~)) must be paid by the buyer to the seller, and each seller ((~~shall~~)) must collect from the buyer the full amount of the tax payable in respect to each taxable sale under this section. The taxes required by this section to be collected by the seller ((~~shall~~)) must be stated separately from the selling price, and for purposes of determining the tax due from the buyer to the seller, it ((~~shall be~~)) is conclusively presumed that the selling price quoted in any price list does not include the taxes imposed by this section. Sellers must report and return all taxes imposed in this section in accordance with rules adopted by the department.

(10) As used in this section, the terms, "spirits" and "package" ((~~shall~~)) have the same meaning ((~~ascribed to them~~)) as provided in chapter 66.04 RCW.

Sec. 107. RCW 66.08.050 and 2011 c 186 s 2 are each amended to read as follows:

The board, subject to the provisions of this title and the rules, ((~~shall~~)) must:

(1) ((~~Determine the localities within which state liquor stores shall be established throughout the state, and the number and situation of the stores within each locality;~~

~~(2) Appoint in cities and towns and other communities, in which no state liquor store is located, contract liquor stores. In addition, the board may appoint, in its discretion, a manufacturer that also manufactures liquor products other than wine under a license under this title, as a contract liquor store for the purpose of sale of liquor products of its own manufacture on the licensed premises only. Such contract liquor stores shall be authorized to sell liquor under the guidelines provided by law, rule, or contract, and such contract liquor stores shall be subject to such additional rules and regulations consistent with this title as the board may require. Sampling on contract store premises is permitted under this act;~~

~~(3) Establish all necessary warehouses for the storing and bottling, diluting and rectifying of stocks of liquors for the purposes of this title;~~

~~(4) Provide for the leasing for periods not to exceed ten years of all premises required for the conduct of the business; and for remodeling the same, and the procuring of their furnishings, fixtures, and supplies; and for obtaining options~~

~~of renewal of such leases by the lessee. The terms of such leases in all other respects shall be subject to the direction of the board;~~

~~(5)~~)) Determine the nature, form and capacity of all packages to be used for containing liquor kept for sale under this title;

((~~(6)~~)) (2) Execute or cause to be executed, all contracts, papers, and documents in the name of the board, under such regulations as the board may fix;

((~~(7)~~)) (3) Pay all customs, duties, excises, charges and obligations whatsoever relating to the business of the board;

((~~(8)~~)) (4) Require bonds from all employees in the discretion of the board, and to determine the amount of fidelity bond of each such employee;

((~~(9)~~)) (5) Perform services for the state lottery commission to such extent, and for such compensation, as may be mutually agreed upon between the board and the commission;

((~~(10)~~)) (6) Accept and deposit into the general fund-local account and disburse, subject to appropriation, federal grants or other funds or donations from any source for the purpose of improving public awareness of the health risks associated with alcohol consumption by youth and the abuse of alcohol by adults in Washington state. The board's alcohol awareness program ((~~shall~~)) must cooperate with federal and state agencies, interested organizations, and individuals to effect an active public beverage alcohol awareness program;

((~~(11)~~)) (7) Perform all other matters and things, whether similar to the foregoing or not, to carry out the provisions of this title, and ((~~shall have~~)) has full power to do each and every act necessary to the conduct of its ((~~business, including all buying, selling, preparation and approval of forms, and every other function of the business whatsoever, subject only to audit by the state auditor: PROVIDED, That the board shall have~~)) regulatory functions, including all supplies procurement, preparation and approval of forms, and every other undertaking necessary to perform its regulatory functions whatsoever, subject only to audit by the state auditor. However, the board has no authority to regulate the content of spoken language on licensed premises where wine and other liquors are served and where there is not a clear and present danger of disorderly conduct being provoked by such language or to restrict advertising of lawful prices.

Sec. 108. RCW 66.08.060 and 2005 c 231 s 3 are each amended to read as follows:

((~~(1) The board shall not advertise liquor in any form or through any medium whatsoever.~~

~~(2) In-store liquor merchandising is not advertising for the purposes of this section.~~

~~(3)~~)) The board ((~~shall have~~)) has power to adopt any and all reasonable rules as to the kind, character, and location of advertising of liquor.

Sec. 109. RCW 66.20.010 and 2011 c 119 s 213 are each amended to read as follows:

Upon application in the prescribed form being made to any employee authorized by the board to issue permits, accompanied by payment of the prescribed fee, and upon the employee being satisfied that the applicant should be granted a permit under this title, the employee ((~~shall~~)) must issue to the

(3) Any act or part of act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, adopted subsequent to May 25, 2011 in any 2011 special session.

PART III
MISCELLANEOUS PROVISIONS

NEW SECTION. **Sec. 301.** This act does not increase any tax, create any new tax, or eliminate any tax. Section 106 of this act applies to spirits licensees upon the effective date of this section, but all taxes presently imposed by RCW 82.08.150 on sales of spirits by or on behalf of the liquor control board continue to apply so long as the liquor control board makes any such sales.

NEW SECTION. **Sec. 302.** A new section is added to chapter 66.24 RCW to read as follows:

The distribution of spirits license fees under sections 103 and 105 of this act through the liquor revolving fund to border areas, counties, cities, towns, and the municipal research center must be made in a manner that provides that each category of recipients receive, in the aggregate, no less than it received from the liquor revolving fund during comparable periods prior to the effective date of this section. An additional distribution of ten million dollars per year from the spirits license fees must be provided to border areas, counties, cities, and towns through the liquor revolving fund for the purpose of enhancing public safety programs.

NEW SECTION. **Sec. 303.** The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act.

NEW SECTION. **Sec. 304.** If any provision of this act or its application to any person or circumstance is held invalid, the remainder of this act or the application of the provision to other persons or circumstances is not affected.

NEW SECTION. **Sec. 305.** This act takes effect upon approval by the voters. Section 216, subsections (1) and (2) of this act take effect if Engrossed Substitute House Bill No. 5942 is enacted by the legislature in 2011 and the bill, or any portion of it, becomes law. Section 216, subsection (3) of this act takes effect if any act or part of an act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, is adopted subsequent to May 25, 2011 in any 2011 special session.

Originally filed in Office of Secretary of State May 26, 2011.

Approved by the People of the State of Washington in the General Election on November 8, 2011.

CHAPTER 3

[Engrossed Substitute Senate Bill 6239]

SAME SEX MARRIAGE

AN ACT Relating to providing equal protection for all families in Washington by creating equality in civil marriage and changing the domestic partnership laws, while protecting religious freedom; amending RCW 26.04.010, 26.04.020, 26.04.050, 26.04.060, 26.04.070, 26.60.010,

already granted for the particular locality are adequate for the reasonable needs of the community.

(7) The board may adopt rules to implement this section. [2009 c 271 § 1.]

66.24.610 VIP airport lounge operator. There shall be a license to allow a VIP airport lounge operator to sell or otherwise provide spirits, wine, and beer solely for consumption on the premises of a VIP airport lounge. The license described in this section allows the VIP airport lounge operator to purchase spirits from the board, and to purchase beer and wine at retail outlets, or from the manufacturer or a distributor. No licensee may serve liquor from a bar where patrons may sit to be served, but may only serve liquor from a service bar, as approved by the board. The annual fee for this license shall be two thousand dollars. [2011 c 325 § 1.]

66.24.620 Sale of spirits by a holder of a spirits distributor or spirits retail license—State liquor store closure. (1) The holder of a spirits distributor license or spirits retail license issued under this title may commence sale of spirits upon issuance thereof, but in no event earlier than March 1, 2012, for distributors, or June 1, 2012, for retailers. The board must complete application processing by those dates of all complete applications for spirits licenses on file with the board on or before sixty days from December 8, 2011.

(2) The board must effect orderly closure of all state liquor stores no later than June 1, 2012, and must thereafter refrain from purchase, sale, or distribution of liquor, except for asset sales authorized by chapter 2, Laws of 2012.

(3) The board must devote sufficient resources to planning and preparation for sale of all assets of state liquor stores and distribution centers, and all other assets of the state over which the board has power of disposition, including without limitation goodwill and location value associated with state liquor stores, with the objective of depleting all inventory of liquor by May 31, 2012, and closing all other asset sales no later than June 1, 2013. The board, in furtherance of this subsection, may sell liquor to spirits licensees.

(4)(a) Disposition of any state liquor store or distribution center assets remaining after June 1, 2013, must be managed by the department of revenue.

(b) The board must obtain the maximum reasonable value for all asset sales made under this section.

(c) The board must sell by auction open to the public the right at each state-owned store location of a spirits retail licensee to operate a liquor store upon the premises. Such right must be freely alienable and subject to all state and local zoning and land use requirements applicable to the property. Acquisition of the operating rights must be a precondition to, but does not establish eligibility for, a spirits retail license at the location of a state store and does not confer any privilege conferred by a spirits retail license. Holding the rights does not require the holder of the right to operate a liquor-licensed business or apply for a liquor license.

(5) All sales proceeds under this section, net of direct sales expenses and other transition costs authorized by this section, must be deposited into the liquor revolving fund.

(6)(a) The board must complete the orderly transition from the current state-controlled system to the private licensee system of spirits retailing and distribution as required under this chapter by June 1, 2012.

(b) The transition must include, without limitation, a provision for applying operating and asset sale revenues of the board to just and reasonable measures to avert harm to interests of tribes, military buyers, and nonemployee liquor store operators under then existing contracts for supply by the board of distilled spirits, taking into account present value of issuance of a spirits retail license to the holder of such interest. The provision may extend beyond the time for completion of transition to a spirits licensee system.

(c) Purchases by the federal government from any licensee of the board of spirits for resale through commissaries at military installations are exempt from sales tax based on selling price levied by RCW 82.08.150. [2012 c 2 § 102 (Initiative Measure No. 1183, approved November 8, 2011).]

Finding—2012 c 2 (Initiative Measure No. 1183): "(1) The people of the state of Washington, in enacting this initiative measure, find that the state government monopoly on liquor distribution and liquor stores in Washington and the state government regulations that arbitrarily restrict the wholesale distribution and pricing of wine are outdated, inefficient, and costly to local taxpayers, consumers, distributors, and retailers. Therefore, the people wish to privatize and modernize both wholesale distribution and retail sales of liquor and remove outdated restrictions on the wholesale distribution of wine by enacting this initiative.

(2) This initiative will:

(a) Privatize and modernize wholesale distribution and retail sales of liquor in Washington state in a manner that will reduce state government costs and provide increased funding for state and local government services, while continuing to strictly regulate the distribution and sale of liquor;

(b) Get the state government out of the commercial business of distributing, selling, and promoting the sale of liquor, allowing the state to focus on the more appropriate government role of enforcing liquor laws and protecting public health and safety concerning all alcoholic beverages;

(c) Authorize the state to auction off its existing state liquor distribution and state liquor store facilities and equipment;

(d) Allow a private distributor of alcohol to get a license to distribute liquor if that distributor meets the requirements set by the Washington state liquor control board and is approved for a license by the board and create provisions to promote investments by private distributors;

(e) Require private distributors who get licenses to distribute liquor to pay ten percent of their gross spirits revenues to the state during the first two years and five percent of their gross spirits revenues to the state after the first two years;

(f) Allow for a limited number of retail stores to sell liquor if they meet public safety requirements set by this initiative and the liquor control board;

(g) Require that a retail store must have ten thousand square feet or more of fully enclosed retail space within a single structure in order to get a license to sell liquor, with limited exceptions;

(h) Require a retail store to demonstrate to state regulators that it can effectively prevent sales of alcohol to minors in order to get a license to sell liquor;

(i) Ensure that local communities have input before a liquor license can be issued to a local retailer or distributor and maintain all local zoning requirements and authority related to the location of liquor stores;

(j) Require private retailers who get licenses to sell liquor to pay seventeen percent of their gross spirits revenues to the state;

(k) Maintain the current distribution of liquor revenues to local governments and dedicate a portion of the new revenues raised from liquor license fees to increase funding for local public safety programs, including police, fire, and emergency services in communities throughout the state;

(l) Make the standard fines and license suspension penalties for selling liquor to minors twice as strong as the existing fines and penalties for selling beer or wine to minors;

(m) Make requirements for training and supervision of employees selling spirits at retail more stringent than what is now required for sales of beer and wine;

(n) Update the current law on wine distribution to allow wine distributors and wineries to give volume discounts on the wholesale price of wine to retail stores and restaurants; and

(o) Allow retailers and restaurants to distribute wine to their own stores

APPENDIX B

from a central warehouse." [2012 c 2 § 101 (Initiative Measure No. 1183, approved November 8, 2011).]

Application—2012 c 2 (Initiative Measure No. 1183): "This act does not increase any tax, create any new tax, or eliminate any tax. Section 106 of this act applies to spirits licensees upon December 8, 2011, but all taxes presently imposed by RCW 82.08.150 on sales of spirits by or on behalf of the liquor control board continue to apply so long as the liquor control board makes any such sales." [2012 c 2 § 301 (Initiative Measure No. 1183, approved November 8, 2011).]

Rules—2012 c 2 (Initiative Measure No. 1183): "The department of revenue must develop rules and procedures to address claims that this act unconstitutionally impairs any contract with the state and to provide a means for reasonable compensation of claims it finds valid, funded first from revenues based on spirits licensing and sale under this act." [2012 c 2 § 303 (Initiative Measure No. 1183, approved November 8, 2011).]

Effective date—Contingent effective date—2012 c 2 (Initiative Measure No. 1183): "This act takes effect upon approval by the voters. Section 216, subsections (1) and (2) of this act take effect if Engrossed Substitute House Bill No. 5942 is enacted by the legislature in 2011 and the bill, or any portion of it, becomes law. Section 216, subsection (3) of this act takes effect if any act or part of an act relating to the warehousing and distribution of liquor, including the lease of the state's liquor warehousing and distribution facilities, is adopted subsequent to May 25, 2011, in any 2011 special session." [2012 c 2 § 305 (Initiative Measure No. 1183, approved November 8, 2011).]

66.24.630 Spirits retail license. (1) There is a spirits retail license to: Sell spirits in original containers to consumers for consumption off the licensed premises and to permit holders; sell spirits in original containers to retailers licensed to sell spirits for consumption on the premises, for resale at their licensed premises according to the terms of their licenses, although no single sale may exceed twenty-four liters, unless the sale is by a licensee that was a contract liquor store manager of a contract liquor store at the location of its spirits retail licensed premises from which it makes such sales; and export spirits.

(2) For the purposes of this title, a spirits retail license is a retail license, and a sale by a spirits retailer is a retail sale only if not for resale. Nothing in this title authorizes sales by on-sale licensees to other retail licensees. The board must establish by rule an obligation of on-sale spirits retailers to:

(a) Maintain a schedule by stock-keeping unit of all their purchases of spirits from spirits retail licensees, indicating the identity of the seller and the quantities purchased; and

(b) Provide, not more frequently than quarterly, a report for each scheduled item containing the identity of the purchasing on-premise licensee and the quantities of that scheduled item purchased since any preceding report to:

(i) A distributor authorized by the distiller to distribute a scheduled item in the on-sale licensee's geographic area; or

(ii) A distiller acting as distributor of the scheduled item in the area.

(3)(a) Except as otherwise provided in (c) of this subsection, the board may issue spirits retail licenses only for premises comprising at least ten thousand square feet of fully enclosed retail space within a single structure, including storerooms and other interior auxiliary areas but excluding covered or fenced exterior areas, whether or not attached to the structure, and only to applicants that the board determines will maintain systems for inventory management, employee training, employee supervision, and physical security of the product substantially as effective as those of stores currently operated by the board with respect to preventing sales to or pilferage by underage or inebriated persons.

(b) License issuances and renewals are subject to RCW 66.24.010 and the regulations promulgated thereunder, including without limitation rights of cities, towns, county legislative authorities, the public, churches, schools, and public institutions to object to or prevent issuance of local liquor licenses. However, existing grocery premises licensed to sell beer and/or wine are deemed to be premises "now licensed" under RCW 66.24.010(9)(a) for the purpose of processing applications for spirits retail licenses.

(c) The board may not deny a spirits retail license to an otherwise qualified contract liquor store at its contract location or to the holder of former state liquor store operating rights sold at auction under RCW 66.24.620 on the grounds of location, nature, or size of the premises to be licensed. The board may not deny a spirits retail license to applicants that are not contract liquor stores or operating rights holders on the grounds of the size of the premises to be licensed, if such applicant is otherwise qualified and the board determines that:

(i) There is no retail spirits license holder in the trade area that the applicant proposes to serve;

(ii) The applicant meets, or upon licensure will meet, the operational requirements established by the board by rule; and

(iii) The licensee has not committed more than one public safety violation within the three years preceding application.

(d) A retailer authorized to sell spirits for consumption on or off the licensed premises may accept delivery of spirits at its licensed premises or at one or more warehouse facilities registered with the board, which facilities may also warehouse and distribute nonliquor items, and from which the retailer may deliver to its own licensed premises and, pursuant to sales permitted under subsection (1) of this section:

(i) To other retailer premises licensed to sell spirits for consumption on the licensed premises;

(ii) To other registered facilities; or

(iii) To lawful purchasers outside the state. The facilities may be registered and utilized by associations, cooperatives, or comparable groups of retailers, including at least one retailer licensed to sell spirits.

(4)(a) Except as otherwise provided in (b) of this subsection, each spirits retail licensee must pay to the board, for deposit into the liquor revolving fund, a license issuance fee equivalent to seventeen percent of all spirits sales revenues under the license, exclusive of taxes collected by the licensee and of sales of items on which a license fee payable under this section has otherwise been incurred. The board must establish rules setting forth the timing of such payments and reporting of sales dollar volume by the licensee, with payments required quarterly in arrears. The first payment is due October 1, 2012.

(b) This subsection (4) does not apply to craft distilleries.

(5) In addition to the payment required under subsection (4) of this section, each licensee must pay an annual license renewal fee of one hundred sixty-six dollars. The board must periodically review and adjust the renewal fee as may be required to maintain it as comparable to annual license renewal fees for licenses to sell beer and wine not for consumption on the licensed premises. If required by law at the

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Cc: Maureen Obrien (mobrien@dunnandblack.com)
Subject: RE: Supreme Court No. 89609-7 --Brief of Respondents

Rec'd 6-5-14

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Cc: Maureen Obrien (mobrien@dunnandblack.com)
Subject: Supreme Court No. 89609-7 --Brief of Respondents

Good afternoon,

Attached for filing in this matter: Tillman Carr, et al. v. State of Washington, Supreme Court Case No. 89609-7, please find **Brief of Respondents with Proof of Service, and Appendices A and B attached.** This pleading are being filed by Assistant Attorneys General Fronda Woods, Charles Zalesky, and Kelly Owings. Hard copies have been placed in today's mail to counsel as well.

By this email, I am also serving a copy on all counsel of record. Please confirm receipt.

Thank you.

Bibi Shairulla
Legal Assistant to
Diane L. McDaniel, Schuyler B. Rue, R. July Simpson, and Fronda Woods

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