

NO. 64799-7-I

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

WORLDWIDE WATER, INC.,  
CLEAR WATER COMPLIANCE SERVICES, INC., and  
CASCADE ECOSOLUTIONS, INC.,

Appellants,

v.

PLAINFIELD SPECIALTY HOLDINGS II INC.,  
a Delaware corporation,  
and  
TYRELL B. VANCE LLC,  
as Receiver for Plainfield Specialty Holdings II Inc.,

Respondents.

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**AMENDED BRIEF OF APPELLANTS**

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## **I. NATURE OF THE CASE**

This appeal concerns a trial court's order authorizing a state court Receiver to transfer, for no consideration, claims held by the Appellant companies against their secured lender, Respondent Plainfield. The transfer to Plainfield of causes of action against it results in Appellants' complete loss of all rights in the claims, such that the effect is to grant Respondent a release from Appellants without any adjudication of the claims. No law, statutory or otherwise, authorizes the stripping of Appellants' rights in the claims, and, in fact, violates basic concepts of due process. The trial court's order must be reversed.

## **II. ASSIGNMENT OF ERROR**

In the context of a motion by the Receiver to terminate the receivership, the trial court erred in entering an order which included a provision assigning to Respondent Plainfield Appellants' causes of action which Appellants held and

asserted against Plainfield. CP 1190-1192. The trial court's order exceeded its statutory authority.

### **III. ISSUES RELATED TO ASSIGNMENT OF ERROR**

1. Whether the trial court erred in authorizing the Receiver to transfer the Appellants' claims against Plainfield to Plainfield where the statute governing receivership authorizes only the abandonment of unadministered property to the debtor (Appellant) and not to third parties.

2. Whether, even assuming the Receiver had authority to transfer collateral to a secured creditor, the trial court erred in authorizing transfer of the Appellants' claims against Plainfield to Plainfield where Plainfield does not hold a security interest in the Plainfield Claims.

3. Whether the trial court erred in authorizing the Receiver to transfer the Appellants' claims against Plainfield to Plainfield where Plainfield has no incentive to pursue claims against itself, thus assuring that no value will be realized on the Plainfield Claims.

#### IV. STATEMENT OF THE CASE

##### A. This Appeal--Receivership Order Assigning Claims

Appellants appeal a trial court order authorizing a Receiver to transfer to Respondent Plainfield the very claims that Appellants held against Plainfield. That there was no statutory basis cited by either the Court or the Receiver for the illogical transfer underscores the impropriety of trial court's ruling. It is important that the severity of the underlying nature of the Appellants' litigation claims against Plainfield be summarized in order to emphasize the unjust effect of the trial court's incongruous and improper ruling. Therefore, Appellants set forth below a summary of their claims against Plainfield before setting forth the specific procedural facts leading up to the hearing in which the trial court wrongly allowed for transfer to Plainfield of Appellants' claims against Plainfield.

**B. How Appellants' Claims Against Plainfield Arose**

Within a span of less than two years from about March 2007 to April 2009, Respondent Plainfield wrongfully induced Appellants, Worldwide Water, Inc. (“Worldwide”) and two of its primary subsidiaries Clear Water Compliance Services, Inc. (“Clear Water”) and Cascade Ecosolutions, Inc., (“Cascade”), into making Plainfield their exclusive source of financing and expanding their business model to enter into numerous ventures and contractual obligations, before unlawfully cutting off funding to throw the Appellants’ once successful steadily growing business into receivership and liquidation. During receivership proceedings, Appellants and Appellants’ equity holders (Defendant-Intervenors Thomas Leggiere (Chief Executive Officer of Worldwide, Clear Water, and Cascade); Lucille Leggiere; Charles Oborn; Arlene Oborn; Brilliance Enterprises, Inc.; SMMK, Inc.; Neil H. Heineman; and George Viray) requested that the Court at least recognize the interest in claims that they might seek against Plainfield for the damages

caused by Plainfield's conduct.<sup>1</sup> As a result of Plainfield's actions, Appellants have an interest in claims against Plainfield for, *inter alia*, breach of contract, breach of implied duty of good faith and fair dealing, promissory estoppel, fraudulent inducement, and negligent misrepresentation.

**1. Appellants' Successful and Steady Business Growth before Plainfield**

In 1998, Thomas Leggiere ("Leggiere") founded Clear Water becoming a shareholder and its Chief Executive Officer. CP 447, ¶ 2. Clear Water's principal line of business has been the treatment of stormwater and ground water runoff from construction and industrial sites through innovative stormwater treatment processes and professional service. CP 448, ¶ 4. For the first eight years of its existence, Clear Water reinvested company profits and secured small business administration loans to finance its operations. CP 448, ¶ 5. Clear Water

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<sup>1</sup> As Appellants explained to the Court below, Plainfield is currently the subject of multiple suits and counter-suits by other borrowers in multiple states that allege fraudulent business practices by Plainfield featuring allegations and seeking remedies remarkably similar to those made against Appellants. CP 92, n. 1.

experienced steady modest growth from 1998 through 2007, including expansion from a business with 18 employees and \$1.8 million in sales in 2004 to a business with 70 employees and \$7.2 million in sales in 2006 without advertising or direct marketing. Id. In 2006, Clear Water began searching for additional funding of \$5 million to further expand its offering of products and services, and the geographic regions in which it could offer them. CP 449, ¶ 7.

## **2. Plainfield Promises to Provide Financing and Support Expansion of Business**

In March 2007, Leggiere was introduced to Eric Reehl (“Reehl”), a senior account manager with Plainfield Asset Management. CP 449, ¶ 8. During this meeting, Leggiere told Plainfield about his company’s search for a \$5 million equity investment to support future growth. CP 449, ¶ 9. Reehl represented to Leggiere that Plainfield could provide the financing needed. Id. Reehl also arranged for Leggiere to meet with Ford Johnson (“Johnson”), the President and owner of JLC

Technologies (“JLC”), in Tyler, Texas, because (i) Plainfield needed to “vet” Clear Water’s water treatment capabilities, and (ii) Plainfield wanted Clear Water and JLC--a Plainfield holding--to form a strategic alliance so that Clear Water could participate with JLC in a \$500 million contract JLC had with Baker-Hughes to provide water treatment services to the oil and gas industry in the United States and the Middle East. Id.

Discussions between Clear Water and Plainfield regarding financing continued, and on May 22, 2007, Leggiere met with Reehl in New York. CP 449, ¶ 9. At the meeting, Reehl verbally committed to provide financing to Clear Water, and represented that Plainfield could and would take care of their financing needs, but then conditioned that investment upon Clear Water’s acceptance of a \$20 million loan facility from Plainfield--the full amount of which Clear Water believed it was required to draw down by a date certain and that the borrowed funds could not be prepaid. Id.

**a. Consummation of the Transaction**

In July 2007, Clear Water executed the financing and business relationship with Plainfield. CP 449, ¶ 8. Pursuant to the deal, one of Plainfield's hedge funds, Plainfield Specialty Holdings I, Inc., committed \$5 million in capital and became the majority stockholder of preferred shares in Worldwide Water, the holding company established at Plainfield's request to oversee and provide shared services to Clear Water and other existing and to-be-formed subsidiary companies. Id. Plainfield (specifically Plainfield Specialty Holdings II, Inc., another Plainfield hedge fund) also committed to a \$20 million loan facility to Clear Water, Worldwide, and Worldwide's other subsidiaries, and became the senior secured lender to the Worldwide business. Id.

Significantly, Appellants reasonably relied upon Plainfield's promised alliance with JLC to meet revenue goals when they ultimately agreed to the \$20 million loan because the funding could be used in connection with--and indeed would be

needed for--the JLC joint venture that Plainfield promoted. CP 450, ¶ 12. Indeed, Plainfield assisted in formulating a business plan anticipating revenue of \$4 million for the remaining five months of 2007 alone. Id.

**3. Worldwide’s Expansion in Reliance Upon Plainfield’s Promised Financing After Plainfield Unilaterally Removes the JLC Alliance Opportunity**

In January 2008, to the shock of Leggiere and other company representatives, Reehl told Appellants in a meeting at Plainfield’s offices that the venture with JLC was “not going to happen” and provided no additional explanation.<sup>2</sup> CP 450, ¶ 11. Nevertheless, Reehl encouraged Worldwide to continue expansion. Id. Accordingly, in reliance upon Plainfield’s promise to provide the necessary financing, Worldwide pursued a number of expansion opportunities and other projects despite

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<sup>2</sup> Although not an issue to be determined in the present proceedings, the veracity of Plainfield’s prior representations regarding the venture with JLC is a material issue of fact given that JLC was a Plainfield holding and that Clear Water reasonably relied upon Plainfield’s representations as a basis for executing the business transactions with Plainfield.

the loss of the JLC alliance. Most significantly, Worldwide pursued, *inter alia*, (i) expansion of services into New York and North Carolina; (ii) adding new services for water treatment of groundwater and sludge dewatering that are not affected by rainfall patterns; (iii) acquiring interests in other companies to create new opportunities to provide inter-related services; (iv) pursuing project opportunities in Panama, including with the Panama Canal Authority; (v) pursuing opportunities in the Middle East to provide water-related services; (vi) establishing relationships with the oil and gas industry in New Mexico; and (vii) participating in EPA efforts to establish water quality regulations. CP 451, ¶ 13.

#### **4. Plainfield Begins to Pull the Plug on the Promised Financing**

Despite Appellants' initiatives encouraged by Plainfield, Plainfield shortly began unilaterally reducing the amounts of funding it had agreed to provide. On June 24, 2008, Worldwide submitted a funding request to Plainfield of \$4.5 million to cover six initiatives, plus interest reserve and funding fees.

CP 453, ¶ 14. In a phone call, Reehl rejected funding for one initiative to purchase a local company that promised immediate returns and instead encouraged Worldwide to pursue long-term growth strategies. Id. Reehl also told Worldwide to delay or stretch payments of accounts payable and to submit payment requests only at the “last minute,” which was contrary to prior practices to timely pay vendors. CP 453, ¶ 15.

On July 9, 2008, Plainfield approved an advance of \$1.8 million, but only after Worldwide had submitted four revised funding requests to meet business needs. CP 453, ¶ 16 & Exh. 2, CP 472-478. The funding amount was a material deviation by Plainfield from the requirements of the Note Purchase Agreement (“NPA”) for minimum draws of \$2 million. CP 453, ¶ 16.

On September 18, 2008, Leggiere reviewed with Reehl a detailed six-page summary of Worldwide’s business initiatives, keeping Plainfield informed of the efforts to grow the business. CP 454, ¶ 18. Significantly, the summary detailed both

Worldwide's completed projects and other initiatives presently under contract, including, inter alia: (i) a project on which Worldwide was retained to work by the New York State Department of Transportation; (ii) a project in progress for Wal-Mart in North Carolina; (iii) a contract for sludge dewatering at a mine in California; (iv) a "mobile decant" technology Worldwide was about to launch; and (v) an ongoing effort by Worldwide to secure almost \$20 million in projects for the federal government. CP 454, ¶ 18 & Exh. 3, CP 479-493. At the conclusion of the conference, Reehl acknowledged Worldwide's extensive efforts, encouraging continued development of Appellants' businesses. CP 454, ¶ 18.

On September 29, 2008, Leggiere was informed, with no explanation whatsoever, that Reehl was no longer with Plainfield. CP 454, ¶ 19. Soon after, Plainfield's relationship with Worldwide further deteriorated. Id.

**5. Plainfield Tries to Use Worldwide's Desperate Need for Cash to Steal the Company**

On October 2, 2008, Plainfield abruptly cut off funding to Worldwide except for the hiring of an outside restructuring advisor and restructuring officer demanded by Plainfield. CP 454, ¶ 20. On that day, Worldwide submitted a funding request for \$1.4 million, which Plainfield rejected and demanded should be reduced to \$370,000. *Id.* Plainfield, however, rejected the re-submitted request for \$370,000, and cut off further funding. CP 454, ¶ 20 & Exh. 4, CP 487-493 & Exh. 5, CP 494-499. Both amounts were far below the minimum draw required under the NPA. CP 453, ¶ 16.

On October 7-8, 2008, Plainfield representatives Michael Johnson and David Frost travelled to Worldwide's offices for a series of meetings discussing Worldwide's finances. CP 454, ¶ 21. Appearing to want to work with Worldwide, Frost demanded that Worldwide prepare a plan for budget cuts, which Worldwide prepared. *Id.*

On October 14, 2008, Plainfield's legal counsel, however, sent Leggiere an email accusing Worldwide of defaulting on the NPA, without any explanation, and demanding that Worldwide agree to a new series of agreements, including a Senior Secured Note for \$20 million, a Post-Default Advance Agreement, and a First Amendment to Stockholders Agreement. CP 455, ¶ 22 & Exh. 6, CP 500-537. The First Amendment to Stockholders Agreement included a provision that Worldwide's board of directors consist of five directors, and that three of them shall be appointed by Plainfield--giving Plainfield complete control of Worldwide's board of directors. CP 455, ¶ 22 & Exh. 6, CP 521-522.

On October 15, 2008, Frost and Plainfield's counsel demanded Worldwide execute the new set of agreements but would not guarantee further funding even if Worldwide relinquished control of the board of directors. CP 455, ¶ 23. Worldwide disputed that it had defaulted on the NPA and refused to accept Plainfield's terms that were made at a time

when Worldwide was exclusively dependent upon Plainfield for financing. Id. On or about October 23, 2008, Plainfield's legal counsel again emailed Leggiere a letter affirmatively stating that Worldwide was in default, but without pointing to facts establishing default. CP 455, ¶ 24.

During this period from October 15 to November 11, 2008, Worldwide did agree, at Plainfield's demand to even consider further funding, to retain a restructuring consultant, specifically Matthew Kvarda ("Kvarda") from Alvarez & Marsal ("A & M"), to make recommendations to reorganize Worldwide. CP 455-456, ¶ 25.

On November 11, 2008, at a meeting with Plainfield and Worldwide representatives, Kvarda (i) recommended Plainfield provide financing to bring Worldwide current on its accounts payable; (ii) recommended Plainfield subordinate its first lien position on up to \$1.5 million of Worldwide Water's accounts payable (which it was required to do pursuant to Section 13.1(h) of the NPA) so that Worldwide could obtain a third

party line of credit; (iii) recommended that Worldwide make certain cuts in operating expenses; and (iv) recommended that the parties re-evaluate the condition of the company in early 2009 to determine what further action might be required. CP 456, ¶ 26. Worldwide ultimately made cuts in operating expenses that were \$270,000 per year deeper than those suggested by Kvarda. *Id.* Yet, despite the fact that A & M was retained at Plainfield's own insistence, and despite the fact that Worldwide immediately implemented the cuts in operating expenses A & M suggested (and more), Plainfield completely rejected A & M's recommendations. CP 456, ¶ 27.

Just four days later, on November 15, 2008, Plainfield served Worldwide with a Notice of Acceleration and Intention to Exercise Remedies stating (i) that Worldwide was in default (again without specifying the basis of the purported default); (ii) that Plainfield had rejected A & M's recommendations; and (iii) that Plainfield would provide no additional funding whatsoever. CP 456, ¶ 28 & Exh. 10, CP 567-570. During a

conference call on November 17, 2008, Plainfield again confirmed that it would provide no further funding, and would only consider a plan to pay the debt if Plainfield was not required to provide any more funding. CP 456, ¶ 29.

Plainfield continued to refuse funding requests and to assist Worldwide's efforts to sustain their business, forcing Worldwide to survive on whatever receivables it could collect. CP 457, ¶¶ 31-32. For instance, on November 21, 2008, Worldwide's CFO sent an e-mail to Plainfield requesting its approval of a line of credit to Worldwide from a third party to address Worldwide's business needs by subordinating Plainfield's interest in up to \$1.5 million in accounts receivables as provided in Section 13.1(h) of the NPA and Section 1.01(b) of the Security Agreement of July 27, 2007. CP 457, ¶ 31. Plainfield, however, refused to subordinate their interests and the alternative funding fell through. *Id.* Likewise, in late January 2009, Leggiere attempted to convince Plainfield's founder and Chief Investment Officer Max Holmes

for assistance in resolving the financing dispute, which Holmes refused to provide. CP 457-458, ¶ 34.

In February 2009, under Plainfield's demands, Worldwide again retained Mr. Kvarda, but this time as Chief Restructuring Officer (CRO). CP 458, ¶ 35. Worldwide cooperated fully with Mr. Kvarda to implement any suggestions to restructure Worldwide, but he resigned as CRO when Plainfield refused to timely fund a payroll request rather than risk liability for failing to meet the company's payroll obligations. Id.

Notably before resigning, Kvarda communicated to Leggiere that he would recommend to Plainfield to approve an inventory transaction with Cascade EcoSolutions that would have generated much needed liquidity. CP 458-460, ¶¶ 37-43. After much delay, however, Plainfield blocked the transaction. CP 460, ¶ 43-46. Plainfield also refused to cooperate with Worldwide's efforts to work with potential buyers of Worldwide's assets. CP 458, ¶ 36.

Finally, unable to bring Worldwide to its knees using the numerous tactics described above, on Good Friday, April 10, 2009, Plainfield filed an action for monies due claiming breach of contract, and for the appointment of a general receiver against Worldwide, Clear Water, and Cascade in the Superior Court of the State of Washington, Snohomish County. The Receivership action and the final order entered in this action is the subject of this Appeal.

As a result of Plainfield's conduct, including its wrongful failure to provide funding, Worldwide and its subsidiaries and affiliates have suffered millions of dollars in damages because of (i) the loss of a number of present and prospective business opportunities, including the lost of the confidence of governments and other clients in the industries in which Worldwide competed--especially since Worldwide's reputation was stellar prior to Plainfield's involvement; (ii) the loss of confidence from Worldwide's vendors, suppliers, creditors, and other counterparties; (iii) the loss of valuable employees,

infrastructure, and other resources necessary for it to be able to be competitive; (iv) the lost opportunities to contract with other providers of financing; and (v) the expenditure of tens of thousands of dollars in attorneys fees and other costs--both for the company and individually to fight Plainfield's manufactured default events and receivership action.

**C. Plainfield Improperly Gets A Hold of the Very Claims Against it--Trial Court's Receivership Order**

On April 9, 2009, Plainfield filed a Complaint for Monies Due and Appointment of A Receiver and also a Motion and Petition For Appointment of Receiver and Memorandum In Support thereof. CP 969-1004, CP 117-134. Plainfield filed the Declaration of Michael S. Johnson In Support of Motion of Appointment of Receiver attaching the loan and security documents in support of its claims against Appellant for monies due. CP 746-803. The Security Agreement attached as Exhibit C to the Johnson Declaration on its face makes clear that Appellants did not grant--and Plainfield did not hold--a

security interest in Appellants' litigation claims against Plainfield ("Plainfield Claims"). CP 868-912.

Appellants filed a Brief in Opposition to Plainfield's Complaint and Motion with supporting Declarations of Thomas Leggiere and Geoffrey Chism outlining in detail Appellants' claims against Plainfield. CP 91-110, CP 447-602, CP 111-113, and CP 114-116.

While the trial court granted the appointment of a Receiver, it noted the seriousness of the Plainfield Claims: ". . . the shareholders have certainly raised some issues of fact that for justice to be done in this case, is probably going to require somebody to resolve these issues." April 29, 2009 RP, p. 43, ll. 21-24.

Despite the lengthy discourse over the Plainfield Claims, upon subsequently preparing a Scheduled of Property and Liabilities, the Receiver inexplicably chose not to include the Plainfield claims in the list of assets. CP 26-57.

Following auction of what had been Appellants' vibrant and successful operating company, the Receiver brought a Motion to Terminate Receivership and Discharge Receiver, Approve Receiver's Final Report, Fees and Costs and Distribution of Proceeds, and Exonerate Bond. CP 5-8. The Receiver's Termination Motion stated "all of the assets of the receivership entities were subject to the security interest of the plaintiff, Plainfield Specialty Holds II, Inc." and "[t]he Receiver now requests authority . . . to assign any remaining assets to Plainfield." CP 6, l. 23, CP 7, ll. 1-4.

Interestingly, Plainfield filed a Response to the Receiver's Termination Motion seeking language in the proposed Order which assigned to Plainfield "and any claims or causes of action possessed by the Receivership Entities." CP 1198, l. 13 (emphasis in original). Ostensibly, Plainfield filed this Response to try and capture the claims that the Appellants held and asserted against Plainfield.

Appellants filed a Response to Plainfield's request pointing out to the trial court the existence of the Appellants' claims against Plainfield, the lengthy record in connection with the Plainfield Claims, and arguing that any assignment to Plainfield of the Plainfield Claims would improperly effect a release of those claims. CP 1193-1196.

The Receiver filed a Reply admitting that "the Receiver did not do a formal investigation into allegations against Plainfield" but instead "examined the claims and decided not to pursue these." CP 410, l. 21. The Receiver responded with not a single citation to any legal basis on which an assignment of the Plainfield Claims to Plainfield could be proper. Id. Nevertheless, the trial court entered an Order granting the Receiver's Termination Motion which Order including Plainfield's specifically requested language transferring to it Appellants' claims against it. As set forth herein, the assignment of the Plainfield Claims to Plainfield has no basis in law and results in patent injustice.

## V. SUMMARY OF ARGUMENT

It was improper for the trial court to authorize the Receiver to transfer the Plainfield Claims to Plainfield because (a) such transfer exceeded the Receiver's statutory authority; (b) Plainfield did not hold a security interest in the commercial tort claims; and (c) Plainfield has no incentive to pursue tort claims against itself or to maximize the value of the claims. "Statutory interpretation is a question of law reviewed *de novo*." Estate of Haselwood v. Bremerton Ice Arena, Inc., 166 Wn.2d 489, 497, 210 P.3d 308 (2009), citing TCAP Corp. v. Gervin, 163 Wn.2d 645, 650, 185 P.3d 589 (2008).

## VI. ARGUMENT

### A. Receivership Act Only Authorized Receiver to Abandon the Unadministered Plainfield Claims to Appellants.

In 2004, the Washington legislature signed into law the provisions relating to receivers found in RCW 7.60 ("Receivership Act"). The Receivership Act provides that a receiver serves as an agent of the court, RCW 7.60.005(10), and

acts as an officer of the court for the common benefit of all parties in interest, Gloyd v. Rutherford, 62 Wn.2d 59, 60-61, 380 P.2d 867 (1963). A receiver's independence is vital to the integrity of the receivership process:

Often the receivership is instituted as part of an action to foreclose on real or personal property by a secured creditor, or by a debtor corporation mired in conflict or deadlocked workout negotiations. In such a case, the plaintiff (whether a creditor or the debtor) will be the party moving for appointment of a receiver, and will be the first to contact a particular person to act as the receiver in the case. **Once the receiver has been appointed by the court, however, the receiver does not answer to the plaintiff or any other party, but instead must exercise independent judgment on behalf of the court, and thereby on behalf of all the constituents to the receivership process.**

Shelly Crocker, *State Court Receiverships*, 59 CONSUMER FIN. L.Q. REPORT (Winter 2005), at 411 (emphasis added).

With regards to an interest in a claim or cause of action, the Receivership Act provides that a receiver may sell the property pursuant to provisions of RCW 7.60.260, administer the cause of action under RCW 7.60.060(1)(c), or abandon the property under RCW 7.60.150. The Receiver did not sell the

Plainfield Claims and indicated it was not going to administer them. CP 431-442; CP 408-411. Nowhere does the Receivership Act provide the Receiver with title to the receivership property or authority to simply assign property to a third person who demands it.

If the Receiver determined he would not sell or administer the Plainfield Claims, his only alternative under the Receivership Act was to abandon the claims pursuant to RCW 7.60.150.

RCW 7.60.150 provides that a receiver “may abandon any estate property that is burdensome to the receiver or is of inconsequential value or benefit.” RCW 7.60.150. The Receiver had decided “not to pursue” the Plainfield Claims. CP 410, 1. 23.

Abandoning property is not the same as affirmatively transferring it to a third party. Abandonment means that the property reverts to its original owner, the debtor, here Appellant. The Receivership Act is patterned in many respects,

including abandonment of property, after the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.* ("Bankruptcy Code") and thus, it is appropriate for this Court to look to interpretation of the Bankruptcy Code for guidance.<sup>3</sup> Like RCW 7.60.150, Bankruptcy Code § 554(a) states that "[a]fter notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." To the extent that the property set forth on a debtor's bankruptcy schedules is not administered at the time a case is closed, the property is abandoned to the debtor. Bankruptcy Code § 554(c).<sup>4</sup>

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<sup>3</sup> Geraghty v. National Bank of Commerce of Seattle, 8 Wn.2d 439, 441-45, 112 P.2d 846 (1941) (In looking to bankruptcy law to interpret a Washington statute regarding set off, the Court held that "[i]t is, of course, a universally recognized rule of statutory construction that when a statute is adopted from another jurisdiction, the judicial construction...from [that jurisdiction] is also adopted" and noted that since the state statute was adopted from the federal act, "the cases interpreting [the federal section] are authority.").

<sup>4</sup> Moreover, while Bankruptcy Code § 554(c) allows the court "to order[] otherwise," RCW 7.60.150 allows for nothing other than abandonment of the unadministered asset to the debtor, here, Appellant.

The Ninth Circuit has confirmed that abandonment has the effect of fully restoring the debtor's interest in the property:

“Abandonment” is a term of art with special meaning in the bankruptcy context. It is the formal relinquishment of the property at issue from the bankruptcy estate. Upon abandonment, the debtor's interest in the property is restored *nunc pro tunc* as of the filing of the bankruptcy petition.

Catalano v. C.I.R., 279 F.3d 682, 685 (9th Cir. 2002).

The only other receivership statute on which the Receiver could even purportedly rely for its request to assign the litigation claims to Plainfield is the termination statute, RCW 7.60.290. However, nothing in that statute relates to transfer of receivership assets to a third party.

There is no authority, either under the Bankruptcy Code or the Receivership Act, for a receiver to transfer assets to a third-party, simply because that party demands them. The trial court's authority was to abandon the Plainfield Claims to the Appellants upon termination of the receivership, thereby

putting the Appellants back in the position of deciding whether to pursue those claims against Plainfield.

**B. Plainfield Does Not Hold a Security Interest in the Plainfield Claims.**

The Receiver's apparent rationale for transferring the Plainfield Claims to Plainfield was 1) his mistaken conclusion that Plainfield holds a security interest in the Plainfield Claims and 2) his implied, unauthorized and unsupported conclusion that the Plainfield Claims are worth less than Appellants' outstanding obligations to Plainfield.

Plainfield does not, in fact, hold a security interest in the Plainfield Claims. Plainfield Claims constitute commercial tort claims, which are defined in the Uniform Commercial Code adopted by Washington as claims "arising in tort with respect to which . . . the claimant is an organization or the claimant is an individual, and the claim . . . arose in the course of the claimant's business or profession." RCW 62A.9A-102(a)(13). To the extent the Plainfield Claims were in existence at the time the parties entered into the security agreement, they would have

had to have been explicitly identified therein. Pursuant to RCW 62A.9A-108(e)(1), “description only by type of collateral defined in the Uniform Commercial Code is an **insufficient** description of a commercial tort claim.” RCW 62A.9A-108(e)(1) (emphasis added). Nothing in the Security Agreement under which Appellants granted Respondent Plainfield collateral called out specific claims against Plainfield. CP 868-912. Commercial tort claims that are not in existence at the time the parties enter into a security agreement are not covered at all. RCW 62A.9A-204(b)(2) and Official Comment thereto.

The fact that the Receiver was appointed did not provide Plainfield with any extra rights in the commercial tort claims. The general rule is “that a receiver takes the property . . . subject to the same equities and liens as he finds it in the hands of the . . . corporation out of whose possession it is taken.” Gloyd v. Rutherford, 62 Wn.2d at 60. Plainfield did not have a valid security interest the tort claims against it before the

Receivership was filed, and that remained unchanged when the Receiver stepped in the shoes of the Appellants. The trial court erred in allowing the Receiver to transfer the commercial tort claims to Plainfield, thereby elevating its status beyond that of a general unsecured creditor as to those claims.

Even *had* Plainfield held a valid security interest in the Plainfield Claims, which it did not, simply giving the claims to Plainfield provides Plainfield with an end-run around the procedural safeguards provided by Article 9 of the Uniform Commercial Code found in RCW 62A.9A-101, *et seq.*

Pursuant to RCW 62A.9A-610, assuming it had a valid security interest, absent Appellants' consent, Plainfield would have had to foreclose on the Plainfield Claims in accordance with the provisions of the Uniform Commercial Code which include the requirement of a commercially reasonable disposition of the collateral in a manner designed to maximize its value.

RCW 62A.9A.610. The Appellants would have been able to avail themselves of the protections set forth in RCW 62A.9A,

*et. seq.* Here, the Receiver unlawfully eliminated all of Appellants' procedural due process rights under the Article 9 and destroyed any potential value the Plainfield Claims may have had by giving Plainfield the asset without requiring it to pursue its remedies under state law.

Moreover, the Receiver admittedly undertook no independent investigation or analysis into the viability of the Plainfield Claims. There is no evidence that the Receiver sought to engage counsel to pursue the same on a contingency basis. If meritorious, the damages to Appellants as a result of Plainfield's actions, which destroyed their business, could easily exceed any outstanding amount owed to Plainfield. Thus, it was wholly inappropriate for the Receiver to seek to transfer the Plainfield Claims to Plainfield and for the trial court to authorize such a transfer.

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**C. Plainfield is the only Party with no Incentive to Monetize the Plainfield Claims.**

It is clear from Plainfield's insistence that the Receiver transfer the Plainfield Claims to it that Plainfield recognizes its exposure under such claims and its desire to receive a free release of these claims. In the event Appellants succeed in their legal position, damages could far exceed the amount owed to Plainfield, even assuming it is secured in the claims, which it is not.

Plainfield is the only party that has no incentive to attempt to realize on the claims and every reason not to do so. Plainfield is hardly going to pursue claims against itself. Like a fox guarding the henhouse, Plainfield was the last party to whom the Receiver should have agreed to transfer the litigation claims. The trial court erred in authorizing the transfer. Since, as a matter of law, the Plainfield Claims would have simply reverted to Appellants upon termination of the receivership, the

trial court's order should be reversed, reinstating ownership of the Plainfield Claims with Appellants.

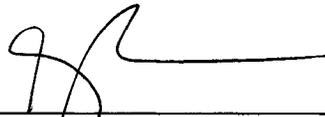
## VI. CONCLUSION

For the reasons stated above, this Court should reverse the trial court's order disbursing to Plainfield any claims or causes of action and reinstate Appellants' ownership of those claims.

DATED this <sup>3rd</sup>~~1st~~ day of June, 2010.

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By



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**CERTIFICATE OF SERVICE**

I certify that on the <sup>3rd</sup> 1st day of June, 2010, I caused copies of the Amended Brief of Appellants to be hand-delivered to the following parties:

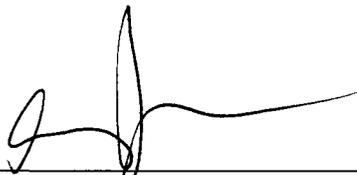
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