

66401-8

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ORIGINAL

Case No. 66401-8

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

SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Appellant,

v.

PORT OF SEATTLE, *et al.*,

Respondents.

APPELLANT'S OPENING BRIEF

Michael A. Goldfarb, WSBA No. 13492
Christopher M. Huck, WSBA No. 34104
**KELLEY, DONION, GILL,
HUCK & GOLDFARB, PLLC**
701 Fifth Avenue, Suite 6800
Seattle, Washington 98104
Telephone: (206) 452-0260
Facsimile: (206) 397-3062
E-mail: goldfarb@kdg-law.com
E-mail: huck@kdg-law.com

Attorneys for Appellant

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I. INTRODUCTION

The trial court committed reversible error on two issues, and this matter should be remanded to the trial court to address both. First, the trial court, without an evidentiary hearing establishing loss, and without considering the legal effect of the waiver of damages by the Port of Seattle (the “Port”), ordered that certain bond proceeds posted by the Seattle-Tacoma International Taxi Association (“STITA”) of \$144,000 be paid to the Port.

For the reasons explained below, it was error to disburse the bond proceeds when there was not only a dispute about whether the Port had suffered any compensable injury at all, but where there was a legal question raised by a companion case about whether the underlying contract that the Port claimed it was delayed in signing was *ultra vires* to begin with. In that related case, a different trial court had denied cross-motions for summary judgment on whether the contract at issue was *ultra vires* and set that issue for trial.

To the extent the Port’s contract is ultimately determined to be *ultra vires*, the Port can hardly claim that it sustained any damage by being temporarily stayed from signing a void contract. STITA sensibly asked the trial court in this case to defer distributing the bond proceeds until that issue was decided, but the trial court, in error, disagreed.

The trial court's second error occurred when, after ordering disbursement of the bond proceeds, the trial court dismissed this action based on nothing more than a presentation of judgment. The trial court entered a judgment even though no motion to dismiss or summary judgment motion was filed by the Port. The trial court should have required the Port to file a motion for dismissal or a motion for summary judgment as required by the Civil Rules. Dismissing "all claims" based upon a "presentation of judgment" under CR 54 was error.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by ordering disbursement of bond proceeds in the amount of \$144,000. (CP 933—Original Order—and CP 1397—Order on Reconsideration).
2. The trial court erred by dismissing the case with no motion to dismiss or motion for summary judgment, and instead dismissed based solely on a "presentation of judgment." (CP 1344).

Issues Pertaining to Assignments of Error:

1. Whether the trial court erred by disbursing bond proceeds of \$144,000 where the Court of Appeals set the bond amount with the notation that "the amount of loss the Port may lose as a result of any delay is open to legitimate dispute," and where there was an open question as to whether the Port had sustained any damages for several reasons, including the fact that the Port had voluntarily extended STITA's contract, only to later claim damages from that extension.

2. Whether the trial court erred by disbursing bond proceeds of \$144,000 where, in a related case, a different King County judge denied cross-motions for summary judgment and set for trial the issue of whether the contract between the Port and Yellow Taxi was *ultra vires*, in which case, the Port could not claim damages stemming from delay in implementing an illegal and void contract.

3. Whether the trial court erred by dismissing this action based only on a notice of presentment of judgment, rather than on a motion for dismissal or motion for summary judgment under the Civil Rules.

III. STATEMENT OF THE CASE

A. The Underlying Lawsuit, the Bond, and the First Order for Disbursement.

On January 29, 2010, STITA filed this action, naming the Port and all other bidders for the Port's proposed concession agreement for taxi service for SeaTac Airport, which was to commence on September 1, 2010, and run for the following five years. (CP 1-16).

STITA was providing services at SeaTac Airport pursuant to an existing contract, which was to expire on August 30, 2010, but which contained a term allowing the Port to extend. (CP 870).

In this lawsuit, STITA alleged that the Port's award of the new taxi concession to Puget Sound Dispatch, LLC ("Yellow Taxi") was unlawful. (CP 1-16). STITA moved for injunctive relief before the trial court, but

on February 8, 2010, that motion was denied. (CP 458). Later that day, STITA sought an emergency stay, and Commissioner Neel of the Court of Appeals, granted a temporary stay to maintain the status quo pending review of the motion. (CP 867). The parties then submitted briefing to the Commissioner addressing a temporary stay enjoining the Port from entering into a concession agreement with Yellow Taxi, pending completion of the appeal.

On February 22, 2010, the commissioner granted the stay pending further order of the Court of Appeals, set an expedited briefing schedule, and invited briefing on a supersedeas bond. (CP 1055).

On March 29, 2010, Commissioner Neel ordered STITA to post a supersedeas bond of \$144,000. (CP 1055-56). Commissioner Neel's order made it clear that the Court was not determining the amount of any damages, but simply setting a bond amount based on hypothetical damage claims by the Port:

There may be more than 30 days delay in commencing the new contract, and there may be no delay. Based on the materials before me, setting the bond amount based on a potential delay of 30 days is reasonable. ***The amount of loss the Port may lose as a result of any delay is also open to legitimate dispute....*** (CP 1055) (emphasis added).

STITA's appeal then proceeded on an expedited basis. On June 7, 2010, the Court of Appeals issued its unpublished opinion affirming the

trial court's denial of STITA's motion for a temporary restraining order. (CP 1059—copy of the Court's Unpublished Opinion later filed as an attachment in the trial court).

On June 28, 2010, Yellow Taxi filed a petition for review with the Washington Supreme Court, and on July 6, 2010, STITA filed a cross-petition for review. (CP 867).

On August 5, 2010, the Supreme Court denied both Yellow Taxi's and STITA's petitions for review. (CP 868). It is undisputed that the Supreme Court issued that order, which dissolved the appellate stay, 25 days prior to the original August 31, 2010 termination date of the existing STITA agreement. (CP 868) The Port executed the new concession agreement with Yellow Taxi the next day, August 6, 2010, still more than three weeks before the before the original September 1, 2010 start date. (CP 869).

B. The Rainier Lawsuit and the Extension of the STITA Contract.

While STITA's appeal in this case was pending, on February 12, 2010, Rainier Dispatch, LLC ("Rainier"), one of the other taxi company bidders, initiated a separate lawsuit in King County Superior Court, entitled *Rainier Dispatch, LLC v. Port of Seattle, Airport Joint Venture Response Partnership LLC, Checker Cab of Seatac Corporation, Orange*

Cab Company, Puget Sound Dispatch, LLC d/b/a Yellow Taxi Assoc., and Seattle-Tacoma International Taxi Association, Case No. 10-2-07109-1 SEA (the “Rainier Lawsuit”). (CP 868-69). That lawsuit named the same parties that are parties to this action.

In the Rainer Lawsuit, STITA alleged that the proposed Port-Yellow Taxi contract was *ultra vires*, which issue has yet to be ultimately determined by the trial court. Specifically, on June 28, STITA filed its Answer and Cross Claims in the Rainier Lawsuit, alleging that the proposed Port-Yellow Taxi contract would be void because the Port had violated the Open Public Meetings, Act, RCW 42.30 *et seq.* STITA also alleged that after the December 15, 2009 public meeting where the Port Commissioner’s had purported to approve awarding the contract to Yellow Taxi, the Port and Yellow Taxi had privately negotiated a series of substantial changes to the contract in violation of both the bid documents and the delegation of authority to the Port’s CEO to award the contract, rendering any contract signed by the Port *ultra vires*. (CP 868-869).

STITA’s existing agreement with the Port of Seattle was to expire on August 31, 2010. But Section 31 provided for a month to month extension of the term at the election of the Port: “If the Concessionaire [STITA] shall, with the written request or consent of the [Port], continue to render services after the expiration ...of this concession, the resulting

concession shall, unless otherwise mutually agreed, be for an indefinite period of time on a month-to month basis. (CP 870).

On June 28, 2010, the Port requested a meeting with STITA to discuss the Port's proposal to extend the termination date of the STITA agreement beyond August 31, 2010. (CP 870).

On July 7, 2010, the Port met with STITA and negotiated an extension. On July 20, 2010, the Port sent an email and a letter where the Port extended the termination date of the STITA agreement until October 31, 2010. (CP 870).¹ The Port obtained continued taxi service from STITA under that agreement until November 1, 2010, when Yellow Taxi began providing service.

C. The First Order Disbursing the Bond Proceeds.

On September 24, 2010 the Court of Appeals issued a Mandate remanding this case to the Superior Court. (CP 868) The same day, the Port filed a motion for disbursement of the STITA bond proceeds. (CP 465).

On September 30, 2010, STITA filed its opposition to the motion.

¹ The Port had options other than extending with STITA. It could have required Yellow Taxi to perform as promised in Yellow Taxi's bid, which called for a September 1, 2010 start date. It could have simply waited for the Supreme Court decision (the Court of Appeals decision had issued at this point), or it could have made temporary arrangements to allow all King County licensed taxi's to serve the Airport, without any contract, just as those taxi's serve other parts of King County, and the Port could have imposed a per trip fee.

(CP 866, CP 1415-1422).² STITA pointed out that the Port's motion to disburse the bond proceeds was premature because in a related proceeding, there was to be a hearing on whether the underlying new concession agreement between the Port and Yellow Taxi was void, and because there was a factual dispute as to whether the Port had sustained any injury because the Port had chosen to voluntarily extend the STITA contract. (CP 866-871).

STITA's position was that the court should defer any ruling the bond proceeds until the questions in the Rainier Lawsuit were decided. And further, STITA argued that even if those issues were decided adversely to STITA, there should still be discovery and an evidentiary hearing on whether the Port had sustained any actual damages given the Port's waiver of damages encompassed by its voluntary extension of the STITA agreement, and its simultaneous voluntary release of Yellow Taxi from any obligation to perform until November 1, 2010.

On October 1, 2010, despite these objections, the trial court entered an Order Granting Motion for Order of Disbursement of Supersedeas Bond. (CP 933).

² The King County Clerk inadvertently omitted this document from the docket. That omission has now been corrected, and STITA has filed a supplemental designation of clerk's papers to include CP 1415-1422 (STITA's Opposition to Port of Seattle's Motion for Order of Disbursement of Supersedeas Bond) with the record before this Court.

D. The Related Proceedings Before Judge Ramsdell and the Motion to Consolidate.

On October 1, 2010 (the same day that Judge Gonzalez was disbursing the bond proceeds over objection), Judge Ramsdell took up cross-motions for summary judgment by the Port and STITA, which included STITA's claims that the new contract (which by now had been signed), was *ultra vires*.

Judge Ramsdell denied the cross-motions on whether the contract was *ultra vires* and reserved that issue for later trial. As a part of his oral ruling, Judge Ramsdell said:

If it's determined that the contract substantially conforms to the RFP, then it seems to me that there is no argument that the act of the CEO was *ultra vires*. If it did not, then the CEO did not have the authority to sign, according to the commissioner's directive." (CP 1091).

On October 4, 2010, STITA moved to consolidate the Rainier Lawsuit with this case. (CP 939). Among other things, STITA pointed out that it was improper to disburse the bond proceeds while the issue of whether the underlying contract was void had not been decided, and that consolidation was the appropriate way to avoid that confusion. (CP 940). The Port opposed consolidation on the theory that the bond issue was moot given Judge Gonzales October 1, 2010 order to disburse the bond proceeds. (CP 1107). On October 12, 2010, Judge Hilyer denied the

motion to consolidate. (CP 1346).

E. The Port's Notice of Presentation.

Meanwhile, on October 10, 2010, the Port filed a "Notice of Presentation" by which it asked the trial court to dismiss this action by entry of the attached judgment. (CP 1032). The Port did not file a dismissal motion under either CR 12 or CR 56. (CP 1032). Indeed, no rule was cited in the notice at all. Rather, the notice simply stated "YOU ARE HEREBY NOTIFIED that attorneys for the Port of Seattle will present to The Honorable Steven Gonzalez on October 12, 2010, without oral argument, the proposed Judgment for Defendant Port of Seattle which is attached hereto." (CP 1032).³

On October 8, 2010, STITA objected to this attempt to summarily dismiss the lawsuit as both procedurally and substantively improper. (CP 1094). STITA pointed out among other things that the Port was attempting to skip a step (*i.e.*, the Port had not filed any type of dismissal motion under the Civil Rules), that there was a pending motion for consolidation that would be mooted by a dismissal, that the Port was attempting to gain an improper procedural advantage by seeking a quick dismissal to insulate its recovery of the bond proceeds from the claims in the Rainier Lawsuit, that STITA should be allowed to respond to a proper

³ The Notice of Presentation was dated October 5, 2010.

motion by seeking leave to amend, and that nothing in the Court of Appeals decision instructed the trial court to dismiss the case. (CP 1095-96).

Nonetheless, on October 11, 2010, the trial court signed a “Judgment for Defendant Port of Seattle” entered under CR 54, in the form submitted by the Port’s counsel. (CP 1344).⁴ The “judgment” among other things states: “(1) Judgment is entered in favor of the Port; (2) Judgment is entered against STITA; and (3) All claims against the Port are dismissed with prejudice.” (CP 1345).

F. STITA’s Motion to Reconsider on the Bond Proceeds.

Finally, on October 8, 2010, STITA sought reconsideration of the order disbursing the bond proceeds. (CP 1042-1050, CP 1051-1093). STITA pointed out that it was improper to disburse the bond proceeds if the underlying contract was *ultra vires* so that the Port had no right to execute it to begin with—in other words that the Port could not claim delay in executing a contract it had no right to sign. (CP 1046). STITA also pointed out that because the Court of Appeals stay was dissolved before the original contract start date, there was a factual question as to whether the Port had in fact sustained compensable damages, since it was the Port that made the voluntary decision to extend the STITA contract.

⁴ The “judgment” does not contain any judgment summary. See RCW 4.64.030.

(CP 1045).

Reconsideration was prompted by the fact that on October 4, 2010, just after the order of disbursement on October 1, Judge Ramsdell had orally ruled that the *ultra vires* claims were to be decided at trial. (CP 1091). And while the reconsideration motion was pending, Judge Ramsdell entered a written order denying the cross-motions for summary judgment on the *ultra vires* issues pending in the Rainier Lawsuit, and confirming that STITA's counterclaim in the Rainier Lawsuit that the contract was *ultra vires* would require a trial. (CP 1394 at ¶ 6). Nonetheless, the trial court denied the motion for reconsideration. (CP 1397).

STITA filed a notice of appeal on December 9, 2010. (CP 1400-02).

IV. ARGUMENT

“Questions of law and conclusions of law are reviewed de novo.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Summary dismissals and judgments are also reviewed de novo. *See State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 140 Wn. 2d 615, 629, 999 P.2d 602 (2000); *see also San Juan County v. No New Gas Tax*, 160 Wn. 2d 141, 164, 157 P.3d 831, 842 (2007) (“Whether dismissal was appropriate under CR 12(b)(6) is a

question of law that we review de novo.”); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) (“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.”).

The issues presented here, whether the dismissal was proper, whether the claims in the related case extinguish any right to the bond proceeds, and whether the Court properly disbursed the bond proceeds for a supersedes bond issued under RAP 8.3 are all legal issues for which *de novo* review is appropriate.

A. The Court Erred in Dismissing this Lawsuit Simply on the Presentment of a Judgment.

The trial court committed error by dismissing this lawsuit simply by signing a judgment presented by the Port. The trial court entered only two orders in the case, first an order denying the request for injunctive relief, and second an order (improperly) disbursing the bond proceeds. The trial court never ruled on a motion to dismiss or a summary judgment motion. The proper pathway for seeking dismissal of claims is by Rule 12, Rule 55, or Rule 56. However, Rule 54, relied upon by the trial court does not provide an independent basis for a court to dismiss claims. Rather, that rule is simply a mechanism for the presentation of judgments based on orders issued under different rules.

As a practical matter, the trial court should not have dismissed the action until the outcome of the related Rainier Lawsuit was known. In particular, the Port has no right to the bond proceeds if the underlying contract that it claimed it was delayed in signing turns out to be *ultra vires*, an issue that is yet to be decided in the Rainier Lawsuit (trial is set for August 1, 2011).

STITA made a sensible motion to consolidate the two cases, but when that motion was denied, the trial court should have entertained either a stay or permitted amendment so that the claims mirrored the Rainier Lawsuit. Instead, the trial court summarily dismissed the case without a motion, preventing STITA from preserving that action until there was a ruling on the larger question of whether the Port-Yellow Taxi contract is void to begin with.

B. The Trial Court Erred in Granting the Motion to Disburse the Bond Proceeds and then Denying Reconsideration.

The trial court erred in disbursing the bond proceeds for several reasons.

First, in the Rainier Lawsuit, Judge Ramsdell ultimately denied cross-motions for summary judgment on the issue of whether the Port's contract with Yellow Taxi is *ultra vires*. Even today, that question has not been decided in the Rainier Lawsuit. If the Port's contract is *ultra vires*

and void, then the Port has no claim to having been delayed in signing it. In other words, no compensable damages can flow to the Port for a delay in signing an illegal and void contract. Because a showing of actual damages is necessary to any claim against the bond, it was premature at best for the Court to disburse the bond proceeds without knowing the outcome of whether the contract is *ultra vires*. See *Fisher v. Parkview Properties, Inc.*, 71 Wn. App. 468, 476, 859 P.2d 77 (1993) (“The elements of a claim for wrongful issuance also include proximate cause and damage.”); see also *Blakiston v. Osgood Panel & Veneer Co.*, 173 Wn. 435, 438-39, 23 P.2d 397 (1933) (recovery on injunction bond requires showing of actual damages).

Second, the trial court misapplied the legal standard offered by the Port to determine whether the stay order issued by the Court of Appeals was “wrongful.” According to the Port, “the test for whether an injunction is wrongful ‘is not whether the injunction was erroneous on its face, but whether it is later determined that the restraint was erroneous in the sense that it would not have been ordered had the court been presented with all of the facts.’” (CP 470, citing *Knappet v. Locke*, 92 Wn.2d 643, 647, 600 P.2d 1257 (1979)). According to the Port, the stay was issued based on “limited briefing” but when presented with the “full merits of the appeal,” the Court of Appeals ruled in the Port’s favor. (CP 471). Similarly, the

Port argued that the Supreme Court ultimately “dissolved the wrongful injunction obtained by STITA under RAP 8.3” (CP 926)

But that misstates what occurred. The Court of Appeals stay was issued under RAP 8.3 to preserve the fruits of appeal, because absent a stay, the fruits of the appeal would be lost. (CP 1066). The stay was not issued based on the typical injunction standard requiring a determination that STITA had a probability of success on the merits that was later reversed based on a more complete hearing. Rather, the stay issued based on the commissioner’s determination that there were fairly debatable issues, and that a stay was necessary so that the appeal could be heard on an expedited basis, without STITA losing certain rights as articulated in *Dick Enterprises, Inc., v. King County*, 83 Wn. App. 566, 571, 922 P.2d 184 (1996).

The Commissioner’s determination that a stay was appropriate under RAP 8.3 was never disturbed on appeal. In that regard, far from dissolving the stay on June 7, 2010, when the Court of Appeals issued its unpublished opinion, that decision actually continued the stay to allow review by the Supreme Court. (CP 1084). Nothing in the Court of Appeals decision or the ultimate Supreme Court Order denying review in any way determined that the procedural basis of the stay imposed by Commissioner Neel was in any way wrongful. In other words, even if

Commissioner Neel had concluded at the time that the Port would likely prevail on the appeal, her decision to stay the execution of the contract to allow the appeal to go forward was proper, and the stay was not “wrongful” either at the time it was entered or even when it was continued by the Court of Appeals in its decision on the merits.

Third, putting aside the question of whether the Port’s contract was *ultra vires* to begin with, and ignoring the fact that the stay was properly entered under Rule 8.3 and was therefore not “wrongful,” there was also an open factual question as to whether the Port sustained compensable damages from delay, and if so, in what amount. STITA made a fair request that before the court disbursed any bond proceeds, it should allow discovery into whether the Port had in fact sustained a loss and to examine the circumstances around the Port’s extension of the STITA contract.

The Port’s theory was that it could not implement the contract while the appellate stay was pending. But the declaration filed by Paul Grace in support of the disbursement of bond proceeds reveals the truth: “Although the Washington Supreme Court dissolved the injunction issued by the Court of Appeals on August 5, 2010, *Yellow Cab was not in a position to commence services as of September 1, 2010.*” (CP 558). The obvious question was “why not?” since Yellow Taxi had bid the contract

with a September 1, 2010 start date, and nothing in the Court of Appeals stay order prevented Yellow Taxi from setting up operations at SeaTac in advance of the contract start date, or to taking other steps to perform as required in its bid to the Port.

The Port and Yellow Taxi had no difficulty signing the new contract on August 6, 2010, the day after the stay was lifted. But the Port chose to voluntarily excuse Yellow Taxi from performing on September 1, 2010 and further requested that STITA continue to perform under its contract. By excusing Yellow Taxi from performing, the Port effectively waived any claim that it had to damages from the delay. *See Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954) (“The doctrine of waiver ordinarily applies to all rights or privileges to which a person is legally entitled.”).

After voluntarily changing the start date, and excusing its new vendor, Yellow Taxi, from performing as promised, the Port then turned around and made a claim for damages from STITA for the period covered by the extension. The trial court allowed no inquiry, and conducted no hearing before summarily awarding \$144,000 in damages to the Port.

Given that the contract was actually signed on August 6, 2010, STITA made a fair request to the trial court to allow discovery on what true losses, if any, were sustained by the Port. The trial court ignored that

request, and without discovery or a sufficient evidentiary basis to do so, awarded the Port \$144,000 in damages in the form of the bond proceeds.

V. CONCLUSION

For all of the above reasons, STITA requests that the Court set aside the “judgment” and further set aside the order disbursing the bond proceeds, and further requests an order directing the trial court to order the bond proceeds returned to the registry of the trial court, and order that the issue of the bond proceeds be addressed only after the issues in the Rainier Lawsuit are decided, and only after permitting discovery and briefing on whether the Port sustained any actual damage as a result of the appellate stay order.

RESPECTFULLY SUBMITTED this 14th day of March, 2011.

**KELLEY, DONION, GILL,
HUCK & GOLDFARB, PLLC**



Michael A. Goldfarb, WSBA No. 13492
Christopher M. Huck, WSBA No. 34104
701 Fifth Avenue, Suite 6800
Seattle, Washington 98104
Telephone: (206) 452-0260
Facsimile: (206) 397-3062
E-mail: goldfarb@kdg-law.com
E-mail: huck@kdg-law.com

Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and complete copy of the foregoing **APPELLANT'S OPENING BRIEF** was caused to be served on counsel of record for Respondents at the address and in the manner shown below.

<p>Attorney for Puget Sound Dispatch DBA Yellow Cab David Christopher Spellman Ronald Edward Beard Lane Powell PC 1420 Fifth Avenue, Suite 4100 Seattle, WA 98101-2388 spellmand@lanepowell.com beardr@lanepowell.com</p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>
<p>Attorney for Rainer Dispatch, LLC Matthew R. King Law Offices of Matthew R. King, PLLC 1420 Fifth Avenue, Suite 2200 Seattle, WA 98101 matthewrkinglaw@hotmail.com</p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>
<p>Attorney for Orange Cab Liam A McCann Law Offices of Liam A. McCann 123 Wells Avenue South Renton, WA 98057 liam@mccann-law-offices.com</p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>

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COUNTY OF KING

<p>Tom Wolfendate Paul Lawrence K&L Gates, LLP 925 Fourth Avenue, Suite 2900 Seattle, WA 98104</p> <p><u>Paul.lawrence@klgates.com</u> <u>Thomas.wolfendate@klgates.com</u></p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>
<p>Attorney for Orange Cab Scott Friedman 2033 6th Avenue, Suite 800 Seattle, WA 98121</p> <p><u>sfriedmanlaw@aol.com</u></p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>
<p>Attorney for STITA John Raymond Ruhl Ryan Swanson Cleveland 1201 Third Avenue, Suite 3400 Seattle, WA 98101</p> <p><u>ruhl@ryanlaw.com</u></p>	<p><input checked="" type="checkbox"/> via email <input type="checkbox"/> via messenger <input checked="" type="checkbox"/> via US Mail <input type="checkbox"/> via fax</p>

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

Executed at Seattle, Washington, this 14th day of March, 2011.



Alison L. Buck