



AMERICAN  
BANKRUPTCY  
INSTITUTE

## 2018 Northeast Bankruptcy Conference and Consumer Forum

### **Small Business Filings: Making Chapter 11 Work in Small Commercial Cases**

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Making Chapter 11 Work in Small Commercial Cases

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RECEIVERSHIPS--AN ALTERNATIVE TO CHAPTER 11?

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Over the past two decades, utilization of chapter 11 has been on a steady decline. In the District of New Hampshire, only 16 chapter 11 cases were filed in 2017 and only 105 in the District of Massachusetts. By contrast, in 1997, 42 chapter 11 cases were filed in the District of New Hampshire and 323 in the District of Massachusetts. Over the twenty year period filings dropped by approximately 66%.

With the notable exception of the District of Delaware, the nationwide trend is similar though not quite as extreme. In 1997, 11,221 chapter 11 cases were filed nationwide. In 2017, that number dropped to 7,052.

According to statistics collected by the US Small Business Administration, from 1999 to 2008, 5.7 million firms went out of business. Over 95% had 20 or fewer employees. See [http://www.sba.gov/sites/default/files/dyn\\_us\\_tot\\_1.pdf](http://www.sba.gov/sites/default/files/dyn_us_tot_1.pdf).

While not all of these businesses terminated operations due to financial distress, few that did utilized chapter 11. Only 6.2% of the “firm deaths” noted in this period utilized bankruptcy at all. See <http://www.uscourts.gov/Statistics/BankruptcyStatistics.aspx>; Bourne, *New Wine in an Old Bottle: How Minnesota’s Receivership Statute Can Promote Both Efficiency and Equity*, 36 Hamline L. Rev. 427 n. 4 (2013).

There are many reasons commentators and practitioners point to for the decline in chapter 11 filings. Some note changes in the economy and the capital structure of many 21<sup>st</sup> century businesses, their operations and the type of assets they hold—fewer hard assets and more intellectual property. Others point to changes in the Bankruptcy Code adopted in 2005 that altered the balance between the goals of reorganization and recovery for creditors rendering filings less beneficial for some debtors. Some point to the increase in the Office of U.S. Trustee regulations and reporting requirements and more complex local court rules, while others note the familiarity of lenders and borrowers with the chapter 11 process has led to more out-of-court restructurings. While some of the reasons identified differ, nearly all commentators and practitioners agree that the cost and expense of the chapter 11 process is a key cause of the reduction in chapter 11 filings. See Statement of Robert J. Keach, Co-Chair, American Bankruptcy Institute Commission to Study the Reform of Chapter 11, Before the Committee on the Judiciary, Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts, United States Senate For Hearing Entitled: “*Small Business Bankruptcy: Assessing the System*” Presented March 7, 2018 (<http://www.judiciary.senate.gov/meetings/small-business-bankruptcy-assessing-the-system>); *Alternatives to Bankruptcy: Receiverships, Assignments for the Benefit of Creditors, and Informal Workout Arrangements*, 2009 WL 405825; Bourne, *New Wine*, *supra*.

Of the chapter 11 cases that are filed, more often than not they are for the purpose of conducting a going concern sale of the enterprise; or quickly become so. *See*, Blain, *The Rise of Receiverships (and the Decline of Chapter 11)*, *Creditors Rights in Chapter 11 Cases*, 2016 WL 11005299.

While chapter 11 works well for the sale of large business enterprises and brings with it unique benefits, the costs to participate in the process have become prohibitively expensive for small businesses. As a result, some companies forego a going concern sale and instead terminate operations and succumb to state law foreclosures that often yield much smaller recoveries for creditors.

Receiverships can be a useful and more cost effective alternative to chapter 11 for the sale of a business. Receivership proceedings arose out of the English Chancery courts back in the 16<sup>th</sup> century and most states have some form of legislation permitting them. They were more heavily utilized in United States in the 19<sup>th</sup> century in the era of railroad failures but lost favor with the adoption of the Bankruptcy Act of 1898 and that continued with the adoption of the Bankruptcy Reform Act of 1978. *See* Bourne, *New Wine*, at 431.

Receiverships continue to be underutilized in most states because there is little or no statutory guidance on how they should operate. New Hampshire is typical. Case law exists describing the purpose of a receivership.

The basic reason for the appointment of a receiver is to secure and conserve the property for the benefit of all persons interested therein. The effect of such an appointment is the freezing of the affairs over which the court has taken control at the time of the appointment, pending the orderly reduction of the assets to such form as may be necessary for distribution and the judicial determination of the rights and obligations involved.

*Petition of Leon Keyser*, 98 N.H. 198, 200; 96 A.2d 551 (1953) (citations omitted). However, there is little or no guidance in statute as to how a receivership should be processed. For a general receivership, a liquidation of an entire business enterprise, there is only a statutory reference that the state's business court can hear "[b]usiness insolvencies and receiverships" and a second statutory reference that courts may appoint receivers in exercise of their equity powers. *See* N.H. RSA 471:7-a, VI, (l); N.H. RSA 498:12. Once an appointment is made there are no statutory provisions to inform the court how the case should proceed.

In certain particularized topic areas New Hampshire law does provide some guidance. *See, eg.*, N.H. RSA Ch. 151-H (permitting the Department of Health and Human Services to petition the superior court to appoint a receiver to protect the "health, safety or welfare" of nursing home residents). Generally, however, the power to appoint a receiver appears only as a remedy or tool in aid of broader statutory scheme. There are few specifics as to the powers or duties of the receiver or how assets are to be managed, sold, liquidated or distributed. *See* N.H. RSA 293-A:14.32 (authorizing the court to appoint a receiver to assist in the winding up and dissolution of a corporation), and N.H. RSA 358-A:4 (authorizing the attorney general to petition the court to appoint a receiver to take charge of a business the attorney general has reason to

believe is necessary to prevent a person from continuing to engage in unfair or deceptive business practices).

Similar provisions are found in the statutory schemes of other New England states. *See* 13-C M.R.S.A §1432 (permitting Maine courts in corporate dissolution proceedings to appoint receiver to manage, wind up and liquidate the business); 22 M.R.S.A §7933 (permitting the Maine commissioner of health and human services to appoint a receiver over a long term care facility and other health care institutions for the health and safety of residents); Mass. Gen. Laws ch. 111, §72N (authorizing the Massachusetts department of health and human services and the state attorney general to seek appointment of a receiver over a nursing home and other similar care facilities to protect the health and safety of residents); and Mass. Gen. Laws ch. 156D, §14.32 (Massachusetts court may appoint receiver to wind up and liquidate affairs of corporation in dissolution proceeding.). However, no New England state appears to have a comprehensive general receivership statute.

The lack of a comprehensive statutory scheme has led to an under-utilization of what could be a quick and efficient alternative to §363 sales in chapter 11. The courts that would oversee receiverships are courts of general jurisdiction. These court hear everything from homicide to personal injury cases, and generally hear few commercial law matters. This leads courts to feel unsure about the receivership process and counsel declining to seek a receivership remedy.

In the Pacific Northwest (Washington State and Oregon) and Midwest (Minnesota), states have enacted comprehensive receivership statutes that read and sound like mini-bankruptcy codes. **See Exhibit A.** The oldest and most heavily utilized of these statutes appears to be in Washington State. **See Exhibit A-1** It took fourteen years of work by members of that states' debtor-creditor bar and replaced a law, portions of which were adopted 150 years ago when the state was a territory. *See* <http://www.millernash.com/washington-governor-signs-sweeping-new-receivership-statute-04-13-2004/>.

In passing the act, the legislature declared:

The purpose of this act is to create more comprehensive, streamlined and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein.

2004 Wash. Laws c. 165 §1.

The law borrows heavily from the bankruptcy code. It includes provisions that:

- Requires third parties to turn over property of the business to the receiver;
- Requires the receiver to file detailed schedules of assets and liabilities;
- Imposes an automatic stay of proceedings against property of the receivership with exceptions similar to those found in the bankruptcy code;

- Grants the receiver the power to assume or reject leases and executory contracts, although not over the counterparty's objection if the contract contains an anti-assignment provision;
- Grants the receiver the power to obtain financing;
- Authorizes the receiver to abandon property of the receivership estate;
- Establishes procedures for creditors to submit claims;
- Establishes a priority scheme similar to that found in the Bankruptcy Code for payment of allowed claims; and
- Grants the receiver the power to sell the property in the receivership estate free and clear of liens.

When combined, these powers allow a receiver to sell an operating business as a going concern. While initially there was resistance to utilizing the statute, it has now been embraced by members of the Washington State insolvency bar. Debtors' counsel representing clients who are willing to cede control to a receiver see benefits because the process is quicker and less expensive. No creditors' committee is appointed and while parties in interest can be heard there is generally much less interference with the sale process. Counsel tend to follow much of the same procedures undertaken for a §363 sale under the Code—a stalking horse is identified, a sales procedures order is entered, and if there are multiple interested parties, an auction process is undertaken. Notably, even with these similarities, counsel report the process is more streamlined and efficient. In addition, while it took some time, title insurers and buyer's counsel are becoming comfortable with the quality of the title that is received from a free and clear order. Friedland, J.P., *Strategic Alternatives for and Against Distressed Businesses*, §74.3 (Jan. 2018).

The statute identifies specific grounds for the appointment of a receiver, and, except where a receiver's appointment is expressly mandated by a statute or is made in connection with a foreclosure to enforce an assignment of rents, the court must also find that the appointment is reasonably necessary and that other available remedies are not available or are inadequate. RCW 7.60.025. The legislature also cross-referenced already existing statutory provisions that permitted the appointment of a receiver and those provisions now apparently benefit from the newly adopted statutory scheme. *See* RCW 7.60.025(j)-(nn). When a request for a receiver is approved, the statute contemplates and courts enter comprehensive orders enumerating the powers and duties of the receiver. A sample is attached as **Exhibit B**.

The impact of an order approving a sale free and clear of liens is fairly broad. It appears to render the sale free of not only liens but also claims of creditors who have knowledge of the proceeding even if they do not participate in the receivership proceeding. The statute provides:

Orders of the court with respect to the treatment of claims and disposition of estate property, including but not limited to orders providing for the sales of property free and clear of liens, are effective as to any person having a claim against or interest in the receivership estate and who has actual knowledge of the receivership, whether or not the

person receives written notice from the receiver and whether or not the person appears or participates in the receivership.

RCW 7.60.190 (4).

If the breadth of a sale order was challenged by a creditor, it is possible it would be found to run afoul of the Bankruptcy Clause of the U.S. Constitution. Some cases have held and commentators questioned whether state laws purporting to grant powers normally reserved for bankruptcy courts should be preempted. See *Sherwood Partners, Inc. v. Lycos, Inc.* 394 F.3d 1198 (9<sup>th</sup> Cir. 2005) (California statute giving assignee of general assignment for benefit of creditors the power to avoid preferential transfers was preempted by Bankruptcy Code as inconsistent with enactment and operation of federal bankruptcy scheme); Harner, *Rethinking Preemption and Constitutional Parameters in Bankruptcy*, 59 Wm. & Mary L. Rev. 147 (2017) (calling on policymakers and courts to rethink and rebalance the allocation of powers between Congress and the states with respect to bankruptcy laws so as to define more clearly the parameters of federal preemption and preserve Congress's exclusive authority over the laws affecting the rights of creditors and other stakeholders in the context of a fresh start for business debtors); See also *Goldstein v. Columbia Diamond Ring Co.*, 366 Mass. 335 (1975) (holding adoption of Bankruptcy Act of 1898 preempted and suspended Massachusetts insolvency statute that has since been repealed); but see *Ready Fixtures Company v. Stevens Cabinet*, 488 F.Supp.2d 787 (W.D. WI 2007) (criticizing *Sherwood* and holding Wisconsin's insolvency preference statute was not preempted by federal bankruptcy preference statute).

These comprehensive state receivership statutes certainly appear to have benefits that warrant their consideration for adoption in New England. Commentators that studied the laws and practitioners that have utilized them note:

- Because the debtor is not in control, receiverships tend to calm creditors' fears of self-dealing by debtor's management or that the proceeding favors insiders' interests over creditors.
- Receivers will often be topic experts unlike some bankruptcy trustees who are frequently experts in the complexity of the Code. Bourne *New Wine*, at 432.
- A receivership (like a bankruptcy filing) stops litigation and piecemeal dismemberment of the assets.
- Receiverships costs tend to be lower and less litigation tends to occur because there is no creditors' committee appointed.
- The sale process moves faster. There is no §341 meeting and the sales procedures orders are often entered in the first days of the case.

Obviously, depending on the constituency, there are drawbacks to the process. Some include:

- Unsecured creditors do not have as much influence due to the lack of the committee. In essence, individual creditors must largely go it alone.

- The Debtor's officers, directors and controlling shareholders lose control of the enterprise and of events.
- The opportunity for an internal reorganization is lost—in essence a sale of the business intact or in parts is the most likely outcome.

Finally, there are practical limitations to state receivership proceedings. In addition to the drawbacks of loss of control and arguably less due process, businesses with assets in multiple jurisdictions may not be candidates for a receivership because the stay order may not have extra-territorial effect and an order holding the sale to be free and clear of liens may not impact assets held outside the state. Still, for smaller businesses with operations in a single state the receivership process could provide the most efficient way to liquidate if a statutory scheme like that existing in Washington State was in place.



EXHIBIT A-1

WASHINGTON STATE RECEIVERSHIP STATUTE

**Chapter 7.60 RCW**

**RECEIVERS**

**Chapter Listing | RCW Dispositions**

**Sections**

7.60.005	Definitions.
7.60.015	Types of receivers.
7.60.025	Appointment of receiver.
7.60.035	Eligibility to serve as receiver.
7.60.045	Receiver's bond.
7.60.055	Powers of the court.
7.60.060	Powers and duties of receiver generally.
7.60.070	Turnover of property.
7.60.080	Duties of person over whose property the receiver is appointed.
7.60.090	Schedules of property and liabilities—Inventory of property—Appraisals.
7.60.100	Receiver's reports.
7.60.110	Automatic stay of certain proceedings.
7.60.120	Utility service.
7.60.130	Executory contracts and unexpired leases.
7.60.140	Receivership financing.
7.60.150	Abandonment of property.
7.60.160	Actions by and against the receiver or affecting property held by receiver.
7.60.170	Personal liability of receiver.
7.60.180	Employment and compensation of professionals.
7.60.190	Participation of creditors and parties in interest in receivership proceeding—Effect of court orders on nonparties.
7.60.200	Notice to creditors and other parties in interest.
7.60.210	Submission of claims in general receiverships.
7.60.220	Objection to and allowance of claims.
7.60.230	Priorities.
7.60.240	Secured claims against after-acquired property.
7.60.250	Interest on claims.
7.60.260	Receiver's disposition of property—Sales free and clear.
7.60.270	Ancillary receiverships.
7.60.280	Resignation or removal of receiver.
7.60.290	Termination of receivership.
7.60.300	Applicability.

**NOTES:**

**Rules of court:** Cf. CR 66, 43(e)(2).

**7.60.005**

**Definitions.**

The definitions in this section apply throughout this chapter unless the context requires otherwise.

(1) "Court" means the superior court of this state in which the receivership is pending.

(2) "Entity" means a person other than a natural person.

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(3) "Estate" means the entirety of the property with respect to which a receiver's appointment applies, but does not include trust fund taxes or property of an individual person exempt from execution under the laws of this state. Estate property includes any nonexempt interest in property that is partially exempt, including fee title to property subject to a homestead exemption under chapter 6.13 RCW.

(4) "Executory contract" means a contract where the obligation of both the person over whose property the receiver is appointed and the other party to the contract are so far unperformed that the failure of either party to the contract to complete performance would constitute a material breach of the contract, thereby excusing the other party's performance of the contract.

(5) "Insolvent" or "insolvency" means a financial condition of a person such that the sum of the person's debts and other obligations is greater than all of that person's property, at a fair valuation, exclusive of (a) property transferred, concealed, or removed with intent to hinder, delay, or defraud any creditors of the person, and (b) any property exempt from execution under any statutes of this state.

(6) "Lien" means a charge against or interest in property to secure payment of a debt or the performance of an obligation.

(7) "Notice and a hearing" or any similar phrase means notice and opportunity for a hearing.

(8) "Person" means an individual, corporation, limited liability company, general partnership, limited partnership, limited liability partnership, association, governmental entity, or other entity, of any kind or nature.

(9) "Property" includes all right, title, and interests, both legal and equitable, and including any community property interest, in or with respect to any property of a person with respect to which a receiver is appointed, regardless of the manner by which the property has been or is acquired. "Property" includes any proceeds, products, offspring, rents, or profits of or from property in the estate. "Property" does not include any power that a person may exercise solely for the benefit of another person or trust fund taxes.

(10) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, or dispose of property of a person.

(11) "Receivership" means the case in which the receiver is appointed. "General receivership" means a receivership in which a general receiver is appointed. "Custodial receivership" means a receivership in which a custodial receiver is appointed.

(12) "Security interest" means a lien created by an agreement.

(13) "State agent" and "state agency" means any office, department, division, bureau, board, commission, or other agency of the state of Washington or of any subdivision thereof, or any individual acting in an official capacity on behalf of any state agent or state agency.

(14) "Utility" means a person providing any service regulated by the utilities and transportation commission.

[ 2004 c 165 § 2.]

#### NOTES:

**Purpose—2004 c 165:** "The purpose of this act is to create more comprehensive, streamlined, and cost-effective procedures applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors and other persons having an interest therein." [ 2004 c 165 § 1.]

**Captions not law—2004 c 165:** "Captions used in this act are not part of the law." [ 2004 c 165 § 48.]

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**7.60.015****Types of receivers.**

A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs. A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property. The court shall specify in the order appointing a receiver whether the receiver is appointed as a general receiver or as a custodial receiver. When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee's sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver. The court by order may convert either a general receivership or a custodial receivership into the other.

[ 2004 c 165 § 3.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.025****Appointment of receiver.**

(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case in which a receiver's appointment is expressly required by statute, or any case in which a receiver's appointment is sought by a state agent whose authority to seek the appointment of a receiver is expressly conferred by statute, or any case in which a receiver's appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver's appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

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- (c) After judgment, in order to give effect to the judgment;
- (d) To dispose of property according to provisions of a judgment dealing with its disposition;
- (e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;
- (f) If and to the extent that property is subject to execution to satisfy a judgment, to preserve the property during the pendency of an appeal, or when an execution has been returned unsatisfied, or when an order requiring a judgment debtor to appear for proceedings supplemental to judgment has been issued and the judgment debtor fails to submit to examination as ordered;
- (g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;
- (h) In an action by a transferor of real or personal property to avoid or rescind the transfer on the basis of fraud, or in an action to subject property or a fund to the payment of a debt;
- (i) In an action against any person who is not an individual if the object of the action is the dissolution of that person, or if that person has been dissolved, or if that person is insolvent or is not generally paying the person's debts as those debts become due unless they are the subject of bona fide dispute, or if that person is in imminent danger of insolvency;
- (j) In accordance with RCW 7.08.030 (4) and (6), in cases in which a general assignment for the benefit of creditors has been made;
- (k) In quo warranto proceedings under chapter 7.56 RCW;
- (l) As provided under RCW 11.64.022;
- (m) In an action by the department of licensing under RCW 18.35.220(3) with respect to persons engaged in the business of dispensing of hearing aids, RCW 18.85.430 in the case of persons engaged in the business of a real estate broker, associate real estate broker, or real estate salesperson, or RCW 19.105.470 with respect to persons engaged in the business of camping resorts;
- (n) In an action under RCW 18.44.470 or 18.44.490 in the case of persons engaged in the business of escrow agents;
- (o) Upon a petition with respect to a nursing home in accordance with and subject to receivership provisions under chapter 18.51 RCW;
- (p) Under "RCW 19.40.071(3), in connection with a proceeding for relief with respect to a transfer fraudulent as to a creditor or creditors;
- (q) Under RCW 19.100.210(1), in an action by the attorney general or director of financial institutions to restrain any actual or threatened violation of the franchise investment protection act;
- (r) In an action by the attorney general or by a prosecuting attorney under RCW 19.110.160 with respect to a seller of business opportunities;
- (s) In an action by the director of financial institutions under RCW 21.20.390 in cases involving actual or threatened violations of the securities act of Washington or under RCW 21.30.120 in cases involving actual or threatened violations of chapter 21.30 RCW with respect to certain businesses and transactions involving commodities;
- (t) In an action for or relating to dissolution of a business corporation under RCW 23B.14.065, 23B.14.300, 23B.14.310, or 23B.14.320, for dissolution of a nonprofit corporation under RCW 24.03.271, for dissolution of a mutual corporation under RCW 24.06.305, or in any other action for the dissolution or winding up of any other entity provided for by Title 23, 23B, 24, or 25 RCW;
- (u) In any action in which the dissolution of any public or private entity is sought, in any action involving any dispute with respect to the ownership or governance of such an entity, or upon the application of a person having an interest in such an entity when the appointment is reasonably necessary to protect the property of the entity or its business or other interests;

- (v) Under RCW 25.05.215, in aid of a charging order with respect to a partner's interest in a partnership;
- (w) Under and subject to \*\*RCW 30.44.100, 30.44.270, and 30.56.030, in the case of a bank or trust company or, under and subject to RCW 32.24.070 through 32.24.090, in the case of a mutual savings bank;
- (x) Under and subject to RCW 31.12.637 and 31.12.671 through 31.12.724, in the case of credit unions;
- (y) Upon the application of the director of financial institutions under RCW 31.35.090 in actions to enforce chapter 31.35 RCW applicable to agricultural lenders, under RCW 31.40.120 in actions to enforce chapter 31.40 RCW applicable to entities engaged in federally guaranteed small business loans, under RCW 31.45.160 in actions to enforce chapter 31.45 RCW applicable to persons licensed as check cashers or check sellers, or under RCW 19.230.230 in actions to enforce chapter 19.230 RCW applicable to persons licensed under the uniform money services act;
- (z) Under RCW 35.82.090 or 35.82.180, with respect to a housing project;
- (aa) Under RCW 39.84.160 or 43.180.360, in proceedings to enforce rights under any revenue bonds issued for the purpose of financing industrial development facilities or bonds of the Washington state housing finance commission, or any financing document securing any such bonds;
- (bb) Under and subject to RCW 43.70.195, in an action by the secretary of health or by a local health officer with respect to a public water system;
- (cc) As contemplated by RCW 61.24.030, with respect to real property that is the subject of nonjudicial foreclosure proceedings under chapter 61.24 RCW;
- (dd) As contemplated by RCW 61.30.030(3), with respect to real property that is the subject of judicial or nonjudicial forfeiture proceedings under chapter 61.30 RCW;
- (ee) Under RCW 64.32.200(2), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW to foreclose upon a lien for common expenses against a dwelling unit subject to the horizontal property regimes act, chapter 64.32 RCW. For purposes of this subsection (1)(ee), a judicial action is commenced as provided in superior court civil rule 3(a) and a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);
- (ff) Under RCW 64.34.364(10), in an action or proceeding commenced under chapter 61.12 or 61.24 RCW by a unit owners' association to foreclose a lien for nonpayment of delinquent assessments against condominium units. For purposes of this subsection (1)(ff), a judicial action is commenced as provided in superior court civil rule (3)(a) and a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8);
- (gg) Upon application of the attorney general under RCW 64.36.220(3), in aid of any writ or order restraining or enjoining violations of chapter 64.36 RCW applicable to timeshares;
- (hh) Under RCW 70.95A.050(3), in aid of the enforcement of payment or performance of municipal bonds issued with respect to facilities used to abate, control, or prevent pollution;
- (ii) Upon the application of the department of social and health services under RCW 74.42.580, in cases involving nursing homes;
- (jj) Upon the application of the utilities and transportation commission under RCW 80.28.040, with respect to a water company or wastewater company that has failed to comply with an order of such commission within the time deadline specified therein;
- (kk) Under RCW 87.56.065, in connection with the dissolution of an irrigation district;
- (ll) Upon application of the attorney general or the department of licensing, in any proceeding that either of them are authorized by statute to bring to enforce Title 18 or 19 RCW; the securities act of Washington, chapter 21.20 RCW; the Washington commodities act, chapter 21.30 RCW; the land development act, chapter 58.19 RCW; or under chapter 64.36 RCW relating to the regulation of timeshares;
- (mm) Upon application of the director of financial institutions in any proceeding that the director of financial institutions is authorized to bring to enforce chapters 31.35, 31.40, and 31.45 RCW; or



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(nn) In such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

(2) The superior courts of this state shall appoint as receiver of property located in this state a person who has been appointed by a federal or state court located elsewhere as receiver with respect to the property specifically or with respect to the owner's property generally, upon the application of the person or of any party to that foreign proceeding, and following the appointment shall give effect to orders, judgments, and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable. The venue of such a proceeding may be any county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located at the time the proceeding is commenced.

(3) At least seven days' notice of any application for the appointment of a receiver must be given to the owner of property to be subject thereto and to all other parties in the action, and to other parties in interest as the court may require. If any execution by a judgment creditor under Title 6 RCW or any application by a judgment creditor for the appointment of a receiver, with respect to property over which the receiver's appointment is sought, is pending in any other action at the time the application is made, then notice of the application for the receiver's appointment also must be given to the judgment creditor in the other action. The court may shorten or expand the period for notice of an application for the appointment of a receiver upon good cause shown.

(4) The order appointing a receiver in all cases must reasonably describe the property over which the receiver is to take charge, by category, individual items, or both if the receiver is to take charge of less than all of the owner's property. If the order appointing a receiver does not expressly limit the receiver's authority to designated property or categories of property of the owner, the receiver is a general receiver with the authority to take charge over all of the owner's property, wherever located.

(5) The court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver's appointment, in such amount as the court may specify, for the payment of costs and damages incurred or suffered by any person should it later be determined that the appointment of the receiver was wrongfully obtained.

[ 2011 c 214 § 27; 2011 c 34 § 1; 2010 c 212 § 4; 2006 c 52 § 1; 2004 c 165 § 4.]

#### NOTES:

**Reviser's note:** \*(1) RCW 19.40.071 was amended by 2017 c 57 § 7, changing subsection (3) to subsection (1)(c).

\*\* (2) RCW 30.44.100, 30.44.270, and 30.56.030 were recodified as RCW 30A.44.100, 30A.44.270, and 30A.56.030, respectively, pursuant to 2014 c 37 § 4, effective January 5, 2015.

(3) This section was amended by 2011 c 34 § 1 and by 2011 c 214 § 27, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

**Findings—Purpose—Limitation of chapter—Effective date—2011 c 214:** See notes following RCW 80.04.010.

**Application—Effective date—2010 c 212:** See notes following RCW 24.03.266.

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

#### 7.60.035

##### Eligibility to serve as receiver.

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Except as provided in this chapter or otherwise by statute, any person, whether or not a resident of this state, may serve as a receiver, with the exception that a person may not be appointed as a receiver, and shall be replaced as receiver if already appointed, if it should appear to the court that the person:

- (1) Has been convicted of a felony or other crime involving moral turpitude or is controlled by a person who has been convicted of a felony or other crime involving moral turpitude;
- (2) Is a party to the action, or is a parent, grandparent, child, grandchild, sibling, partner, director, officer, agent, attorney, employee, secured or unsecured creditor or lienor of, or holder of any equity interest in, or controls or is controlled by, the person whose property is to be held by the receiver, or who is the agent or attorney of any disqualified person;
- (3) Has an interest materially adverse to the interest of persons to be affected by the receivership generally; or
- (4) Is the sheriff of any county.

[ 2004 c 165 § 5.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

#### 7.60.045

##### Receiver's bond.

Except as otherwise provided for by statute or court rule, before entering upon duties of receiver, a receiver shall execute a bond with one or more sureties approved by the court, in the amount the court specifies, conditioned that the receiver will faithfully discharge the duties of receiver in accordance with orders of the court and state law. Unless otherwise ordered by the court, the receiver's bond runs in favor of all persons having an interest in the receivership proceeding or property held by the receiver and in favor of state agencies. The receiver's bond must provide substantially as follows:

[Case Caption]

#### RECEIVER'S BOND

##### TO WHOM IT MAY CONCERN:

KNOW ALL BY THESE PRESENTS, that . . . . ., as Principal, and . . . . ., as Surety, are held and firmly bound in the amount of . . . . . Dollars (\$ . . . . .) for the faithful performance by Principal of the Principal's duties as receiver with respect to property of . . . . . in accordance with order(s) of such court previously or hereafter entered in the above-captioned proceeding and state law. If the Principal faithfully discharges the duties of receiver in accordance with such orders, this obligation shall be void, but otherwise it will remain in full force and effect.

Dated this . . . day of . . . . ., . . . . .

.....  
[Signature of Receiver]

.....  
[Signature of Surety]

The court, in lieu of a bond, may approve the posting of alternative security, such as a letter of credit or a deposit of funds with the clerk of the court, to be held by the clerk to secure the receiver's faithful performance of the receiver's duties in accordance with orders of the court and state law until the court



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authorizes the release or return of the deposited sums. No part of the property over which the receiver is appointed may be used in making the deposit; however, any interest that may accrue on a deposit ordered by the court shall be remitted to the receiver upon the receiver's discharge. A claim against the bond shall be made within one year from the date the receiver is discharged. Claims by state agencies against the bond shall have priority.

[ 2004 c 165 § 6.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.055**

**Powers of the court.**

(1) Except as otherwise provided for by this chapter, the court in all cases has exclusive authority over the receiver, and the exclusive possession and right of control with respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed, wherever located, and the exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property, and all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties. However, the court does not have exclusive jurisdiction over actions in which a state agency is a party and in which a statute expressly vests jurisdiction or venue elsewhere.

(2) For good cause shown, the court has the power to shorten or expand the time frames specified in this chapter.

[ 2011 c 34 § 2; 2004 c 165 § 7.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.060**

**Powers and duties of receiver generally.**

(1) A receiver has the following powers and authority in addition to those specifically conferred by this chapter or otherwise by statute, court rule, or court order:

(a) The power to incur or pay expenses incidental to the receiver's preservation and use of the property with respect to which the appointment applies, and otherwise in the performance of the receiver's duties, including the power to pay obligations incurred prior to the receiver's appointment if and to the extent that payment is determined by the receiver to be prudent in order to preserve the value of property in the receiver's possession and the funds used for this purpose are not subject to any lien or right of setoff in favor of a creditor who has not consented to the payment and whose interest is not otherwise adequately protected;

(b) If the appointment applies to all or substantially all of the property of an operating business or any revenue-producing property of any person, to do all things which the owner of the business or property might do in the ordinary course of the operation of the business as a going concern or use of the

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property including, but not limited to, the purchase and sale of goods or services in the ordinary course of such business, and the incurring and payment of expenses of the business or property in the ordinary course;

(c) The power to assert any rights, claims, or choses in action of the person over whose property the receiver is appointed relating thereto, if and to the extent that the claims are themselves property within the scope of the appointment or relate to any property, to maintain in the receiver's name or in the name of such a person any action to enforce any right, claim, or chose in action, and to intervene in actions in which the person over whose property the receiver is appointed is a party for the purpose of exercising the powers under this subsection (1)(c);

(d) The power to intervene in any action in which a claim is asserted against the person over whose property the receiver is appointed relating thereto, for the purpose of prosecuting or defending the claim and requesting the transfer of venue of the action to the court. However, the court shall not transfer actions in which both a state agency is a party and as to which a statute expressly vests jurisdiction or venue elsewhere. This power is exercisable with court approval in the case of a liquidating receiver, and with or without court approval in the case of a general receiver;

(e) The power to assert rights, claims, or choses in action of the receiver arising out of transactions in which the receiver is a participant;

(f) The power to pursue in the name of the receiver any claim under chapter 19.40 RCW assertable by any creditor of the person over whose property the receiver is appointed, if pursuit of the claim is determined by the receiver to be appropriate;

(g) The power to seek and obtain advice or instruction from the court with respect to any course of action with respect to which the receiver is uncertain in the exercise of the receiver's powers or the discharge of the receiver's duties;

(h) The power to obtain appraisals with respect to property in the hands of the receiver;

(i) The power by subpoena to compel any person to submit to an examination under oath, in the manner of a deposition in a civil case, with respect to estate property or any other matter that may affect the administration of the receivership; and

(j) Other powers as may be conferred upon the receiver by the court or otherwise by statute or rule.

(2) A receiver has the following duties in addition to those specifically conferred by this chapter or otherwise by statute or court rule:

(a) The duty to notify all federal and state taxing and applicable regulatory agencies of the receiver's appointment in accordance with any applicable laws imposing this duty, including but not limited to 26 U.S.C. Sec. 6036 and RCW 51.14.073, 51.16.160, and 82.32.240, or any successor statutes;

(b) The duty to comply with state law;

(c) If the receiver is appointed with respect to any real property, the duty to file with the auditor of the county in which the real property is located, or the registrar of lands in accordance with RCW 65.12.600 in the case of registered lands, a certified copy of the order of appointment, together with a legal description of the real property if one is not included in that order; and

(d) Other duties as the receiver may be directed to perform by the court or as may be provided for by statute or rule.

(3) The various powers and duties of a receiver provided for by this chapter may be expanded, modified, or limited by order of the court for good cause shown.

[ 2004 c 165 § 8.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

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**7.60.070****Turnover of property.**

Upon demand by a receiver appointed under this chapter, any person shall turn over any property over which the receiver has been appointed that is within the possession or control of that person unless otherwise ordered by the court for good cause shown. A receiver by motion may seek to compel turnover of estate property unless there exists a bona fide dispute with respect to the existence or nature of the receiver's interest in the property, in which case turnover shall be sought by means of an action under RCW 7.60.160. In the absence of a bona fide dispute with respect to the receiver's right to possession of estate property, the failure to relinquish possession and control to the receiver shall be punishable as a contempt of the court.

[ 2004 c 165 § 9.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.080****Duties of person over whose property the receiver is appointed.**

The person over whose property the receiver is appointed shall:

- (1) Assist and cooperate fully with the receiver in the administration of the estate and the discharge of the receiver's duties, and comply with all orders of the court;
- (2) Supply to the receiver information necessary to enable the receiver to complete any schedules that the receiver may be required to file under RCW 7.60.090, and otherwise assist the receiver in the completion of the schedules;
- (3) Upon the receiver's appointment, deliver into the receiver's possession all of the property of the estate in the person's possession, custody, or control, including, but not limited to, all accounts, books, papers, records, and other documents; and
- (4) Following the receiver's appointment, submit to examination by the receiver, or by any other person upon order of the court, under oath, concerning the acts, conduct, property, liabilities, and financial condition of that person or any matter relating to the receiver's administration of the estate.

When the person over whose property the receiver is appointed is an entity, each of the officers, directors, managers, members, partners, or other individuals exercising or having the power to exercise control over the affairs of the entity are subject to the requirements of this section.

[ 2004 c 165 § 10.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.090****Schedules of property and liabilities—Inventory of property—Appraisals.**

- (1) In the event of a general assignment of property for the benefit of creditors under chapter 7.08 RCW, the assignment shall have annexed as schedule A a true list of all of the person's known creditors,

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their mailing addresses, the amount and nature of their claims, and whether their claims are disputed; and as schedule B a true list of all property of the estate, including the estimated liquidation value and location of the property and, if real property, a legal description thereof, as of the date of the assignment.

(2) In all other cases, within thirty-five days after the date of appointment of a general receiver, the receiver shall file as schedule A a true list of all of the known creditors and applicable regulatory and taxing agencies of the person over whose assets the receiver is appointed, their mailing addresses, the amount and nature of their claims, and whether their claims are disputed; and as schedule B a true list of all property of the estate identifiable by the receiver, including the estimated liquidation value and location of the property and, if real property, a legal description thereof, as of the date of appointment of the receiver.

(3) The schedules must be in substantially the following forms:

## SCHEDULE A—CREDITOR LIST

1. List all creditors having security interests or liens, showing:

Name	Address	Amount	Collateral	Whether or not disputed
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2. List all wages, salaries, commissions, or contributions to an employee benefit plan owed, showing:

Name	Address	Amount	Whether or not disputed
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3. List all consumer deposits owed, showing:

Name	Address	Amount	Whether or not disputed
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4. List all taxes owed, showing:

Name	Address	Amount	Whether or not disputed
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5. List all unsecured claims, showing:

Name	Address	Amount	Whether or not disputed
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6. List all owners or shareholders, showing:

Name	Address	Percentage of Ownership
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7. List all applicable regulatory agencies, showing:

Name	Address
------	---------

## SCHEDULE B—LIST OF PROPERTY

List each category of property and for each give approximate value obtainable for the asset on the date of assignment/appointment of the receiver, and address where asset is located.

I. Nonexempt Property

	Description and Location	Liquidation Value on Date of Assignment/Appointment of Receiver
1.	Legal Description and street address of real property, including leasehold interests:	
2.	Fixtures:	

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3. Cash and bank accounts:
4. Inventory:
5. Accounts receivable:
6. Equipment:
7. Prepaid expenses, including deposits, insurance, rents, and utilities:
8. Other, including loans to third parties, claims, and choses in action:

II. Exempt Property

Description and Location	Liquidation Value on Date of Assignment/Appointment of Receiver
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I DECLARE under penalty of perjury under the laws of the state of Washington that the foregoing is true, correct, and complete to the best of my knowledge. DATED this . . . day of . . . . ., . . . . ., at . . . . ., state of . . . . .

.....  
[SIGNATURE]

(4) When schedules are filed by a person making a general assignment of property for the benefit of creditors under chapter 7.08 RCW, the schedules shall be duly verified upon oath by such person.

(5) The receiver shall obtain an appraisal or other independent valuation of the property in the receiver's possession if ordered by the court.

(6) The receiver shall file a complete inventory of the property in the receiver's possession if ordered by the court.

[ 2011 c 34 § 3; 2004 c 165 § 11.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.100**

**Receiver's reports.**

A general receiver shall file with the court a monthly report of the receiver's operations and financial affairs unless otherwise ordered by the court. Except as otherwise ordered by the court, each report of a general receiver shall be due by the last day of the subsequent month and shall include the following:

- (1) A balance sheet;
- (2) A statement of income and expenses;
- (3) A statement of cash receipts and disbursements;
- (4) A statement of accrued accounts receivable of the receiver. The statement shall disclose amounts considered to be uncollectable;
- (5) A statement of accounts payable of the receiver, including professional fees. The statement shall list the name of each creditor and the amounts owing and remaining unpaid over thirty days; and

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(6) A tax disclosure statement, which shall list postfiling taxes due or tax deposits required, the name of the taxing agency, the amount due, the date due, and an explanation for any failure to make payments or deposits.

A custodial receiver shall file with the court all such reports the court may require.

[ 2004 c 165 § 12.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.110

#### Automatic stay of certain proceedings.

(1) Except as otherwise ordered by the court, the entry of an order appointing a general receiver or a custodial receiver with respect to all of a person's property shall operate as a stay, applicable to all persons, of:

- (a) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the person over whose property the receiver is appointed that was or could have been commenced before the entry of the order of appointment, or to recover a claim against the person that arose before the entry of the order of appointment;
- (b) The enforcement, against the person over whose property the receiver is appointed or any estate property, of a judgment obtained before the order of appointment;
- (c) Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;
- (d) Any act to create, perfect, or enforce any lien or claim against estate property except by exercise of a right of setoff, to the extent that the lien secures a claim against the person that arose before the entry of the order of appointment; or
- (e) Any act to collect, assess, or recover a claim against the person that arose before the entry of the order of appointment.

(2) The stay shall automatically expire as to the acts specified in subsection (1)(a), (b), and (e) of this section sixty days after the entry of the order of appointment unless before the expiration of the sixty-day period the receiver, for good cause shown, obtains an order of the court extending the stay, after notice and a hearing. A person whose action or proceeding is stayed by motion to the court may seek relief from the stay for good cause shown. Any judgment obtained against the person over whose property the receiver is appointed or estate property following the entry of the order of appointment is not a lien against estate property unless the receivership is terminated prior to a conveyance of the property against which the judgment would otherwise constitute a lien.

(3) The entry of an order appointing a receiver does not operate as a stay of:

- (a) The continuation of a judicial action or nonjudicial proceeding of the type described in RCW 7.60.025(1) (b), (ee), or (ff), if the action or proceeding was initiated by the party seeking the receiver's appointment;
- (b) The commencement or continuation of a criminal proceeding against the person over whose property the receiver is appointed;
- (c) The commencement or continuation of an action or proceeding to establish paternity, or to establish or modify an order for alimony, maintenance, or support, or to collect alimony, maintenance, or support under any order of a court;

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(d) Any act to perfect, or to maintain or continue the perfection of, an interest in estate property if the interest perfected would be effective against a creditor of the person over whose property the receiver is appointed holding at the time of the entry of the order of appointment either a perfected nonpurchase money security interest under chapter 62A.9A RCW against the property involved, or a lien by attachment, levy, or the like, whether or not such a creditor exists. If perfection of an interest would require seizure of the property involved or the commencement of an action, the perfection shall instead be accomplished by filing, and by serving upon the receiver, or receiver's counsel, if any, notice of the interest within the time fixed by law for seizure or commencement;

(e) The commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power;

(f) The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power, or with respect to any licensure of the person over whose property the receiver is appointed;

(g) The exercise of a right of setoff, including but not limited to (i) any right of a commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency to set off a claim for a margin payment or settlement payment arising out of a commodity contract, forward contract, or securities contract against cash, securities, or other property held or due from the commodity broker, forward contract merchant, stockbroker, financial institution, or securities clearing agency to margin, guarantee, secure, or settle the commodity contract, forward contract, or securities contract, and (ii) any right of a swap participant to set off a claim for a payment due to the swap participant under or in connection with a swap agreement against any payment due from the swap participant under or in connection with the swap agreement or against cash, securities, or other property of the debtor held by or due from the swap participant to guarantee, secure, or settle the swap agreement; or

(h) The establishment by a governmental unit of any tax liability and any appeal thereof.

[ 2011 c 34 § 4; 2004 c 165 § 13.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

#### 7.60.120

##### Utility service.

A utility providing service to estate property may not alter, refuse, or discontinue service to the property without first giving the receiver fifteen days' notice of any default or intention to alter, refuse, or discontinue service to estate property. This section does not prohibit the court, upon motion by the receiver, to prohibit the alteration or cessation of utility service if the receiver can furnish adequate assurance of payment, in the form of deposit or other security, for service to be provided after entry of the order appointing the receiver.

[ 2004 c 165 § 14.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.



**7.60.130****Executory contracts and unexpired leases.**

(1) A general receiver may assume or reject any executory contract or unexpired lease of the person over whose property the receiver is appointed upon order of the court following notice to the other party to the contract or lease upon notice and a hearing. The court may condition assumption or rejection of any executory contract or unexpired lease on the terms and conditions the court believes are just and proper under the particular circumstances of the case. A general receiver's performance of an executory contract or unexpired lease prior to the court's authorization of its assumption or rejection shall not constitute an assumption of the contract or lease, or an agreement by the receiver to assume it, nor otherwise preclude the receiver thereafter from seeking the court's authority to reject it.

(2) Any obligation or liability incurred by a general receiver on account of the receiver's assumption of an executory contract or unexpired lease shall be treated as an expense of the receivership. A general receiver's rejection of an executory contract or unexpired lease shall be treated as a breach of the contract or lease occurring immediately prior to the receiver's appointment; and the receiver's right to possess or use property pursuant to any executory contract or lease shall terminate upon rejection of the contract or lease. The other party to an executory contract or unexpired lease that is rejected by a general receiver may take such steps as may be necessary under applicable law to terminate or cancel the contract or lease. The claim of a party to an executory contract or unexpired lease resulting from a general receiver's rejection of it shall be served upon the receiver in the manner provided for by RCW 7.60.210 within thirty days following the rejection.

(3) A general receiver's power under this section to assume an executory contract or unexpired lease shall not be affected by any provision in the contract or lease that would effect or permit a forfeiture, modification, or termination of it on account of either the receiver's appointment, the financial condition of the person over whose property the receiver is appointed, or an assignment for the benefit of creditors by that person.

(4) A general receiver may not assume an executory contract or unexpired lease of the person over whose property the receiver is appointed without the consent of the other party to the contract or lease if:

(a) Applicable law would excuse a party, other than the person over whose property the receiver is appointed, from accepting performance from or rendering performance to anyone other than the person even in the absence of any provisions in the contract or lease expressly restricting or prohibiting an assignment of the person's rights or the performance of the person's duties;

(b) The contract or lease is a contract to make a loan or extend credit or financial accommodations to or for the benefit of the person over whose property the receiver is appointed, or to issue a security of the person; or

(c) The executory contract or lease expires by its own terms, or under applicable law prior to the receiver's assumption thereof.

(5) A receiver may not assign an executory contract or unexpired lease without assuming it, absent the consent of the other parties to the contract or lease.

(6) If the receiver rejects an executory contract or unexpired lease for:

(a) The sale of real property under which the person over whose property the receiver is appointed is the seller and the purchaser is in possession of the real property;

(b) The sale of a real property timeshare interest under which the person over whose property the receiver is appointed is the seller;

(c) The license of intellectual property rights under which the person over whose property the receiver is appointed is the licensor; or

(d) The lease of real property in which the person over whose property the receiver is appointed is the lessor;

then the purchaser, licensee, or lessee may treat the rejection as a termination of the contract, license agreement, or lease, or alternatively, the purchaser, licensee, or lessee may remain in possession in which case the purchaser, licensee, or lessee shall continue to perform all obligations arising thereunder



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as and when they may fall due, but may offset against any payments any damages occurring on account of the rejection after it occurs. The purchaser of real property in such a case is entitled to receive from the receiver any deed or any other instrument of conveyance which the person over whose property the receiver is appointed is obligated to deliver under the executory contract when the purchaser becomes entitled to receive it, and the deed or instrument has the same force and effect as if given by the person. A purchaser, licensee, or lessee who elects to remain in possession under the terms of this subsection has no rights against the receiver on account of any damages arising from the receiver's rejection except as expressly provided for by this subsection. A purchaser of real property who elects to treat rejection of an executory contract as a termination has a lien against the interest in that real property of the person over whose property the receiver is appointed for the recovery of any portion of the purchase price that the purchaser has paid.

(7) Any contract with the state shall be deemed rejected if not assumed within sixty days of appointment of a general receiver unless the receiver and state agency agree to its assumption or as otherwise ordered by the court for good cause shown.

(8) Nothing in this chapter affects the enforceability of antiassignment prohibitions provided under contract or applicable law.

[ 2011 c 34 § 5; 2004 c 165 § 15.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.140

#### Receivership financing.

(1) If a receiver is authorized to operate the business of a person or manage a person's property, the receiver may obtain unsecured credit and incur unsecured debt in the ordinary course of business allowable under RCW 7.60.230(1)(a) as an administrative expense of the receiver without order of the court.

(2) The court, after notice and a hearing, may authorize a receiver to obtain credit or incur indebtedness other than in the ordinary course of business. The court may allow the receiver to mortgage, pledge, hypothecate, or otherwise encumber estate property as security for repayment of any indebtedness that the receiver may incur.

[ 2004 c 165 § 16.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.150

#### Abandonment of property.

The receiver, or any party in interest, upon order of the court following notice and a hearing, and upon the conditions or terms the court considers just and proper, may abandon any estate property that is burdensome to the receiver or is of inconsequential value or benefit. However, a receiver may not

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abandon property that is a hazard or potential hazard to the public in contravention of a state statute or rule that is reasonably designed to protect the public health or safety from identified hazards, including but not limited to chapters 70.105 and 70.105D RCW. Property that is abandoned no longer constitutes estate property.

[ 2004 c 165 § 17.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.160

#### **Actions by and against the receiver or affecting property held by receiver.**

(1) The receiver has the right to sue and be sued in the receiver's capacity as such, without leave of court, in all cases necessary or proper for the conduct of the receivership. However, action seeking to dispossess the receiver of any estate property or otherwise to interfere with the receiver's management or control of any estate property may not be maintained or continued unless permitted by order of the court obtained upon notice and a hearing.

(2) Litigation by or against a receiver is adjunct to the receivership case. The clerk of the court shall assign a cause number that reflects the relationship of any litigation to the receivership case. All pleadings in adjunct litigation shall include the cause number of the receivership case as well as the adjunct litigation number assigned by the clerk of the court. All adjunct litigation shall be referred to the judge, if any, assigned to the receivership case.

(3) The receiver may be joined or substituted as a party in any suit or proceeding that was pending at the time of the receiver's appointment and in which the person over whose property the receiver is appointed is a party, upon application by the receiver to the court or agency before which the action is pending.

(4) Venue for adjunct litigation by or against the receiver shall lie in the court in which the receivership is pending, if the courts of this state have jurisdiction over the cause. Actions in other courts in this state shall be transferred to the court upon the receiver's filing of a motion for change of venue, provided that the receiver files the motion within thirty days following service of original process upon the receiver. However, actions in other courts or forums in which a state agency is a party shall not be transferred on request of the receiver absent consent of the affected state agency or grounds provided under other applicable law.

(5) Action by or against a receiver does not abate by reason of death or resignation of the receiver, but continues against the successor receiver or against the entity in receivership, if a successor receiver is not appointed.

(6) Whenever the assets of any domestic or foreign corporation, that has been doing business in this state, has been placed in the hands of any general receiver and the receiver is in possession of its assets, service of all process upon the corporation may be made upon the receiver.

(7) A judgment against a general receiver is not a lien on the property or funds of the receivership, nor shall any execution issue thereon, but upon entry of the judgment in the court in which a general receivership is pending, or upon filing in a general receivership of a certified copy of the judgment from another jurisdiction, the judgment shall be treated as an allowed claim in the receivership. A judgment against a custodial receiver shall be treated and has the same effect as a judgment against the person over whose property the receiver is appointed, except that the judgment is not enforceable against estate property unless otherwise ordered by the court upon notice and a hearing.

[ 2004 c 165 § 18.]

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**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.170****Personal liability of receiver.**

(1)(a) The receiver is personally liable to the person over whose property the receiver is appointed or its record or beneficial owners, or to the estate, for loss or diminution in value of or damage to estate property, only if (i) the loss or damage is caused by a failure on the part of the receiver to comply with an order of the court, or (ii) the loss or damage is caused by an act or omission for which members of a board of directors of a business corporation organized and existing under the laws of this state who vote to approve the act or omission are liable to the corporation in cases in which the liability of directors is limited to the maximum extent permitted by RCW 23B.08.320.

(b) A general receiver is personally liable to state agencies for failure to remit sales tax collected after appointment. A custodial receiver is personally liable to state agencies for failure to remit sales tax collected after appointment with regard to assets administered by the receiver.

(2) The receiver has no personal liability to a person other than the person over whose property the receiver is appointed or its record or beneficial owners for any loss or damage occasioned by the receiver's performance of the duties imposed by the appointment, or out of the receiver's authorized operation of any business of a person, except loss or damage occasioned by fraud on the part of the receiver, by acts intended by the receiver to cause loss or damage to the specific claimant, or by acts or omissions for which an officer of a business corporation organized and existing under the laws of this state are liable to the claimant under the same circumstances.

(3) Notwithstanding subsections (1)(a) and (2) of this section, a receiver has no personal liability to any person for acts or omissions of the receiver specifically contemplated by any order of the court.

(4) A person other than a successor receiver duly appointed by the court does not have a right of action against a receiver under this section to recover property or the value thereof for or on behalf of the estate.

[ 2004 c 165 § 19.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.180****Employment and compensation of professionals.**

(1) The receiver, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons that do not hold or represent an interest adverse to the estate to represent or assist the receiver in carrying out the receiver's duties.

(2) A person is not disqualified for employment under this section solely because of the person's employment by, representation of, or other relationship with a creditor or other party in interest, if the relationship is disclosed in the application for the person's employment and if the court determines that there is no actual conflict of interest or inappropriate appearance of a conflict.

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(3) This section does not preclude the court from authorizing the receiver to act as attorney or accountant if the authorization is in the best interests of the estate.

(4) The receiver, and any professionals employed by the receiver, is permitted to file an itemized billing statement with the court indicating both the time spent, billing rates of all who perform work to be compensated, and a detailed list of expenses and serve copies on any person who has been joined as a party in the action, or any person requesting the same, advising that unless objections are filed with the court, the receiver may make the payments specified in the notice. If an objection is filed, the receiver or professional whose compensation is affected may request the court to hold a hearing on the objection on five days' notice to the persons who have filed objections. If the receiver is a custodial receiver appointed in aid of foreclosure, payment of fees and expenses may be allowed upon the stipulation of any creditor holding a security interest in the property for whose benefit the receiver is appointed.

[ 2004 c 165 § 20.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.190

#### **Participation of creditors and parties in interest in receivership proceeding—Effect of court orders on nonparties.**

(1) Creditors and parties in interest to whom written notice of the pendency of the receivership is given in accordance with RCW 7.60.210, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating in the receivership, are bound by the acts of the receiver with regard to management and disposition of estate property whether or not they are formally joined as parties.

(2) Any person having a claim against or interest in any estate property or in the receivership proceedings may appear in the receivership, either in person or by an attorney. Appearance must be made by filing a written notice of appearance, including the name and mailing address of the party in interest, and the name and address of the person's attorney, if any, with the clerk, and by serving a copy of the notice upon the receiver and the receiver's attorney of record, if any. The receiver shall maintain a master mailing list of all persons joined as parties in the receivership and of all persons serving and filing notices of appearance in the receivership in accordance with this section. A creditor or other party in interest has a right to be heard with respect to all matters affecting the person, whether or not the person is joined as a party to the action.

(3) Any request for relief against a state agency shall be mailed to or otherwise served on the agency and on the office of the attorney general.

(4) Orders of the court with respect to the treatment of claims and disposition of estate property, including but not limited to orders providing for sales of property free and clear of liens, are effective as to any person having a claim against or interest in the receivership estate and who has actual knowledge of the receivership, whether or not the person receives written notice from the receiver and whether or not the person appears or participates in the receivership.

(5) The receiver shall give not less than ten days' written notice by mail of any examination by the receiver of the person with respect to whose property the receiver has been appointed and to persons who serve and file an appearance in the proceeding.

(6) Persons on the master mailing list are entitled to not less than thirty days' written notice of the hearing of any motion or other proceeding involving any proposed:

(a) Allowance or disallowance of any claim or claims;

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(b) Abandonment, disposition, or distribution of estate property, other than an emergency disposition of property subject to eroding value or a disposition of property in the ordinary course of business;

(c) Compromise or settlement of a controversy that might affect the distribution to creditors from the estate;

(d) Compensation of the receiver or any professional employed by the receiver; or

(e) Application for termination of the receivership or discharge of the receiver. Notice of the application shall also be sent to state taxing and applicable regulatory agencies.

Any opposition to any motion to authorize any of the actions under (a) through (e) of this subsection must be filed and served upon the receiver and the receiver's attorney, if any, at least three days before the date of the proposed action. Persons on the master mailing list shall be served with all pleadings or in opposition to any motion. The court may require notice to be given to persons on the master mailing list of additional matters the court deems appropriate. The receiver shall make a copy of the current master mailing list available to any person on that list upon the person's request.

(7) All persons duly notified by the receiver of any hearing to approve or authorize an action or a proposed action by the receiver is bound by any order of the court with respect to the action, whether or not the persons have appeared or objected to the action or proposed action or have been joined formally as parties to the particular action.

(8) Whenever notice is not specifically required to be given under this chapter, the court may consider motions and grant or deny relief without notice or hearing, if it appears that no person joined as a party or who has appeared in the receivership would be prejudiced or harmed by the relief requested.

[ 2011 c 34 § 6; 2004 c 165 § 21.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.200

#### Notice to creditors and other parties in interest.

(1) A general receiver shall give notice of the receivership by publication in a newspaper of general circulation published in the county or counties in which estate property is known to be located once a week for three consecutive weeks, the first notice to be published within thirty days after the date of appointment of the receiver; and by mailing notice to all known creditors and other known parties in interest within thirty days after the date of appointment of the receiver. The notice of the receivership shall include the date of appointment of the receiver; the name of the court and the case number; the last day on which claims may be filed with the court and mailed to or served upon the receiver; and the name and address of the debtor, the receiver, and the receiver's attorney, if any. For purposes of this section, all intangible property of a person is deemed to be located in the county in which an individual owner thereof resides, or in which any entity owning the property maintains its principal administrative offices.

(2) The notice of the receivership shall be in substantially the following form:

IN THE SUPERIOR COURT, IN AND FOR		
COUNTY, WASHINGTON		
[Case Name]	)	Case No.
	)	
	)	NOTICE OF RECEIVERSHIP
	)	
	)	

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TO CREDITORS AND OTHER PARTIES IN INTEREST:

PLEASE TAKE NOTICE that a receiver was appointed for , whose last known address is ,  
on , .

YOU ARE HEREBY FURTHER NOTIFIED that in order to receive any dividend in this proceeding you must file proof of claim with the court within 30 days after the date of this notice. If you are a state agency, you must file proof of claim with the receiver within 180 days after the date of this notice. A copy of your claim must also be either mailed to or served upon the receiver.

RECEIVER

Attorney for receiver (if any): \_\_\_\_\_

Address: \_\_\_\_\_

[ 2011 c 34 § 7; 2004 c 165 § 22.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.210****Submission of claims in general receiverships.**

(1) All claims, whether contingent, liquidated, unliquidated, or disputed, other than claims of creditors with security interests in or other liens against property of the estate, arising prior to the receiver's appointment, must be served in accordance with this chapter, and any claim not so filed is barred from participating in any distribution to creditors in any general receivership.

(2) Claims must be served by delivering the claim to the general receiver within thirty days from the date notice is given by mail under this section, unless the court reduces or extends the period for cause shown, except that a claim arising from the rejection of an executory contract or an unexpired lease of the person over whose property the receiver is appointed may be filed within thirty days after the rejection. Claims need not be filed. Claims must be served by state agencies on the general receiver within one hundred eighty days from the date notice is given by mail under this section.

(3) Claims must be in written form entitled "Proof of Claim," setting forth the name and address of the creditor and the nature and amount of the claim, and executed by the creditor or the creditor's authorized agent. When a claim, or an interest in estate property of securing the claim, is based on a writing, the original or a copy of the writing must be included as a part of the proof of claim, together with evidence of perfection of any security interest or other lien asserted by the claimant.

(4) A claim, executed and served in accordance with this section, constitutes prima facie evidence of the validity and amount of the claim.

[ 2004 c 165 § 23.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.



**7.60.220****Objection to and allowance of claims.**

(1) At any time prior to the entry of an order approving the general receiver's final report, the general receiver or any party in interest may file with the court an objection to a claim, which objection must be in writing and must set forth the grounds for the objection. A copy of the objection, together with notice of hearing, must be mailed to the creditor at least thirty days prior to the hearing. Claims properly served upon the general receiver and not disallowed by the court are entitled to share in distributions from the estate in accordance with the priorities provided for by this chapter or otherwise by law.

(2) Upon the request of a creditor, the general receiver, or any party in interest objecting to the creditor's claim, or upon order of the court, an objection is subject to mediation prior to adjudication of the objection, under the rules or orders adopted or issued with respect to mediations. However, state claims are not subject to mediation absent agreement of the state.

(3) Upon motion of the general receiver or other party in interest, the following claims may be estimated for purpose of allowance under this section under the rules or orders applicable to the estimation of claims under this subsection:

(a) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(b) Any right to payment arising from a right to an equitable remedy for breach of performance.

Claims subject to this subsection shall be allowed in the estimated amount thereof.

[ 2004 c 165 § 24.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**7.60.230****Priorities.**

(1) Allowed claims in a general receivership shall receive distribution under this chapter in the order of priority under (a) through (h) of this subsection and, with the exception of (a) and (c) of this subsection, on a pro rata basis.

(a) Creditors with liens on property of the estate, which liens are duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral. However, the receiver may recover from property securing an allowed secured claim the reasonable, necessary expenses of preserving, protecting, or disposing of the property to the extent of any benefit to the creditors. If and to the extent that the proceeds are less than the amount of a creditor's allowed claim or a creditor's lien is avoided on any basis, the creditor is an unsecured claim under (h) of this subsection. Secured claims shall be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.

(b) Actual, necessary costs and expenses incurred during the administration of the estate, other than those expenses allowable under (a) of this subsection, including allowed fees and reimbursement of reasonable charges and expenses of the receiver and professional persons employed by the receiver under RCW 7.60.180. Notwithstanding (a) of this subsection, expenses incurred during the administration of the estate have priority over the secured claim of any creditor obtaining or consenting to the appointment of the receiver.

(c) Creditors with liens on property of the estate, which liens have not been duly perfected under applicable law, shall receive the proceeds from the disposition of their collateral if and to the extent that unsecured claims are made subject to those liens under applicable law.

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(d) Claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay, or contributions to an employee benefit plan, earned by the claimant within one hundred eighty days of the date of appointment of the receiver or the cessation of the estate's business, whichever occurs first, but only to the extent of ten thousand nine hundred fifty dollars.

(e) Allowed unsecured claims, to the extent of two thousand four hundred twenty-five dollars for each individual, arising from the deposit with the person over whose property the receiver is appointed before the date of appointment of the receiver of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use by individuals that were not delivered or provided.

(f) Claims for a support debt as defined in RCW 74.20A.020(10), but not to the extent that the debt (i) is assigned to another entity, voluntarily, by operation of law, or otherwise; or (ii) includes a liability designated as a support obligation unless that liability is actually in the nature of a support obligation.

(g) Unsecured claims of governmental units for taxes which accrued prior to the date of appointment of the receiver.

(h) Other unsecured claims.

(2) If all of the classes under subsection (1) of this section have been paid in full, any residue shall be paid to the person over whose property the receiver is appointed.

[ 2011 c 34 § 8; 2004 c 165 § 25.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

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**7.60.240**

**Secured claims against after-acquired property.**

Except as otherwise provided for by statute, property acquired by the estate or by the person over whose property the receiver is appointed after the date of appointment of the receiver is subject to an allowed secured claim to the same extent as would be the case in the absence of a receivership.

[ 2004 c 165 § 26.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

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**7.60.250**

**Interest on claims.**

To the extent that funds are available in the estate for distribution to creditors in a general receivership, the holder of an allowed noncontingent, liquidated claim is entitled to receive interest at the legal rate or other applicable rate from the date of appointment of the receiver or the date on which the claim became a noncontingent, liquidated claim. If there are sufficient funds in the estate to fully pay all interest owing to all members of the class, then interest shall be paid proportionately to each member of the class.

[ 2004 c 165 § 27.]

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**NOTES:****Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.**7.60.260****Receiver's disposition of property—Sales free and clear.**

(1) The receiver, with the court's approval after notice and a hearing, may use, sell, or lease estate property other than in the ordinary course of business. Except in the case of a leasehold estate with a remaining term of less than two years or a vendor's interest in a real estate contract, estate property consisting of real property may not be sold by a custodial receiver other than in the ordinary course of business.

(2) The court may order that a general receiver's sale of estate property either (a) under subsection (1) of this section, or (b) consisting of real property which the debtor intended to sell in its ordinary course of business be effected free and clear of liens and of all rights of redemption, whether or not the sale will generate proceeds sufficient to fully satisfy all claims secured by the property, unless either:

(i) The property is real property used principally in the production of crops, livestock, or aquaculture, or the property is a homestead under RCW 6.13.010(1), and the owner of the property has not consented to the sale following the appointment of the receiver; or

(ii) The owner of the property or a creditor with an interest in the property serves and files a timely opposition to the receiver's sale, and the court determines that the amount likely to be realized by the objecting person from the receiver's sale is less than the person would realize within a reasonable time in the absence of the receiver's sale.

Upon any sale free and clear of liens authorized by this section, all security interests and other liens encumbering the property conveyed transfer and attach to the proceeds of the sale, net of reasonable expenses incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the conveyance. The court may authorize the receiver at the time of sale to satisfy, in whole or in part, any allowed claim secured by the property out of the proceeds of its sale if the interest of any other creditor having a lien against the proceeds of the sale would not thereby be impaired.

(3) At a public sale of property under subsection (1) of this section, a creditor with an allowed claim secured by a lien against the property to be sold may bid at the sale of the property. A secured creditor who purchases the property from a receiver may offset against the purchase price its allowed secured claim against the property, provided that the secured creditor tenders cash sufficient to satisfy in full all secured claims payable out of the proceeds of sale having priority over the secured creditor's secured claim. If the lien or the claim it secures is the subject of a bona fide dispute, the court may order the holder of the claim to provide the receiver with adequate security to assure full payment of the purchase price in the event the lien, the claim, or any part thereof is determined to be invalid or unenforceable.

(4) If estate property includes an interest as a co-owner of property, the receiver shall have the rights and powers of a co-owner afforded by applicable state or federal law, including but not limited to any rights of partition.

(5) The reversal or modification on appeal of an authorization to sell or lease estate property under this section does not affect the validity of a sale or lease under that authorization to an entity that purchased or leased the property in good faith, whether or not the entity knew of the pendency of the appeal, unless the authorization and sale or lease were stayed pending the appeal.

[ 2011 c 34 § 9; 2004 c 165 § 28.]

**NOTES:**<http://app.leg.wa.gov/RCW/default.aspx?cite=7.60&full=true>

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.270

#### Ancillary receiverships.

(1) A receiver appointed in any action pending in the courts of this state, without first seeking approval of the court, may apply to any court outside of this state for appointment as receiver with respect to any property or business of the person over whose property the receiver is appointed constituting estate property which is located in any other jurisdiction, if the appointment is necessary to the receiver's possession, control, management, or disposition of property in accordance with orders of the court.

(2) A receiver appointed by a court of another state, or by a federal court in any district outside of this state, or any other person having an interest in that proceeding, may obtain appointment by a superior court of this state of that same receiver with respect to any property or business of the person over whose property the receiver is appointed constituting property of the foreign receivership that is located in this jurisdiction, if the person is eligible under RCW 7.60.035 to serve as receiver, and if the appointment is necessary to the receiver's possession, control, or disposition of the property in accordance with orders of the court in the foreign proceeding. The superior court upon the receiver's request shall enter the orders, not offensive to the laws and public policy of this state, necessary to effectuate orders entered by the court in the foreign receivership proceeding. A receiver appointed in an ancillary receivership in this state is required to comply with this chapter requiring notice to creditors or other parties in interest only as may be required by the superior court in the ancillary receivership.

[ 2004 c 165 § 29.]

#### NOTES:

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

### 7.60.280

#### Resignation or removal of receiver.

(1) The court shall remove or replace the receiver on application of the person over whose property the receiver is appointed, the receiver, or any creditor, or on the court's own motion, if the receiver fails to execute and file the bond required by RCW 7.60.045, or if the receiver resigns or refuses or fails to serve for any reason, or for other good cause.

(2) Upon removal, resignation, or death of the receiver, the court shall appoint a successor receiver if the court determines that further administration of the estate is required. Upon executing and filing a bond under RCW 7.60.045, the successor receiver shall immediately take possession of the estate and assume the duties of receiver.

(3) Whenever the court is satisfied that the receiver so removed or replaced has fully accounted for and turned over to the successor receiver appointed by the court all of the property of the estate and has filed a report of all receipts and disbursements during the person's tenure as receiver, the court shall enter an order discharging that person from all further duties and responsibilities as receiver after notice and a hearing.

[ 2004 c 165 § 30.]

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**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

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**7.60.290**

**Termination of receivership.**

(1) Upon distribution or disposition of all property of the estate, or the completion of the receiver's duties with respect to estate property, the receiver shall move the court to be discharged upon notice and a hearing.

(2) The receiver's final report and accounting setting forth all receipts and disbursements of the estate shall be annexed to the petition for discharge and filed with the court.

(3) Upon approval of the final report, the court shall discharge the receiver.

(4) The receiver's discharge releases the receiver from any further duties and responsibilities as receiver under this chapter.

(5) Upon motion of any party in interest, or upon the court's own motion, the court has the power to discharge the receiver and terminate the court's administration of the property over which the receiver was appointed. If the court determines that the appointment of the receiver was wrongfully procured or procured in bad faith, the court may assess against the person who procured the receiver's appointment (a) all of the receiver's fees and other costs of the receivership and (b) any other sanctions the court determines to be appropriate.

[ 2004 c 165 § 31.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

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**7.60.300**

**Applicability.**

This chapter applies to receivers and receiverships otherwise provided for by the laws of this state except as otherwise expressly provided for by statute or as necessary to give effect to the laws of this state. This chapter does not apply to any proceeding authorized by or commenced under Title 48 RCW.

[ 2004 c 165 § 32.]

**NOTES:**

**Purpose—Captions not law—2004 c 165:** See notes following RCW 7.60.005.

**EXHIBIT A-2**

**MINNESOTA RECEIVERSHIP STATUTE**

5/1/2018

576 - 2017 Minnesota Statutes

## 2017 Minnesota Statutes

Authenticate

## CHAPTER 576. RECEIVERSHIP

Section	Headnote
<u><a href="#">576.01</a></u>	<i>[Repealed, 2012 c 143 art 3 s 39]</i>
<u><a href="#">576.011</a></u>	MS 2010 <i>[Renumbered 578.01]</i>
<u><a href="#">576.02</a></u>	<i>[Repealed, 1974 c 394 s 12]</i>
<u><a href="#">576.04</a></u>	MS 2010 <i>[Renumbered 578.02]</i>
<u><a href="#">576.05</a></u>	MS 2010 <i>[Renumbered 578.03]</i>
<u><a href="#">576.06</a></u>	MS 2010 <i>[Renumbered 578.04]</i>
<u><a href="#">576.07</a></u>	MS 2010 <i>[Renumbered 578.05]</i>
<u><a href="#">576.08</a></u>	MS 2010 <i>[Renumbered 578.06]</i>
<u><a href="#">576.09</a></u>	MS 2010 <i>[Renumbered 578.07]</i>
<u><a href="#">576.10</a></u>	MS 2010 <i>[Renumbered 578.08]</i>
<u><a href="#">576.11</a></u>	MS 2010 <i>[Renumbered 578.09]</i>
<u><a href="#">576.12</a></u>	MS 2010 <i>[Renumbered 578.10]</i>
<u><a href="#">576.121</a></u>	MS 2010 <i>[Renumbered 578.11]</i>
<u><a href="#">576.122</a></u>	MS 2010 <i>[Renumbered 578.12]</i>
<u><a href="#">576.123</a></u>	MS 2010 <i>[Renumbered 578.13]</i>
<u><a href="#">576.13</a></u>	MS 2010 <i>[Renumbered 578.14]</i>
<u><a href="#">576.14</a></u>	MS 2010 <i>[Renumbered 578.15]</i>
<u><a href="#">576.141</a></u>	MS 2010 <i>[Renumbered 578.16]</i>
<u><a href="#">576.142</a></u>	MS 2010 <i>[Renumbered 578.17]</i>
<u><a href="#">576.143</a></u>	MS 2010 <i>[Renumbered 578.18]</i>
<u><a href="#">576.144</a></u>	MS 2010 <i>[Renumbered 578.19]</i>
<u><a href="#">576.15</a></u>	MS 2010 <i>[Renumbered 578.20]</i>
<u><a href="#">576.16</a></u>	MS 2010 <i>[Renumbered 578.21]</i>
<u><a href="#">576.21</a></u>	DEFINITIONS.
<u><a href="#">576.22</a></u>	APPLICABILITY OF CHAPTER AND OF COMMON LAW.
<u><a href="#">576.23</a></u>	POWERS OF THE COURT.
<u><a href="#">576.24</a></u>	TYPES OF RECEIVERSHIPS.
<u><a href="#">576.25</a></u>	APPOINTMENT OF RECEIVERS; RECEIVERSHIP NOT A TRUST.
<u><a href="#">576.26</a></u>	ELIGIBILITY OF RECEIVER.
<u><a href="#">576.27</a></u>	BOND.
<u><a href="#">576.28</a></u>	IMMUNITY; DISCOVERY FROM RECEIVER.
<u><a href="#">576.29</a></u>	POWERS AND DUTIES OF RECEIVERS; GENERALLY.
<u><a href="#">576.30</a></u>	RECEIVER AS LIEN CREDITOR; REAL PROPERTY RECORDING; SUBSEQUENT SALES OF REAL PROPERTY.
<u><a href="#">576.31</a></u>	DUTIES OF RESPONDENT.
<u><a href="#">576.32</a></u>	EMPLOYMENT AND COMPENSATION OF PROFESSIONALS.
<u><a href="#">576.33</a></u>	SCHEDULES OF PROPERTY AND CLAIMS.
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<u><a href="#">576.50</a></u>	OBJECTION TO AND ALLOWANCE OF CLAIMS.
<u><a href="#">576.51</a></u>	PRIORITY OF CLAIMS.
<u><a href="#">576.52</a></u>	INTEREST ON UNSECURED CLAIMS.
<u><a href="#">576.53</a></u>	DISTRIBUTIONS.

[576.01](#) [Repealed, [2012 c 143 art 3 s 39](#)]

[576.011](#) MS 2010 [Renumbered [578.01](#)]

[576.02](#) [Repealed, [1974 c 394 s 12](#)]

[576.04](#) MS 2010 [Renumbered [578.02](#)]

[576.05](#) MS 2010 [Renumbered [578.03](#)]

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[576.15](#) MS 2010 [Renumbered [578.20](#)]

[576.16](#) MS 2010 [Renumbered [578.21](#)]

#### **576.21 DEFINITIONS.**

(a) The definitions in this section apply throughout this chapter unless the context requires otherwise.

(b) "Court" means the district court in which the receivership is pending unless the context requires otherwise.

(c) "Entity" means a person other than a natural person.

(d) "Executory contract" means a contract, including a lease, where the obligations of both the respondent and the other party to the contract are unperformed to the extent that the failure of either party to complete performance of its obligations would constitute a material breach of the contract, thereby excusing the other party's performance of its obligations under the contract.

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- (e) "Foreign receiver" means a receiver appointed in any foreign jurisdiction.
- (f) "Foreign jurisdiction" means any state or federal jurisdiction other than that of this state.
- (g) "General receiver" means the receiver appointed in a general receivership.
- (h) "General receivership" means a receivership over all or substantially all of the nonexempt property of a respondent for the purpose of liquidation and distribution to creditors and other parties in interest, including, without limitation, a receivership resulting from the appointment of a receiver pursuant to section 302A.753, 308A.945, 308B.935, 317A.753, or 322B.836.
- (i) "Lien" means a charge against or interest in property to secure payment of a debt or the performance of an obligation, including any mortgage or security interest.
- (j) "Limited receiver" means the receiver appointed in a limited receivership.
- (k) "Limited receivership" means a receivership other than a general receivership.
- (l) "Party" means a person who is a party within the meaning of the Minnesota Rules of Civil Procedure in the action in which a receiver is appointed.
- (m) "Party in interest" includes the respondent, any equity security holder in the respondent, any person with an ownership interest in or lien on receivership property, and, in a general receivership, any creditor of the respondent.
- (n) "Person" has the meaning given it in section 645.44 and shall include limited liability companies, limited liability partnerships, and other entities recognized under the laws of this state.
- (o) "Property" means all of respondent's right, title, and interest, both legal and equitable, in real and personal property, regardless of the manner by which any of the same were or are acquired. Property includes, but is not limited to, any proceeds, products, offspring, rents, or profits of or from the property. Property does not include: (1) any power that the respondent may exercise solely for the benefit of another person, or (2) property impressed with a trust except to the extent that the respondent has a residual interest.
- (p) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage, and, if authorized by this chapter or order of the court, dispose of receivership property.
- (q) "Receivership" means the case in which the receiver is appointed, and, as the context requires, the proceeding in which the receiver takes possession of, manages, or disposes of the respondent's property.
- (r) "Receivership property" means (1) in the case of a general receivership, all or substantially all of the nonexempt property of the respondent, or (2) in the case of a limited receivership, that property of the respondent identified in the order appointing the receiver, or in any subsequent order.
- (s) "Respondent" means the person over whose property the receiver is appointed.
- (t) "State agent" and "state agency" means any office, department, division, bureau, board, commission, or other agency of the state of Minnesota or of any subdivision thereof, or any individual acting in an official capacity on behalf of any state agent or state agency.
- (u) "Time of appointment" means the date and time specified in the first order of appointment of a receiver or, if the date and time are not specified in the order of appointment, the date and time that the court ruled on the motion for the appointment of a receiver. Time of appointment does not mean any subsequent date or time, including the execution of a written order, the filing or docketing of a written order, or the posting of a bond.
- (v) "Utility" means a person providing any service regulated by the Public Utilities Commission.

**History:** 2012 c 143 art 1 s 1

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**576.22 APPLICABILITY OF CHAPTER AND OF COMMON LAW.**

(a) This chapter applies to receiverships provided for in section 576.25, subdivisions 2 to 6, and to receiverships:

- (1) pursuant to section 193.147, in connection with a mortgage on an armory;
- (2) pursuant to section 223.17, subdivision 8, paragraph (b), in connection with a defaulting grain buyer;
- (3) pursuant to section 232.22, subdivision 7, paragraph (c), in connection with a defaulting public grain warehouse;
- (4) pursuant to section 296A.22, in connection with nonpayment of tax;
- (5) pursuant to sections 302A.751, 302A.753, 308A.941, 308A.945, 308B.931, 308B.935, 317A.751, 317A.753, 322B.833, and 322B.836, or in an action relating to the dissolution of a foreign entity with property within the state;
- (6) pursuant to section 321.0703, in connection with the rights of a creditor of a partner or transferee;
- (7) pursuant to section 322.22, in connection with the rights of creditors of limited partners;
- (8) pursuant to section 323A.0504, in connection with a partner's transferable interest;
- (9) pursuant to section 453.55, in connection with bonds and notes;
- (10) pursuant to section 453A.05, in connection with bonds and notes;
- (11) pursuant to section 513.47, in connection with a proceeding for relief with respect to a transfer fraudulent as to a creditor or creditors;
- (12) pursuant to section 514.06, in connection with the severance of a building and resale;
- (13) pursuant to section 515.23, in connection with an action by a unit owners' association to foreclose a lien for nonpayment of delinquent assessments against condominium units;
- (14) pursuant to section 518A.71, in connection with the failure to pay, or to provide security for, maintenance or support payments;
- (15) pursuant to section 559.17, in connection with assignments of rents; however, any receiver appointed under section 559.17 shall be a limited receiver, and the court shall apply the provisions of this chapter to the extent not inconsistent with section 559.17;
- (16) pursuant to section 571.84, in connection with a garnishee in possession of property subject to a garnishment proceeding;
- (17) pursuant to section 575.05, in connection with property applied to judgment;
- (18) pursuant to section 575.06, in connection with adverse claimants;
- (19) pursuant to sections 582.05 to 582.10, in connection with mortgage foreclosures; however, any receiver appointed under sections 582.05 to 582.10 shall be a limited receiver, and the court shall apply the provisions of this chapter to the extent not inconsistent with sections 582.05 to 582.10;
- (20) pursuant to section 609.904, in connection with criminal penalties; or
- (21) pursuant to section 609.907, in connection with preservation of property subject to forfeiture.

(b) This chapter does not apply to any receivership in which the receiver is a state agency or in which the receiver is appointed, controlled, or regulated by a state agency unless otherwise provided by law.

(c) In receiverships not specifically referenced in paragraph (a) or (b), the court, in its discretion, may apply provisions of this chapter to the extent not inconsistent with the statutes establishing the receiverships.

(d) Unless explicitly displaced by this chapter, the provisions of other statutory law and the principles of common law remain in full force and effect and supplement the

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provisions of this chapter.

**History:** 2012 c 143 art 1 s 2; 2016 c 135 art 3 s 2

#### **576.23 POWERS OF THE COURT.**

The court has the exclusive authority to direct the receiver and the authority over all receivership property wherever located including, without limitation, authority to determine all controversies relating to the collection, preservation, improvement, disposition, and distribution of receivership property, and all matters otherwise arising in or relating to the receivership, the receivership property, the exercise of the receiver's powers, or the performance of the receiver's duties.

**History:** 2012 c 143 art 1 s 3

#### **576.24 TYPES OF RECEIVERSHIPS.**

A receivership may be either a limited receivership or a general receivership. Any receivership which is based upon the enforcement of an assignment of rents or leases, or the foreclosure of a mortgage lien, judgment lien, mechanic's lien, or other lien pursuant to which the respondent or any holder of a lien would have a statutory right of redemption, shall be a limited receivership. If the order appointing the receiver does not specify whether the receivership is a limited receivership or a general receivership, the receivership shall be a limited receivership unless and until the court by later order designates the receivership as a general receivership, notwithstanding that pursuant to section 576.25, subdivision 8, a receiver may have control over all the property of the respondent. At any time, the court may order a general receivership to be converted to a limited receivership and a limited receivership to be converted to a general receivership.

**History:** 2012 c 143 art 1 s 4

#### **576.25 APPOINTMENT OF RECEIVERS; RECEIVERSHIP NOT A TRUST.**

**Subdivision 1. No necessity of separate action.** A receiver may be appointed under this chapter whether or not the motion for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment.

**Subd. 2. Before judgment.** Except where judgment for failure to answer may be had without application to the court, a limited receiver may be appointed before judgment to protect any party to an action who demonstrates an apparent right to property that is the subject of the action and is in the possession of an adverse party, and that the property or its rents and profits are in danger of loss or material impairment.

**Subd. 3. In a judgment or after judgment.** A limited or general receiver may be appointed in a judgment or after judgment to carry the judgment into effect, to preserve property pending an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply the property in satisfaction of the judgment.

**Subd. 4. Entities.** In addition to those situations specifically provided for in statute, a limited or general receiver may be appointed when a corporation or other entity is dissolved, insolvent, in imminent danger of insolvency, or has forfeited its corporate rights and in like cases of the property within the state of foreign corporations and other entities.

**Subd. 5. Appointment of receiver of mortgaged property.** (a) A limited receiver shall be appointed at any time after the commencement of mortgage foreclosure proceedings under chapter 580 or 581 and before the end of the period for redemption, if the mortgage being foreclosed:

(1) secures an original principal amount of \$100,000 or more or is a lien upon residential real estate containing more than four dwelling units; and

(2) is not a lien upon property that was entirely homesteaded, residential real estate containing four or fewer dwelling units where at least one unit is homesteaded; or agricultural property.

The foreclosing mortgagee or the purchaser at foreclosure sale may at any time bring an action in the district court of the county in which the mortgaged property or any part thereof is located for the appointment of a receiver; provided, however, if the foreclosure is by action under chapter 581, a separate action need not be filed.

(b) The court shall appoint a receiver upon a showing that the mortgagor has breached a covenant contained in the mortgage relating to any of the following:

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- (1) application of tenant security deposits as required by section 504B.178;
- (2) payment when due of prior or current real estate taxes or special assessments with respect to the mortgaged property or the periodic escrow for the payment of the taxes or special assessments;
- (3) payment when due of premiums for insurance of the type required by the mortgage or the periodic escrow for the payment of the premiums; or
- (4) keeping of the covenants required of a landlord or licensor pursuant to section 504B.161, subdivision 1.

(c) The receiver shall be or shall retain an experienced property manager.

(d) The receiver shall collect the rents, profits, and all other income of any kind. The receiver, after providing for payment of its reasonable fees and expenses, shall, to the extent possible and in the order determined by the receiver to preserve the value of the mortgaged property:

- (1) manage the mortgaged property so as to prevent waste;
- (2) execute contracts and leases within the period of the receivership, or beyond the period of the receivership if approved by the court;
- (3) pay the expenses listed in paragraph (b), clauses (1) to (3);
- (4) pay all expenses for normal maintenance of the mortgaged property; and
- (5) perform the terms of any assignment of rents that complies with section 559.17, subdivision 2.

(e) The purchaser at a foreclosure sale shall have the right, at any time and without limitation as provided in section 582.03, to advance money to the receiver to pay any or all of the expenses that the receiver should otherwise pay if cash were available from the mortgaged property. Sums so advanced, with interest, shall be a part of the sum required to be paid to redeem from the sale. The sums shall be proved by the affidavit of the purchaser, an agent, or attorney, stating the expenses and describing the mortgaged property. The affidavit shall be furnished to the sheriff in the manner of expenses claimed under section 582.03.

(f) Any sums collected that remain in the possession of the receiver at the termination of the receivership shall, in the event the termination of the receivership is due to the reinstatement of the mortgage debt or redemption of the mortgaged property by the mortgagor, be paid to the mortgagor; and in the event termination of the receivership occurs at the end of the period of redemption without redemption by the mortgagor or any other party entitled to redeem, interest accrued upon the sale price pursuant to section 580.23 or 581.10 shall be paid to the purchaser at the foreclosure sale. Any net sum remaining shall be paid to the mortgagor, except if the receiver was enforcing an assignment of rents that complies with section 559.17, subdivision 2, in which case any net sum remaining shall be paid pursuant to the terms of the assignment.

(g) This subdivision applies to all mortgages executed on or after August 1, 1977, and to amendments or modifications thereto, and to amendments or modifications made on or after August 1, 1977, to mortgages executed before August 1, 1977, if the amendment or modification is duly recorded and is for the principle purpose of curing a default.

**Subd. 6. Other cases.** A receiver may be appointed in other cases as are provided by law, or in accord with existing practice, except as otherwise prescribed.

**Subd. 7. Motion for appointment of receiver.** The court may appoint a receiver upon a motion with notice to the respondent, to all other parties in the action, and to parties in interest and other persons as the court may require. Notice shall also be given to any judgment creditor who is seeking the appointment of a receiver in any other action. A motion to appoint a general receiver shall be treated as a dispositive motion. The court may appoint a receiver ex parte or on shortened notice on a temporary basis if it is clearly shown that an emergency exists requiring the immediate appointment of a receiver. In that event, the court shall set a hearing as soon as practicable and at the subsequent hearing, the burdens of proof shall be as would be applicable to a motion made on notice that is not expedited.

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**Subd. 8. Description of receivership property.** The order appointing the receiver or subsequent order shall describe the receivership property with particularity appropriate to the circumstances. If the order does not so describe the receivership property, until further order of the court, the receiver shall have control over all of the respondent's nonexempt property.

**Subd. 9. Receivership not a trust.** The order appointing the receiver does not create a trust.

**History:** *2012 c 143 art 1 s 5*

#### **576.26 ELIGIBILITY OF RECEIVER.**

**Subdivision 1. Who may serve as receiver.** Unless otherwise prohibited by law or prior order, any person, whether or not a resident of this state, may serve as a receiver, provided that the court, in its order appointing the receiver, makes written conclusions based in the record that the person proposed as receiver:

- (1) is qualified to serve as receiver and as an officer of the court; and
- (2) is independent as to the parties and the underlying dispute.

**Subd. 2. Considerations regarding qualifications.** (a) In determining whether a proposed receiver is qualified to serve as receiver and as an officer of the court, the court shall consider any relevant information, including, but not limited to, whether:

- (1) the proposed receiver has knowledge and experience sufficient to perform the duties of receiver;
- (2) the proposed receiver has the financial ability to post the bond required by section 578.06;
- (3) the proposed receiver or any insider of the proposed receiver has been previously disqualified from serving as receiver and the reasons for disqualification;
- (4) the proposed receiver or any insider of the proposed receiver has been convicted of a felony or other crime involving moral turpitude; and
- (5) the proposed receiver or any insider of the proposed receiver has been found liable in a civil court for fraud, breach of fiduciary duty, civil theft, or similar misconduct.

(b) For the purposes of this subdivision, "insider" includes:

- (1) if the proposed receiver is a corporation, an officer or director of the corporation, or a person in control of the proposed receiver; and
- (2) if the proposed receiver is a partnership, a general or limited partner of the partnership, or a person in control of the proposed receiver.

**Subd. 3. Considerations regarding independence.** (a) In determining whether a proposed receiver is independent as to the parties and the underlying dispute, the court shall consider any relevant information, including, but not limited to:

- (1) the nature and extent of any relationship that the proposed receiver has to the parties and the property proposed as receivership property including, without limitation, whether the proposed receiver is a party to the action, a family member of a party to the action, or an officer, director, member, employee, or owner of or controls a party to the action;
- (2) whether the proposed receiver has any interest materially adverse to the interests of any of the parties to the action;
- (3) whether the proposed receiver has any material financial or pecuniary interest, other than receiver compensation allowed by court order, in the outcome of the underlying dispute, including any proposed contingent or success fee compensation arrangement; and
- (4) whether the proposed receiver is a debtor, secured or unsecured creditor, lienor of, or holder of any equity interest in, any of the parties to the action of the receivership property.

(b) In evaluating all information, the court may exercise its discretion and need not consider any single item of information to be determinative of independence. Without limiting the generality of the preceding sentence, the proposed receiver shall not be disqualified solely because the proposed receiver was appointed receiver in other unrelated

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matters involving any of the parties to the matter in which the appointment is sought, or the proposed receiver has been engaged by any of the parties to the action in matters unrelated to the underlying action.

**Subd. 4. Information provided to court.** The proposed receiver, the parties, and prospective parties in interest may provide any information relevant to the qualifications, independence, and the selection of the receiver.

**History:** 2012 c 143 art 1 s 6; art 3 s 38

#### **576.27 BOND.**

After appointment, a receiver shall give a bond in the sum, nature, and with the conditions that the court shall order in its discretion consistent with section 574.11. Unless otherwise ordered by the court, the receiver's bond shall be conditioned on the receiver's faithful discharge of its duties in accordance with the orders of the court and the laws of this state. The receiver shall execute a bond with a surety authorized to write bonds in the state.

**History:** 2012 c 143 art 1 s 7

#### **576.28 IMMUNITY; DISCOVERY FROM RECEIVER.**

(a) The receiver shall be entitled to all defenses and immunities provided at common law for acts or omissions within the scope of the receiver's appointment.

(b) No person other than a successor receiver duly appointed by the court shall have a right of action against a receiver to recover receivership property or the value thereof.

(c) A party or party in interest may conduct discovery of the receiver concerning any matter relating to the receiver's administration of the receivership property after obtaining an order authorizing the discovery.

**History:** 2012 c 143 art 1 s 8

#### **576.29 POWERS AND DUTIES OF RECEIVERS; GENERALLY.**

**Subdivision 1. Powers.** (a) A receiver, whether general or limited, shall have the following powers in addition to those specifically conferred by this chapter or otherwise by statute, rule, or order of the court:

- (1) the power to collect, control, manage, conserve, and protect receivership property;
- (2) the power to incur and pay expenses incidental to the receiver's exercise of the powers or otherwise in the performance of the receiver's duties;
- (3) the power to assert rights, claims, causes of action, or defenses that relate to receivership property; and
- (4) the power to seek and obtain instruction from the court with respect to any matter relating to the receivership property, the exercise of the receiver's powers, or the performance of the receiver's duties.

(b) In addition to the powers provided in paragraph (a), a general receiver shall have the power:

- (1) to (i) assert, or when authorized by the court, to release, any rights, claims, causes of action, or defenses of the respondent to the extent any rights, claims, causes of action, or defenses are receivership property; (ii) maintain in the receiver's name or in the name of the respondent any action to enforce any right, claim, cause of action, or defense; and (iii) intervene in actions in which the respondent is a party for the purpose of exercising the powers under this clause or requesting transfer of venue of the action to the court;
- (2) to pursue any claim or remedy that may be asserted by a creditor of the respondent under sections 513.41 to 513.51;
- (3) to compel any person, including the respondent, and any party, by subpoena pursuant to Rule 45 of the Minnesota Rules of Civil Procedure, to give testimony or to produce and permit inspection and copying of designated books, documents, electronically stored information, or tangible things with respect to receivership property or any other matter that may affect the administration of the receivership;

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(4) to operate any business constituting receivership property in the ordinary course of the business, including using, selling, or leasing property of the business or otherwise constituting receivership property; incurring and payment of expenses of the business or other receivership property; and hiring employees and appointing officers to act on behalf of the business;

(5) if authorized by an order of the court following notice and a hearing, to use, improve, sell, or lease receivership property other than in the ordinary course of business; and

(6) if appointed pursuant to section [302A.753](#), [308A.945](#), [308B.935](#), [317A.753](#), or [322B.836](#), to exercise all of the powers and authority provided by the section or order of the court.

**Subd. 2. Duties.** A receiver, whether general or limited, shall have the duties specifically conferred by this chapter or otherwise by statute, rule, or order of the court.

**Subd. 3. Modification of powers and duties.** Except as otherwise provided in this chapter, the court may modify the powers and duties of a receiver provided by this section.

**History:** [2012 c 143 art 1 s 9](#); [2016 c 135 art 3 s 3](#)

### **576.30 RECEIVER AS LIEN CREDITOR; REAL PROPERTY RECORDING; SUBSEQUENT SALES OF REAL PROPERTY.**

**Subdivision 1. Receiver as lien creditor.** As of the time of appointment, the receiver shall have the powers and priority as if it were a creditor that obtained a judicial lien at the time of appointment pursuant to sections [548.09](#) and [550.10](#) on all of the receivership property, subject to satisfying the recording requirements as to real property described in subdivision 2.

**Subd. 2. Real property recording.** If any interest in real property is included in the receivership property, a notice of lis pendens shall be recorded as soon as practicable with the county recorder or registrar of titles, as appropriate, of the county in which the real property is located. The priority of the receiver as lien creditor against real property shall be from the time of recording of the notice of lis pendens, except as to persons with actual or implied knowledge of the appointment under section [507.34](#).

**Subd. 3. Subsequent sales of real property.** The following documents are prima facie evidence of the authority to sell and convey the real property:

- (1) the notice of lis pendens;
- (2) a court order certified by the court administrator authorizing the receiver to sell, or cause the respondent to sell, real property; and
- (3) a deed executed by the receiver, or by the respondent if authorized by the court.

The court may also require a motion for an order for sale of the real property or a motion for an order confirming sale of the real property.

**History:** [2012 c 143 art 1 s 10](#); [2016 c 135 art 3 s 4](#)

### **576.31 DUTIES OF RESPONDENT.**

The respondent shall:

- (1) assist and cooperate fully with the receiver in the administration of the receivership and the receivership property and the discharge of the receiver's duties, and comply with all orders of the court;
- (2) immediately upon the receiver's appointment, deliver to the receiver all of the receivership property in the respondent's possession, custody, or control, including, but not limited to, all books and records, electronic data, passwords, access codes, statements of accounts, deeds, titles or other evidence of ownership, financial statements, and all other papers and documents related to the receivership property;
- (3) supply to the receiver information as requested relating to the administration of the receivership and the receivership property, including information necessary to complete any reports or other documents that the receiver may be required to file; and
- (4) remain responsible for the filing of all tax returns, including those returns applicable to periods which include those in which the receivership is in effect.



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**History:** 2012 c 143 art 1 s 11**576.32 EMPLOYMENT AND COMPENSATION OF PROFESSIONALS.**

**Subdivision 1. Employment.** (a) To represent or assist the receiver in carrying out the receiver's duties, the receiver may employ attorneys, accountants, appraisers, auctioneers, and other professionals that do not hold or represent an interest adverse to the receivership.

(b) This section does not require prior court approval for the retention of professionals. However, any professional to be retained shall provide the receiver with a disclosure of any potential conflicts of interest, and the professional or the receiver shall file with the court a notice of the retention and of the proposed compensation. Any party in interest may bring a motion for disapproval of any retention within 21 days after the filing of the notice of retention.

(c) A person is not disqualified for employment under this section solely because of the person's employment by, representation of, or other relationship with the receiver, respondent, a creditor, or other party in interest if the court determines that the employment is appropriate.

**Subd. 2. Compensation.** (a) The receiver and any professional retained by the receiver shall be paid by the receiver from the receivership property in the same manner as other expenses of administration and without separate orders, but subject to the procedures, safeguards, and reporting that the court may order.

(b) Except to the extent fees and expenses have been approved by the court, or as to parties in interest who are deemed to have waived the right to object, any interim payments of fees and expenses to the receiver are subject to approval in connection with the receiver's final report pursuant to section 576.38.

**History:** 2012 c 143 art 1 s 12**576.33 SCHEDULES OF PROPERTY AND CLAIMS.**

(a) The court may order the respondent or a general receiver to file under oath to the best of its actual knowledge:

(1) a schedule of all receivership property and exempt property of the respondent, describing, as of the time of appointment: (i) the location of the property and, if real property, a legal description thereof; (ii) a description of all liens to which the property is subject; and (iii) an estimated value of the property; and

(2) a schedule of all creditors and taxing authorities and regulatory authorities which supervise the respondent, their mailing addresses, the amount and nature of their claims, whether the claims are secured by liens of any kind, and whether the claims are disputed.

(b) The court may order inventories and appraisals if appropriate to the receivership.

**History:** 2012 c 143 art 1 s 13**576.34 NOTICE.**

In a general receivership, unless the court orders otherwise, the receiver shall give notice of the receivership to all creditors and other parties in interest actually known to the receiver by mail or other means of transmission within 21 days after the time of appointment. The notice of the receivership shall include the time of appointment and the names and addresses of the respondent, the receiver, and the receiver's attorney, if any.

**History:** 2012 c 143 art 1 s 14**576.35 NOTICES, MOTIONS, AND ORDERS.**

**Subdivision 1. Notice of appearance.** Any party in interest may make an appearance in a receivership by filing a written notice of appearance, including the name, mailing address, fax number, e-mail address, if any, and telephone number of the party in interest and its attorney, if any, and by serving a copy on the receiver and the receiver's attorney, if any. It is not necessary for a party in interest to be joined as a party to be heard in the receivership. A proof of claim does not constitute a written notice of appearance.

**Subd. 2. Master service list.** From time to time the receiver shall file an updated master service list consisting of the names, mailing addresses, and, where available, fax

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numbers and e-mail addresses of the respondent, the receiver, all persons joined as parties in the receivership, all persons known by the receiver to have asserted any ownership or lien in receivership property, all persons who have filed a notice of appearance in accordance with this section, and their attorneys, if any.

**Subd. 3. Motions.** Except as otherwise provided in this chapter, an order shall be sought by a motion brought in compliance with the Minnesota Rules of Civil Procedure and the General Rules of Practice for the District Courts.

**Subd. 4. Persons served.** Except as otherwise provided in this chapter, a motion shall be served as provided in the Minnesota Rules of Civil Procedure, unless the court orders otherwise, on all persons on the master service list, all persons who have asserted an ownership interest or lien in receivership property that is the subject of the motion, all persons who are identified in the motion as directly affected by the relief requested, and other persons as the court may direct.

**Subd. 5. Service on state agency.** Any request for relief against a state agency shall be served as provided in the Minnesota Rules of Civil Procedure, unless the court orders otherwise, on the specific state agency and on the Office of the Attorney General.

**Subd. 6. Order without hearing.** Where a provision in this chapter, an order issued in the receivership, or a court rule requires an objection or other response to a motion or application within a specific time, and no objection or other response is interposed, the court may grant the relief requested without a hearing.

**Subd. 7. Order upon application.** Where a provision of this chapter permits, as to administrative matters, or where it otherwise appears that no party in interest would be materially prejudiced, the court may issue an order ex parte or based on an application without a motion, notice, or hearing.

**Subd. 8. Persons bound by orders of the court.** Except as to persons entitled to be served pursuant to subdivision 4 and who were not served, an order of the court binds parties in interest and all persons who file notices of appearance, submit proofs of claim, receive written notice of the receivership, receive notice of any motion in the receivership, or who have actual knowledge of the receivership whether they are joined as parties or received notice of the specific motion or order.

**History:** 2012 c 143 art 1 s 15

#### 576.36 RECORDS; INTERIM REPORTS.

**Subdivision 1. Preparation and retention of records.** The receiver shall prepare and retain appropriate business records, including records of all cash receipts and disbursements and of all receipts and distributions or other dispositions of receivership property. After due consideration of issues of confidentiality, the records may be provided by the receiver to parties in interest or shall be provided as ordered by the court.

**Subd. 2. Interim reports.** (a) The court may order the receiver to prepare and file interim reports addressing:

- (1) the activities of the receiver since the last report;
- (2) cash receipts and disbursements, including payments made to professionals retained by the receiver;
- (3) receipts and dispositions of receivership property; and
- (4) other matters.

(b) The order may provide for the delivery of the receiver's interim reports to persons on the master service list and to other persons and may provide a procedure for objection to the interim reports, and may also provide that the failure to object constitutes a waiver of objection to matters addressed in the interim reports.

**History:** 2012 c 143 art 1 s 16

#### 576.37 REMOVAL OF RECEIVERS.

**Subdivision 1. Removal of receiver.** The court may remove the receiver if: (1) the receiver fails to execute and file the bond required by section 576.27; (2) the receiver resigns, refuses, or fails to serve for any reason; or (3) for other good cause.

**Subd. 2. Successor receiver.** Upon removal of the receiver, if the court determines that further administration of the receivership is required, the court shall appoint a

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successor receiver. Upon executing and filing a bond under section 576.27, the successor receiver shall immediately succeed the receiver so removed and shall assume the duties of receiver.

**Subd. 3. Report and discharge of removed receiver.** Within 14 days after removal, the receiver so removed shall file with the court and serve a report pursuant to section 576.38, subdivision 3, for matters up to the date of the removal. Upon approval of the report, the court may enter an order pursuant to section 576.38 discharging the removed receiver.

**History:** 2012 c 143 art 1 s 17

#### **576.38 TERMINATION OF RECEIVERSHIPS; FINAL REPORT.**

**Subdivision 1. Termination of receivership.** The court may discharge a receiver and terminate the receivership. If the court determines that the appointment of the receiver was procured in bad faith, the court may assess against the person who procured the receiver's appointment:

- (1) all of the receiver's fees and expenses and other costs of the receivership; and
- (2) any other sanctions the court deems appropriate.

**Subd. 2. Request for discharge.** Upon distribution or disposition of all receivership property, or the completion of the receiver's duties, the receiver shall file a final report and shall request that the court approve the final report and discharge the receiver.

**Subd. 3. Contents of final report.** The final report, which may incorporate by reference interim reports, shall include, in addition to any matters required by the court in the case:

- (1) a description of the activities of the receiver in the conduct of the receivership;
- (2) a schedule of all receivership property at the commencement of the receivership and any receivership property added thereafter;
- (3) a list of expenditures, including all payments to professionals retained by the receiver;
- (4) a list of any unpaid expenses incurred during the receivership;
- (5) a list of all dispositions of receivership property;
- (6) a list of all distributions made or proposed to be made; and
- (7) if not done separately, a motion or application for approval of the payment of fees and expenses of the receiver.

**Subd. 4. Notice of final report.** The receiver shall give notice of the filing of the final report and request for discharge to all persons who have filed notices of appearance. If there is no objection within 21 days, the court may enter an order approving the final report and discharging the receiver without the necessity of a hearing.

**Subd. 5. Effect of discharge.** A discharge removes all authority of the receiver, excuses the receiver from further performance of any duties, and discharges any lis pendens recorded by the receiver.

**History:** 2012 c 143 art 1 s 18

#### **576.39 ACTIONS BY OR AGAINST RECEIVER OR RELATING TO RECEIVERSHIP PROPERTY.**

**Subdivision 1. Actions by or against receiver.** The receiver may sue in the receiver's capacity and, subject to other sections of this chapter and all immunities provided at common law, may be sued in that capacity.

**Subd. 2. Venue.** Unless applicable law requires otherwise or the court orders otherwise, an action by or against the receiver or relating to the receivership or receivership property shall be commenced in the court and assigned to the judge before whom the receivership is pending.

**Subd. 3. Joinder.** Subject to section 576.42, a limited or general receiver may be joined or substituted as a party in any action or other proceeding that relates to receivership property that was pending at the time of appointment. Subject to other sections of this chapter, a general receiver may be joined or substituted as a party in any

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action or other proceeding that was pending at the time of appointment in which the respondent is a party. Pending actions may be transferred to the court upon the receiver's motion for change of venue made in the court in which the action is pending.

**Subd. 4. Effect of judgments.** A judgment entered subsequent to the time of appointment against a receiver or the respondent shall not constitute a lien on receivership property, nor shall any execution issue thereon. Upon submission of a certified copy of the judgment in accordance with section 576.49, the amount of the judgment shall be treated as an allowed claim in a general receivership. A judgment against a limited receiver shall have the same effect as a judgment against the respondent, except that the judgment shall be enforceable against receivership property only to the extent ordered by the court.

**History:** 2012 c 143 art 1 s 19

#### **576.40 TURNOVER OF PROPERTY.**

**Subdivision 1. Demand by receiver.** Except as expressly provided in this section, and unless otherwise ordered by the court, upon demand by a receiver, any person shall turn over any receivership property that is within the possession or control of that person. Unless ordered by the court, a person in possession of receivership property pursuant to a valid lien perfected prior to the time of appointment is not required to turn over receivership property.

**Subd. 2. Motion by receiver.** A receiver may seek to compel turnover of receivership property by motion in the receivership. If there exists a bona fide dispute with respect to the existence or nature of the receiver's or the respondent's interest in the property, turnover shall be sought by means of an action under section 576.39. In the absence of a bona fide dispute with respect to the receiver's or the respondent's right to possession of receivership property, the failure to relinquish possession and control to the receiver may be punishable as contempt of the court.

**History:** 2012 c 143 art 1 s 20

#### **576.41 ANCILLARY RECEIVERSHIPS.**

**Subdivision 1. Ancillary receiverships in foreign jurisdictions.** A receiver appointed by a court of this state may, without first seeking approval of the court, apply in any foreign jurisdiction for appointment as receiver with respect to any receivership property which is located within the foreign jurisdiction.

**Subd. 2. Ancillary receiverships in the courts of this state.** (a) A foreign receiver may obtain appointment by a court of this state as a receiver in an ancillary receivership with respect to any property located in or subject to the jurisdiction of the court if (1) the foreign receiver would be eligible to serve as receiver under section 576.26, and (2) the appointment is in furtherance of the foreign receiver's possession, control, or disposition of property subject to the foreign receivership and in accordance with orders of the foreign jurisdiction.

(b) The courts of this state may enter any order necessary to effectuate orders entered by the foreign jurisdiction's receivership proceeding. Unless the court orders otherwise, a receiver appointed in an ancillary receivership in this state shall have the powers and duties of a limited receiver as set forth in this chapter and shall otherwise comply with the provisions of this chapter applicable to limited receivers.

**History:** 2012 c 143 art 1 s 21

#### **576.42 STAYS.**

**Subdivision 1. Control of property.** All receivership property is under the control and supervision of the court appointing the receiver.

**Subd. 2. Stay by court order.** In addition to any stay provided in this section, the court may order a stay or stays to protect receivership property and to facilitate the administration of the receivership.

**Subd. 3. Stay in all receiverships.** Except as otherwise ordered by the court, the entry of an order appointing a receiver shall operate as a stay, applicable to all persons, of:

(1) any act to obtain possession of receivership property, or to interfere with or exercise control over receivership property, other than the commencement or continuation of a judicial, administrative, or other action or proceeding, including the issuance or use of

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process, to enforce any lien having priority over the rights of the receiver in receivership property; and

(2) any act to create or perfect any lien against receivership property, except by exercise of a right of setoff, to the extent that the lien secures a claim that arose before the time of appointment.

**Subd. 4. Limited additional stay in general receiverships.** (a) Except as otherwise ordered by the court, in addition to the stay provided in subdivision 3, the entry of an order appointing a general receiver shall operate as a stay, applicable to all persons, of:

(1) the commencement or continuation of a judicial, administrative, or other action or proceeding, including the issuance or use of process, against the respondent or the receiver that was or could have been commenced before the time of appointment, or to recover a claim against the respondent that arose before the time of appointment;

(2) the commencement or continuation of a judicial, administrative, or other action or proceeding, including the issuance or use of process, to enforce any lien having priority over the rights of the receiver in receivership property.

(b) As to the acts specified in this subdivision, the stay shall expire 30 days after the time of appointment unless, before the expiration of the 30-day period, the receiver or other party in interest files a motion seeking an order of the court extending the stay and before the expiration of an additional 30 days following the 30-day period, the court orders the stay extended.

**Subd. 5. Modification of stay.** The court may modify any stay provided in this section upon the motion of any party in interest affected by the stay.

**Subd. 6. Inapplicability of stay.** The entry of an order appointing a receiver does not operate as a stay of:

(1) the commencement or continuation of a criminal proceeding against the respondent;

(2) the commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power;

(3) the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power, or with respect to any licensure of the respondent;

(4) the establishment by a governmental unit of any tax liability and any appeal thereof;

(5) the commencement or continuation of an action or proceeding to establish paternity; to establish or modify an order for alimony, maintenance, or support; or to collect alimony, maintenance, or support under any order of a court;

(6) the exercise of a right of setoff;

(7) any act to maintain or continue the perfection of a lien on, or otherwise preserve or protect rights in, receivership property, but only to the extent that the act was necessary to preserve or protect the lien or other rights as they existed as of the time of the appointment. If the act would require seizure of receivership property or commencement of an action prohibited by a stay, the continued perfection shall instead be accomplished by filing a notice in the court before which the receivership is pending and by serving the notice upon the receiver and receiver's attorney, if any, within the time fixed by law for seizure or commencement of the action;

(8) the commencement of a bankruptcy case under federal bankruptcy laws; or

(9) any other exception as provided in United States Code, title 11, section 326(b), as to the automatic stay in federal bankruptcy cases to the extent not inconsistent with any provision in this section.

**History:** 2012 c 143 art 1 s 22

#### **576.43 UTILITY SERVICE.**

A utility providing service to receivership property that has received written notice from the receiver of the appointment of the receiver may not alter, refuse, or discontinue

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service to the receivership property without first giving the receiver written notice of any receivership default in compliance with the utility's approved tariffs. After written notice to the utility and a hearing satisfactory to the court, the court may prohibit the alteration, refusal, or discontinuance of utility service if the receiver furnishes adequate assurance of payment for service to be provided after the time of appointment.

**History:** 2012 c 143 art 1 s 23

#### **576.44 RECEIVERSHIP FINANCING.**

(a) Without necessity of a court order, the receiver may obtain unsecured credit and incur unsecured debt on behalf of the receivership, and the amounts shall be allowable as expenses of the receivership under section 576.51, subdivision 1, clause (2).

(b) Without necessity of a court order, the receiver may obtain secured financing on behalf of the receivership from any secured party under a financing facility existing at the time of the appointment.

(c) The court may authorize the receiver to obtain credit or incur indebtedness, and the court may authorize the receiver to mortgage, pledge, hypothecate, or otherwise encumber receivership property as security for repayment of any indebtedness.

**History:** 2012 c 143 art 1 s 24

#### **576.45 EXECUTORY CONTRACTS.**

**Subdivision 1. Performance by receiver.** Unless a court orders otherwise, a receiver succeeds to all of the rights and duties of the respondent under any executory contract. The court may condition the continued performance by the receiver on terms that are appropriate under the circumstances. Performance of an executory contract shall create a claim against the receivership to the extent of the value of the performance received by the receivership after the time of appointment. The claim shall not constitute a personal obligation of the receiver.

**Subd. 2. Assignment and delegation by receiver.** For good cause, the court may authorize a receiver to assign and delegate an executory contract to a third party under the same circumstances and under the same conditions as the respondent was permitted to do so pursuant to the terms of the executory contract and applicable law immediately before the time of appointment.

**Subd. 3. Termination by receiver.** For good cause, the court may authorize the receiver to terminate an executory contract. The receiver's right to possess or use property or receive services pursuant to the executory contract shall terminate at the termination of the executory contract. Except as to the claim against the receivership under subdivision 1, if a termination of an executory contract constitutes a breach of the executory contract, the termination shall create a claim equal to the damages, if any, for breach of the contract as if the breach of contract had occurred immediately before the time of appointment. Any claim arising under this section for termination of an executory contract shall be presented or filed in the same manner as other claims in the receivership no later than the later of: (1) the time set for filing of claims in the receivership; or (2) 28 days after the notice by the receiver of the termination of the executory contract.

**History:** 2012 c 143 art 1 s 25; 2016 c 135 art 3 s 5

#### **576.46 SALES FREE AND CLEAR OF LIEN IN GENERAL RECEIVERSHIPS.**

**Subdivision 1. Sales free and clear of liens.** (a) The court may order that a general receiver's sale of receivership property is free and clear of all liens, except any lien for unpaid real estate taxes or assessments and liens arising under federal law, and may be free of the rights of redemption of the respondent if the rights of redemption are receivership property and the rights of redemption of the holders of any liens, regardless of whether the sale will generate proceeds sufficient to fully satisfy all liens on the property, unless either:

(1) the property is (i) real property classified as agricultural land under section 273.13, subdivision 23, or the property is a homestead under section 510.01; and (ii) each of the owners of the property has not consented to the sale following the time of appointment; or

(2) any owner of the property or holder of a lien on the property serves and files a timely objection, and the court determines that the amount likely to be realized from the

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sale by the objecting person is less than the objecting person would realize within a reasonable time in the absence of this sale.

(b) The receiver shall have the burden of proof to establish that the amount likely to be realized by the objecting person from the sale is equal to or more than the objecting person would realize within a reasonable time in the absence of the sale.

(c) Upon any sale free and clear of liens authorized by this section, all liens encumbering the property conveyed shall transfer and attach to the proceeds of the sale, net of reasonable expenses approved by the court incurred in the disposition of the property, in the same order, priority, and validity as the liens had with respect to the property immediately before the sale. The court may authorize the receiver to satisfy, in whole or in part, any ownership interest or lien out of the proceeds of the sale if the ownership interest or lien of any party in interest would not thereby be impaired.

**Subd. 2. Co-owned property.** If any receivership property includes an interest as a co-owner of property, the receiver shall have the rights and powers afforded by applicable state or federal law of the respondent, including but not limited to any rights of partition, but may not sell the property free and clear of the co-owner's interest in the property.

**Subd. 3. Right to credit bid.** A creditor with a claim secured by a valid and perfected lien against the property to be sold may bid on the property at a sale and may offset against the purchase price part or all of the amount secured by its lien, provided that the creditor tenders cash sufficient to satisfy in full the reasonable expenses, approved by the court, incurred in the disposition of the property and all liens payable out of the proceeds of sale having priority over the lien of that creditor.

**Subd. 4. Effect of appeal.** The reversal or modification on appeal of an authorization to sell property under this section does not affect the validity of a sale to a person that purchased the property in good faith, whether or not the person knew of the pendency of the appeal, unless the authorization and sale is stayed pending the appeal.

**History:** 2012 c 143 art 1 s 26

#### **576.47 ABANDONMENT OF PROPERTY.**

The court may authorize the receiver to abandon to the respondent any receivership property that is burdensome or is not of material value to the receivership.

**History:** 2012 c 143 art 1 s 27; 2016 c 135 art 3 s 6

#### **576.48 LIENS AGAINST AFTER-ACQUIRED PROPERTY.**

Except as otherwise provided for by statute, property that becomes receivership property after the time of appointment is subject to a lien to the same extent as it would have been in the absence of the receivership.

**History:** 2012 c 143 art 1 s 28

#### **576.49 CLAIMS PROCESS.**

**Subdivision 1. Recommendation of receiver.** In a general receivership, and in a limited receivership if the circumstances require, the receiver shall submit to the court a recommendation concerning a claims process appropriate to the particular receivership.

**Subd. 2. Order establishing process.** In a general receivership and, if the court orders, in a limited receivership, the court shall establish the claims process to be followed in the receivership addressing whether proofs of claim must be submitted, the form of any proofs of claim, the place where the proofs of claim must be submitted, the deadline or deadlines for submitting the proofs of claim, and other matters bearing on the claims process.

**Subd. 3. Alternative procedures.** The court may authorize proofs of claim to be filed with the receiver rather than the court. The court may authorize the receiver to treat claims as allowed claims based on the amounts established in the books and records of the respondent or the schedule of claims filed pursuant to section 576.33, without necessity of formal proofs of claim.

**History:** 2012 c 143 art 1 s 29

#### **576.50 OBJECTION TO AND ALLOWANCE OF CLAIMS.**



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**Subdivision 1. Objections and allowance.** The receiver or any party in interest may file a motion objecting to a claim and stating the grounds for the objection. The court may order that a copy of the objection be served on the persons on the master service list at least 30 days prior to the hearing. Claims allowed by court order, and claims properly submitted and not disallowed by the court shall be allowed claims and shall be entitled to share in distributions of receivership property in accordance with the priorities provided by this chapter or otherwise by law.

**Subd. 2. Examination of claims.** If the claims process does not require proofs of claim to be filed with the court, at any time after expiration of the claim-filing period and upon 14 days' written notice to the receiver, any party in interest shall have the right to examine:

(1) all claims filed with the receiver; and

(2) all books and records in the receiver's possession that provided the receiver the basis for concluding that creditors identified therein are entitled to participate in any distributions of receivership property without having to file claims.

**Subd. 3. Estimation of claims.** For the purpose of allowance of claims, the court may estimate:

(1) any contingent or unliquidated claim, the fixing or liquidation of which would unduly delay the administration of the receivership; or

(2) any right to payment arising from a right to an equitable remedy.

**History:** 2012 c 143 art 1 s 30

#### **576.51 PRIORITY OF CLAIMS.**

**Subdivision 1. Priorities.** Allowed claims shall receive distribution under this chapter in the following order of priority and, except as set forth in clause (1), on a pro rata basis:

(1) claims secured by liens on receivership property, which liens are valid and perfected before the time of appointment, to the extent of the proceeds from the disposition of the collateral in accordance with their respective priorities under otherwise applicable law, subject first to reimbursing the receiver for the reasonable and necessary expenses of preserving, protecting, or disposing of the collateral, including allowed fees and reimbursement of reasonable expenses of the receiver and professionals;

(2) actual, necessary costs and expenses incurred during the receivership, other than those expenses allowable under clause (1), including allowed fees and reimbursement of reasonable expenses of the receiver and professionals employed by the receiver under section 576.32;

(3) claims for wages, salaries, or commissions, including vacation, severance, and sick leave pay, or contributions to an employee benefit plan, earned by the claimant within the 90 days before the time of appointment or the cessation of the respondent's business, whichever occurs first, but only to the extent of the dollar amount in effect in United States Code, title 11, section 507(4);

(4) allowed unsecured claims, to the extent of the dollar amount in effect in United States Code, title 11, section 507(7), for each individual, arising from the deposit with the respondent, before the time of appointment of the receiver, of money in connection with the purchase, lease, or rental of property or the purchase of services for personal, family, or household use by individuals that were not delivered or provided;

(5) claims for arrears in amounts owing pursuant to a support order as defined in section 518A.26, subdivision 3;

(6) unsecured claims of governmental units for taxes that accrued before the time of appointment of the receiver;

(7) all other unsecured claims due as of the time of appointment, including the balance due the holders of secured claims to the extent not satisfied under clause (1); and

(8) interest pursuant to section 576.52.

**Subd. 2. Payments to respondent.** If all of the amounts payable under subdivision 1 have been paid in full, any remaining receivership property shall be returned to the

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respondent.

**History:** 2012 c 143 art 1 s 31**576.52 INTEREST ON UNSECURED CLAIMS.**

To the extent that funds are available to pay holders of allowed unsecured claims in full or the amounts due as of the time of appointment, each holder shall also be entitled to receive interest, calculated from the time of appointment, at the rate set forth in the agreement evidencing the claim, or if no rate is provided, at the judgment rate that would be payable as of the time of appointment; provided however, that no holder shall be entitled to interest on that portion, if any, of its unsecured claim that is itself interest calculated from the time of appointment. If there are not sufficient funds in the receivership to pay in full the interest owed to all the holders, then the interest shall be paid pro rata.

**History:** 2012 c 143 art 1 s 32**576.53 DISTRIBUTIONS.**

**Subdivision 1. Proposed distributions.** Before any interim or final distribution is made, the receiver shall file a distribution schedule listing the proposed distributions. The distribution schedule may be filed at any time during the case or may be included in the final report.

**Subd. 2. Notice.** The receiver shall give notice of the filing of the distribution schedule to all persons on the master mailing list or that have filed proofs of claim. If there is no objection within 21 days after the notice, the court may enter an order authorizing the receiver to make the distributions described in the distribution schedule without the necessity of a hearing.

**Subd. 3. Other distributions.** In the order appointing the receiver or in subsequent orders, the court may authorize distribution of receivership property to persons with ownership interests or liens.

**History:** 2012 c 143 art 1 s 33

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EXHIBIT A-3

OREGON RECEIVERSHIP STATUTE

5/11/2018

Chapter 037

Chapter 37 — Receivership

2017 EDITION

RECEIVERSHIP

SPECIAL ACTIONS AND PROCEEDINGS

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- 37.030 Definitions
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Chapter 037

- 37.240 Executory contracts
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- 37.380 Secured claims against after-acquired property
- 37.390 Ancillary receiverships
- 37.400 Removal of receiver
- 37.410 Termination of receivership

**37.010 Short title.** ORS 37.020 to 37.410 may be cited as the Oregon Receivership Code. [2017 c.358 §1]

**37.020 Receivership described.** Receivership is the process by which a court appoints a person to take charge of property during the pendency of an action or upon a judgment or order entered therein and to manage or dispose of the property as the court may direct. [2017 c.358 §2]

**37.030 Definitions.** As used in the Oregon Receivership Code:

- (1) "Affiliate" means:
  - (a) With respect to an individual:
    - (A) A companion of the individual;
    - (B) A lineal ancestor or descendant, whether by blood or adoption, of the individual or a companion of the individual;
    - (C) A companion of an ancestor or descendant described in subparagraph (B) of this paragraph;
    - (D) A sibling, aunt, uncle, great-aunt, great-uncle, first cousin, niece, nephew, grandniece or grandnephew of the individual, whether related by the whole or the half blood or adoption, or a companion of any of them; or

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- (E) Any other individual occupying the residence of the individual; and
- (b) With respect to any person:
  - (A) Another person that directly or indirectly controls, is controlled by or is under common control with the person;
  - (B) An officer, director, manager, member, partner, employee or trustee or other fiduciary of the person; or
  - (C) A companion of, or an individual occupying the residence of, an individual described in subparagraph (A) or (B) of this paragraph.
- (2) "Companion" means spouse or domestic partner.
- (3) "Domestic relations suit" has the meaning given that term in ORS 107.510.
- (4) "Entity" means a person other than a natural person.
- (5) "Estate" means the entirety of the property over which a receiver is appointed.
- (6) "Executory contract" means:
  - (a) A contract, including an unexpired lease, under which the obligations of both parties are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other; or
  - (b) A contract, including an unexpired lease, under which a party has an unexercised option to require its counterparty to perform.
- (7) "Foreign action" means an action in a federal or state court outside of this state.
- (8) "Insolvency" means a financial condition of a person such that:
  - (a) The sum of the person's debts and other obligations is greater than a fair valuation of all of the person's property, excluding:
    - (A) Property transferred, concealed or removed with intent to hinder, delay or defraud any creditors of the person; and
    - (B) Any property exempt from execution under any law of this state; or
  - (b) The person is generally not paying debts as they become due.
- (9) "Interested person" means any person having a claim against the owner or a claim or interest in any estate property.
- (10) "Lien" means a charge against or interest in property to secure payment of a debt or the performance of an obligation.
- (11) "Owner" means the person over whose property a receiver is appointed.
- (12) "Party" means:
  - (a) When used in relation to an action, a person named in the caption of the action; or
  - (b) When used in relation to a contract, a signatory to the contract.
- (13) "Person" means an individual, corporation, limited liability company, general partnership, limited partnership, limited liability partnership, cooperative, business trust, governmental entity or other entity, of any kind or nature.
- (14) "Property" includes all right, title and interests, both legal and equitable, in or with respect to any property with respect to which a receiver is appointed, including any proceeds, products, offspring, rents or profits, regardless of the manner by which the property has been or is acquired.
- (15) "Receiver" means a person appointed by the court as the court's agent, and subject to the court's direction, to take possession of, manage or dispose of property.
- (16) "Receivership" means an action in which a receiver is appointed.
- (17) "Residential property" means real property:
  - (a) Upon which are situated four or fewer residential units, one of which is occupied as a principal residence by the owner, the owner's spouse or a dependent of the owner; and
  - (b) Where residential use is the primary activity occurring on the real property.
- (18) "Security interest" means a lien created by agreement.
- (19) "Special notice list" means a special notice list maintained by a receiver as required under ORS 37.160.
- (20) "State agency" has the meaning given that term in ORS 36.110.
- (21) "Utility" means a person providing any service regulated by the Public Utility Commission. [2017 c.358 §3]

**37.040 Applicability.** (1) Except as otherwise provided by law, the Oregon Receivership Code applies to all receiverships initiated in a court of this state, except for:

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(a) Actions in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver; and

(b) Actions authorized by or commenced under federal law.

(2) In cases in which a state agency or officer is expressly authorized by statute to seek or obtain the appointment of a receiver, the state agency or officer may elect, when seeking appointment, for the receivership to be governed by the provisions of the Oregon Receivership Code.

(3) Except as otherwise provided by law, the provisions of the Oregon Receivership Code control over conflicting provisions of state law, including ORCP 80, with respect to receiverships governed by the Oregon Receivership Code. [2017 c.358 §4]

**Note:** Section 42, chapter 358, Oregon Laws 2017, provides:

**Sec. 42.** Sections 2 to 41 of this 2017 Act [37.020 to 37.410] apply to receiverships in which the receiver is appointed on or after the effective date of this 2017 Act [January 1, 2018]. [2017 c.358 §42]

**37.050 Property not subject to receivership; exception.** (1) A court may not appoint a receiver with respect to the following:

(a) Personal property of an individual that is used primarily for personal, family or household purposes.

(b) Property of an individual exempt from execution under the laws of this state.

(c) Any power or interest that a person may exercise solely for the benefit of another person.

(d) Property held in trust for another person.

(2) Notwithstanding subsection (1) of this section, a court may appoint a receiver with respect to property described in subsection (1)(a) of this section in a domestic relations suit.

(3) A court may appoint a receiver with respect to any nonexempt interest in property that is partially exempt from execution, including fee title to real property subject to a homestead exemption. [2017 c.358 §5]

**37.060 Appointment of receiver.** (1) A court may appoint a receiver in the following cases, upon motion by any person or upon its own motion:

(a) Before judgment, if the property that is the subject of the action, or rents or profits deriving from the property, are in danger of being lost or materially injured or impaired.

(b) After judgment, if reasonably necessary to carry the judgment into effect.

(c) After judgment, to dispose of property according to the judgment, to preserve the property during the pendency of an appeal or when an execution has been returned unsatisfied and the debtor refuses to apply the property in satisfaction of the judgment.

(d) In an action under ORS 95.200 to 95.310.

(e) When property is attached by a creditor, if:

(A) The property is of a perishable nature or is otherwise in danger of waste, impairment or destruction; or

(B) The debtor has abandoned the property and receivership is reasonably necessary to conserve, protect or dispose of the property.

(f) After judgment, either before or after the issuance of an execution, to preserve, protect or prevent the transfer of property subject to execution and sale thereunder.

(g) When an entity has been dissolved or is insolvent or in imminent danger of insolvency, if receivership is reasonably necessary to protect the property of the entity or to conserve or protect the interests of the entity's stockholders, members, partners or creditors.

(h) In any situation in which the appointment of a receiver is expressly required or permitted by statute.

(i) In any situation in which, in the discretion of the court, appointment of a receiver is reasonably necessary to secure justice to the parties.

(2) In determining whether to appoint a receiver, a court may consider the existence of a contract provision providing for the appointment of a receiver, but the court is not bound by such a provision.

(3) If a court in a foreign action has appointed a person as receiver with respect to property in this state, whether with respect to the property specifically or the owner's property generally, a court in this state shall:

(a) Upon motion by the receiver or by any party to the foreign action, appoint the person as receiver of the property in this state, if the person is eligible under ORS 37.070 and fulfills such other requirements as are required by statute or imposed by the court.

(b) Following the appointment, give effect to orders, judgments and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable.

(4) The venue of an action described in subsection (3) of this section may be any county in which the receiver appointed in the foreign action resides or maintains an office, or any county in which any property over which the receiver is to be appointed is located at the time the action is commenced.

(5)(a) An order appointing a receiver must reasonably describe the property over which the receiver is to take charge, by category, individual items or any combination thereof, if the receiver is appointed over less than all of a person's property.

(b) An order appointing a receiver may appoint the receiver over all of a person's property, wherever located.

(c) An order that appoints a receiver over a person and does not describe the property over which the receiver is to take charge is construed to appoint the receiver over all of the person's property, except for property not subject to receivership under ORS 37.050.

(6) A court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver's appointment, in such amount as the court may specify, for the payment of costs incurred or damages suffered by any person if a receivership is determined to be wrongfully obtained. [2017 c.358 §6]

**37.070 Eligibility to serve as receiver.** (1) Any person, whether or not a resident of this state, may serve as a receiver, except for:

- (a) An entity that is not authorized to conduct business in this state;
  - (b) A person who has been convicted of a crime involving moral turpitude, or is controlled by a person who has been convicted of a crime involving moral turpitude; and
  - (c) The sheriff of any county, except as expressly permitted by statute.
- (2) If a court appoints an entity as a receiver, the court may require a specific individual to appear in the receivership on behalf of the entity. [2017 c.358 §7]

**37.080 Required disclosures relating to conflicts of interest.** A court may not appoint a person as a receiver unless the person first:

- (1) Discloses whether the person:
  - (a) Is an affiliate of a party to the receivership;
  - (b) Has an interest materially adverse to an interest of a party to the receivership;
  - (c) Has a material financial interest in the outcome of the action, other than compensation approved by the court;
  - (d) Has a debtor-creditor relationship with the owner; or
  - (e) Holds an equity interest in a party to the receivership, other than a noncontrolling interest in a publicly traded company; and
- (2) Affirms under oath that the person's disclosure under subsection (1) of this section is true and complete. [2017 c.358 §8]

**37.090 Receiver's bond, alternative security or insurance.** (1) Except as otherwise provided by law, a court may, at any time before or during the service of a receiver, require a receiver or person nominated as a receiver to post a bond that:

- (a) Is conditioned on the faithful discharge of the receiver's duties;
- (b) Is in an amount that is determined by the court to be adequate to secure payment of any costs, damages and attorney fees that may be sustained or suffered by any person due to a wrongful act of the receiver; and
- (c) Has one or more sureties that meet the qualifications set forth in ORCP 82 D or that are approved by the court.

(2) Except as otherwise provided by law, the court may require the posting of alternative security in lieu of a bond, such as a letter of credit or a deposit of funds with the clerk of the court, to be held to secure the receiver's faithful performance of the receiver's duties until the court authorizes the release or return of the alternative security. The court shall remit any interest that may accrue on a deposit under this subsection to the receiver upon the receiver's discharge.

(3) Except as otherwise provided by law, the court may require the receiver or person nominated as receiver to carry an insurance policy with coverage and limits determined by the court in lieu of a bond.

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(4) A receiver may charge the cost of a bond, alternative security or insurance policy required by the court under this section against the estate.

(5) The court may authorize a receiver to act before the receiver posts a required bond or alternative security or acquires a required insurance policy. [2017 c.358 §9]

**37.100 Exclusive jurisdiction of appointing court.** (1) The court appointing a receiver has:

- (a) Exclusive authority over the receiver;
  - (b) Exclusive jurisdiction over and right to control all real property and all tangible and intangible personal property constituting the estate, wherever located, to the full extent of the court's jurisdiction; and
  - (c) Exclusive jurisdiction to determine all controversies relating to the collection, preservation, application and distribution of the estate and all claims against the receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties.
- (2) Notwithstanding subsection (1) of this section, if any part of the estate is subject to the jurisdiction of another court under ORS 107.105, the court appointing the receiver may not exercise authority over such part of the estate unless expressly permitted by order of the other court. [2017 c.358 §10]

**37.110 Powers of receiver.** (1) The court appointing a receiver may confer upon the receiver the power to perform any of the following actions, in any combination:

- (a) Collect, control, manage, conserve and protect estate property;
  - (b) Operate a business constituting estate property, including preservation, use, sale, lease, license, exchange, collection or disposition of property in the ordinary course of business;
  - (c) In the ordinary course of business, incur unsecured debt and pay expenses incidental to the receiver's preservation, use, sale, lease, license, exchange, collection or disposition of estate property;
  - (d) Assert a right, claim, cause of action or defense of the owner that relates to estate property;
  - (e) Assert in the name of the receiver any claim under ORS 95.200 to 95.310 assertible by any creditor of the owner;
  - (f) Seek and obtain instruction from the court concerning estate property, exercise of the receiver's powers and performance of the receiver's duties;
  - (g) On subpoena, compel a person to submit to examination under oath in the manner of a deposition in a civil case, or to produce and permit inspection and copying of designated records or tangible things, with respect to estate property or any other matter that may affect administration of the receivership;
  - (h) Engage and pay compensation to one or more professionals under ORS 37.310;
  - (i) Apply to a court of another state for appointment as ancillary receiver with respect to estate property in that state under ORS 37.390;
  - (j) Incur debt for the use or benefit of estate property other than in the ordinary course of business under ORS 37.260;
  - (k) Make improvements to estate property;
  - (L) Use or transfer estate property other than in the ordinary course of business under ORS 37.250;
  - (m) Assume an executory contract of the owner under ORS 37.240;
  - (n) Pay compensation to the receiver;
  - (o) Determine whether or not to establish a claims procedure under ORS 37.340;
  - (p) Allow or disallow a claim of a creditor under ORS 37.360;
  - (q) Make a distribution of estate property under ORS 37.370;
  - (r) Take any other action authorized under the Oregon Receivership Code; and
  - (s) Take any other actions that the court deems reasonably necessary to avoid injustice.
- (2) The court may limit, expand or modify the powers conferred by the court on the receiver at any time.
- (3) A receiver has powers conferred by the court under this section in addition to the powers conferred on the receiver by statute. [2017 c.358 §11]

**37.120 Duties of receiver.** (1) A receiver shall notify all federal and state taxing and applicable regulatory agencies of the receiver's appointment in accordance with any applicable laws imposing this duty, including 26 U.S.C. 6036.

(2) A receiver shall comply with applicable law.

[https://www.oregonlegislature.gov/bills\\_laws/ors/ors037.html](https://www.oregonlegislature.gov/bills_laws/ors/ors037.html)

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(3) If appointed with respect to any real property, a receiver shall file with the recorder of the county in which the real property is located a certified copy of the order of appointment, together with a legal description of the real property if one is not included in the order.

(4) The court appointing a receiver may impose additional duties on the receiver at any time. The court may limit, expand or modify duties imposed by the court on a receiver at any time. [2017 c.358 §12]

**37.130 Turnover of property.** (1) Upon demand by a receiver, a person shall turn over to the receiver any estate property within the possession, custody or control of the person.

(2) If a bona fide dispute exists over whether property is estate property, the court in which the receivership is pending shall resolve the dispute.

(3) A receiver may not demand a turnover of residential property without specific judicial approval, which the court may grant only in case of waste, destruction, obstruction of marketing of the property, enforcement of an order in a domestic relations suit or other good cause shown.

(4) If a creditor has possession or control of estate property and the validity, perfection or priority of the creditor's lien depends on the creditor's possession or control, the creditor may retain possession or control of the property until the court orders adequate protection of the creditor's lien. [2017 c.358 §13]

**37.140 Collection by receiver of debts owed to owner.** (1) Upon demand by a receiver, a person that owes a debt that is estate property and is matured or payable on demand shall pay the debt to the receiver, except to the extent that the debt is subject to setoff or recoupment.

(2) A person who has notice of the appointment of a receiver and owes a debt that is estate property may not satisfy the debt by payment to the owner. [2017 c.358 §14]

**37.150 Duties of owner.** (1) An owner shall:

(a) Assist and cooperate fully with the receiver in the administration of the estate and the discharge of the receiver's duties, and comply with all orders of the court;

(b) Supply to the receiver information necessary to enable the receiver to complete any schedules that the receiver is required to file under ORS 37.190, and otherwise assist the receiver in the completion of the schedules;

(c) Upon the receiver's appointment, deliver to the receiver all of the estate property in the person's possession, custody or control, including accounts, books, papers, records and other documents; and

(d) After the receiver's appointment, submit to examination under oath by the receiver, or by any other person upon order of the court, concerning the acts, conduct, property, liabilities and financial condition of the owner or any matter relating to the receiver's administration of the estate.

(2) When the owner is an entity, each officer, director, manager, member, partner or other individual exercising or having the power to exercise control over the affairs of the entity are subject to the requirements of this section. [2017 c.358 §15]

**37.160 Mailing and special notice lists to be maintained by receiver.** (1) A receiver shall maintain a master mailing list of the names and addresses of all parties to the receivership, all known creditors of the owner and interested persons who have filed notices of appearance in the receivership. The receiver shall make a copy of the current master mailing list available to any person on the list upon the person's request.

(2)(a) A receiver shall maintain a special notice list of the names and addresses of all parties to the receivership and any other person who requests to be placed on the list. The receiver shall make a copy of the current special notice list available to any person on the list upon the person's request.

(b) Any person on the special notice list may notify the receiver of the person's preferred means of receiving notices and other communications. If the receiver is so notified, the receiver shall add the information to the special notice list. [2017 c.358 §16]

**37.170 Notices.** (1)(a) Whenever a person is required to give notice under a provision of the Oregon Receivership Code, the person must:

(A) Serve notice on all persons specified by the provision;

(B) Serve notice on all persons on the special notice list;

(C) File notice with the court; and

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- (D) File proof of service with the court.
- (b) If the provision does not specify to whom notice must be given, the person must give notice to all known persons whose property interests will or may be directly affected by the proposed action, as well as comply with paragraph (a)(B) to (D) of this subsection.
- (2) Whenever a person is required to give notice under a provision of the Oregon Receivership Code, the person must give at least as much time notice as specified by the relevant provision, or 14 days if no time is specified.
- (3)(a) Except as otherwise provided, notice to any person not on the special notice list must be served by first class mail or as otherwise directed by the court.
- (b) Notice to any person on the special notice list who has specified a preferred means of receiving notice must be served by those means, except as otherwise ordered by the court.
- (4)(a) Except as provided in ORS 37.180, whenever a provision of the Oregon Receivership Code authorizes a person to take an action after giving notice, the person may take the action without specific authorization from the court if:
  - (A) The person gives notice that describes the action that the person will take unless an objection is filed and describes a procedure for objecting to the proposed action; and
  - (B) No objections are filed.
- (b) If an objection is filed, the court shall hear the objection and issue an order allowing, disallowing or allowing a modified form of the action.
- (c) The court may, on its own motion, require a hearing on any proposed action.
- (d) If a person is allowed under this subsection to take an action without specific authorization from the court, the person may nonetheless move the court for an order authorizing the action.
- (5) The court may extend or shorten any notice periods for good cause shown.
- (6) The court may order that notice of any proposed action be given to any person, regardless of whether such notice is otherwise required under the Oregon Receivership Code.
- (7) In all circumstances, the court may consider motions and grant or deny relief without notice or hearing, if it appears to the court that no party to the receivership or interested person would be prejudiced or harmed by the relief requested. [2017 c.358 §17]

**37.180 When court order required.** (1) A receiver may not take any of the following actions unless the receiver, after giving notice, obtains a court order specifically authorizing the action, except as provided in subsection (2) of this section:

- (a) Sale or other disposition of real property;
- (b) Use or transfer of property outside the ordinary course of business;
- (c) Sale of a co-owner's interest in jointly owned property;
- (d) Assumption of an executory contract;
- (e) Obtaining credit or incurring debt outside the ordinary course of business;
- (f) Compromise or settlement of a controversy that might affect the distribution to creditors from the estate;
- (g) Disallowance of all or part of a claim against the estate; and
- (h) Termination of the receivership.

(2) For any action described in subsection (1)(a) to (f) of this section, a court may establish conditions under which a receiver may take the action without first obtaining an order specifically authorizing the action, if the court finds that the burden of seeking a court order is likely to outweigh the materiality of the actions under those conditions. The court may establish such conditions in the order appointing the receiver or in any other order. [2017 c.358 §18]

**37.190 Creditor list and inventory.** (1) Within 60 days after appointment, or within such other time as the court may specify, a receiver shall file with the court a schedule of all known creditors of the owner, their last known mailing addresses, the amount and nature of their claims and whether their claims are disputed.

(2) If the court concludes that the estate is unlikely to be sufficient to make material distributions to unsecured creditors, the court may order that the receiver need not file a schedule as described in subsection (1) of this section. The court may order the receiver to file a schedule of any appropriate subset of creditors.

(3) Within 60 days after appointment, or within such other time as the court may specify, a receiver shall file with the court a true inventory of all estate property of which the receiver has taken possession, custody or

control, except that the inventory need not include legal claims that are estate property. [2017 c.358 §19]

**37.200 Receiver's periodic reports.** (1) A receiver shall file with the court a monthly report of the receiver's operations and financial affairs, unless the court orders a different reporting period. The receiver shall file each report no later than 30 days after the end of a reporting period. The initial report under this section must be filed no later than 60 days after the receiver is appointed, unless the court orders a different deadline.

(2) Each periodic report must include:

- (a) A concise narrative summary of the receiver's activities during the period and a description of any major upcoming events;
- (b) Beginning and ending cash balances;
- (c) A statement of cash receipts and disbursements;
- (d) A statement of noncash receipts and payments;
- (e) A statement of receipts and dispositions of estate property outside the ordinary course of business, including a description of the property, the value of the property and the amounts received from any disposition of the property;
- (f) A statement of accounts receivable;
- (g) A statement of fees and expenses of the receiver;
- (h) A tax disclosure statement listing taxes due or tax deposits required, the name of the taxing agency, the date due and an explanation for any failure to make payments or deposits; and
- (i) Any other information required by the court. [2017 c.358 §20]

**37.210 Claims bar date.** A receiver may, after providing notice to all known creditors of the owner, set a deadline for the submission of claims by creditors. The receiver, upon court order, may disallow any claims submitted after the deadline. [2017 c.358 §21]

**37.220 Automatic stay of certain proceedings.** (1) Except as otherwise ordered by the court, the entry of an order appointing a receiver operates as a stay, applicable to all persons, of:

- (a) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative or other action or proceeding against the owner that was or could have been commenced before the entry of the order of appointment, or to recover a claim against the owner that arose before the entry of the order of appointment;
  - (b) The enforcement, against the owner or any estate property, of a judgment entered before the entry of the order of appointment;
  - (c) Any act to obtain possession of estate property from the receiver, or to interfere with, or exercise control over, estate property;
  - (d) Any act to create, perfect or enforce any lien or claim against estate property, to the extent that the lien secures a claim against the owner that arose before the entry of the order of appointment;
  - (e) Any act to collect, assess or recover a claim against the owner that arose before the entry of the order of appointment; or
  - (f) The exercise of a right of setoff against the owner.
- (2) The stay automatically expires as to the acts specified in subsection (1)(a), (b) and (e) of this section six months after the entry of the order of appointment, unless the stay is extended by court order.
- (3) A person whose action or proceeding is stayed may move the court for relief from the stay, and the court shall grant such relief for good cause shown. A motion for relief from stay under this subsection is deemed granted if the court does not act on the motion within 60 days after the motion is filed. A person may move the court ex parte for an expedited hearing on a motion for relief from stay.
- (4) Any judgment obtained against the owner or estate property after entry of the order of appointment is not a lien against estate property unless the receivership is terminated before a conveyance of the property against which the judgment would otherwise constitute a lien.
- (5) The entry of an order appointing a receiver does not operate as a stay of:
- (a) The continuation of a judicial or nonjudicial foreclosure action that was initiated by the party seeking the receiver's appointment, unless otherwise ordered by the court;
  - (b) The commencement or continuation of a criminal action against the owner;

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- (c) The commencement or continuation of an action or proceeding to establish paternity, to establish or modify an order for spousal or child support or to collect spousal or child support under any order of a court;
- (d) Any act to perfect, or to maintain or continue the perfection of, an interest in estate property if the interest perfected would be effective against a creditor of the owner holding at the time of the entry of the order of appointment either a perfected nonpurchase money security interest under ORS chapter 79 against the property, or a lien by attachment, levy or the like, including liens under ORS chapter 87, whether or not such a creditor exists, except that if perfection of an interest would require seizure of the property involved or the commencement of an action, the perfection may and must instead be accomplished by filing and serving on the receiver notice of the interest within the time fixed by law for seizure or commencement;
- (e) The commencement or continuation of an action or proceeding by a governmental unit to enforce its police or regulatory power;
- (f) The enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce its police or regulatory power, or with respect to any licensure of the owner; or
- (g) The establishment by a governmental unit of any tax liability and any appeal thereof.
- (6) The court may void an act that violates the stay imposed by this section.
- (7) If a person knowingly violates the stay imposed by this section, the court may:
  - (a) Award actual damages caused by the violation, reasonable attorney fees and costs; and
  - (b) Sanction the violation as civil contempt.
- (8) The stay described in this section expires upon the termination of the receivership. [2017 c.358 §22]

**37.230 Utility service.** (1) A utility providing service to estate property may not alter, refuse or discontinue service to the property without first giving the receiver 14 days' notice of any default or intention to alter, refuse or discontinue service to estate property.

(2) Nothing in this section precludes the court from prohibiting the alteration or cessation of utility service if the receiver can furnish adequate assurance of payment, in the form of deposit or other security, for service to be provided after entry of the order appointing the receiver. [2017 c.358 §23]

**37.240 Executory contracts.** (1) A receiver may, upon order of the court, assume any executory contract of the owner. A receiver may, after giving notice, reject any executory contract of the owner. The court may condition assumption or rejection of any executory contract on terms and conditions that the court deems just and proper. A receiver's performance of an executory contract does not constitute an assumption of the contract or an agreement by the receiver to assume it, nor otherwise preclude the receiver from rejecting it.

(2) If a receiver assumes an executory contract, the receiver must assume the contract in its entirety.

(3) Any obligation or liability incurred by a receiver due to the receiver's assumption of an executory contract is an expense of the receivership. A receiver's rejection of an executory contract is treated as a breach of the contract occurring immediately before the receiver's appointment, and the receiver's right to possess or use property pursuant to an executory contract terminates upon rejection of the contract. The other party to an executory contract that is rejected by a receiver may take any necessary steps to terminate or cancel the contract. Any claims resulting from a receiver's rejection of an executory contract must be submitted to the receiver in the manner provided for by ORS 37.350 within 30 days after the rejection.

(4) A receiver's power under this section to assume an executory contract is not affected by any provision in the contract that would effect or permit a forfeiture, modification or termination of the contract on account of the receiver's appointment, the financial condition of the owner or an assignment for the benefit of creditors by the owner.

(5) A receiver may not assume an executory contract of the owner without the consent of the other party to the contract if:

(a) Applicable law would excuse the other party from accepting performance from or rendering performance to anyone other than the owner even in the absence of any provisions in the contract expressly restricting or prohibiting an assignment of rights or duties;

(b) The contract is a contract to make a loan or extend credit or financial accommodations to or for the benefit of the owner, or to issue a security of the owner; or

(c) The contract expires by its own terms, or under applicable law, prior to the receiver's assumption thereof.

(6) A receiver may not assign an executory contract lease without assuming it, unless the receiver obtains consent from all other parties to the contract.



(7) If the receiver rejects an executory contract for the sale of real property under which the owner is the seller and the purchaser is in possession of the real property, the sale of a real property timeshare interest under which the owner is the seller, the license of intellectual property rights under which the owner is the licensor or the lease of real property under which the owner is the lessor, then:

(a) The purchaser, licensee or lessee may:

(A) Treat the rejection as a termination of the contract, license agreement or lease; or

(B) Remain in possession and continue to perform all obligations arising under the contract, but offset against any payments any damages occurring on account of the rejection after it occurs.

(b) A purchaser of real property is entitled to receive from the receiver any deed or any other instrument of conveyance that the owner is obligated to deliver under the contract when the purchaser becomes entitled to receive it, and the deed or instrument has the same force and effect as if given by the owner.

(c) A purchaser, licensee or lessee who elects to remain in possession under the terms of this subsection has no claim or rights against the receiver on account of any damages arising from the receiver's rejection except as expressly permitted by this subsection.

(d) A purchaser of real property who elects to treat rejection of an executory contract as a termination has a lien against the real property for the portion of the purchase price that the purchaser has paid.

(8)(a) If a receiver does not seek authorization from the court to assume an executory contract within 180 days after the receiver's appointment, the receiver is deemed to have rejected the contract.

(b) The court may shorten or extend the time period described in paragraph (a) of this subsection for good cause shown.

(9) Nothing in this section affects the enforceability of prohibitions against assignment that exist under contract or applicable law. [2017 c.358 §24]

**37.250 Use or transfer of estate property outside ordinary course of business; transfer of co-owned property; limitation on disposition of residential property.** (1) Upon court order, a receiver may use estate property outside the ordinary course of business.

(2) Upon court order, a receiver may transfer estate property other than in the ordinary course of business by sale, lease, license, exchange or other disposition. Unless the transfer agreement provides otherwise, a transfer under this section is free and clear of a lien of the person that obtained appointment of the receiver, any subordinate liens and any right of redemption, but is subject to any senior liens. A transfer under this section may occur by means other than a public auction sale. On motion by any party or interested person, the court may prescribe standards or procedures calculated to maximize the proceeds of the transfer.

(3) If a lien on estate property is extinguished by a transfer under this section, the lien attaches to the proceeds of the transfer with the same validity, perfection and priority that the extinguished lien had on the transferred property immediately before the transfer, regardless of whether the proceeds are sufficient to satisfy all obligations secured by the lien.

(4) A creditor holding a valid lien on the property to be transferred may purchase the property and offset against the purchase price all or part of the allowed amount secured by the lien, if the creditor tenders sufficient funds to satisfy the reasonable expenses of transfer and any obligation secured by any senior lien extinguished by the transfer.

(5) A reversal or modification of an order authorizing a transfer under this section does not affect the validity of the transfer to a person that acquired the property in good faith or revive against any person any lien extinguished by the transfer, regardless of whether the transferee knew of the request for reversal or modification before the transfer, unless the court stayed the order before the transfer.

(6) If estate property includes an interest as a co-owner of property, the receiver has all rights and powers of a co-owner afforded by applicable law, including any rights of partition.

(7) If at the time of appointment of a receiver an owner holds an undivided interest in property as a tenant in common, joint tenant or tenant by the entirety, the receiver may sell both the interest that is estate property and the interest of any co-owner upon court order if the court determines that:

(a) Partition in kind of the property is impracticable;

(b) Sale of the estate's undivided interest in the property would realize significantly less for the estate than sale of the property free and clear of the interests of the co-owner; and

(c) The benefit to the estate of the sale outweighs the detriment, if any, to the co-owner.

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(8) A receiver may not sell, transfer or otherwise dispose of residential property, or an undivided interest therein, without specific judicial approval, which a court may grant only in case of waste, destruction, obstruction of marketing of the property, enforcement of an order in a domestic relations suit or other good cause shown.

(9) As used in this section, "good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing. [2017 c.358 §25]

**37.260 Receivership financing.** (1) If a receiver is authorized to operate the business of a person or manage a person's property, the receiver may obtain credit and incur debt in the ordinary course of business. Expenses related to such credit and debt are allowable under ORS 37.370 as an administrative expense of the receiver.

(2) Upon court order, a receiver may obtain credit or incur debt other than in the ordinary course of business. The court may allow the receiver to mortgage, pledge, hypothecate or otherwise encumber estate property as security for repayment of any debt incurred under this subsection. A creditor's security interest may be in the form of a receiver's certificate. [2017 c.358 §26]

**37.270 Recovery of costs related to secured property.** A receiver may recover from property securing a secured claim the necessary costs and expenses of preserving, or disposing of, the property to the extent of any benefit to the holder of such claim, including the payment of all ad valorem property taxes with respect to the property. [2017 c.358 §27]

**37.280 Abandonment of property.** (1) A receiver, after giving notice, may abandon estate property that is burdensome to the receiver or is of inconsequential value or benefit. Property that is abandoned no longer constitutes estate property.

(2) A receiver may not abandon property in contravention of a state statute or rule that is reasonably designed to protect the public health or safety from identified hazards, including ORS chapters 465 and 466. [2017 c.358 §28]

**37.290 Actions by or against receiver or affecting estate property.** (1) A person may not sue a receiver personally for an act or omission in administering estate property unless permitted by the court that appointed the receiver.

(2) A person may not initiate or continue an action seeking to dispossess the receiver of any estate property or to otherwise interfere with the receiver's management or control of any estate property unless permitted by the court that appointed the receiver.

(3) Actions by or against a receiver are adjunct to the receivership. All pleadings in adjunct actions must include the case number of the receivership. All adjunct actions shall be referred to the judge assigned to the receivership action, unless:

- (a) The court does not have jurisdiction over the adjunct action; or
- (b) The assignment would not promote judicial efficiency.

(4) If an action is filed against a receiver in a court in this state other than the court in which the receivership is pending, the court in which the action is filed shall transfer the action to the court in which the receivership is pending upon the receiver's motion if the receiver files the motion within 30 days after service of original process upon the receiver. However, if a state agency is a party to the action, the action may not be transferred under this subsection unless the agency consents to the transfer.

(5) The receiver may be joined or substituted as a party in any action that was pending at the time of the receiver's appointment and in which the owner is a party, upon motion by the receiver to the court or agency in which the action is pending.

(6) In case of the death, removal or resignation of the receiver, an action by or against a receiver continues by or against the successor receiver or, if a successor receiver is not appointed, by or against the owner.

(7) Whenever the assets of any domestic or foreign entity that has been doing business in this state have been placed in the hands of a receiver, service of all process upon the entity may be made upon the receiver.

(8) A judgment against a receiver is not a lien on the property or funds of the receivership, and no execution may issue thereon. Upon entry of the judgment in the court in which the receivership is pending, or upon filing in the receivership of a certified copy of a judgment from another jurisdiction, the judgment is treated as an allowed claim in the receivership.

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(9) No person other than a successor receiver duly appointed by the court has a right of action against a former receiver to recover property or the value thereof for or on behalf of the estate. [2017 c.358 §29]

**37.300 Personal liability of receiver.** (1) A receiver may be personally liable to the owner, or a record or beneficial owner of estate property, for loss or diminution in value of or damage to estate property only if the loss, diminution or damage is caused by:

- (a) Failure of the receiver to comply with an order of the court; or
- (b) An act or omission for which liability could not be limited under ORS 60.047 if the receiver were an Oregon corporation.

(2) A receiver may be personally liable to a person other than the owner, or the record or beneficial owner of estate property, for any loss, diminution or damage caused by the receiver's performance of the receiver's duties, or the receiver's authorized operation of a business, only if the loss, diminution or damage is caused by:

- (a) Fraud by the receiver;
- (b) An act intended by the receiver to cause loss, diminution or damage to the specific claimant; or
- (c) An act or omission for which an officer or director of an Oregon corporation would be liable to the claimant under the same circumstances.

(3) Notwithstanding subsections (1) and (2) of this section, a receiver has no personal liability to any person for acts or omissions of the receiver permitted by any order of the court.

(4) A receiver is entitled to all defenses and immunities provided by law for an act or omission within the scope of the receiver's appointment.

(5) Nothing in this section may be construed to expand any obligation or liability of a receiver under state law, common law or federal law for remediation of environmental damages or hazards. [2017 c.358 §30]

**37.310 Employment and compensation of professionals.** (1) After giving notice, a receiver may employ attorneys, accountants, appraisers, brokers, real estate licensees, auctioneers or other professionals to represent or assist the receiver in carrying out the receiver's duties.

(2) The notice given by the receiver before employing a professional must disclose:

- (a) The identity and qualifications of the professional;
- (b) The scope and nature of the proposed engagement;
- (c) Any potential conflict of interest; and
- (d) The proposed compensation.

(3) If an objection is filed after the receiver provides notice of the professional's employment, the professional may continue to perform the professional's duties while the objection is pending.

(4)(a) A receiver may not employ a professional who holds or represents an interest adverse to the estate, except by order of the court.

(b) A professional is not disqualified for employment under this subsection solely because of the professional's employment by, representation of or other relationship with a creditor or other interested person, if the relationship is disclosed in the notice of the professional's employment.

(5) Nothing in this section precludes the receiver from acting as attorney or accountant if doing so is in the best interests of the estate.

(6) After giving notice, the receiver may make payments to professionals for services rendered to the receiver. The notice must include an itemized billing statement indicating the time spent, billing rates of all persons who performed work to be compensated and a detailed list of expenses. [2017 c.358 §31]

**37.320 Participation of creditors and other interested persons in receivership; effect of receivership on nonparties.** (1) Any interested person may appear in a receivership, either in person or by an attorney. Before appearing in the receivership, an interested person who is not party to the receivership must file with the court a written notice of appearance, including the name and mailing address of the interested person, and the name and address of the person's attorney, if any, and serve a copy of the notice upon the receiver. A creditor or other interested person may be heard with respect to all matters affecting the person, whether or not the person is joined as a party to the receivership.

(2) Persons who receive notice of the pendency of a receivership, whether actual or constructive, and creditors or other persons submitting written claims in the receivership or otherwise appearing and participating



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in the receivership, are bound by the acts of the receiver with respect to management and disposition of estate property, regardless of whether they are formally joined as parties to the receivership.

(3) Any person having a claim against or interest in estate property and having actual or constructive knowledge of the receivership is bound by acts of the receiver or orders of the court with respect to the treatment of claims and disposition of estate property, including sales of property free and clear of liens, regardless of whether the person receives written notice from the receiver and regardless of whether the person appears in the receivership.

(4) A person duly notified by the receiver of a proposed act by the receiver is bound with respect to the act, regardless of whether the person objected to the act or is joined formally as a party in the receivership.

(5) As used in this section, "bound" means barred from bringing a motion or proceeding to contest an act or order, either within or outside of the receivership. [2017 c.358 §32]

**37.330 Initial notice to creditors and other interested persons.** (1) A receiver shall, within 30 days after the receiver's appointment, provide notice of the receivership to all known creditors of the owner and any other known interested persons that includes:

- (a) The date of appointment of the receiver;
- (b) The name of the court and the case number of the receivership;
- (c) The deadline for the submission of claims by creditors, if known;
- (d) The name and address of the owner;
- (e) The name and address of the receiver and receiver's attorney, if any;
- (f) A procedure for notifying the receiver if the recipient is represented by an attorney;
- (g) A procedure for being placed on the special notice list; and
- (h) A statement that the person may not receive notice of all further proceedings in the receivership unless the person requests to be placed on the special notice list.

(2) The notice required under this section must be given by first class mail or by such other methods as the court may approve or require.

(3) In addition to the methods described in subsection (2) of this section, the notice required under this section must be published at least once per week for two consecutive weeks in a newspaper of general circulation in all counties in which estate property is known to be located. [2017 c.358 §33]

**37.340 Claims process.** (1) If a receiver determines that the estate is sufficient to provide distributions to creditors, the receiver shall, upon notice, establish a claims process by sending a written document describing a claims process, including relevant dates and deadlines, to all known creditors of the owner. The receiver may prescribe forms or otherwise specify information required to be included in a claim.

(2) If the receiver determines that the estate is insufficient to provide distributions to creditors, the receiver may give notice that no claims process will take place in the receivership. [2017 c.358 §34]

**37.350 Submission of claims by creditors.** (1) Claims may not be submitted until a claims process is established under ORS 37.340.

(2) All claims that arose before the receiver's appointment, whether contingent, liquidated, unliquidated or disputed, other than claims of creditors with security interests in or other liens against estate property, must be submitted in accordance with this section. Any claim not so submitted is barred from participating in any distribution to creditors.

(3) Claims must be submitted by delivering the claim to the receiver or an agent designated by the receiver within 30 days after the claims process is established, except that a claim arising from the rejection of an executory contract of the owner must be submitted within 30 days after the rejection. Claims by state agencies must be submitted within 180 days after the claims process is established. The court may shorten or extend any time period set forth in this subsection.

(4) Claims must be submitted in a form prescribed by the receiver. If no form is prescribed, claims must be in written form and must:

- (a) Include the name and address of the claimant;
- (b) Set forth the nature and amount of the claim;
- (c) Be executed by the claimant or the claimant's agent; and
- (d) Include any other information required by the receiver.

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(5) Claims may not be filed with the court. If a claim is incorrectly filed with the court, the court shall forward the claim to the receiver or an agent designated by the receiver.

(6) A claim executed and submitted in accordance with this section constitutes prima facie evidence of the validity and amount of the claim. [2017 c.358 §35]

**37.360 Objection to and allowance of claims.** (1)(a) At any time before the entry of an order approving the receiver's final report, a receiver may, upon court order and after at least 21 days' notice, disallow a claim. The notice must set forth the grounds for the disallowance.

(b) At any time before the entry of an order approving the receiver's final report, any interested person may object to a claim. The objector must mail a copy of the objection, together with a notice of hearing, to the receiver and claimant at least 21 days before the hearing. The court shall hear the objection and enter an order allowing or disallowing the claim.

(2) Upon request of a creditor, the receiver or a person objecting to a creditor's claim, or upon order of the court, an objection is subject to mediation before adjudication of the objection, under the rules or orders adopted or issued with respect to mediations. However, claims by the state are not subject to mediation unless the state consents to mediation.

(3) Upon motion of the receiver or an interested person, the following claims may be estimated for purpose of allowance under this section under the rules or orders applicable to the estimation of claims under this subsection:

(a) Any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the receivership; or

(b) Any right to payment arising from a right to an equitable remedy for breach of performance.

(4) Claims estimated under subsection (3) of this section are allowed in the estimated amount thereof. [2017 c.358 §36]

**37.370 Priorities.** (1) Allowed claims in a receivership receive distribution under the Oregon Receivership Code in the order of priority set forth in this subsection.

(a) The first priority is unpaid costs and expenses allowable under ORS 37.270.

(b) The second priority is claims of creditors with liens on estate property that are duly perfected under applicable law. Such creditors receive the proceeds from the disposition of their collateral. Secured claims must be paid from the proceeds in accordance with their respective priorities under otherwise applicable law.

(c) The third priority is actual, necessary costs and expenses incurred during the administration of the estate, other than those expenses allowable under subsection (2) of this section, including allowed fees and reimbursement of reasonable charges and expenses of the receiver and professional persons employed by the receiver under ORS 37.310. Notwithstanding paragraph (b) of this subsection, expenses incurred during the administration of the estate have priority over the secured claim of any creditor obtaining the appointment of the receiver.

(d) The fourth priority is claims to which 31 U.S.C. 3713 applies.

(e) The fifth priority is claims of creditors with liens on estate property that are not required to be perfected under applicable law. Such creditors receive the proceeds of the disposition of their collateral.

(f) The sixth priority is claims of creditors with liens on estate property that have not been duly perfected under applicable law. Such creditors receive the proceeds from the disposition of their collateral if and to the extent that unsecured claims are made subject to those liens under applicable law.

(g) The seventh priority is claims for wages, salaries or commissions, including vacation, severance and sick leave pay, or contributions to an employee benefit plan, earned by the claimant within 180 days of the earlier of the date of appointment of the receiver and the cessation of the estate's business, but only to the extent of \$12,850 in aggregate for each claimant.

(h) The eighth priority is unsecured claims of individuals, to the extent of \$2,850 for each claimant, arising from the deposit with the owner before the date of appointment of the receiver of moneys in connection with the purchase, lease or rental of property or the purchase of services for personal, family or household use that were not delivered or provided.

(i) The ninth priority is claims for a spousal support debt or child support debt, except to the extent that the debt:

(A) Is assigned to another entity, voluntarily, by operation of law, or otherwise; or

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(B) Includes a liability designated as a support obligation, unless that liability is actually in the nature of a support obligation.

(j) The tenth priority is unsecured claims of state governmental units for taxes that accrued before the appointment of the receiver.

(k) The eleventh priority is other unsecured claims.

(L) The last priority is interests of the owner.

(2) If the proceeds from the disposition of collateral securing an allowed secured claim are less than the amount of the claim or a creditor's lien is avoided on any basis, the creditor has an unsecured claim in the amount of the deficiency.

(3) Except for claimants described in subsection (1)(b) and (d) of this section, claimants receive distributions on a pro rata basis.

(4) If all of the claims under subsection (1) of this section have been paid in full, the receiver shall pay any residue to the owner. [2017 c.358 §37]

**37.380 Secured claims against after-acquired property.** Property acquired by the estate or by the owner after the date of appointment of the receiver is subject to an allowed secured claim to the same extent as would be the case in the absence of a receivership. [2017 c.358 §38]

**37.390 Ancillary receiverships.** (1) A receiver appointed in any action pending in the courts of this state may, upon court order, apply to any court outside of this state for appointment as receiver with respect to any estate property that is located in any other jurisdiction, if the appointment is necessary to the receiver's possession, control, management or disposition of property in accordance with orders of the court. The receiver may move the court ex parte for an expedited hearing on a motion for leave to apply for an ancillary receivership.

(2) A receiver appointed in a foreign action, or any party to the foreign action, may move a court of this state for appointment of that same receiver with respect to any property of the foreign receivership that is located in this state. The court shall act on the motion as provided in ORS 37.060 (3). A receiver appointed in an ancillary receivership in this state is subject to the requirements imposed on receivers by statutes of this state, except as expressly exempted by the court. [2017 c.358 §39]

**37.400 Removal of receiver.** (1) On motion of the owner, the receiver or any creditor, or on the court's own motion, the court shall remove a receiver if the receiver resigns or refuses or fails to serve for any reason, or for other good cause.

(2) Upon removal of the receiver, the court shall appoint a successor receiver if the court determines that further administration of the estate is required. Upon appointment, the successor receiver immediately takes possession of the estate and assumes the duties of receiver.

(3) If the court is satisfied that a replaced receiver has fully accounted for and turned over to the successor receiver all of the property of the estate and has filed a report of all receipts and disbursements during the person's tenure as receiver, the court shall, after notice to all persons on the special notice list and hearing, enter an order discharging the replaced receiver from all further duties and responsibilities as receiver. [2017 c.358 §40]

**37.410 Termination of receivership.** (1) Upon distribution or disposition of all property of the estate or the completion of the receiver's duties with respect to estate property, or for other good cause, the receiver shall move the court for an order discharging the receiver.

(2) The receiver shall attach to the motion for discharge a final report and accounting setting forth:

(a) A list of estate property received during the receivership;

(b) A list of disbursements, including payments to professionals engaged by the receiver;

(c) A list of dispositions of estate property;

(d) A list of distributions made or proposed to be made from the estate for creditor claims;

(e) If not filed separately, a request for approval of the payment of fees and expenses of the receiver; and

(f) Any other information required by the court.

(3) If the court approves the final report and accounting, the court shall discharge the receiver. The court may issue an order exonerating the receiver's bond or alternative security.

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- (4) The receiver's discharge:
- (a) Releases the receiver from any further duties and responsibilities under the Oregon Receivership Code; and
- (b) Releases the receiver and any persons acting on behalf of the receiver from all further liability in connection with the administration of estate property or the receivership.
- (5) Upon motion of any interested person, or upon the court's own motion, the court may discharge the receiver and terminate the court's administration of the property over which the receiver was appointed.
- (6) Upon termination of the receivership under any circumstances, if the court determines that the appointment of the receiver was wrongfully procured or procured in bad faith, the court may assess against the person who procured the receiver's appointment all of the receiver's fees and other costs of the receivership, and any other sanctions the court deems appropriate. [2017 c.358 §41]

CHAPTERS 38 AND 39 [Reserved for expansion]\_\_\_\_\_

**EXHIBIT B**  
**ORDER APPOINTING RECEIVER**

The Honorable Ken Schubert

**FILED**  
KING COUNTY, WASHINGTON

AUG 01 2014

SUPERIOR COURT CLERK

DEPUTY

SUPERIOR COURT OF WASHINGTON  
FOR KING COUNTY

RAYMOND BERO, an individual,

Plaintiff,

v.

NAME INTELLIGENCE, INC., a Washington  
corporation; JAY WESTERDAL, an  
individual; WESTERDALCORP LLC, a  
Washington limited liability company; and  
PER WESTERDAL and MELODY  
WESTERDAL, individually and the marital  
community composed thereof;

Defendants.

NO. 13-2-25989-3 SEA

ORDER APPOINTING GENERAL  
RECEIVER

[Proposed] *pu*

For good cause shown, and pursuant to RCW Chapter 7.60, the Court grants Plaintiff's  
Application for Appointment of General Receiver and makes the following Findings and  
enters the following Order:

**I. FINDINGS**

**The Receivership Property**

1.1 The plaintiff is Raymond Bero ("Plaintiff," "Lender," or "Beneficiary").

ORDER APPOINTING GENERAL RECEIVER - 1  
#941274 v1 / 33363-005

KARR TUTTLE CAMPBELL  
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Fax: (206) 682 7100

**ORIGINAL**

1.2 The defendants are Name Intelligence, Inc., a Washington corporation ("NI"), Westerdalcorp LLC, a Washington limited liability company ("Westerdalcorp"), and Jay Westerdal, an individual ("Westerdal").

1.3 The receivership property consists of certain pledged real and personal property of Defendants NI, Westerdalcorp and Westerdal (collectively, the "Property") as follows:

1.3.1 The real property commonly known as 1845 W. Mercer Way, Mercer Island, WA 98040, which is a residence and which is legally described in the attached Exhibit A.

1.3.2 The personal property of NI described in the attached Exhibit B.

1.3.3 The personal property of Westerdalcorp described in the attached Exhibit C.

1.3.4 All of Westerdal's stock, shares and membership interests in NI and Westerdalcorp.

#### Secured Obligations

##### *Note, Security Agreements & Deed of Trust*

1.4 Plaintiff, Westerdal and NI are parties to a Settlement Agreement, dated June 14, 2012 (the "Settlement Agreement") and Plaintiff and NI are parties to a related Promissory Note, dated June 14, 2012, in the principal amount of \$2,500,000.00 (the "Note"), which provides for payment of the principal according to the following schedule:

<u>Date of Payment</u>	<u>Amount of Payment</u>
October 31, 2012	\$500,000.00
June 12, 2013	\$500,000.00
June 12, 2014	\$750,000.00
June 12, 2015	\$750,000.00

NI's obligations under the Note are unconditionally guaranteed by Westerdal and Westerdalcorp pursuant to a Guaranty dated June 14, 2012 (the "Guaranty"). The Note,

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1 Settlement Agreement, Guaranty, Security and Pledge Agreement, Security Agreement,  
2 Pledge Agreement and other related documents entered into by the parties thereto on June 14,  
3 2012 in connection with the Settlement Agreement shall be referred to collectively herein as  
4 the "Settlement Documents."

5 1.5 The Note and Guaranty are secured by, among other things:

6 1.5.1 Deed of Trust from Westerdalcorp, dated June 14, 2012, recorded under  
7 Recording No. 20120618001379, records of King County, Washington ("Deed of Trust");

8 1.5.2 Security Agreement from NI, dated June 14, 2012 (the "Security  
9 Agreement");

10 1.5.3 Security and Pledge Agreement from Westerdal and Westerdalcorp,  
11 dated June 14, 2012 (the "Security and Pledge Agreement")

12 1.5.4 Pledge Agreement from Westerdal, dated June 14, 2012 (the "Pledge  
13 Agreement");

14 1.6 Plaintiff is the holder of and is in possession of the Note. Plaintiff is the  
15 beneficiary and secured party under the Deed of Trust.

16 *Secured Obligations & Valid and Perfected Security Interest*

17 1.7 The Deed of Trust, the Guaranty, the Security Agreement, the Security and  
18 Pledge Agreement and the Pledge Agreement secure monetary and non-monetary obligations  
19 of the Defendants to Plaintiff arising under the Settlement Agreement and the Note  
20 (collectively, the "Secured Obligations").

21 1.8 Based on the Deed of Trust, Plaintiff has a valid and perfected lien on and  
22 security interest in the real property described in paragraph 1.3.1.

23 1.9 Plaintiff has a valid perfected interest in the personal property described in  
24 paragraphs 1.3.2, 1.3.3 and 1.3.4 based on UCC Financing Statements filed with the  
25 Washington Department of Licensing, Nos. 2012-171-2660-0, 2012-171-2650-1 and 2012-  
26 171-2639-6.

27 ORDER APPOINTING GENERAL RECEIVER - 3  
28 #941274 v1 / 33363-005

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*Grounds for Appointment of Receiver Pursuant to RCW 7.60.025*

1.10 NI and Westerdal are in default on the Secured Obligations, including the following:

1.10.1 Failure to make a timely installment payment due under the Note on June 12, 2013. See Order Granting Plaintiff's Motion for Partial Summary Judgment, ¶ 5(d). On March 5, 2014, the Court entered Judgment in the total amount of \$1,427,630.33 on the Order Granting Plaintiff's Motion for Partial Summary Judgment. As used herein, the term "Judgment" means the amount awarded Plaintiff in the judgment entered on March 5, 2014, together with interest and any further monetary awards, attorney fees (including awards in connection with any appeals) and any sanctions or other amounts that might be entered in favor of Plaintiff in this case. Subsequently, on April 3, 2014, Bero entered a Partial Satisfaction of Judgment, which reduced the unsatisfied balance on the Judgment to \$1,326,954.04 as of that date. Interest continues to accrue on the Judgment at a rate of 6.25% per annum.

1.11 The appointment of a receiver is authorized by the Security and Pledge Agreement, which provides on page 6 that Plaintiff's remedies upon default include the right to :

Have a receiver appointed by any court of competent jurisdiction to take possession of the Collateral. Pledgor and Company hereby consent to the appointment of such a receiver and agrees not to oppose any such appointment.

1.12 The appointment of a receiver is also authorized by the Security Agreement, which provides on page 7 that Plaintiff's remedies upon default include the right to :

Have a receiver appointed by any court of competent jurisdiction to take possession of the Collateral. Pledgor and Company hereby consent to the appointment of such a receiver and agrees not to oppose any such appointment.

ORDER APPOINTING GENERAL RECEIVER - 4  
#941274 v1 / 33363-005

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1.13 The appointment of a receiver is further authorized by Pledge Agreement, which provides on page 7-8 that Plaintiff's remedies upon default include:

... to the maximum extent permitted by law, to exercise all voting, consensual and other powers of ownership pertaining to the Collateral as if Secured Party were the sole and absolute owner of the Collateral (and Pledgors and the Company agree to take all such action as may be appropriate to give effect to such right).

1.14 Grounds exist under RCW 7.60.025(1)(a) for the appointment of a receiver because Plaintiff has established an interest in the Property, and the Property is in the possession of the Defendants.

1.15 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(a) because the Property or its revenue-producing potential is in danger of being lost or materially injured or impaired.

1.16 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(b)(i) because Plaintiff has commenced a judicial proceeding to foreclose upon its lien against the Property in this action, Plaintiff's interest in the Property is probable, and the Property or its revenue-producing potential is in danger of being lost or materially injured or impaired.

1.17 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(b)(ii) because Plaintiff has commenced a judicial proceeding to foreclose upon its lien against the Property in this action, Plaintiff's interest in the Property is probable, and the Defendants contractually agreed in the Security Agreement, Security and Pledge Agreement and Pledge Agreement to the appointment of a receiver upon an event of default, and such event has occurred.

1.18 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(c) in order to give effect to this Court's Judgment on Plaintiff's Motion for Partial Summary Judgment.

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1.19 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(e) to preserve or protect the Property, or prevent its transfer, because collateral has previously been sold without notice to Plaintiff.

1.20 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(i) because NI, Westerdal and Westerdalcorp are not paying their debts as they come due or are in imminent danger of insolvency. NI, Westerdal and Westerdalcorp have not made a payment on the Judgment since entry of the Partial Satisfaction of Judgment on April 3, 2014, which reduced the unsatisfied balance on the Judgment to \$1,326,954.04, notwithstanding their representation that they will "work as aggressively as possible to satisfy the Judgment." NI has not made payments sufficient to satisfy its undisputed obligations on the Note *before* default and acceleration, which required a reduction of the principal balance to \$750,000 by June 12, 2014.

1.21 Grounds exist for the appointment of a receiver under RCW 7.60.025(1)(nn) because a receiver is necessary to secure ample justice to the parties.

1.22 The appointment of a receiver for the Property is reasonably necessary, and other available remedies are inadequate or unavailable. The best interests of Plaintiff and the other creditors of NI and Westerdalcorp will be served by the appointment of a receiver under the terms provided for in this Order. Under the circumstances, the appointment of a receiver is necessary to secure ample justice and to safeguard the Property.

#### The Receiver

1.23 Resource Transition Consultants, LLC ("Receiver") has no separate interest in this action, and is eligible and qualified to act as a receiver of the Property under RCW 7.60.035.

#### Notice

1.24 Defendants were provided with good and sufficient notice of Plaintiff's application for this Order and such notice afforded Defendants a reasonable opportunity to

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object or be heard with respect to the matters that are the subject of this Order, and no other notice is required.

**II. ORDER**

For good cause shown, the Court concludes that a general receiver should be appointed pursuant to Chapter 7.60, RCW. Accordingly,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

**Appointment of Receiver**

2.1 Resource Transition Consultants, LLC ("Receiver") is appointed as general receiver over the Property, with authority to take possession and control, and to manage, operate, market, and sell the Property, wherever located. Receiver is authorized to act by and through its officers, agents, and employees. Entry of this Order, countersigned by Receiver, evidences Receiver's acceptance of its rights and duties hereunder and constitutes administration of any required oath of office.

2.2 Pursuant to RCW 7.60.055, the Court has exclusive authority over Receiver, exclusive possession and right of control with respect to the Property with respect to which Receiver is appointed, wherever located, and exclusive jurisdiction to determine all controversies relating to the collection, preservation, application and distribution of the Property, and all claims against Receiver arising out of the exercise of Receiver's powers or the performance of Receiver's duties.

2.3 Within seven (7) calendar days following entry of this Order, Receiver shall execute and file with the Court either cash or a bond in the amount of Ten Thousand Dollars (\$10,000.00) with a surety authorized by the Washington Commissioner of Insurance to engage in the business of suretyship in the state of Washington, in favor of the Clerk of King County Superior Court, on the condition that Receiver will faithfully discharge the duties of

Receiver in this action and obey the orders of the Court herein. Receiver is authorized to pay

*Defendants indicate in their response at p. 14 that they would propose a different bond amount in a proposed order, which this Court has not received to date. 7/1*

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any premium or other fee of the surety providing such bond from the assets, as an expense of Receiver.

**Rights and Responsibilities of Receiver**

2.4 Receiver shall be a "general receiver" as defined in RCW 7.60.015, with exclusive control over the Property and the duty to preserve and protect it, including the authority to market, sell and liquidate the Property.

2.5 Receiver shall have the exclusive power and authority to manage, operate, maintain, secure, market, license sell, repair, and control the Property; exercise all powers available to Defendants NI, Westerdalcorp and Westerdal and their agents, in their capacities as owners of the Property; and to do all things permitted pursuant to RCW 7.60.060, including but not limited to the leasing, licensing marketing and sale of any of the receivership Property in accordance with the procedures set forth herein, with all actions taken by Receiver to be governed by the terms of this Order.

2.6 Receiver shall have all of the stock ownership, voting, membership and management rights of Westerdal in NI and Westerdalcorp and may exercise said rights to the extent Westerdal could under the applicable corporate and organizational governing documents of NI and Westerdalcorp.

2.7 Except as otherwise limited by this Order, Receiver shall have the authority, without further order of this Court, to do all things required in the normal and ordinary course of business with respect to the Property, including without limitation the authority to collect any rents, deposits, royalties or other charges payable by any person, including any occupant of any part of the Property; the authority to pay all utilities and other ordinary operating expenses of the Property, including payroll, payroll taxes, employee benefits, insurance, taxes, landscaping, janitorial services, and maintenance; the authority to enter into, modify or terminate employment or service contracts for the Property, including without limitation janitorial, security, landscaping, equipment maintenance, roof repair, paving repair, and

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1 general maintenance contracts; the authority to enter into listing agreements, and the authority  
2 to bring legal actions against any person for unlawful detainer, the collection of rent, or for the  
3 collection of any sums now or hereafter owing on account of the Property.

4 2.8 Receiver shall establish and maintain such accounting, bookkeeping and  
5 record-keeping systems as Receiver determines to be advisable in Receiver's business  
6 judgment in connection with its operation and management of the Property, and in the  
7 management of the financial and business affairs related to the Property.

8 2.9 Receiver may establish bank accounts with any federally insured financial  
9 institution for the purpose of receiving and disbursing funds used for the development,  
10 management, maintenance, operation and sale of the Property.

11 2.10 Receiver is authorized to perform or contract for accounting, consulting and  
12 tax services with respect to the Property, as necessitated by this proceeding or as may be  
13 required by law in the performance of Receiver's duties.

14 2.11 Receiver is authorized to bring and prosecute actions for the collection of any  
15 sums now or hereafter owing on account of the Property.

16 2.12 Receiver, in the ordinary course of business and without further order of the  
17 Court, may contract for the purchase or acquisition of such goods, materials, services and  
18 supplies as Receiver deems necessary or appropriate to preserve, protect, market and sell the  
19 Property, or any portion of it, *not to exceed \$10,000 or more w/o written consent of PT*  
20 *or court approval. 21 Notice and an opportunity for hearing shall be given.*  
21 Receiver is authorized to pay when due for goods, materials,  
22 services and supplies furnished by others to the Property in the ordinary course of their  
23 business on a going-forward basis.

24 2.13 Receiver is authorized to make such repairs, replacements or alterations to the  
25 Property as Receiver determines to be prudent or necessary, but not to exceed \$10,000 or  
26 more without the written consent of Plaintiff, or approval of the Court after notice to Plaintiff  
27 and an opportunity for hearing. Unless otherwise ordered by the Court, Receiver is not  
28

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1 obligated to undertake, and will have no liability for, any remediation or cleanup with respect  
2 to hazardous materials presently existing under, on or about the Property.

3 2.14 To the extent reasonably possible from the income generated by the Property,  
4 Receiver shall pay the operating expenses of the Property.

5 2.15 Until termination of the Receivership, Receiver shall file with the Court and  
6 serve upon the parties a monthly operating report, performed in the format determined  
7 adequate by Plaintiff and Receiver, summarizing the status of management of the Property  
8 during the month.

9 2.16 Receiver, with reasonable promptness, shall provide to each of the parties such  
10 information concerning the financial and other affairs relating to the Property, or concerning  
11 Receiver's management and operation of the Property, as any party may reasonably request  
12 from Receiver in writing from time to time.

13 2.17 Receiver is authorized to perform accounting, consulting, and tax services with  
14 respect to the Property, as necessitated by this proceeding or as may be required by law in the  
15 performance of its duties.

16 2.18 Receiver, in its discretion, may delegate performance of certain of Receiver's  
17 administrative, clerical and accounting duties and functions.

18 2.19 In the performance of Receiver's duties, Receiver may employ such persons or  
19 entities as Receiver deems appropriate, including attorneys and accountants, in connection  
20 with Receiver's management and operation of the Property. All such persons and entities,  
21 including any persons who may also be directors, officers or employees of any such entities,  
22 shall be subject to the management and direction of Receiver in connection with their  
23 performance of any duties associated with such employment by Receiver. Receiver shall be  
24 free at all times to terminate the employ of any such person or entity.  
25  
26  
27  
28

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2.20 Receiver is authorized to acquire or renew, or seek reinstatement of, all governmental licenses, permits or other authorizations, relating to the Property either in Receiver's name or in the name of Defendants.

2.21 Receiver is authorized to review all existing insurance coverage with respect to the Property and to procure and/or maintain such insurance as Receiver deems to be necessary for preservation or protection of the Property. The Receiver shall not be responsible for claims arising from the lack of procurement or inability to obtain insurance.

2.22 Receiver shall cause to be paid when due, for periods after its appointment, all current taxes and withholdings, and all Workers' Compensation, Industrial Insurance or similar premiums or payments for which Receiver (in its role as Receiver) is or hereafter becomes obligated to pay. Nothing in this Order shall be construed as imposing any obligation on Receiver to file tax returns on behalf of Defendants or to impose any liability on Receiver for any taxes, of any kind, which accrued prior to the date of the entry of this Order.

2.23 Receiver shall have the rights, powers and duties conferred by, and Receivership shall be administered in accordance with, RCW 7.60.005 - 7.60.300 and the Settlement Documents. Receiver shall comply with all applicable state and federal laws.

**Effect of the Receivership on Certain Parties**

2.24 Immediately upon entry of this Order, the directors, officers, shareholders, members, employees, agents, accountants, and attorneys of NI and Westerdalcorp shall comply fully with RCW 7.60.080, and shall cooperate with Receiver in connection with Receiver's assumption and performance of its duties, so as to enable Receiver to assume and perform those duties without jeopardy to the Property. The directors, officers, shareholders, members, employees, agents, accountants, and attorneys of NI and Westerdalcorp shall provide to Receiver, promptly upon request, all books, records (including but not limited to financial records), documents and other information relating to the Property, and shall

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1 promptly provide Receiver with access to the Property, and books, records, documents and  
2 information which Receiver at any time may request from any of them.

3 2.25 Immediately upon entry of this Order, the directors, officers, shareholders,  
4 members, employees, agents, accountants, and attorneys of NI and Westerdalcorp, and every  
5 other person or entity in a position to exercise control over the Property, are hereby enjoined  
6 from obstructing, delaying, or interfering with Receiver in the performance of its duties or  
7 from taking any action purporting to transfer, encumber or dispose of the Property or any  
8 portion of it.

9 2.26 Immediately upon entry of this Order, the directors, officers, members,  
10 managers, employees, agents, accountants, and attorneys of NI and Westerdalcorp, and every  
11 other person or entity in a position to exercise control over any Property, are hereby enjoined  
12 from destroying and not fully preserving any books and records relating to the Property.

13 2.27 Immediately upon entry of this Order, NI and Westerdalcorp and their  
14 directors, officers, shareholders, members, employees, agents, accountants, and attorneys, and  
15 every other person or entity in a position to exercise control over the Property, shall have no  
16 further right to exercise such control.

17 2.28 Westerdal and any other directors, officers, shareholders, members, employees,  
18 agents or accountants of NI and Westerdalcorp shall submit to examination by Receiver,  
19 under oath, concerning the acts, conduct, property, liabilities and financial condition of that  
20 person or any matter relating to Receiver's administration of the Property.

21 2.29 Westerdal, NI and Westerdalcorp shall instruct all contractors, property  
22 managers, agents, tenants, licensees, or others now or hereafter in possession of any portion of  
23 the Property to make all rent and profits payments to Receiver or Receiver's designee until  
24 further order of this Court.

25 2.30 Westerdal, NI and Westerdalcorp shall provide Receiver with immediate and  
26 ongoing full access to all books, records or documents relating to the Property.

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2.31 Westerdal, NI and Westerdalcorp shall refrain from advertising the Property for sale or providing tours of the Property to prospective purchasers without Receiver's consent.

2.32 All financial institutions, credit card processors, domain name registrars, insurance agents or underwriters, utility providers, vendors, suppliers, tradesmen, materialmen, service providers, franchisors, taxing agencies, and all government agencies and departments are hereby ordered to take direction from Receiver as it relates to the accounts of Defendants and to surrender any and all funds held on deposit or apply said funds as directed by the Receiver.

2.33 Any utility company providing services to the Property, including gas, electricity, water, sewer, trash collection, telephone, communications or similar services, shall be prohibited from discontinuing service to the Property based upon unpaid bills incurred by Defendants. Further, such utilities shall transfer any deposits held by the utility to the exclusive control of Receiver and be prohibited from demanding that Receiver deposit additional funds in advance to maintain or secure such services.

2.34 Receiver may issue demand upon the U. S. Postal Service to grant exclusive possession and control of mail and instrumentalities thereof, including postal boxes, as may have been used by Westerdal, NI and Westerdalcorp, and may direct that certain mail related to the Property and its business be redirected to Receiver.

### Compensation of Receiver

2.35 Receiver shall be compensated as follows:

2.36 The Receiver shall be paid a monthly fee in the amount of Six Thousand Dollars (\$6,000.00), payable in arrears on the first day of each subsequent month, with the first payment due the first day of the month after the month in which this Order is entered, provided that the monthly fee for the first payment shall be pro-rated on a daily basis for period between entry of this Order and the first day of the subsequent month.

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1           2.37 A commission of two percent (2%) of the gross selling price of the Property of  
 2 the receivership at the closing of the sale of the Property, except for the following items of the  
 3 Property, the sale of which shall result in a commission of one percent (1%) of the gross  
 4 selling price: the real property commonly known as 1845 W. Mercer Way, Mercer Island, WA  
 5 98040, which is legally described in the attached Exhibit A; the domain Holiday.com; and the  
 6 business commonly known as "Strong Credit," described in the attached Exhibit C. All other  
 7 fees and commissions payable to brokers, agents, auctioneers or parties who have acted as  
 8 Receiver's agents and/or licensees in the sale of the Real Property shall be in addition to the  
 9 commission paid to Receiver.  
 10

11           2.38 The fees and costs of the Receiver and its professionals shall be paid from the  
 12 gross receipts derived from the Receivership Estate and shall be a first-priority lien on the  
 13 receivership estate. If the assets are not sufficient to pay the Receiver's fees as presented,  
 14 Plaintiff shall make Advances to the Receiver sufficient to pay such approved fees and costs  
 15 in accordance with the provisions of this Order addressing Advances.  
 16

17                           Personal Liability of Receiver

18           2.39 The personal liability of Receiver shall be governed by RCW 7.60.170.

19                           No Personal Obligation of Receiver

20           2.40 No obligation incurred by Receiver in the performance of its duties and  
 21 responsibilities, whether pursuant to any contract, by reason of any tort, or otherwise, shall be  
 22 Receiver's obligation or the personal obligation of its principals or agents. Rather, the  
 23 recourse of any person or entity to whom Receiver becomes obligated in connection with the  
 24 performance of its duties and responsibilities shall be solely against the assets of the  
 25 receivership estate, and the receivership estate shall hold harmless and indemnify Receiver  
 26 from any and all such obligations except to the extent they arise from Receiver's gross  
 27 negligence, willful misconduct or fraud. Receiver shall have no obligation to advance its own  
 28 funds to pay any costs and expenses of acting as Receiver.

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Rents, Income, Proceeds and Advances by Plaintiff

2.41 Receiver may use rents,<sup>1</sup> income generated by or from the operation of the Property or the proceeds of the sale of the Property (collectively "Receivership Income") to pay the fees, costs and expenses of Receiver in the performance of its duties under this Order ("Receiver's Expenses"). To the extent Receivership Income exceeds such Receiver's Expenses, then Receiver shall pay them to Plaintiff for application to the Judgment. To the extent Receivership Income is not sufficient to fund such Receiver's Expenses, including fees and costs of his professionals, then Plaintiff may, without further order of the Court, advance funds to Receiver to cover such shortfalls ("Advances"), and any and all such Advances by Plaintiff to Receiver shall be added to the principal amount of the Judgment and paid out of the Property's Receivership Income and proceeds, or, at Plaintiff's election, charged against and paid out of the receivership, and shall be entitled to a first and paramount lien against the Property. Plaintiff, in his sole discretion, may choose not to make such Advances provided that Plaintiff immediately so advises Receiver in writing, in which case Receiver shall be permitted to resign as Receiver, upon fourteen (14) calendar days' notice to the parties in

<sup>1</sup> "Rents" are defined in the Deed of Trust at page 2 as follows:

All rents, issues and profits of the Property, all existing and future leases of the Property (including extensions, renewals and subleases) and all agreements for use and occupancy of the Property (all such leases and agreements whether written or oral are hereafter referred to as the "Leases"), and all guaranties of tenants' performance under the Leases, together with the immediate and continuing right to collect and receive all of the rents, income, receipts, revenues, issues, profits and other income of any nature now or hereafter due (including any income of any nature coming due during any redemption period) under the Leases or from or arising out of the Property including minimum rents, additional rents, percentage rents, parking or common area maintenance contributions, tax and insurance contributions, deficiency rents, forfeitures or liquidated damages following default in any Lease, all proceeds payable under any policy of insurance covering loss of rents or other income resulting from untenantability caused by destruction or damage to the Property, all proceeds payable as a result of exercise of any option to purchase the Property, all proceeds derived from the termination or rejection of any Lease in a bankruptcy or other insolvency proceeding, and all proceeds from any rights and claims of any kind that Grantor may have against any tenant under the Leases or any occupants of the Property (all of the above are hereafter collectively referred to as the "Rents").

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1 interest, provided that if Plaintiff moves for the appointment of a successor receiver within  
2 said 14 day period, the Receiver shall continue to serve until such time as the hearing on  
3 Plaintiff's motion.

4 2.42 To the extent Plaintiff elects to provide Advances, all such Advances shall be  
5 added to the Judgment and shall be pursuant to and covered by the terms and conditions of the  
6 Settlement Documents and secured by the Property.

7 2.43 All use of Receivership Income and all Advances made by Plaintiff to Receiver  
8 shall be repaid by Receiver from, and shall be secured by a first and paramount lien on the  
9 Property and on all Receivership Income, monies, property or proceeds arising by, from or as  
10 a result of the Property.

11 2.44 In accordance with RCW 7.60.150, Receiver, on order of the Court, following  
12 notice and a hearing, and on the conditions or terms that the Court considers just and proper,  
13 may abandon any estate property that is burdensome to Receiver or is of inconsequential value  
14 or benefit. Property that is abandoned shall no longer constitute property of the receivership  
15 estate.

16 2.45 Each of the procedures outlined above is hereby authorized by order of this  
17 Court, and, pursuant to RCW 7.60.170(3), no liability for Receiver will arise on account of  
18 any acts or omissions contemplated in this Order, whether such acts or omissions are  
19 undertaken by Receiver or any parties employed by Receiver, including Receiver's counsel.

20 General Provisions

21 2.46 Unless and until otherwise ordered by the Court, and except as otherwise  
22 expressly provided by this Order or by other order of this Court, Receiver is authorized to do  
23 all other things determined by Receiver to be reasonably necessary or incidental to the  
24 performance of Receiver's duties.

25 2.47 If Receiver is at any time uncertain as to the scope of its authority or as to any  
26 matter affecting or relating to the performance of its duties, Receiver may seek and obtain  
27

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1 instructions from this Court with respect to such matters upon motion and notice to the  
2 parties.

3 2.48 Upon fourteen (14) days calendar notice to the parties in interest, and those  
4 with an interest in the Property that have filed with the Court a request for notice of the  
5 proceedings in this action, the Receiver may elect to resign, and Receiver shall resign if  
6 Plaintiff in writing requests Receiver to resign.

7 2.49 Receiver may compel by subpoena any person to submit to an examination  
8 under oath in the manner of a deposition in a civil case with respect to the Property or any  
9 other matter that may affect the administration of the receivership estate.

10 2.50 Upon entry of this Order, pursuant to RCW 7.60.110, commencement or  
11 continuation of any proceeding against Defendants is stayed; as well as enforcement of any  
12 judgment, any act to assess or recover any pre-receivership claim, any act to obtain possession  
13 of or exercise control over the Property, or to create, perfect, or enforce any lien against the  
14 Property.

15 2.51 This Order shall not operate as an automatic stay pursuant to RCW 7.60.110 as  
16 to Plaintiff or Receiver, or to Plaintiff's continuation of a judicial or non-judicial proceeding  
17 to foreclose upon any lien against the Property or Receivership Income.

18 2.52 This Receivership Order shall terminate only upon payment in full of all  
19 amounts due the Receiver and satisfaction in full of all amounts due under the Judgment,  
20 including any advances made by Plaintiff as provided for herein.

21 ENTERED this 31<sup>st</sup> day of July, 2014.

22  
23  
24  
25  
26 THE HONORABLE KEN SCHUBERT  
27 KING COUNTY SUPERIOR COURT JUDGE  
28

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**CREDITOR TRUST AGREEMENT**

This Creditor Trust Agreement (the “Creditor Trust Agreement”) is being entered into as of \_\_\_\_\_, by and between [Company] (the “Debtor”) and \_\_\_\_\_, not individually but solely in his capacity as trustee under this Creditor Trust Agreement (the “Creditor Trustee”), and with the consent of [Secured Lender ] (the “Secured Lender”), holder of certain secured debt issued by the Debtor, all as set forth herein. The Debtor, the Creditor Trustee, and the Secured Lender may be collectively referred to herein as the “Parties” and individually as a “Party.”

**Recitals**

WHEREAS, [description of debt documents, security documents, perfection of liens, amount outstanding].

WHEREAS, [description of defaults, forbearance/liquidation agreements, out-of-court liquidation, etc.].

WHEREAS, [on account of the Secured Lender’s liens on the assets of the Debtor (collectively, the “Collateral”), pursuant the Debt Documents, the Debtor had and has no unencumbered assets].

WHEREAS, the Debtor desires to enter into this agreement to provide for the following (all capitalized terms as defined below):

(a) The transfer of all right, title and interest of the Debtor in the Creditor Trust Assets to the Creditor Trust for distribution to the holders of certain Allowed Claims pursuant to and in accordance with this Creditor Trust Agreement;

(b) The treatment of the Transfer for federal income tax purposes as a taxable sale or exchange of the Creditor Trust Assets by the Debtor to the Beneficiaries;

(c) The treatment for all purposes, including federal income tax purposes, of the Beneficiaries as the deemed owners of the Creditor Trust Assets and as the grantors of the Creditor Trust;

(d) The treatment of the Creditor Trust as a grantor trust for federal income tax purposes;

(e) The valuation of the Creditor Trust Assets by the Creditor Trustee and the use of such valuations for all federal income tax purposes;

(f) The management of the Creditor Trust Assets by the Creditor Trustee; and

(g) The distribution of the Creditor Trust Assets or the proceeds thereof to the Beneficiaries as set forth in this Creditor Trust Agreement.

NOW, THEREFORE, in consideration of the mutual agreements of the parties contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged and affirmed, the parties hereby agree as follows:

**ARTICLE I  
DEFINITIONS**

Section 1.1 Terms Defined. All terms used in this Creditor Trust Agreement, unless the context otherwise requires, shall have the meanings assigned to them in this Creditor Trust Agreement, including any and all capitalized terms used herein. In addition, and without limiting the foregoing, the following terms shall have the following meanings:

(a) “Advisory Committee” shall initially mean [2-3 large unsecured creditors] and such other holders of Allowed Claims as the Creditor Trustee shall select and who shall accept appointment, provided that there shall not be more than three (3) members of the Advisory Committee at any time; vacancies on the Advisory Committee shall be filled from the ranks of Beneficiaries of the Creditor Trust, by the majority vote of the remaining members of the Advisory Committee, or, if there are no such members, by the Creditor Trustee.

(b) “Allowed Claims” shall mean claims allowed by the Creditor Trustee, or pursuant to an arbitration award or final order of any court of competent jurisdiction, in accordance with the provisions of Article VII of this Creditor Trust Agreement.

(c) “Assenting Creditor” shall mean any creditor who files an Assent and Proof of Claim (as defined below in section 7.1) pursuant to Article VII of this Creditor Trust Agreement.

(d) “Beneficiaries” means the holders of Allowed Claims.

(e) “Creditor Trust” shall mean the trust formed pursuant to this Creditor Trust Agreement.

(f) “Creditor Trust Assets” shall mean [the agreed-upon funds] transferred by the Secured Lender into the Creditor Trust for the benefit of the Beneficiaries.

(g) “Creditor Trustee” means the Trustee originally designated hereunder and all successor Trustees, if any.

(h) “Disputed Claim” shall mean a claim for which an Assent and Proof of Claim has been filed, to which the Creditor Trustee has asserted an objection in writing, and which claim is therefore subject to the claim process set forth in Section 7.2 of this Creditor Trust Agreement.

(i) “Distributions” shall mean the amounts to be paid to creditors, including holders of Allowed Claims, by the Creditor Trustee pursuant to the terms of this Creditor Trust Agreement.

(j) “Effective Date” means the later of the date that the Credit Trust Assets are transferred to the Creditor Trust.

Section 1.2 Other Definitional Provisions. The words "hereof," "herein" and "hereunder" and words of similar import when used in this Creditor Trust Agreement shall refer to this Creditor Trust Agreement as a whole and not to any particular provision of this Creditor Trust Agreement, and section references are to this Creditor Trust Agreement unless otherwise specified.

**ARTICLE II  
DECLARATION OF TRUST**

Section 2.1 Purpose of the Creditor Trust. the Debtor and the Creditor Trustee, pursuant to the applicable tax statutes, rules and regulations, to the extent incorporated in this Creditor Trust Agreement, hereby settle the Creditor Trust on behalf of and for the sole benefit of the Beneficiaries and for the sole purpose of distributing the Creditor Trust Assets to the Beneficiaries pursuant to this Creditor Trust Agreement in accordance with Treas. Reg. § 301.7701-4(d). The Creditor Trust has no objective to continue or engage in the conduct of a trade or business except to the extent reasonably necessary to, and consistent with, the sole purpose of the Creditor Trust. It shall not be the objective or purpose of this Creditor Trust to, and the Creditor Trustee shall have no authority to, conduct a trade or business except as reasonable and necessary to, and consistent with, the distribution of the Creditor Trust Assets. In particular, the Creditor Trust, through the Creditor Trustee, will do the following: (a) accept and place all Creditor Trust Assets into the Creditor Trust; (b) object to and resolve all Disputed Claims; (c) make all Distributions in accordance with this Creditor Trust Agreement to the extent such Distributions are to be made from the Creditor Trust Assets; (d) retain professionals and other agents; and (f) take such steps as are reasonable and necessary to accomplish the Creditor Trust's purpose, all as provided in, and subject to the terms and provisions of this Creditor Trust Agreement. The Creditor Trust Assets shall be held for the exclusive and sole benefit of the Beneficiaries and shall only be used to fund Distributions to such Beneficiaries in accordance with this Creditor Trust Agreement and to fund payment of costs, fees, and expenses incurred in connection with the administration of the Creditor Trust.

Section 2.2 Rights of Debtor. The Debtor shall have no claim to or right or interest in, whether direct, residual, contingent or otherwise, the Creditor Trust Assets once such assets have been transferred to the Creditor Trust.

Section 2.3 Name of the Creditor Trust. The Creditor Trust established hereby shall be known as the "the [Company] Creditor Trust." In connection with the exercise of his powers, the Creditor Trustee may use the name or such variation thereof as he sees fit, and may transact the affairs of the Creditor Trust in such name.

Section 2.4 Transfer of Assets to Create Creditor Trust. The Secured Creditors shall guaranty funding of the Creditor Trust, from the proceeds of the liquidation of the Debtor's assets, of [amount of funds] within [timeline]. In no event shall the Secured Creditors be responsible for funding any additional amounts or any amounts other than as set forth above. Through the transfer of such assets to the Creditor Trust, and except as otherwise provided herein, such assets are Creditor Trust Assets and the Creditor Trust has the sole and exclusive right, title and interest in and possession of the Creditor Trust Assets.

Section 2.5 Acceptance by Creditor Trustee. \_\_\_\_\_ hereby accepts and confirms the following: (a) the appointment to serve as Creditor Trustee; (b) the Transfer of the Creditor Trust Assets, and all right, title and interest therein, to the Creditor Trust; and (c) the obligations and duties imposed on him by this Creditor Trust Agreement. The Creditor Trustee agrees to receive, hold, administer and distribute the Creditor Trust Assets and the income derived therefrom, and to reconcile, administer and satisfy claims pursuant to the terms of this Creditor Trust Agreement.

### ARTICLE III TERMINATION OF TRUST

Section 3.1 Maximum Term. The Creditor Trust shall terminate no later than the second anniversary of the Effective Date; provided, however, that, if necessary to accomplish the liquidating purpose of the Creditor Trust, the Creditor Trustee may extend the term of the Creditor Trust for up to an additional year (the "Supplemental Creditor Trust Term") by serving a notice of his intent to extend the term of the Creditor Trust upon the holders of Allowed Claims and Disputed Claims, within three (3) months prior to the beginning of the Supplemental Creditor Trust Term.

Section 3.2 Final Distribution. In the sole discretion of the Creditor Trustee, upon the final reconciliation of all claims of the Creditor Trust, and upon payment of all outstanding taxes and costs of administering the Creditor Trust, the Creditor Trustee shall make a final distribution to holders of Allowed Claims, however, the Creditor Trustee shall be permitted to retain a reserve to pay any reasonable expenses related to making the final distribution and to pay any expenses of the Creditor Trustee or Trust Professionals related to the final distribution. An accounting of the income and expenses of the Creditor Trust through the date of the final distribution shall accompany the final distribution to Beneficiaries.

Section 3.3 Winding Up of the Creditor Trust and Discharge of the Creditor Trustee. For purposes of winding up the affairs of the Creditor Trust at its termination, the Creditor Trustee shall continue to act as Creditor Trustee until his duties have been fully discharged. After doing so, the Creditor Trustee, his agents, professionals and employees, if any, shall have no further duties or obligations hereunder, except as required by this Creditor Trust Agreement, or applicable law concerning the termination of a trust.

### ARTICLE IV OBLIGATIONS OF THE CREDITOR TRUSTEE

Section 4.1. Establishment and Maintenance of Accounts, Reserves and Escrows.

(a) Initial Establishment of Accounts and Reserves. On the Final Dismissal Date or as soon thereafter as practicable, the Creditor Trustee shall establish the following accounts and reserves:

- (i) General Account(s): One or more general accounts (the "General Account(s)") into which shall be deposited, to the extent sufficient assets are available, cash for Distributions to the Beneficiaries pursuant to this Creditor Trust Agreement.



- (ii) Disputed Claims Reserve: An account or accounts, designated as a Disputed Claims Reserve, as described more fully in Section 4.2 below (the “Disputed Claims Reserve”).
- (iii) Operating Reserve Account: An account, designated as an Operating Reserve Account, as described more fully in Section 4.3 below (the “Operating Reserve Account”).

(b) Subsequent Establishment of Accounts, Reserves and Escrows. On or after the Effective Date, the Creditor Trustee (i) shall establish and maintain such additional accounts, reserves and escrows, to the extent sufficient assets are available, as may be required by applicable law or by order of a court of competent jurisdiction, and (ii) may establish and maintain such additional accounts, reserves and escrows as he deems necessary or desirable to carry out the provisions of this Creditor Trust Agreement.

(c) Amounts Deposited in Reserves. The amounts to be initially deposited in the reserves shall be established by the Creditor Trustee. Changes in the amounts maintained in the reserves may be made at any time thereafter in the discretion of the Creditor Trustee.

**Section 4.2 Disputed Claims Reserve.**

(a) Prior to making each of the Distributions under this Creditor Trust Agreement, the Creditor Trustee shall fund, to the extent that sufficient assets are available, one or more, as appropriate, Disputed Claims Reserves with an amount of cash equal to the respective Distributions to which holders of Disputed Claims would be entitled under this Creditor Trust Agreement as of such date if such Disputed Claims were Allowed Claims;

(b) After a final resolution has been reached with respect to any Disputed Claim for which cash was reserved in a Disputed Claims Reserve, the balance, if any, of cash remaining in such Disputed Claims Reserve on account of such claim, after making the Distribution, if any, to which the holder of such claim became entitled by virtue of such final resolution, shall be transferred to the General Account(s).

**Section 4.3 Operating Reserve Account.**

(a) On the Final Dismissal Date, or as soon thereafter as practicable, the Creditor Trustee shall establish the Operating Reserve Account, which shall be funded with no less than \$[100,000] and administered pursuant to this Creditor Trust Agreement for purposes of providing funds necessary to cover the ordinary and reasonable costs, expenses and obligations to be incurred in administering the Creditor Trust.

(b) The Creditor Trustee may, in his sole discretion, transfer funds from the General Account(s) to the Operating Reserve Account if he deems it necessary or appropriate to provide funds necessary to cover the ordinary and reasonable costs, expenses and obligations to be incurred in administering the Creditor Trust.

(c) In connection with making a Distribution of cash under this Creditor Trust Agreement, if the Creditor Trustee determines, in his sole discretion, that any excess cash is available from the Operating Reserve Account (the “Excess Operating Reserve Amount”), the Creditor Trustee may transfer the Excess Operating Reserve Amount to the General Account(s) for subsequent Distribution to the Beneficiaries pursuant to the terms of this Creditor Trust Agreement.

Section 4.4 Use of Assets. All cash or other property held or collected by the Creditor Trustee shall be used solely for the purposes contemplated by this Creditor Trust Agreement.

Section 4.5 Distributions. The Creditor Trustee will distribute at least annually to the Beneficiaries the net income of the Creditor Trust plus all the Creditor Trust Assets in excess of the amounts reasonably necessary to maintain and implement the Creditor Trust or to meet claims or contingent liabilities (including Disputed Claims).

## **ARTICLE V POWERS AND DUTIES OF THE CREDITOR TRUSTEE**

Section 5.1 Duties of Creditor Trustee. The Creditor Trustee shall have such duties and responsibilities as are specified in this Creditor Trust Agreement.

Section 5.2 Authority of Creditor Trustee. The Creditor Trustee's rights and authority include, without limitation, the right and authority to:

- (a) receive, control, manage and dispose of all Creditor Trust Assets for the benefit of the Beneficiaries;
- (b) act as custodian of the Creditor Trust Assets;
- (c) calculate and pay all Distributions required or permitted to be made under this Creditor Trust Agreement, as expeditiously as is practicable;
- (d) subject to this Creditor Trust Agreement, establish, fund, and/or administer the Disputed Claims Reserve and such other reserves, accounts and escrows as may be authorized by this Creditor Trust Agreement;
- (e) employ, supervise, compensate and indemnify attorneys, accountants, financial advisors and other professionals or other persons retained to represent the interests of and serve on behalf of the Creditor Trust (the “Trust Professionals”) and waive any conflicts of interest as deemed necessary or appropriate in his discretion. The Creditor Trustee may commit the Creditor Trust to and shall pay such Trust Professionals reasonable compensation for services rendered and expenses incurred. A law firm or other professional shall not be disqualified from being employed by the Creditor Trustee solely because of its current or prior retention as counsel or professional to the Debtor;

(f) file such tax returns as may be required by federal, state or local taxing authorities and consistent with the treatment of the Creditor Trust as a grantor trust for federal income tax purposes;

(g) object to claims filed against this Creditor Trust pursuant to the terms of Article VII of this Creditor Trust Agreement, and to compromise and settle any such claims including Disputed Claims in accordance with the terms of such Article VII;

(h) pay all expenses and make other necessary payments relating to the Creditor Trust Assets;

(i) perform any and all acts necessary or appropriate for the conservation and protection of the Creditor Trust Assets;

(j) exercise all powers and rights, and take all actions contemplated by or provided for under this Creditor Trust Agreement; and

(k) take any and all other actions necessary or appropriate to implement or enforce the provisions of this Creditor Trust Agreement.

Section 5.3 Limitations on the Creditor Trustee. Notwithstanding anything in this Creditor Trust Agreement to the contrary, the Creditor Trustee, in his capacity as such, shall not do or undertake any of the following: (i) guaranty any debt; (ii) loan Creditor Trust Assets; (iii) transfer Creditor Trust Assets to another trust with respect to which the Creditor Trustee serves as trustee; or (iv) except as otherwise reasonably necessary to maintain the value of the Creditor Trust Assets and to further the purpose of the Creditor Trust, invest Creditor Trust Assets other than in short-term, liquid investments, such as bank demand and time deposits, short-term bank or saving institution certificates of deposit or Treasury Bills.

Section 5.4 Creditor Trustee and Conflicts of Interest. If the Creditor Trustee determines, in the exercise of his reasonable discretion, that he has a material conflict of interest with respect to the settlement of a claim or any other matter, the Creditor Trustee may select a designee to act on behalf of the Creditor Trust solely with respect to such matter (the "Designee"), with such Designee's authority to act on behalf of the Creditor Trust to terminate upon the matter's conclusion. If the Designee files a pleading, motion or other filing with a court or tribunal on behalf of the Creditor Trust, it shall do so in its own name as the "Designee of the [Company] Creditor Trust."

Section 5.5 Register of Beneficiaries. The Debtor shall provide the Creditor Trustee with a register of the names, addresses and amounts it owes to the creditors who are or may be potential Beneficiaries (the "Register") within five (5) business days of the execution hereof. Thereafter, the Register will be maintained by the Creditor Trustee, and changes thereto will be made upon notification proper under this Creditor Trust Agreement submitted to the Creditor Trustee. The Creditor Trustee shall not be liable for relying on the accuracy of the Register, provided that he has properly maintained the Register in accordance with this Creditor Trust Agreement.

Section 5.6 Books and Records. The Creditor Trustee also shall maintain in respect of the Creditor Trust and the Beneficiaries, books and records relating to the Creditor Trust Assets and income realized therefrom and the payment of expenses of and claims against the Creditor Trust in such detail and for such period of time as may be necessary to enable him to make full and proper reports in respect thereof. Such books and records shall be maintained in a manner consistent with this Creditor Trust Agreement. Except as expressly provided in this Creditor Trust Agreement, nothing in the Creditor Trust Agreement is intended to require the Creditor Trustee to file any accounting or seek approval of any court with respect to the administration of the Creditor Trust, or as a condition for making any payment or distribution out of the Creditor Trust Assets. The Creditor Trustee shall prepare a report of receipts and disbursements on at least a quarterly basis and make same available to the Advisory Committee and any Beneficiary upon the request of any member of the Advisory Committee or Beneficiary.

Section 5.7 Tax Returns. The Creditor Trustee shall file such tax returns as may be required by federal, state or local taxing authorities and consistent with the treatment of the Creditor Trust as a grantor trust for federal income tax purposes. The Creditor Trustee shall file federal income tax returns consistent with and pursuant to §1.671-4(a) of the Income Tax Regulations.

Section 5.8 Final Accounting of Creditor Trustee. The Creditor Trustee shall within ninety days after the termination of the Creditor Trust or his resignation or removal prepare a final accounting containing at least the following information:

- (a) A description of the Creditor Trust Assets and their disposition;
- (b) A summarized accounting in sufficient detail of all gains, losses, receipts, disbursements and other transactions in connection with the Creditor Trust and the Creditor Trust Assets during the Creditor Trustee's term of service, including their source and nature;
- (c) The ending balance of all Creditor Trust Assets as of the date of the Creditor Trustee's accounting, including the cash balance on hand and the name and location of the depository where it is kept;
- (d) All known liabilities owed by the Creditor Trust;
- (e) The then-current Register of Allowed and Disputed Claims.

The final accounting shall be served upon the Debtor and upon any Beneficiary who requests, in writing, a copy of such accounting.

## **ARTICLE VI LIABILITY OF CREDITOR TRUSTEE**

Section 6.1 Appointment. The Creditor Trustee is \_\_\_\_\_ solely in his capacity as Creditor Trustee of the Creditor Trust and not otherwise.

Section 6.2 Resignation. The Creditor Trustee may resign by giving not less than sixty (60) days' prior written notice thereof to the Advisory Committee; provided, however, that such resignation shall not become effective until the appointment of a successor Creditor Trustee in accordance with Section 6.4 hereof. If a Creditor Trustee resigns from his position hereunder, subject to a final accounting, such Creditor Trustee shall be entitled to all accrued but unpaid fees, expenses, and other compensation to the extent incurred, arising or relating to events occurring before such resignation, and any out-of-pocket expenses reasonably incurred in connection with the transfer of all powers and duties to the successor Creditor Trustee.

Section 6.3 Removal. The [Debtor and the] Advisory Committee may remove the Creditor Trustee for cause. For purposes of this Section 6.3, "cause" shall mean: (a) an act of fraud, embezzlement, or theft in connection with the Creditor Trustee's duties or in the course of his employment in such capacity, (b) the intentional wrongful damage to the Creditor Trust Assets, or (c) gross negligence by the Creditor Trustee in connection with the performance of his duties under this Creditor Trust Agreement. Unless his immediate removal is required by the [Debtor and the] Advisory Committee, the Creditor Trustee shall continue to serve until a successor Creditor Trustee is appointed, and such appointment becomes effective, in accordance with Section 6.4 hereof. If the Creditor Trustee is removed for cause, such Creditor Trustee shall not be entitled to any accrued but unpaid fees, expenses or other compensation under this Creditor Trust Agreement or otherwise. If the Creditor Trustee is unwilling or unable to serve (i) by virtue of his inability to perform his duties under this Creditor Trust Agreement due to death, illness, or other physical or mental disability, or (ii) for any other reason whatsoever other than for "cause," subject to a final accounting, such Creditor Trustee shall be entitled to all accrued but unpaid fees, expenses, and other compensation, to the extent incurred, arising or relating to events occurring before his removal or resignation, and to any out-of-pocket expenses reasonably incurred in connection with the transfer of all powers and duties and all rights to any successor Creditor Trustee.

Section 6.4 Appointment of Successor Creditor Trustee. In the event of a vacancy by reason of the death or immediate removal of the Creditor Trustee or prospective vacancy by reason of resignation or removal, the Advisory Committee shall have the right to appoint the successor Creditor Trustee consistent with the best interests of the Beneficiaries of the Creditor Trust. Every successor Creditor Trustee appointed hereunder shall execute, acknowledge and deliver to the Advisory Committee and the retiring Creditor Trustee, if any, an instrument accepting such appointment subject to the terms and provisions hereof. The successor Creditor Trustee, without any further act, shall become vested with all the rights, powers and duties of the Creditor Trustee; provided, however, that no Creditor Trustee shall be liable for the acts or omissions of any prior or later Creditor Trustee.

Section 6.5 Continuity. The death, resignation or removal of the Creditor Trustee shall not terminate the Creditor Trust or revoke any existing agency (other than any agency of such Creditor Trustee as a Creditor Trustee) created pursuant to the Creditor Trust Agreement or invalidate any action theretofore taken by the Creditor Trustee, and the successor Creditor Trustee agrees that the provisions of the Creditor Trust Agreement shall be binding on and inure to the benefit of each successor Creditor Trustee and all his heirs and legal and personal representatives, successors or assigns. In the event of the resignation or removal of the Creditor

Trustee, such Creditor Trustee shall (a) execute and deliver by the effective date of his resignation or removal such documents, instruments and other writings as may be reasonably required to effect the termination of such Creditor Trustee's capacity under this Creditor Trust Agreement and (b) assist and cooperate in effecting the assumption of such Creditor Trustee's obligations and functions by the successor Creditor Trustee.

Section 6.6 Compensation. The Creditor Trustee shall be compensated [describe fee structure] and shall be entitled to reimbursement of expenses incurred, such amounts to be paid only from Creditor Trust Assets. Any Trust Professionals or agents retained or utilized by the Creditor Trustee shall be entitled to reasonable compensation for services rendered and reimbursement of expenses incurred as determined by Creditor Trustee, such amounts to be paid from Creditor Trust Assets. Compensation of the Creditor Trustee and the Trust Professionals shall be paid out of the Operating Reserve Account. After the Effective Date, the payment of the fees and expenses of the Creditor Trustee and his agents, financial advisors, attorneys, consultants, independent contractors, representatives and other Trust Professionals shall be made in the ordinary course of business and shall not be subject to prior approval. Any successor Creditor Trustee shall receive such reasonable compensation and reimbursement of expenses in the same manner as the initial Creditor Trustee. The Advisory Committee shall not be entitled to reimbursement of any attorneys' fees or other professional fees from the Creditor Trust; provided, however, that the members of the Advisory Committee shall have the right to be reimbursed by the Creditor Trust for any other actual and reasonable out of pocket expenses incurred in serving on the Advisory Committee upon submitting proof of the incurrence of such expenses to the Creditor Trustee.

Section 6.7 Indemnification. The Creditor Trust shall indemnify and hold harmless (i) the Creditor Trustee, (ii) the Trust Professionals, and (iii) each member of the Advisory Committee (collectively, the "Indemnified Parties"), from and against and with respect to any and all liabilities, losses, damages, claims, costs and expenses, including, but not limited to, attorneys' fees arising out of or due to their actions or omissions, or consequences of such actions or omissions, with respect to the Creditor Trust Agreement, if the Indemnified Parties acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the Beneficiaries. To the extent the Creditor Trust indemnifies and holds harmless the Indemnified Parties as provided above, the legal fees and related costs incurred by counsel to the Creditor Trustee in monitoring and participating in the defense of the claims giving rise to the right of indemnification shall be paid from the Creditor Trust Assets. Notwithstanding anything to the contrary in this section, the limits of the Creditor Trust's liability hereunder shall be the extent of the Creditor Trust Assets at the time any request for indemnity is made.

Section 6.8 Insurance. The Creditor Trustee shall obtain all reasonably necessary insurance coverage for himself, the Advisory Committee and the Trust Professionals, including, but not limited to, coverage with respect to the liabilities, duties and obligations of the Creditor Trustee, the Advisory Committee and the Trust Professionals (in the form of an errors and omissions policy or otherwise), which insurance coverage shall remain in effect for a reasonable period after the conclusion of the Creditor Trustee's service. The Creditor Trust shall pay all insurance premiums and costs associated with the insurance requirements of this Section 6.8.



Section 6.9 Reliance by Creditor Trustee. The Creditor Trustee may rely, and shall be fully protected in acting or refraining from acting if he relies, upon any resolution, statement, certificate, instrument, opinion, report, notice, request, consent, order, or other instrument or document that the Creditor Trustee reasonably believes to be genuine and to have been signed or presented by the proper party or parties or, in the case of cables, telecopies, e-mails and telexes, to have been sent by the proper party or parties, and the Creditor Trustee may conclusively rely as to the truth of the statements and correctness of the opinions expressed therein. The Creditor Trustee may consult with counsel and other professionals with respect to matters in their area of expertise, and any opinion of counsel shall be full and complete authorization and protection in respect of any action taken or not taken by the Creditor Trustee. The Creditor Trustee shall be entitled to rely upon the advice of such professionals in acting or failing to act, and shall not be liable for any act taken or not taken in reliance thereon. The Creditor Trustee may rely upon the information provided by the Debtor or its representatives to the Creditor Trustee concerning claims against the Debtor, and their reconciliation and documents supporting such reconciliation.

Section 6.10 Reliance by Persons Dealing with the Creditor Trustee. In the absence of actual knowledge to the contrary, any person dealing with the Creditor Trustee shall be entitled to rely on the authority of the Creditor Trustee to act on behalf of the Creditor Trust and shall have no obligation to inquire into the existence of such authority.

## **ARTICLE VII**

### **CLAIMS ALLOWANCE AND DISTRIBUTION PROCEDURES**

Section 7.1 Filing of Assents and Proofs of Claim. The Creditor Trustee shall give, or cause to be given, notice of this Creditor Trust to all persons or entities on the Register, and shall forward, or cause to be forwarded, to such persons an Assent and Proof of Claim Form in the form attached hereto as Exhibit A (the “Assent and Proof of Claim”). The Creditor Trustee shall also publish in an [relevant state] local, and national newspaper for one week, notice of the Assent and Proof of Claim process. Any person holding or asserting a claim against the Debtor may assert a claim against this Creditor Trust and the Creditor Trust Assets and become a party to this Creditor Trust Agreement to the extent of such debt or claim as an Assenting Creditor, by completing and executing an Assent and Proof of Claim and returning it to the Creditor Trustee at an address designated in the Assent and Proof of Claim so that it is received by the Creditor Trustee by a date to be set by the Trustee in the notice of the Assent and Proof of Claim (the “Bar Date”) or within such further time as the Creditor Trustee may fix. The failure to file an Assent and Proof of Claim by the Bar Date will forever bar a creditor from receiving a Distribution from the Creditor Trust. The Creditor Trustee may extend the Bar Date upon written notice, and may at any time in his reasonable discretion permit any Assenting Creditor to become a party hereto though no such extension of time has been made by him. Except as provided in section 7.3 hereof, only Assenting Creditors whose claims are approved pursuant to the procedure in section 7.2 hereof shall be entitled to any distribution from the Creditor Trust.

Section 7.2 Determination of Amount of Claim. In accordance with the provisions set forth below, the Creditor Trustee shall have the authority to allow or dispute the amounts of the debts or claims of each Assenting Creditor, provided, however, that [(a) the Creditor Trustee shall be bound by [insert any relevant settlement agreements the Debtor has reached

with creditors] and (b)] claims for interest accruing after the Effective Date or for attorneys' fees shall be disallowed, whether or not allowed by agreement or applicable law. Such claim amounts shall be computed as if payable on the date hereof, including any interest accruing thereon prior to the date hereof, where called for under applicable agreements or law. The Creditor Trustee may for this purpose require the Assenting Creditors to verify their respective claims by affidavit or other evidence satisfactory to the Creditor Trustee.

(a) If the Creditor Trustee allows a claim in the amount set forth in an Assent and Proof of Claim without dispute, such claim shall be an Allowed Claim in the amount so allowed by the Creditor Trustee.

(b) If a dispute arises out of or relates to a claim of an Assenting Creditor, such claim shall be a Disputed Claim, and the Creditor Trustee and the Assenting Creditor agree first to try in good faith to settle the dispute through mediation by a mutually acceptable mediator or, if the Creditor Trustee and the Assenting Creditor are unable to agree on a mediator, by utilizing JAMS \_\_\_\_\_, with each party responsible for paying fifty percent (50%) of any such mediation fees and expenses. If after any such mediation there remain unresolved matters, such matters shall be settled by final, binding arbitration in [city] in accordance with the Streamlined Arbitration Rules and Procedures promulgated by JAMS, and judgment upon any such arbitration award may be entered in the state or federal courts of the State of \_\_\_\_\_. In connection with any Disputed Claim, the Creditor Trustee may make at any time (or at any juncture in the process) any compromise or agreement as to the amount thereof as he may deem appropriate in the exercise of his discretion. The Creditor Trustee will report the final settlement of any claim dispute to the Advisory Committee, but nothing herein shall be construed to require the Creditor Trustee to seek consent to any settlement or compromise. The amount of a Disputed Claim of an Assenting Creditor as finally determined hereunder shall be, upon such determination, the amount of the Allowed Claim for the purposes of any distributions to be made hereunder. To the extent a Disputed Claim of an Assenting Creditor is disapproved in full, such Assenting Creditor shall not be entitled to distributions to be made hereunder by the Creditor Trustee.

Section 7.3 Distributions to Secured and Priority Claims and Assenting Creditors.  
The Creditor Trustee shall distribute the Creditor Trust Assets in accordance with the following priorities:

(a) First, to payment of all valid liens against the Creditor Trust Assets;

(b) Second, to costs reasonably incurred in the preservation and distribution of the Creditor Trust Assets, compensation and expense reimbursement reasonably incurred by the Creditor Trustee and by the Trust Professionals that he engages in the discharge of his duties and obligations hereunder, and such other administrative expenses as shall be reasonably be incurred;

(c) Third, to the payment of all debts owing as of the date hereof to the United States of America that are entitled to priority payment under 31 U.S.C. § 3713 or other applicable law (excluding Section 507(a) of Title 11 of the United States Code (the "Bankruptcy Code");

(d) Fourth, to the extent that such debts are entitled to priority treatment and payment under applicable law (excluding Section 507(a) of the Bankruptcy Code), all debts owing to state or local governments or agencies as of the date hereof, including, but not limited to, unsecured state employment, property and income taxes;

(e) Fifth, all other debts owing as of the date hereof that are entitled to priority treatment and payment under applicable law (excluding Section 507(a) of the Bankruptcy Code) in the order of priority established under such applicable law; and

(f) Last, to all remaining claims against the Debtor held by Assenting Creditors that have been approved and allowed hereunder, with the Creditor Trust Assets to be distributed pro rata to the holders of Allowed Claims hereunder, until all such debts are paid in full.

The Creditor Trustee shall make interim distributions in his discretion whenever the Creditor Trust accumulates sufficient funds to enable him to make a reasonable distribution. To the extent that funds are reserved for a Disputed Claim, and such claim is subsequently disallowed or reduced, any funds not distributed on account of such claim shall be distributed pro rata on account of Allowed Claims. No Distribution shall be in an amount less than \$[50.00], except the final Distribution. Distributions of fractions of dollars will not be required. Whenever any Distribution of a fraction of a dollar would be required, the Distribution will reflect a rounding of such fraction to the nearest whole dollar (up or down), with half dollars being rounded down.

**Section 7.4    Undeliverable Distributions and Distributions of Unclaimed Property.**

(a) Distributions to holders of Allowed Claims will be sent to the last known address set forth on such holder's Assent and Proof of Claim. Holders of Allowed Claims may change the address to which the Distributions will be sent by filing a written change of address with the Creditor Trustee as provided for in Article XII hereof. If a Distribution is returned as undeliverable, the Creditor Trustee shall hold the Distribution and shall not be required to take any further action with respect to the delivery of the Distribution unless and until the Creditor Trustee is notified in writing of the then-current address of the person or entity entitled to receive the Distribution. Unless and until the Creditor Trustee is so notified, such Distribution shall be deemed to be "Unclaimed Property" and shall be dealt with in accordance with the provision below for distribution of Unclaimed Property.

(b) If any Distributions are returned to the Creditor Trustee as undeliverable, then such distributions shall be deemed to be "Unclaimed Property." Nothing contained herein shall require the Creditor Trustee, or anyone else, to attempt to locate such person or entity. The Unclaimed Property shall be set aside and maintained by the Creditor Trustee. If such person or entity presents itself within six months of the date of the payment returned as undeliverable, then the Unclaimed Property shall be distributed to such person or entity. If such person or entity does not present itself within six months of the date of payment returned undeliverable, then any such Unclaimed Property and accrued interest or dividends earned thereon, shall become the property of the Creditor Trust to be administered by the Creditor Trustee to other Allowed Claims.

(c) Any Distribution not negotiated by the Beneficiary within 120 days of the date of the check shall be stopped, and those monies shall be determined to be Unclaimed Property, and treated pursuant to Section 7.4(b) hereof.

Section 7.5 Covenant of the Assenting Creditors and Creditor Trustee. Each of the Assenting Creditors, by serving an Assent and Proof of Claim and thereby becoming a party hereto, and in consideration of the terms hereof, agrees to all of the terms of this Creditor Trust Agreement (including the Recitals hereto) and, further and without limiting the foregoing in any way, covenants to forbear from bringing suit or other action against any person or entity to collect, perfect or otherwise realize upon its claims against the Debtor, and, further, releases and covenants not to sue the Debtor, its officers, directors, affiliates, representatives or lenders, including the Secured Lender (all collectively, the “Releasees”) with respect to any claim or cause of action, whether known or unknown, relating in any way to the Debtor or the actions of any such persons or entities with respect to the Debtor or the Debtor’s property or affairs based in whole or in part on facts that exist as of the date that the Assent and Proof of Claim are filed, whether or not such cause of action has accrued, or is deemed to have accrued, as a matter of otherwise applicable state law; provided, however, that nothing herein shall prevent any action to recover under any bond or policy of credit insurance. The Creditor Trustee agrees and acknowledges that no causes of action or claims against Releasees are Creditor Trust Assets and the Creditor Trustee has no standing to assert claims, and has no claims to assert, against Releasees, and such Creditor Trustee is hereby barred from acquiring and/or asserting any such claims or causes of action against any or all of the Releasees, except as preserved in section 7.6 below. Upon the written request of the Debtor, the Secured Creditors, or any Beneficiary, the Creditor Trustee shall provide copies of any or all Assents and Proofs of Claim to such requesting party.

Section 7.6 No Release of Obligations Under This Creditor Trust Agreement. Notwithstanding any other provision of this Creditor Trust Agreement, nothing in Section 7.5 shall release any Party from any of its obligations to perform under this Creditor Trust Agreement or release any right, claim or remedy that any Party may have for any breach by any other Party of this Creditor Trust Agreement.

## ARTICLE VIII BENEFICIARIES

Section 8.1 Interest Beneficial Only. The ownership of a beneficial interest in the Creditor Trust shall not entitle any Beneficiary under the Creditor Trust to any title in or to the Creditor Trust Assets or to any right to call for a partition or division of the Creditor Trust Assets or to require an accounting, except as specifically provided by this Creditor Trust Agreement.

Section 8.2 Evidence of Beneficial Interest. Ownership of a beneficial interest in the Creditor Trust Assets shall not be evidenced by any certificate, security or receipt or in any other form or manner whatsoever, except as maintained on the books and records of the Creditor Trust by the Creditor Trustee.

Section 8.3 Registration of Beneficial Interest. The Creditor Trustee shall cause the Register to be kept at his office or at such other place or places as may be designated by the Creditor Trustee from time to time. The Register shall reflect the ownership of the beneficial interests of the Beneficiaries, except to the extent that a claim becomes an Allowed Claim in a different amount, in which case the amount of the Allowed Claim will determine the beneficial interest. The Creditor Trustee shall deliver a copy of the Register to the Advisory Committee upon the written request of any member of the Advisory Committee.

Section 8.4 Absolute Owners. The Creditor Trustee may deem and treat each Beneficiary reflected as the owner of a beneficial interest on the Register as the absolute owner thereof for the purposes of receiving Distributions and payments on account thereof for federal and state income tax purposes and for all other purposes whatsoever.

Section 8.5 Standing of Beneficiary. Except as expressly provided in the Creditor Trust Agreement, a Beneficiary does not have standing to direct the Creditor Trustee to do or not to do any act or to institute any action or proceeding at law or in equity against any party upon or with respect to the Creditor Trust Assets.

Section 8.6 Non-Transferability. Beneficial interests in the Creditor Trust shall not be subject to assignment or alienation, either voluntary or involuntary, other than by operation of law. A Beneficiary shall not be entitled to sell, assign, exchange, pledge or otherwise transfer or convey its beneficial interest in the Creditor Trust or any right or interest therein.

## **ARTICLE IX TAXES**

Section 9.1 Income Tax Status. Consistent with Revenue Procedure 82-58, as modified by Revenue Procedure 94-45, 199428 I.E. 124 (to the extent applicable), the Creditor Trust shall be treated as a “liquidating trust” pursuant to the Treasury Regulation Section 301.7701-4(d) and as a “grantor trust” pursuant to Sections 671-679 of the Internal Revenue Code of 1986, as amended. As such, the Beneficiaries will be treated as the grantors of the Creditor Trust and the deemed owners of the Creditor Trust Assets. All items of income, deductions and credit loss of the Creditor Trust shall be allocated for federal income tax purposes to the Beneficiaries based on their respective interests in the Creditor Trust, including Beneficiaries holding Disputed Claims, in such manner as the Creditor Trustee deems reasonable and appropriate. The Creditor Trustee will consistently value the Creditor Trust Assets and such valuation will be used for all federal income tax purposes by the Creditor Trust and the Beneficiaries. The amount of such valuation(s) shall be disclosed to the Advisory Committee upon the request of any member thereof.

Section 9.2 Tax Returns. The Creditor Trustee shall make such timely filing with the Internal Revenue Service, other taxing authorities, and the Beneficiaries as required under Treas. Reg. § 1.671.4(a) or other applicable law.

Section 9.3 Withholding of Taxes Related to Creditor Trust Operations. To the extent that the operation of the Creditor Trust or the liquidation of the Creditor Trust Assets creates a tax liability, the Creditor Trust shall promptly pay such tax liability and any such payment shall be considered a cost and expense of the operation of the Creditor Trust payable from the Creditor Trust Assets. The Creditor Trustee may reserve a sum, the amount of which shall be determined by the Creditor Trustee in his sole discretion, sufficient to pay any accrued or potential tax liability of the Creditor Trust. In the exercise of his discretion and judgment, the Creditor Trustee may enter into agreements with taxing authorities or other governmental units settling, compromising, or otherwise establishing the amount of any tax liability of the Creditor Trust. The foregoing notwithstanding, consistent with its status as a grantor trust, the Beneficiaries shall be responsible for the payment of federal income taxes on their allocable portion of any taxable income of the Creditor Trust.

## **ARTICLE X ADVISORY COMMITTEE**

Section 10.1 Immediately upon the Creditor Trustee's entry into this Creditor Trust Agreement, the Advisory Committee for the Creditor Trust shall come into existence. The Creditor Trustee shall consult with the Advisory Committee from time to time concerning the administration of the Creditor Trust Assets; provided, however, that the Creditor Trustee has the sole discretion to make decisions on behalf of the Creditor Trust and is not bound to follow any recommendations made by the Advisory Committee. Other than the right to consult with the Creditor Trustee, the Advisory Committee shall have no other duties or rights, except those set forth in sections 5.6, 6.2, 6.3, 6.4, 6.6, 6.7, 6.8, 7.2, 8.3 and 9.1 of this Creditor Trust Agreement. The Advisory Committee shall continue to exist until the termination of the Creditor Trust, at which time the Advisory Committee shall disband and shall cease to exist. Any member of the Advisory Committee may resign at any time, in which event the remaining members shall constitute the Advisory Committee or, if there are no remaining members, the Creditor Trustee shall have the option of appointing a Beneficiary as a successor member. The provisions of Sections 6.6 and 6.7 of this Creditor Trust Agreement shall apply to any such successor, and shall survive such resignation with respect to any former member.

## **ARTICLE XI ACCESS TO THE DEBTOR'S BOOKS AND RECORDS**

Section 11.1 The Debtor agrees, on reasonable notice, to provide the Creditor Trustee or the Trustee Professionals with reasonable access to the Debtor's books, records, contracts, and other documents that the Creditor Trustee may need in the administration of his duties as the Creditor Trustee.

## **ARTICLE XII MISCELLANEOUS PROVISIONS**

Section 12.1 Descriptive Headings. The headings contained in this Creditor Trust Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Creditor Trust Agreement.

Section 12.2 Amendment. This Creditor Trust Agreement may not be amended except by an instrument executed by the Creditor Trustee, the Debtor and the Secured Lender.

Section 12.3 Governing Law. This Creditor Trust Agreement shall be governed by and construed in accordance with the laws of the State of \_\_\_\_\_ without regard to the rules of conflict of laws of the State of \_\_\_\_\_ or any other jurisdiction.

Section 12.4 Counterparts, Effectiveness. This Creditor Trust Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which shall constitute one and the same agreement. This Creditor Trust Agreement shall become effective when each party hereto shall have received counterparts thereof signed by all the other parties hereto, subject to the terms hereof regarding the Effective Date.

Section 12.5 Severability; Validity. If any provision of this Creditor Trust Agreement or the application thereof to any person or circumstance is held invalid or unenforceable, the remainder of this Creditor Trust Agreement, and the application of such provision to other persons or circumstances, shall not be affected thereby, and to such end, the provisions of this Creditor Trust Agreement are agreed to be severable.

Section 12.6 No Waiver by Creditor Trustee. No failure by the Creditor Trustee to exercise, and no delay by the Creditor Trustee in exercising, any right, power or privilege hereunder shall operate as a waiver, nor shall any single or partial exercise of any right, power or privilege hereunder preclude any further exercise thereof, or of any other right, power or privilege.

Section 12.7 Prevailing Party. If the Creditor Trust is the prevailing party in a dispute regarding the provisions of this Creditor Trust Agreement or the enforcement thereof, the Creditor Trust shall be entitled to collect any and all costs, expenses and fees, including attorneys' fees, from the non-prevailing party incurred in connection with such dispute or enforcement action, provided, however, that this section shall not be construed to require an award of fees or costs in a dispute resolved or adjudicated pursuant to Section 7.2 hereof.

Section 12.8 Bond. Notwithstanding any state law to the contrary, the Creditor Trustee (including any successor Creditor Trustee) shall be exempt from giving any bond or other security.

Section 12.9 Notices. Any notice or other communication hereunder shall be in writing and shall be deemed given upon (a) confirmation of receipt of a facsimile transmission, (b) confirmed delivery by a standard overnight carrier or when delivered by hand, or (c) the expiration of five (5) business days after the day when mailed by registered or certified mail (postage prepaid, return receipt requested), addressed to the respective parties at the following addresses (or such other address for a party as shall be specified by like notice):

If the Creditor Trustee, to:

[\_\_\_\_\_]



and

If to a Beneficiary:

To the name and address set forth in the Register, unless such Beneficiary has supplied to the Creditor Trustee, in writing, a different address.

Section 12.10 Irrevocability. The Creditor Trust is irrevocable.

Section 12.11 Successors or Assigns. The terms of the Creditor Trust Agreement shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and assigns.

IN WITNESS WHEREOF, the parties hereto have either executed and acknowledged this Creditor Trust Agreement, or caused it to be executed and acknowledged on their behalf by their duly authorized representatives, all as of the date first above written.

DATED: [Debtor Company]  
By \_\_\_\_\_  
Its: \_\_\_\_\_

DATED: CREDITOR TRUSTEE  
\_\_\_\_\_

DATED: [SECURED CREDITOR]  
By \_\_\_\_\_  
Its: \_\_\_\_\_

# AMERICAN BANKRUPTCY INSTITUTE

## ***ASSENT AND PROOF OF CLAIM*** **To the Creditor Trust Agreement for the Benefit of Creditors of** **[COMPANY]**

The undersigned, being either a creditor or duly authorized representative of a creditor of [COMPANY], having received and having had an opportunity to read completely that certain Creditor Trust Agreement between [COMPANY] and, *inter alia*, the Creditor Trustee named therein and dated \_\_\_\_\_ (the "**Creditor Trust Agreement**"), hereby irrevocably assents to, and agrees to be bound by, the terms and provisions of the Creditor Trust Agreement. Without limiting the foregoing in any respect, the undersigned submits this Assent and Proof of Claim pursuant to the Creditor Trust Agreement, which the undersigned has read and understood (or been given the opportunity to read and understand), and ***agrees to be bound by the provisions of the Creditor Trust Agreement regarding releases to and covenants not to sue certain parties named in the Creditor Trust Agreement, including the Secured Lenders (as therein defined), allowance of the undersigned's claim, disputes regarding such claim, if any, and distributions upon the claim asserted below.***

WITNESS my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_.

Amount of Claim: \_\_\_\_\_

Name of Creditor: \_\_\_\_\_

Address: \_\_\_\_\_

City, State & Zip: \_\_\_\_\_

By: \_\_\_\_\_  
(Signature of authorized representative)

Name and Title of  
Authorized Representative [Print or type]: \_\_\_\_\_

( ) \_\_\_\_\_ ( ) \_\_\_\_\_  
Telephone Facsimile

Please attach any documentation establishing or evidencing your claim and return the completed form to:

[Creditor Trustee name & Contact information]

NOTE: *Interest, if any, is applicable only to the date of the Creditor Trust Agreement set forth above.*

Re: Collection and Enforcement of Accounts of [Company] by Secured Parties  
[Secured Parties]

To the Account Debtors of [Company]:

This firm represents [Secured Lender] (the “Secured Lender”), the holder of certain debt issued by [Company] (the “Company”) that is secured by validly perfected liens on [all of the Company’s assets, including all] accounts and the proceeds thereof.<sup>1</sup> The Company is in default under the Debt Documents.

The Company began the process of liquidating its assets on [date]. The Company’s books and records reflect that you have an account outstanding with it.

Notice is hereby given, pursuant to UCC § 9-607(a) and all correlatives under applicable state law, that effective as of the date hereof, all amounts due to the Company in connection with its provision of goods and/or services to you and/or your company shall be paid to the Secured Lender at the following address, or pursuant to the below wiring instructions:

[ ]

The right of the Secured Lender to such payments arises as a result of the default by the Company under the Debt Documents in failing to pay the amounts due to the Secured Lender under a security agreement with the Secured Lender, whereby the Company created a security interest in favor of the Secured Lender in your accounts payable.

The Secured Lender reserves all rights under applicable law to enforce payment of the Company’s accounts should you not remit payment timely. Please do not hesitate to contact me with any questions about this letter.

<sup>1</sup> Due to the volume of the relevant documentation, copies of the security agreements and related documents as well as evidence of perfection of the liens are available upon request (collectively, the “Debt Documents”).

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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

In re: ) Chapter 11  
)  
GEM Hospitality, LLC, *et al.*<sup>1</sup> ) Case No. 18-80361  
) (Jointly Administered)  
Debtors. )  
) Honorable Thomas L. Perkins

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**DEBTORS' APPLICATION TO RETAIN & EMPLOY CBIZ MHM, LLC TO (A) PROVIDE CHIEF  
RESTRUCTURING OFFICER & ADDITIONAL PERSONNEL; & (B) DESIGNATE  
JEFFREY VARSALONE AS CHIEF RESTRUCTURING OFFICER FOR THE  
DEBTORS RETROACTIVE TO THE PETITION DATE**

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GEM Hospitality, LLC, and its affiliated debtors and debtors-in-possession (collectively, the “*Debtors*”), in the above-captioned Chapter 11 cases (the “*Cases*,”), through counsel, submits this *Application to Retain & Employ CBIZ MHM, LLC to (A) Provide Chief Restructuring Officer & Additional Personnel; & (B) Designate Jeffrey Varsalone as Chief Restructuring Officer for the Debtors Retroactive to the Petition Date* (the “*Application*”). In support of this Application, the Debtors state:

**JURISDICTION & VENUE**

The Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157(a). This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this District under 28 U.S.C. §§ 1408 and 1409. The statutory bases for the relief requested in this Application are §§ 363(b) and 105(a) of Title 11 of the United States Code (the “*Bankruptcy Code*”).

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: GEM Hospitality, LLC (6259); Pere Marquette Hotel, LLC (2079); Pere Marquette Courtyard, LLC (3235); Pere Marquette Garage MT, LLC (2707); and Pere Marquette Garage, LLC, (6817).

**BACKGROUND**

1. The Debtors collectively own real property and improvements on which two hotels and a parking garage in Peoria, Illinois are located, including a historic hotel property that has stood in downtown Peoria since the 1920s and a second hotel property also located in Peoria's business and entertainment district. The Debtors also operate one of the hotels located on the property owned by the Debtors. A more complete description of the Debtors' operations and history is set forth in the *Declaration of Jeffrey Varsalone in Support of First Day Motions*, filed contemporaneously with this Motion.

2. The Debtors filed for Chapter 11 bankruptcy protection on March 17, 2018 (the "**Petition Date**"). The Debtors are operating their businesses and as debtors-in-possession under § 1107(a) and 1108 of the Bankruptcy Code. No committee has been appointed in these Cases.

**A. CBIZ's Engagement by the Debtors**

3. Immediately before the Petition Date, the Debtors recognized their need for an independent professional firm experienced in crisis management and turnaround services in the hospitality industry. After consulting several firms with experience in the area, the Debtors engaged CBIZ MHM, LLC ("**CBIZ**") to aid them in administering these Cases as they seek to reorganize their operations.

4. The Debtors determined that it was in their best interest to engage and retain CBIZ, and Mr. Jeffrey T. Varsalone, a Managing Director of CBIZ, as their Chief Restructuring Officer ("**CRO**") under an engagement letter dated March 14, 2018 (the "**Engagement Letter**"). A copy of the Engagement Letter is attached as Exhibit 1 to the Declaration of Jeffrey Varsalone in support of this Application, attached here as **Exhibit A**. Under the terms of the Engagement Letter, CBIZ specifically provided Mr. Varsalone to serve as the Debtors' CRO, along with the support of additional personnel from CBIZ (the "**CBIZ Personnel**," and collectively with the CRO, the

“*CBIZ Professionals*”) to assist the Debtors in in these Cases by performing certain financial, operational, managerial, and bankruptcy-specific functions for the Debtors.

5. Further, in recognition of the need for the services of an independent CRO to assure the success of these Cases, the Debtors executed resolutions appointing Mr. Varsalone CRO, empowering him to oversee the Debtors’ day-to-day operations in these Cases. Copies of each Debtor’s resolutions were attached to their respective petitions in these Cases. *See, e.g.* (Dkt. 1.)

**B. CBIZ’s Retention & Qualifications**

6. The Debtors are familiar with CBIZ’s and Mr. Varsalone’s professional standing and reputation, whom the Debtors recognize have a wealth of experience in providing interim and restructuring executives and managers and advisory services to debtors, committees, and other interested parties in restructuring proceedings both in and out of court.

7. CBIZ is a premiere consulting and financial advisory firm. CBIZ provides a broad range of services to its clients and has extensive experience in dealing effectively with a full range of issues and challenges that arise in corporate restructurings and business reorganizations. CBIZ’s professionals specialize in interim management, turnaround consulting, operational due diligence, creditor advisory services, financial and operational restructuring. CBIZ’s services have included a wide range of activities targeted at stabilizing and improving a company’s financial position, including developing or validating forecasts and business plans and related assessments of a business’s strategic position; monitoring and managing cash, cash flow, and supplier relationships, assessing and recommending cost reduction strategies; and designing and negotiating financial restructuring packages. The CBIZ Professionals are well qualified to act on the Debtors’ behalves, given their extensive knowledge and expertise in chapter 11 proceedings.

8. The CBIZ Professionals specialize in corporate recovery and turnaround services, including financial services, developing and reviewing organizational plans, forensic accounting,



analyzing pre- and postpetition operations, preparing liquidation analyses, assessment of management and company personnel, valuations, and related services. These services are essential to the CRO's ability to perform his duties in these Cases.

9. Mr. Varsalone is a Managing Director with CBIZ, and has a wealth of experience in all facets of complex operational turnarounds and balance sheet restructurings. Mr. Varsalone has close to 20 years of experience in distressed transactions, including restructuring, turnaround, workouts, recapitalizations, reorganizations, going concern asset sales and representing the various parties in interest in Chapter 11 bankruptcies. His experience covers a wide range of industries including hospitality, construction, apparel, retail, consumer products, media, manufacturing, real estate, restaurant, energy, technology and transportation.

10. Mr. Varsalone has been retained by and advised clients involved in bankruptcy cases throughout the country, and has testified in U.S Bankruptcy Courts on a variety of issues. Some of Mr. Varsalone's noted representative bankruptcy matters include *Border's Bookstores*, *Reader's Digest*, *Mervyn's Holdings*, *CST Industries*, *4Kids Entertainment*, *Word World*, *Chopper Logistics*, *Electronics Expo*, *Highline United* and recently as the Chief Restructuring Officer of *Fred Fuller Oil & Propane Co., Inc.* and as the Chief Restructuring officer of *Advanced Contracting Solutions, LLC*, to name a few.

11. The Debtors therefore submit that the retention and employment of CBIZ on the terms set forth here and under the Engagement Letter are necessary and appropriate, in the best interests of their estates, creditors, and all other parties in interest, and should be approved retroactive to the Petition Date.

**C. CBIZ's Scope of Services**

12. Subject to the Court's approval, the Debtors propose retaining CBIZ to provide services, and the CRO, on the terms and conditions set forth in the Engagement Letter. Generally,

CBIZ will provide the Debtors (a) crisis management and restructuring services to the Debtors; and (b) providing Mr. Varsalone as CRO, assisted by the CBIZ personnel in that capacity. Specifically, the tasks that the CBIZ Professionals will perform, or have performed already, for the Debtors include:

- (a) analyzing the business, operations and financial condition of the Debtors;
- (b) assisting the Debtors with managing short term liquidity, including the preparation of a 13 week cash flow forecast and monitoring short term liquidity;
- (c) assisting the Debtors with preparing financial projections;
- (d) evaluating strategic alternatives;
- (e) assisting the Debtors with the preparation of data in order to prepare pleadings and fiduciary filings in these Cases;
- (f) providing testimony on matters within CBIZ's expertise; and
- (g) assisting the Debtors and their counsel in negotiations with various parties in interest in these Cases.

13. The Debtors submit that the services to be provided by CBIZ are necessary to enable them to maximize the value of their estates and successfully administer these Cases. In addition to Mr. Varsalone, the Debtors may need the assistance of CBIZ's other professionals to perform the above-described services. The Debtors submit that the assistance of these professionals is also necessary to enable the Debtors to maximize the value of their estates.

**D. Terms of CBIZ's Compensation & Reporting Same**

14. The Debtors propose to compensate CBIZ on an hourly basis for the time spent by the CBIZ Professionals as set forth in the Engagement Letter. As an accommodation to the Debtors, Mr. Varsalone's customary hourly rate has been reduced from \$605/hr to \$500/hr. The customary hourly rates of the CBIZ Personnel to perform services for the Debtors in these Cases ranges between \$195 and \$500. The resulting blended hourly rate for the CBIZ Professionals is

estimated to be between \$350 and \$375. The CBIZ Professionals will also not charge the Debtors for their travel time.

15. Furthermore, under the terms of the Engagement Letter, CBIZ has agreed to offer its services at a blended rate not to exceed \$400 per hour.

16. CBIZ will also seek reimbursement of the reasonable and necessary expenses incurred by the CBIZ Professionals in these Cases, with the exception of airfare charges, for which CBIZ will not seek reimbursement.

17. If approved by the Court, CBIZ will be employed as a restructuring officer under § 363 of the Bankruptcy Code, as opposed to a professional under § 327 of the Bankruptcy Code. CBIZ will accordingly not be required to submit fee applications under §§ 330 and 331 of the Bankruptcy Code.

18. To maintain transparency and to comply with the U.S. Trustee's protocol applicable to the retention of personnel under § 363 of the Bankruptcy Code, however, CBIZ will file with the Court (and serve copies on the U.S. Trustee, and counsel to any Official Committee of Unsecured Creditors, if such a committee is appointed, contemporaneously with such filing) reports of compensation earned and expenses incurred on a monthly basis (the "**Monthly Reports**"). The Monthly Reports will consist of summary charts describing the services provided by the CBIZ Professionals, identify the compensation earned by each professional, and itemize expenses incurred. Time records for Mr. Varsalone and the CBIZ Personnel professionals will (a) be appended to the reports, (b) contain detailed time entries describing tasks performed, (c) be organized by project category and (d) identify time spent completing each task in 1/10 (0.1) hour increments and the corresponding charge (time multiplied by hourly rate) for each task. CBIZ's compensation will be subject to review by the Court in the event an objection is filed. If no

objection is filed within (10) days after a Monthly Report is filed, CBIZ's fees and expenses may be paid without further notice and without further order of the Court.

19. Because CBIZ and Mr. Varsalone are not employed as professionals under § 327 of the Bankruptcy Code, neither CBIZ nor Mr. Varsalone will submit regular fee applications under §§ 330 and 331 of the Bankruptcy Code. CBIZ and Mr. Varsalone will, however, submit the Monthly Reports described above.

20. CBIZ's fee structure with the Debtors is consistent with—and typical of—compensation arrangements entered into by CBIZ and other comparable firms in connection with rendering similar services under similar circumstances. And given the numerous issues CBIZ may be required to address in performing these services, CBIZ's commitment to the variable level of time and effort necessary to address all such issues as they arise, and the market prices for such services for engagements of this nature in an out-of-court context, as well as in chapter 11, the Debtors submit that the fee arrangements in the Engagement Letter are reasonable under these circumstances.

**E. CBIZ's Disinterestedness**

21. To the best of the Debtors' knowledge, information and belief, neither CBIZ nor any professional employee of CBIZ has any connection with or any interest adverse to the Debtors, their creditors, or any other party in interest, or their respective attorneys and accountants, except as may be set forth in the Varsalone Declaration.

22. Although the Debtors submit that CBIZ's retention is not governed by § 327 of the Bankruptcy Code, the Debtors have attached the Varsalone Declaration, which discloses, among other things, any relationship that either Mr. Varsalone or other professional employees of CBIZ has with the Debtors, their creditors, or other parties in interest. Based upon the Varsalone

Declaration, the Debtors submit that CBIZ is a “disinterested person,” as that term is defined in section 101(14) of the Bankruptcy Code.

23. In addition, as set forth in the Varsalone Declaration, CBIZ will conduct an ongoing review of its files to ensure that no conflicts or other disqualifying circumstances exist or arise. If any new material facts or relationships are discovered or arise, CBIZ will file a supplemental disclosure with the Court.

**F. Indemnification**

24. Subject to the approval of the Court and as more fully described in the Engagement Letter, the Debtors have agreed to indemnify CBIZ to the fullest extent permitted by law, from any and all third party claims, liabilities, costs, and expenses, including reasonable attorneys’ fees, relating to the Services under this Agreement, except to the extent finally determined to have resulted from the gross negligence, willful misconduct, or fraudulent behavior of CBIZ relating to such services.

**RELIEF REQUESTED**

25. Under §§ 105(a) and 363(b) of the Bankruptcy Code, the Debtors request that the Court enter an order authorizing the engagement of CBIZ retroactive to the Petition Date, according to the fee structure described above and the terms and conditions of the Engagement Letter.

26. Section 363(b)(1) of the Bankruptcy Code provides that “[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). And under § 105(a) of the Bankruptcy Code, the “court may issue any order, process, or judgment that is necessary to carry out the provisions of [the Bankruptcy Code].” 11 U.S.C. § 105(a).

27. Under applicable case law in this and other circuits, if a debtor’s proposed use of its assets under § 363(b) of the Bankruptcy Code represents a reasonable exercise of the debtor’s business judgment, such use should be approved. *See, e.g., United Retired Pilots Benefits Protection Assn. v. United Airlines, Inc. (In re UAL Corp.)*, 443 F.3d 565, 582 (7th Cir. 2006) (“the criteria for approval [under § 363(b)(I) is] whether the transaction makes good business sense and does not disturb creditors’ rights”); *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.3d 513, 515 (7th Cir. 1991) (holding that a sale under § 363 involves exercise of fiduciary duty and requires an “articulated business justification”); *see also In re Martin*, 91 F.3d 389, 395 (3d Cir. 1996) (a court will normally defer to the trustee’s judgment so long as there is a “legitimate business justification”); *In re Lionel Corp.*, 722 F.2d 1063, 1070 (2d Cir. 1983) (court required an “articulated business justification” before granting a motion brought pursuant to § 363(b)).

28. The Debtors believe that the retaining the CBIZ Professionals as set forth in this Application is a sound exercise of the Debtor’s business judgment. The Debtors recognize the need for an independent, experienced fiduciary to aid them in administering these Cases. The CBIZ Professionals and Mr. Varsalone can carry out these responsibilities effectively and efficiently, to position the Debtors for an effective exit from these Cases that maximizes value for all parties involved. The Debtors assert that the CBIZ Professionals are well qualified and able to represent the Debtors in a cost effective, efficient and timely manner in this capacity.

29. Furthermore, courts in this Circuit and others have approved relief similar to that sought by the Debtors under this Application. *See, e.g. In re Gulf Packaging, Inc.*, Case No. 15-15249 (PSH) (Bankr. N.D. Ill. June 2, 2015); *In re Lyon Workspace Prods., LLC*, No. 13-02100 (JSB) (Bankr. N.D. Ill. Feb. 19, 2013); *In re Hartford Computer Hardware, Inc.*, No. 11-49744

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(PSH) (Bankr. N.D. Ill. Apr. 12, 2012); *In re Veritis Holdings, Inc.*, No. 12-12821 (CSS) (Bankr. D. Del. Nov. 20, 2012); *In re CHL, LTD.*, No. 12-12437 (KJC) (Bankr. D. Del. Sept. 24, 2012).

30. The Debtors therefore request that the Court grant this Application as the relief sought here is essential, appropriate, and in the best interest of the Debtors' estates and creditors in these Cases.

**NOTICE & NO PREVIOUS REQUEST**

31. The Debtors have provided notice of this Motion to: (a) the Office of the United States Trustee for the Central District of Illinois; (b) the United States Attorney for the Central District of Illinois; (c) The Debtors' Secured Creditors; (d) Stonehenge SCD XXI E, LLC; (e) Bob Howard, as Receiver; (f) First Hospitality Group, Inc.; (g) the entities listed on the List of Creditors Holding the 20 Largest Unsecured Claims; (h) Chevron U.S.A., Inc.; (i) the Peoria County Treasurer; and (i) any party that has requested notice in these Cases under Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given. The Debtors further state that they have not previously sought the relief requested here before this or any other court.

*Wherefore*, the Debtors request that the Court grant this Application and enter an order substantially in the form attached here as **Exhibit B**, which (a) authorizes the Debtors to retain and employ the CBIZ Professionals on the terms and conditions stated in the Engagement Letter, retroactive to the Petition Date; (b) designates Mr. Varsalone the Debtors' Chief Restructuring Officer Retroactive to the Petition Date; and (c) grants any other further relief the Court deems appropriate under the circumstances.



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Date: March 23, 2018

*GEM Hospitality, LLC, et al.*

By: /s/ Elizabeth Vandesteeg  
One of their Attorneys

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**RESOLUTIONS ADOPTED BY THE MEMBERS & MANAGERS OF  
GEM HOSPITALITY, LLC**

The undersigned, being all the members and managers of **GEM Hospitality, LLC**, an Illinois limited liability company (the “**Company**”), under applicable provisions of the Illinois Limited Liability Company Act, and the Company’s Articles of Organization and Operating Agreement, adopts the following resolutions and consents, and such resolutions have not been amended or rescinded and are now in full force and effect as of March 23, 2018:

**Whereas**, the Company and several of its affiliates, Pere Marquette Courtyard, LLC; Pere Marquette Hotel, LLC; Pere Marquette Garage MT, LLC; and Pere Marquette Garage, LLC (collectively, the “**Debtors**”) filed chapter 11 bankruptcy cases in the United States Bankruptcy Court for the Central District of Illinois (the “**Chapter 11 Cases**”) on March 17, 2018 (the “**Petition Date**”). The Chapter 11 Cases are being jointly administered under Case Number 18-80361.

**Whereas**, on March 14, 2018, the Company’s members and managers resolved to appoint Jeffrey T. Varsalone of CBIZ, MHM, LLC. the Company’s Chief Restructuring Officer (“**CRO**”), to serve as an officer of the Company for purposes of managing the Company in the Chapter 11 Cases.

**Whereas**, in the judgment of the Company’s members and managers, it is in the best interests of the Company, its creditors, its members, and other interested parties that the CRO’s authority and powers with respect to the Company’s management in the Chapter 11 Cases be further defined and clarified, to ensure Mr. Varsalone’s ability to act in his capacity as an independent CRO in the Chapter 11 Cases.

**It is now, therefore:**

**Resolved**, that the CRO shall hold express authority over the Company’s day-to-day management. Such management authority shall include, but not be limited to:

- (1) exclusive control over the Company’s checking account, credit cards, accounts and cash, with the authority to delegate to First Hospitality Group, Inc. (“**FHG**”) (or any successor management company the Debtors may select) as the CRO may decide, in conformity with past practice; and
- (2) exclusive authority to direct First Hospitality Group, Inc. (or any successor management company the Debtors may select) under the terms of the management agreements between any of the Debtors and FHG (or any successor management company the Debtors may select).

**Resolved**, that the CRO act as a fiduciary for the Company's bankruptcy estate under the provisions of Title 11 of the United States Code (the "*Bankruptcy Code*"), including but not limited to:

- (1) making decisions regarding the Chapter 11 Cases, including, but not limited to, pursuing potential refinancing, sale, or stand-alone plan exit strategies; retaining any investment banker in connection with these strategies, and making all decisions related to any such transactions; and
- (2) performing a forensic investigation and analysis of the Company's financial records, including for the purpose of determining whether any transactions engaged in by the Company were inappropriate, and to bring any causes of action against third parties whom the CRO believes may be liable to the Debtors on any legal basis.

**Resolved**, that these resolutions supplement, and do not replace, the resolutions adopted by the Company on March 14, 2018.

**Resolved**, that the CRO is authorized to take any further action, and to execute and deliver (or cause to be executed and delivered) any further agreements, documents, certificates, and undertakings to effectuate the purpose and intent of these resolutions, and to incur any fees or expenses the CRO deems necessary or desirable in connection with the Chapter 11 Cases.

**Resolved**, that these resolutions may be signed in any number of counterparts, each of which when read together will constitute one document, and that once signed, will be filed with the records of the Company.

[Signature pages follow]

**2018 NORTHEAST BANKRUPTCY CONFERENCE AND CONSUMER FORUM**

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**In Witness Whereof**, the undersigned have executed these Resolutions as the members and managers of **GEM Hospitality, LLC**, as of the date first written above.

**Members:** **EM Properties, Ltd.**  
an Illinois corporation

By: 

Gary E. Matthews, President

**Monte J. Brannan**



**Managers:** **EM Properties, Ltd.**  
an Illinois corporation

By: 

Gary E. Matthews, President

**Brannan & Company, LLC**  
an Illinois limited liability company

By: 

Monte J. Brannan, Manager

**RESOLUTIONS ADOPTED BY THE MEMBERS & MANAGERS OF  
GEM HOSPITALITY, LLC**

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The undersigned, being all the common members with voting rights ("**Members**") and the managers of **GEM Hospitality, LLC**, an Illinois limited liability company (the "**Company**"), under applicable provisions of the Illinois Limited Liability Company Act, and the Company's Articles of Organization and Operating Agreement, adopt the following resolutions and consent thereto as of April 4, 2018:

**Whereas**, the Company and several of its affiliates, Pere Marquette Courtyard LLC, Pere Marquette Hotel, LLC; Pere Marquette Garage MT, LLC; and Pere Marquette Garage, LLC (collectively, the "**Debtors**") filed chapter 11 bankruptcy cases (the "**Chapter 11 Cases**") in the United States Bankruptcy Court for the Central District of Illinois (the "**Court**") on March 17, 2018 (the "**Petition Date**"). The Chapter 11 Cases are being jointly administered under Case Number 18-80361.

**Whereas**, on March 14, 2018, the Members and the managers resolved to appoint Jeffrey T. Varsalone of CBIZ, MHM, LLC, the Company's Chief Restructuring Officer ("**CRO**"), to serve as an officer of the Company for purposes of managing the Company in the Chapter 11 Cases.

**Whereas**, on March 23, 2018, the Members and the managers resolved to expand the authority of the CRO to include, without limitation, (1) the exclusive control over the Company's checking account, credit cards, accounts and cash, with the authority to delegate to First Hospitality Group, Inc. ("**FHG**") (or any successor management company as the CRO may decide), in conformity with past practice; (2) the exclusive authority to direct FHG (or any successor management company the Debtors may select) under the terms of the management agreements between any of the Debtors and FHG (or any successor management company the Debtors may select); (3) the ability to make decisions regarding the Chapter 11 Cases, including, but not limited to, pursuing potential refinancing, sale, or stand-alone plan exit strategies; retaining any investment banker in connection with these strategies, and making all decisions related to any such transactions; and (4) the ability to perform a forensic investigation and analysis of the Company's financial records, including without limitation, for the purpose of determining whether any transactions engaged in by the Company were inappropriate, and to bring any causes of action against third parties whom the CRO believes may be liable to the Debtors on any legal basis.

**Whereas**, in the judgment of the Company's Members and the managers, it is in the best interests of the Company, its creditors, its members, and other interested parties that the CRO's authority and powers with respect to the Company's management in the Chapter 11 Cases be further defined, defined, and expanded, to ensure Mr. Varsalone's ability to act in his capacity as an independent CRO in the Chapter 11 Cases.

**It is now, therefore:**

**Resolved, that:**

- (1) The CRO is hereby appointed the sole and exclusive manager and officer of the Company under the Operating Agreement, with all powers of the manager and such officers under such agreement and applicable law and all prior managers and officers being hereby removed from their respective offices;
- (2) The Members give to the CRO, for the duration of the Chapter 11 Cases, full and irrevocable proxies with respect to their membership interests to vote or consent on behalf of the Members on all matters on which the Members may vote or consent under the Operating Agreement or applicable law, with the Members acknowledging and agreeing that the grant of such proxies is a condition of their retaining the CRO, which is in their best interests; that such proxies are in the best interest of the expeditious resolution of the Chapter 11 Cases; and that in exercising the proxies granted under these resolutions, the CRO will act in the best interests of the Debtors and all the stakeholders in the Company, and not necessarily in the best interests of the Members.

**Resolved, that** these resolutions may not be altered, amended, rescinded or otherwise modified without the consent of the Court after notice and a hearing.

**Resolved, that** these resolutions supplement, and do not replace, the resolutions adopted by the Company on March 14, 2018 and March 23, 2018.

**Resolved, that** the CRO is authorized to take any further action, and to execute and deliver (or cause to be executed and delivered) any further agreements, documents, certificates, and undertakings to effectuate the purpose and intent of these resolutions, and to incur any fees or expenses the CRO deems necessary or desirable in connection with the Chapter 11 Cases.

**Resolved, that** these resolutions may be signed in any number of counterparts, each of which when read together will constitute one document, and that once signed, will be filed with the records of the Company.

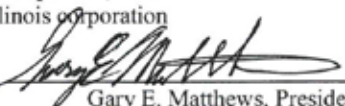
**[Signature pages follow]**



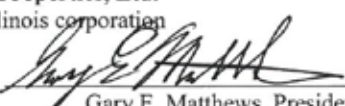
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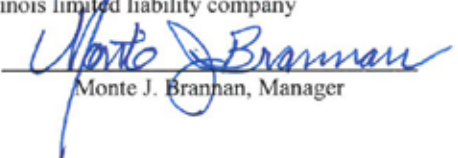
Case 18-80361 Doc 91 Filed 04/06/18 Entered 04/06/18 16:44:16 Desc Main Document Page 84 of 84

**In Witness Whereof**, the undersigned have executed these Resolutions as all of the Members and the managers of **GEM Hospitality, LLC**, as of the date first written above.

**Members:** **EM Properties, Ltd.**  
an Illinois corporation  
By:   
Gary E. Matthews, President

**Monte J. Brannan**  


**Managers:** **EM Properties, Ltd.**  
an Illinois corporation  
By:   
Gary E. Matthews, President

**Brannan & Company, LLC**  
an Illinois limited liability company  
By:   
Monte J. Brannan, Manager



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UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

In re: )  
 )  
GEM Hospitality, LLC, *et al.*<sup>1</sup> ) Case Number 18-80361  
 ) (Chapter 11)  
Debtors. )

**UNITED STATES TRUSTEE'S LIMITED OBJECTION  
TO DEBTORS' APPLICATION TO RETAIN CRO [Doc 46]**

NANCY J. GARGULA, the United States Trustee ("UST") for Region 10, by Attorney Sabrina M. Petesch, files a limited objection to "Debtors' Application to Retain & Employ CBIZ MHM, LLC" [Doc 46], and respectfully represents as follows:

**BACKGROUND**

1. On April 5, 2018, by email to Debtors' counsel, the UST outlined three main issues of concern regarding the Debtors' application to retain a CRO. They were as follows:

a. Indemnification - The Application in paragraph 24 and the Declaration of Jeffrey Varsalone in paragraph 28 refer to terms of the indemnification as "more fully described" in the Engagement Letter. First, there were no discernible references to the indemnification in the engagement letter filed with the application, so the UST requested those terms be clarified. Second, the UST requested confirmation that the indemnification as proposed will not extend further than what the existing LLC managing members receive. Third, the indemnification was overbroad and should instead be limited to only those who work on the case, not the entire firm of CBIZ and only to those services performed for the duration of the case as approved by the

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<sup>1</sup> The Debtors in these cases are: GEM Hospitality, LLC; Pere Marquette Hotel, LLC; Pere Marquette Courtyard, LLC; Pere Marquette Garage MT, LLC; and Pere Marquette Garage, LLC.

Court. The UST requested modification of the CRO employment terms as well, which could also be clarified, perhaps more simply, in the order approving employment.

b. CBIZ Personnel – Debtor is seeking to employ Mr. Varsalone as the CRO. To the extent additional CBIZ personnel are used, their services must only be incidental to the tasks the CRO is charged to perform and in the nature of providing support to the work of Mr. Varsalone. Any such CBIZ personnel must also be directly supervised by Mr. Varsalone and work under his direction. In other words, the additional personnel cannot act independently or perform tasks outside the scope of providing support to Mr. Varsalone, nor can they perform tasks which would primarily be performed by a separate professional employed under § 327.

c. Independent Board Governance – Having the two LLC managing members sign over their voting rights to the CRO would violate state corporate governance law. Simply put, the Debtors' reliance on section 363(b) for approval of a corporate transaction requires proper corporate authority under non-bankruptcy law. Corporate entities must operate through directors or managing members. By contrast, the CRO serves in a corporate officer capacity, and may only serve as a corporate agent at the pleasure of the directors or managing members. Nor is there any authority under state law to allow a CRO to restrict the members' rights to remove them. Consequently, the abdication of voting rights would result in an unaccountable CRO who would not be answerable to the company. Should the case remain in chapter 11, the Code provides only one remedy when a debtor-in-possession's managers are unwilling or unable to perform their jobs: the appointment of a chapter 11 trustee. Unless the Debtor satisfies these concerns, the Court should not approve the application because it is outside the scope of section 363 and otherwise contravenes non-bankruptcy law.

2. On April 9, 2018, the UST received confirmation from Debtors' counsel that they

have no objections to the UST's requests as set forth in the above paragraphs. However, with regard to the "Independent Board Governance" issue, Debtors' counsel does represent that it only created the second set of corporate resolutions in an effort to alleviate the City of Peoria's concerns regarding Gary Matthews and Monte Brannon remaining at the helm, and they cannot speak for the City of Peoria. Thus, the UST files this objection to explain that a CRO must act under the direction, control and guidance of an independent board and be subject to removal by the majority of such independent board.

3. To be clear, the UST takes no position on the City of Peoria's pending motion seeking the appointment of a trustee. If the Court finds the Debtors' managers have engaged in misconduct, however, then the Court should direct the appointment of a chapter 11 trustee.

**ARGUMENT**

4. The steps Debtors' counsel has taken to request that the two controlling LLC members create and sign post-petition corporate resolutions which divest them of their rights to vote amounts to the installation of a "responsible person" or quasi-trustee which is not recognized by the Bankruptcy Code as a valid alternative to a debtor-in-possession or to a chapter 11 trustee. *See In re SunCruz Casinos, LLC*, 298 B.R. 821, 832 (Bankr. S.D. Fla. 2003) ("The Bankruptcy Code expressly provides for appointment of a trustee when a debtor's management is replaced. The Code does not contemplate appointment of a 'Responsible Person' to perform the duties of a trustee."). Congress has established only one remedy to supplant management of a debtor-in-possession while allowing the case to remain in chapter 11 – the appointment of a trustee pursuant to section 1104(a). Parties and bankruptcy courts cannot ignore this provision by writing alternative remedies into the Code.

5. The Court must be faithful to the plain meaning of the Bankruptcy Code's provisions,

as drafted by Congress, and read them narrowly. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 533 (2004) (strictly interpreting 11 U.S.C. § 330(a)(1)). There is no “quasi-trustee” provision in the Code, and Congress has provided for no such entity. Any such alternative remedy would nullify the mandatory nature of trustee appointments as expressed in § 1104(a). *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 402 (1977).

6. Giving the CRO the members’ voting rights means that he no longer answers to an independent member board and that he is stepping out of the CRO box (*i.e.*, traditional corporate officer) and entering the twilight zone between CRO and a Chapter 11 trustee. The CRO would effectively be acting as a court appointed Receiver and “a court may not appoint a receiver in a case under this title.” 11 U.S.C. § 105(b). Legislative history underlying this prohibition could not be clearer: “[T]he bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances. The Bankruptcy Code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established procedures.” S. Rep. No. 989, 95th Cong., 2d Sess. 29 (1978). While the CRO which Debtors seek to employ in this case is not called a “receiver” by name, he clearly is exercising the types of powers and performing the duties traditionally performed by receivers. *See Casco Bay Lines*, 17 B.R. 946 at 952 (“[T]he appointment of a trustee is the only statutorily authorized alternative to a debtor in possession. The Bankruptcy Court is specifically prohibited from appointing a receiver. 11 U.S.C. § 105(b)”).

7. Debtors sometimes attempt to use 11 U.S.C. § 1107(a) as a source of authority to craft a “responsible party” to place in control of a company. Section 1107(a) provides that the debtor in possession will have most of the rights, powers, and duties of a chapter 11 trustee, “subject . . . to such limitations or conditions as the court prescribes . . . .” 11 U.S.C. § 1107(a).

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However, § 1107(a) is not an appointment statute. *See, In re 1031 Tax Group, LLC*, 2007 WL 2085384 at \*3 fn. 4 (Bankr. S.D.N.Y., July 17, 2007) (“Sections 105(a) and 1107(a) may empower a bankruptcy court to prevent a debtor from removing a manager, officer or director, but they do not provide the Court with an independent power of appointment.”); *In re Adelphia Comm. Corp.*, 336 B.R. 610, 668 (Bankr. S.D.N.Y. 2006) (A request for the appointment of an “independent fiduciary” . . . that is in substance if not name a trustee, and represents a back-door means of circumventing the statutory requirements, and case law, applicable to the appointment of trustees under section 1104 . . . is not the type of relief that, in this Court’s view, it should exercise its discretion to grant.”); *In re Suncruz Casinos, LLC*, 298 B.R. 821, 832 (Bankr. S.D. Fla. 2003) (“[T]he Committee recommends that the Court appoint a “responsible Person” in lieu of a trustee, in the event the Court determines that Debtors’ management should be replaced. . . . The Bankruptcy Code expressly provides for appointment of a trustee when a debtor’s management is replaced. The Code does not contemplate appointment of a ‘responsible Person’ to perform the duties of a trustee.”); *In re National Century Financial Enterprises, Inc.*, 292 B.R. 850 (Bankr. S.D. Ohio 2003) (Court rejected request to vest crisis manager with exclusive rights and powers of a debtor in possession); *In re Freedlander, Inc., The Mortg. People*, 86 B.R. 66, 68 (Bankr. E.D. Va. 1988) (adoption of “responsible person” rationale would enable every debtor to defeat a trustee motion by nominating its own successor; this result is not contemplated by the Bankruptcy Code); *but cf. Matter of Gaslight Club, Inc.*, 782 F.2d 767, 770 (7th Cir. 1986) (affirming lower court orders providing debtor-in-possession powers to individual selected by consensual agreement on the “very special facts of this case”).<sup>2</sup>

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<sup>2</sup> *Gaslight* provides little guidance in this factually distinguishable case. Indeed, the *Gaslight* Court emphasized that “we think the peculiar circumstances of the case before us as well as the consent on all sides to the procedure followed make this case different.” 782 F.2d at

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**WHEREFORE**, the United States Trustee respectfully requests that Debtors' application to employ CRO not be approved as currently filed, unless the second set of corporate resolutions in which the two LLC members abdicate their voting rights are vacated or rescinded.

Respectfully submitted,

NANCY J. GARGULA  
United States Trustee

/s/ Sabrina M. Petesch  
Sabrina M. Petesch  
Attorney for U.S. Trustee

United States Department of Justice  
Office of the United States Trustee  
401 Main Street, Suite 1100  
Peoria, Illinois 61602  
Telephone: (309) 671-7854 x 228  
Fax: (309) 671-7857  
[Sabrina.M.Petesich@usdoj.gov](mailto:Sabrina.M.Petesich@usdoj.gov)

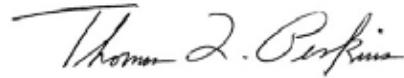
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772 (7th Cir. 1986); *see also* Walter W. Theus Jr., Who's Responsible Here? "Responsible Persons" in Chapter 11 Cases, AM. BANKR. INST. J., May 2008, at 12 (explaining "that [*Gaslight's*] unusual facts limit its precedential value").

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IT IS SO ORDERED.

SIGNED THIS: April 24, 2018



Thomas L. Perkins  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF ILLINOIS  
PEORIA DIVISION

In re:	) Chapter 11
	)
GEM Hospitality, LLC, <i>et al.</i> <sup>1</sup>	) Case No. 18-80361
	) (Jointly Administered)
Debtors.	)
	) Honorable Thomas L. Perkins

ORDER AUTHORIZING DEBTORS TO RETAIN & EMPLOY CBIZ MHM, LLC TO (A) PROVIDE  
CHIEF RESTRUCTURING OFFICER & ADDITIONAL PERSONNEL; & (B) DESIGNATE  
JEFFREY VARSALONE AS CHIEF RESTRUCTURING OFFICER FOR THE  
DEBTORS RETROACTIVE TO THE PETITION DATE

This matter came before the Court on the Application (the “*Application*”),<sup>2</sup> of the above-captioned debtors and debtors-in-possession (the “*Debtors*”), under §§ 361 and 363 of title 11 of the United States Code (the “*Bankruptcy Code*”), for an order authorizing the Debtors to Retain & Employ CBIZ MHM, LLC to (A) Provide Chief Restructuring Officer & Additional Personnel; & (B) Designate Jeffrey Varsalone as Chief Restructuring Officer for the Debtors Retroactive to the Petition Date.

<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor’s federal tax identification number, are: GEM Hospitality, LLC (6259); Pere Marquette Hotel, LLC (2079); Pere Marquette Courtyard, LLC (0929); Pere Marquette Garage MT, LLC (5916); and Pere Marquette Garage, LLC, (3484).

<sup>2</sup> Unless otherwise defined here, capitalized terms used in this Order have the meanings given to them in the Motion.



The Court, after considering the Application, and having determined that the relief requested in the Application is in the best interests of the Debtors, their estates, their creditors and other parties in interest; and it appearing that notice of the Application was good and sufficient under the particular circumstances and that no other or further notice need be given; and upon the record in these Cases; and after due deliberation; it appearing that good and sufficient cause exists for the relief requested in the Application;

**It is hereby Ordered:**

1. The Application is granted.
2. The Debtors are authorized to engage CBIZ, retroactive to the Petition Date, on the terms described in the Application, subject to the following terms, which apply notwithstanding anything in the Application or the Engagement Agreement related thereto to the contrary:
  - a. CBIZ must file with the Court, with copies to the United States Trustee (the “*U.S. Trustee*”) and any official committees appointed in these Cases, a report of staffing on the engagement for the preceding monthly period (each a “*Monthly Report*”). Each Monthly Report will consist of summary charts describing the services provided by the CBIZ Professionals (as defined in the Application), identify the compensation earned by each professional, and itemize expenses incurred. Time records for CBIZ Professionals will (a) be appended to the reports, (b) contain detailed time entries describing tasks performed, (c) be organized by project category; and (d) identify time spent completing each task in 1/10 (0.1) hour increments and the corresponding charge (time multiplied by hourly rate) for each task.
  - b. CBIZ’s compensation will be subject to review by the Court only in the event an objection is timely filed to any Monthly Report.
  - c. If no objection is filed within (10) business days after a Monthly Report is filed, CBIZ’s fees and expenses may be paid without further notice and without further order of the Court.
  - d. In the event an objection is timely filed, CBIZ shall be paid all amounts not in dispute without further notice and without further order of the Court.
  - e. Indemnification of CBIZ and its personnel shall be limited to the indemnification to which the Debtors’ LLC managers and managing members receive under the Debtors’ governance documents and state law, and shall be further limited to specific CBIZ personnel for services they perform for the Debtors during these cases.

- f. To the extent that CBIZ Professionals other than Mr. Varsalone perform services for the Debtors, such services must only be incidental to the tasks that Mr. Varsalone, as CRO, is charged with performing, and in the nature of providing support to the CRO in that capacity. Such personnel must perform these services under Mr. Varsalone's direction and subject to his direct supervision.
3. The Debtors, pursuant to the authority granted to Mr. Varsalone as Manager and holder of the members' voting proxies for each of the Debtors, have indicated a desire to correct certain scrivener's errors in the April 4, 2018, corporate resolutions that grant Mr. Varsalone certain authority on behalf of the Debtors, such that the language more closely tracks the Illinois Limited Liability Corporation Statute, and to have those corrections memorialized in this Order. Paragraph 2 of each of the April 4, 2018, corporate resolutions executed by the members of each of the Debtors is hereby amended to read as follows:

The Members irrevocably appoint the CRO, unless otherwise directed by the Bankruptcy Court, for the duration of the Chapter 11 cases, as proxy to vote or otherwise act for the Members on all matters on which the Members may vote or consent under the Operating Agreement or applicable law, with the Members acknowledging and agreeing that the grant of such proxies is a condition of their retaining the CRO, which is in their best interests; that such proxies are in the best interest of the expeditions resolution of the Chapter 11 cases; and that in exercising the proxies granted under these resolutions, the CRO will act in the best interests of the Debtors and all the stakeholders in the Company, and not necessarily in the best interest of the Members.

4. The terms of the Engagement Letter as modified by this Order, are reasonable terms and conditions of employment, and are hereby approved.
5. CBIZ is not required to submit fee applications under §§ 330 and 331 of the Bankruptcy Code.
6. To the extent there is an inconsistency between this Order, the Application, or the Engagement Letter, the terms of this Order govern.
7. The Debtors are authorized and empowered to take all actions necessary to implement the relief granted in this Order.
8. The terms and conditions of this Order are immediately effective and enforceable upon its entry.
9. This Court retains jurisdiction to hear and determine all matters arising from or related to implementing this Order.