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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF MASON

IN RE THE MATTER OF:)
) NO. 05-2-01083-9
THE PORT OF TAHUYA DISSOLUTION,)
)

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 25th day of September, 2006, Mason County Cause No. 05-2-01083-9 came on for motion hearing before the Honorable Toni A. Sheldon, Judge of the Superior Court sitting at the Mason County Courthouse, in the City of Shelton, County of Mason; and the parties being represented by their respective attorneys as follows:

SUSAN R. SAMPSON, Attorney at Law, Susan R. Sampson, Inc. PS, 1400 Talbot Road S., Suite 400, Renton, Washington 98055-4282, appearing on behalf of Brad Carey;

ROBERT I. GOODSTEIN, Attorney at Law, Robert I. Goodstein Law Group, PLLC, 1001 Pacific Avenue, Suite 400, Tacoma, Washington 98402-4440, appearing on behalf of the Jim Christen and Brad Smith, Petitioners.

1 Court convened with all
2 parties present on Monday,
3 September 25, 2006 at 1:04
4 p.m.

5 THE COURT: Please be seated. The Court calls on
6 for hearing the matter of the Port of Tahuya, 05-2-01083-9.
7 The matter comes on for three motions, as I saw on the
8 calendar today. Let's take the motion for partial
9 reconsideration first please.

10 MS. SAMPSON: May it please the Court, my name is
11 Susan Sampson representing the moving party. And asking the
12 Court to reconsider that part of the earlier proceeding,
13 making a finding that the Port of Tahuya was solvent for
14 purposes of the dissolution proceedings.

15 We suggest that it is not possible to make a finding of
16 solvency first because of the matter of outstanding claims,
17 and second because of the matter of outstanding lawsuit. I
18 will -- with -- with respect to the claims, the Court might
19 recall that the Court is going to issue a letter of
20 instruction on how those claims will be handled. With respect
21 to the lawsuit, the Residents for Quality of Life have filed a
22 lawsuit for failure to disclose public documents. If they
23 succeed in that lawsuit, they will be entitled to a mandatory
24 penalty ranging in the Court's discretion from \$5 to \$100 for
25 failure to disclose each document.

1 In addition, the Public Disclosure Statute carries with it
2 an award of costs and fees for prevailing party. This Court
3 is aware that indeed, documents have been withheld from Brad
4 Carey in particular, both in his private capacity as an
5 applicant for those documents and member of the Residents for
6 Quality of Life, and also in his public capacity as a
7 Commissioner who needed the assistance of the Court before he
8 was ever allowed to view Port documents. This is an
9 indication that indeed, documents have been withheld; that the
10 Port is susceptible to an assessment of costs and fees when
11 that matter is concluded at trial.

12 In response the Port has filed a declaration of George Fox,
13 a CPA and attorney who is not licensed in this state, who has
14 said that because costs and fees cannot be calculated under
15 generally accepted accounting principles, the Port must be
16 deemed to be solvent. But Mr. Fox's declaration relies
17 heavily upon the opinion of counsel for the Port that there is
18 no possible liability. The second page of Mr. Fox's
19 declaration spells that out. That is, I suggest to the Court,
20 an untenable argument. This outstanding lawsuit for costs and
21 fees, in addition to a list of outstanding claims, are an 800
22 pound gorilla. And it just doesn't make common sense, or
23 logical sense, for the Court to say that there is no possible
24 risk or exposure to the Port so that its assets remain known,
25 and so that it is solvent.

1 And related to that is Mr. Goodstein's application for fees
2 today, which will remove another \$30,000 from the property of
3 the Port, if that motion is granted, again reducing the sums
4 that were placed into the registry of the Court. So that as a
5 logical and common sense matter, it cannot be stated that the
6 Port is solvent.

7 For that reason we request reconsideration of that part of
8 the Court's prior order finding the Port to be solvent and
9 reserving that ruling until the conclusion of the handling of
10 the outstanding public disclosure lawsuit and the handling of
11 outstanding claims. Thank you.

12 THE COURT: Mr. Goodstein.

13 MR. GOODSTEIN: Thank you, your Honor. May it
14 please the Court, counsel. Your Honor, I hear nothing new in
15 the argument for reconsideration that was not presented to the
16 Court at the time the initial order was entered.

17 I make two comments as to presentation of counsel. First,
18 there was a statement to the effect that you are aware that
19 documents have been withheld. I don't believe any such
20 finding has been made. I don't believe any such
21 representation has been made by the Port that documents have
22 been withheld. So we take exception to that comment and
23 argument of counsel.

24 Further as to Mr. Fox's affidavit two things. Number one,
25 Mr. Fox is a licensed CPA in the State of Washington. You may

1 look at his affidavit with regard to his qualifications and
2 make such determinations as you wish. However, I submit to
3 you that the purpose of submitting Mr. Fox's affidavit is with
4 regard to establishing that the standard by which the industry
5 holds the findings of solvency or insolvency is the attached
6 FASB 5, the Rule by which accountants are governed in terms of
7 determining whether there is a solvency or not.

8 The sum and substance of that Rule, boiled down into simple
9 terms, is that a lawsuit in and of itself does not create a
10 solvency or insolvency situation until post-adjudication. And
11 the standards are -- are evidenced by Mr. Fox and his
12 representations. And he does not represent, contrary to
13 assertions of counsel, that his determination as to whether
14 you would declare an entity solvent or insolvent under the
15 FASB 5 standard has to do with my representation, or any of
16 counsel's representation as to the merits of the lawsuit.
17 He's simply stating that two things have to occur. Number
18 one, that there has to be a probability as a future event that
19 it is likely to occur. And that there has to be a
20 determinable amount of money.

21 And in this particular instance, neither one of those
22 true -- neither one of those two criteria are met, if for no
23 other reason than the fact that even if the Residents were to
24 prevail in their claim, the amount of reward or award to them
25 on this \$5 to \$100 standard is determined exclusively in the

1 province of the Court. And we don't know what, if any, amount
2 that would be. And further, given the fact that this case is
3 being contested and defended by the Port for what we believe
4 to be good reasons, the finding of probability or likely to
5 occur has not been established at this time either.

6 If you take the argument to the extreme, your Honor,
7 virtually anybody in any corporate situation or government
8 situation could simply file a lawsuit, with or without merit,
9 and attempt to declare the entity to be insolvent or solvent.
10 And we would say that the governing standard is not what I say
11 the merits of the case are, but simply what the generally
12 accepted accounting standards are for making that
13 determination. And that should be the basis for the Court
14 making that determination as well. And in fact, I believe
15 that was the determination made by the Court in that regard.

16 So simply dropping a lawsuit on essentially at the last
17 minute, if you will, does not create the standard that would
18 be accepted by the accounting industry, or for that matter,
19 the state auditor in regard to making a determination of
20 solvency or insolvency. And -- and to the contrary, it's our
21 contention that what this lawsuit attempts to do is try to
22 create a situation that will allow plaintiffs to come back if
23 they were to prevail, and in fact have a diminished amount of
24 money, which is not determined at this particular point in
25 time under the Statute.

1 The Port ostensibly has discretionary authority to levy
2 against the citizens for the -- for the balance not made
3 whole. And we believe that's the -- the gambit that's being
4 played here, with all frankness to the Court.

5 So we again see no merit to the reconsideration. It does
6 not make any new arguments that were not previously presented.
7 We have presented what we believe to be the accounting
8 standards. We've attached them to the pleadings. And we
9 believe that the Port should remain in the place that it was.
10 Thank you, your Honor.

11 THE COURT: Ms. Sampson.

12 MS. SAMPSON: Briefly, your Honor. I'm referring
13 to page 4 of George Fox's declaration at paragraph number
14 eight. Since the loss contingency is only remotely possible
15 in the opinion of the Port's attorney, and he goes on then to
16 state his opinion that generally accepted accounting
17 principles would require a finding that the Port is solvent.
18 But he is relying upon the opinion of counsel.

19 Where the Court has had to intervene to provide a citizen
20 access to documents it cannot be said that it is unlikely that
21 there will be any recourse under the Public Disclosure Law in
22 the future. We expect the public disclosure lawsuit to
23 demonstrate that the Port has indeed, intentionally and
24 wrongfully withheld documents. And the Court will be called
25 upon to rule upon that in the future. But it is not so remote

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a contingency as it should be ignored in the solvency proceeding. Thank you.

MR. GOODSTEIN: May I make one additional point, your Honor?

THE COURT: You may.

MR. GOODSTEIN: At direction of the Court after the last hearing, we did direct the Port to -- or I'm sorry, the county to deposit Port funds in the court registry. I believe the amount that has been deposited is in excess of \$183,000, which is higher than had been previously represented to the Court.

THE COURT: All right. The Court, in looking at the motion for reconsideration also looks to the Civil Rule 59 with regard to the structure and the basis upon which to rule on such a motion. And the Court finds that there hasn't been any specific allegation that any of the requirements under Rule 59 have been met. And in fact the Court has heard the arguments that have been presented here today previously.

So the Court will find that there is no reason for reconsideration of that portion of the Court's earlier order and will deny the motion for reconsideration.

The Court also sees that we have on today a motion for order authorizing payment of attorney's fees, a status report, and request for further instructions. Mr. Goodstein.

1 MR. GOODSTEIN: Thank you, your Honor. I'd just
2 offer to the Court that we have one additional request before
3 the Court which is for the Court to enter an order on the last
4 hearing that we had on this matter, which counsel had not been
5 able to agree upon. So we'll take that in that -- in that
6 order, as the Court wishes.

7 In terms of the status report, your Honor, what we have
8 done is just subsequent to the earlier hearing, we have taken
9 several actions that we just wanted to report to the Court.
10 One is that we have caused the Port's funds to be placed in
11 the Court Registry. The second that the public records have
12 been released to the State Archivist, as we understand it.
13 Third, we have submitted all of the claims that have been made
14 against the Port to the Washington Government Entity Pool.
15 They have orally advised me that they do not believe they have
16 coverage on any of these matters and would deny coverage on
17 all claims. I've asked them to present a formal letter to
18 that effect. We felt like we needed to report that to the
19 Court.

20 We've also been receiving some mail, unsolicited, from
21 members of the community which we have attached to this
22 pleading, just to keep all parties informed as to the
23 communications we've been having in that regard.

24 Further, I'd like to combine this discussion with the
25 discussion on fees. The fee arrangement that had been made

1 between the Port and my office essentially is memorialized in
2 the June a year ago minutes. And it called for a retainer
3 based on 10 hours per month at \$180 per hour, with a
4 "quarterly reckoning". We are satisfied with that hourly
5 rate. And as you know, we have asked the Court at all
6 junctures in these proceedings whether the Court wished us to
7 remain on in handling the matter for the Port. And to date,
8 the Court has instructed us to remain in place. So we have
9 simply submitted our bill accordingly. And we're subject to
10 the Court's ruling on that matter. I believe that takes care
11 of those two matters.

12 THE COURT: All right. Ms. Sampson, did you have
13 argument on any of those?

14 MS. SAMPSON: No, your Honor.

15 THE COURT: The Court will approve the fees that
16 have been documented in the pleading that was filed by the
17 Goodstein Law Group on September 18, 2006 and allow payment
18 from the registry of the court in that amount.

19 With regard to the further instructions, the Court heard
20 from both counsel the last time there was argument with regard
21 to this matter that most of the claimants were willing to have
22 their claims resolved in a rather informal process, including
23 one or two that had already filed lawsuits. And had discussed
24 whether it would be appropriate to have perhaps one or two
25 afternoons set aside for the Court to hear those claims. And

1 that appears to be the best process for the bulk of the
2 claims. And I'll ask that counsel proceed when we're finished
3 here to the Court Administrator's office and have her provide
4 you with two afternoons that we could accomplish that in.
5 Hopefully it won't take any longer than that.

6 And then advise the claimants of the time frames that are
7 set out. And hopefully one or the other of those two
8 afternoons would be agreeable to all claimants scheduled so
9 that we can have some coming in on one afternoon, some coming
10 in on the next. And then firm up a schedule so the Court can
11 ahead of time read the materials that needed to be read for
12 that particular afternoon.

13 If you find that there is a claimant that cannot come on
14 either of those two afternoons, then please contact the Court
15 Administrator for a time that is convenient to the claimant
16 that is unable to appear on the two afternoons that have been
17 previously selected.

18 Then with regard to the third issue which I recall is that
19 Mr. Goodstein's firm felt that there may be a conflict of
20 interest in representing the Port as to the other pending
21 lawsuit. And the Court had at one point suggested that
22 perhaps a special master needed to be appointed to resolve all
23 of these winding up affairs. But in giving the matter
24 additional thought, my direction to the Port attorney is that
25 if you believe you have a conflict of interest, you need to

1 deal with it as any attorney would in that situation and
2 obviously locate alternate counsel to represent the Port on
3 that matter. The Court is not going to get further involved
4 in designating who that might be. It would be a matter that
5 would normally be taken up simply internally.

6 MR. GOODSTEIN: Very good, your Honor.

7 THE COURT: Are there any other claims that cannot
8 be then resolved and disposed of, outside of those two
9 frameworks?

10 MS. SAMPSON: Not that I'm aware of.

11 MR. GOODSTEIN: No. Your Honor, there -- there are
12 two other matters as I have said. If -- if we could move on.

13 THE COURT: You may.

14 MR. GOODSTEIN: One is we have an order with regard
15 to the last hearing which was Mr. Carey's order regarding
16 electronic records. He'd asked for a protective order. We
17 had a short hearing. I believe the order that the Court had
18 orally stated was -- was quite plain, which was that no
19 further -- or no, I'm sorry, no former commissioner of the
20 Port of Tahuya having any public record of the Port of Tahuya
21 in any electronic form, whether on a personal computer or a
22 commercial computer server, accessible by such former
23 commissioner or otherwise, shall destroy or delete such public
24 records before a true, accurate and complete copy of the
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1 public record was delivered to the State Archivist in either
2 paper copy or generally accessible electronic format.

3 And further, that upon a former commissioner's delivery of
4 a public record as described to the State Archivist, then
5 there would be -- the commissioners were released from the
6 effect of the order.

7 The discussions that I've had repeatedly with -- with
8 opposing counsel here have not been acrimonious. But she has
9 raised the issue of whether that would include embedded
10 electronic information. Embedded electronic information, as I
11 understand it, is information which by a process of going into
12 your computer system you can figure out the time and date of
13 the -- of the electronic recording.

14 My position on that is that what this order is directed at
15 is to preserve the records of the Port of Tahuya. I don't
16 believe we have an argument about whether business records of
17 the Port of Tahuya that are on electronic media are business
18 records. The issue, I think, is whether that embedded
19 material is a business record.

20 And my position on that has been that in the ordinary
21 course of -- of business, if the business entity, or the
22 governmental entity -- I'm sorry, the government of the entity
23 impacted by the RCW kept that information as part of their
24 business records, then in fact it would be part of the
25 business record to be delivered. But to ask a governmental

1 entity who does not maintain business records in that form,
2 and the Port of Tahuya has never maintained business records
3 in that form, to do that extra exercise is in my opinion,
4 simply to facilitate Mr. Carey's records lawsuit and has
5 nothing to do with the maintenance of business records to be
6 delivered to the State Archivist.

7 And -- and we have reached impasse on that issue. I
8 prepared an order consistent with what I believe the Court had
9 said before. And I believe Ms. Sampson, you know, raises the
10 issue that I just expressed. And she can argue it better than
11 I can.

12 THE COURT: All right. I'm sure she can. Thank
13 you. Ms. Sampson.

14 MS. SAMPSON: Thank you, your Honor. He does
15 fairly summarize the issue. In general, I like the form of
16 this order which requires a copy to be true, accurate and
17 complete. But I would like to see the Court interlineate or
18 give us a minute entry that a complete copy of an electronic
19 record includes the embedded data that is characteristic of
20 that data.

21 If we turn to a document that is stored on a computer --
22 and we are referring only to those documents that are Port of
23 Tahuya documents -- hit the properties box, additional
24 characteristics of the document other than just the text can
25 be printed. With respect to e-mails, again limiting only to

1 Port business, if we look at the embedded electronic data
2 included in e-mail we are able to determine whether or not the
3 text of that e-mail has been edited, because you can go into
4 an e-mail and edit text.

5 So what we are asking for is an interpretation of the word
6 complete copy that means embedded electronic data native to
7 the Port of Tahuya document contained on a private computer
8 also be printed if the document is delivered to the archivist
9 in paper form. If it were copied in electronic form in its
10 native format, that should still be there.

11 THE COURT: All right.

12 MR. GOODSTEIN: And once again, your Honor, I would
13 just argue that I believe this to be an expansion of the
14 records law. The records law, which you know, I -- I heartily
15 embrace as a good law for the State of Washington is -- is
16 fairly specific as to what constitutes a public record.
17 Nowhere in that law is there an expression that it includes
18 additional data one could extract from one's computer related
19 to that -- to the business document. It simply says those
20 records kept in the ordinary course of an entity's business
21 become part of a public record.

22 The exercise we're being asked to do here by Ms. Sampson
23 and her client, in my mind exceeds the intent and meaning of
24 the -- of the public records law.
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1 THE COURT: The Court will sign the order as it is
2 currently formulated. The Court will deny the request to
3 augment the order by requiring that any embedded electronic
4 data also be forthcoming or preserved and transmitted. And
5 the reason I do that, people who are in business and
6 government as it conducts its business, does not ordinarily
7 document and make public those types of data. Certainly in a
8 discovery request, counsel, if those things you're interested
9 in under the lawsuit for your client, that may be
10 discoverable. But in the ordinary course of business and in
11 the ordinary course of learning government, that electronic
12 embedded data is not usually transmitted with the letter or
13 document, just as if the secretary in an office happens to
14 type the document at one point as opposed to three days later.
15 The only thing that you know about that is the date at the
16 top, and then of course the postage meter date and the date
17 that someone receives it.

18 So we have not yet reached the threshold that embedded
19 electronic data goes out with every document. And do you have
20 the original of that order so that I can sign it today?

21 MR. GOODSTEIN: Yes, your Honor. Approach the
22 bench?

23 THE COURT: You may approach. Order on motion of
24 Brad Carey for protective order has been signed.

25 MR. GOODSTEIN: Thank you.

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THE COURT: Anything further today?

MR. GOODSTEIN: One other matter, your Honor. We were scheduled in the -- in the matter of Ms. Sampson's representation of the Residents in regard to the records request lawsuit for status conference. That was set over to another date for status conference. I believe the discussion at the time, which I didn't participate in, was to the effect that since we were going to be here for this hearing today, to the extent that part of it had to do with a scheduling order, that we would take that up with the Court today, if the Court wishes.

THE COURT: I don't have that particular file, but I don't think that will hamper me because my normal questions are as follows. If this is the initial status conference, is that correct?

MS. SAMPSON: Correct.

MR. GOODSTEIN: Yes.

THE COURT: All right. First of all, is the claim for an amount of money that is less than the mandatory cutoff for arbitration; \$50,000?

MS. SAMPSON: Yes, we exceed mandatory arbitration.

THE COURT: You exceed mandatory arbitration. Then the next is to set a discovery time table; a period of months that would be needed to complete discovery. We'll set a discovery cutoff date. And then just after that date, the

1 trial setting will occur. So on behalf of Plaintiff,
2 Ms. Sampson, how many months do you believe are necessary to
3 complete Plaintiff's discovery?

4 MS. SAMPSON: Four months.

5 THE COURT: And Mr. Goodstein, do you believe that
6 all your discovery on behalf of the Port could be determined
7 in that length of time, or perhaps we should back up and say
8 that this needs to be reset, as the Court's just directed you
9 to find other counsel if you believe there is a conflict of
10 interest that would preclude your firm from continuing?

11 MR. GOODSTEIN: Right. Your Honor, here's what I
12 would propose, because I don't want to bind other counsel if
13 in fact a determination was made that other counsel was
14 necessary. It seems to me that the basis by which Ms. Sampson
15 or her client have expressed the conflict of interest is
16 simply that our office represented the Port of Tahuya at
17 various points in time. Over the last year, Mr. Carey was a
18 Commissioner for the Port of Tahuya. And in addition in -- in
19 his capacity when he wasn't a Commissioner, he may have had
20 conversations with me in my capacity as counsel for the Port
21 of Tahuya.

22 I'm not exactly sure that that rises to the -- the level of
23 a conflict of interest as he's expressed it, given the fact
24 that in my capacity I represent the better interests of the
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1 Port of Tahuya, not in representation of any individual
2 commissioner.

3 However, I would like the opportunity to explore with
4 Ms. Sampson and her client further exactly what the basis for
5 that notion is and if in fact they can articulate a valid
6 basis for that notion. I will, of course, follow the RPCs
7 and -- and withdraw.

8 I think as with most record requests that I've handled,
9 which is more than some and less than others, this is
10 particularly interesting in the sense that I'm -- I'm relating
11 this to you in the context of how much time may be necessary.
12 It's particularly interesting because in this instance, this
13 is not what you typically see in a records request case which
14 is, you know, an -- the -- the allegation that there's been an
15 intentional withholding or an inappropriate withholding of
16 records based on exceptions of the records act. This is based
17 on the notion -- this case is based on the notion that somehow
18 or another the records were in such disorder that they should
19 not be properly approached, even in Mr. Carey's capacity as
20 the secretary for the Board of Commissioners -- for the Port
21 Commission, or in the alternative that he was denied access as
22 a result of his threatening to sue the Port. All of which is
23 contested.

24 So this represents a very different approach to what I
25 would consider to be the garden variety records request claim

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that you see. And I say that only because my experience representing other entities, as I'm sure has been Ms. Sampson's experience, is that normally I like to expedite the records request claim. But that doesn't seem to be necessary in this particular instance.

I guess at this time, on balance, I would say the four months ought to be fine. And if counsel -- new counsel if there is any coming in, can request additional time he can do so as he sees fit.

THE COURT: The Court will then set the discovery cutoff for January 31, 2007. And what would happen in the next week to two weeks after that date would be a trial setting conference where you would call in and we would give you a trial date. I can't give you that from the bench today because I don't have the court's calendar. But when you go up and talk with the Court Administrator to find the two afternoons, also let her know that we did the status conference today and your discovery cutoff is January 31, '07 and she will find a date that's workable to our calendar and your schedules at either 8:30 or 8:45 in the morning to call in and get your trial date.

MR. GOODSTEIN: Thank you, your Honor.

MS. SAMPSON: Thank you.

THE COURT: We are in recess.

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