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67916-3-I

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

MARCY GRANTOR, an individual, individually and as Guardian *ad Litem* for MALIA GRANTOR, a minor,

Appellants.

v.

BIG LOTS STORES, INC, an Ohio corporation, and PNS STORES, INC., a California corporation,

Respondents.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

On February 28, 2010, two-year old Malia Grantor was seriously injured at a Big Lots store in Burien, Washington when an assistant manager at the store knocked some heavy boxes onto her, slamming the little girl face first into a metal shelving unit. On the day of the injury, the store gave plaintiffs/appellants Malia Grantor, and her mother, Marcy Grantor, (collectively the "Grantors") a card identifying Big Lots, Inc. (the parent company) as the corporate entity. When the Grantors contacted the Columbus, Ohio address on that card, and sent a draft complaint naming the entity on that card, Big Lots responded through one of its wholly owned subsidiaries, Big Lots Stores, Inc., attempted to negotiate a settlement, and directed the Grantors to the registered agent for service of process. Throughout these communications, Big Lots never told the Grantors that Big Lots, Inc. (the parent company) was the wrong entity.

Yet, when the Grantors personally served their complaint naming Big Lots, Inc., Big Lots simply ignored the suit until the Grantors finally obtained a default judgment. At that time, Big Lots and its subsidiaries had, for over two years, followed a deliberate policy of ignoring process containing misnomers and even slight spelling errors in their corporate names. Although Big Lots knew at the time that plaintiffs frequently named the wrong Big Lots entity in complaints, Big Lots had expressly

instructed its registered agent **not** to notify its headquarters officers of such process.

On Big Lots' motion to vacate the order of default and default judgment, the court first held that service was effective notwithstanding the misnomer and revised the caption to name the subsidiaries as specified by Big Lots. *See Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503, 505-06 (1983) (misnomer does not defeat service where as here the correct defendant's agent is properly served and the body of the complaint identifies the correct party). The court also found that Big Lots' policy and instructions had caused its failure to appear and the resulting default judgment. And finally, the court found that Big Lots had failed to present any evidence "whatsoever" in support of even a prima facie defense or diminution of damages. Given these findings, Big Lots could not meet the test to vacate the default judgment as a matter of law.

The court nonetheless vacated the default judgment finding, in relevant part, that Big Lots did not have "actual notice" of the suit because of its instructions to the registered agent, and that the misnomer in the caption and Big Lots' instructions to its registered agent constituted excusable neglect. These holdings, and vacating the order of default and the default judgment on these bases, were in direct contravention of established law, and a clear abuse of discretion.

First, knowledge is not the equivalent of notice. Because service was effective, and because Washington's statutory scheme specifically provides that service upon the registered agent **is** service on to the corporation, Big Lots had actual "notice" regardless of whether its agent notified its headquarters officers about the complaint.

Second, a defendant must – at a minimum – present substantial evidence of at least a prima facie defense in order to vacate a default judgment. As Big Lots utterly failed to present any such evidence, it was clear error of law and thus an abuse of discretion to vacate the default order and judgment.

Third, Big Lots' failure to appear was caused by its own affirmative policy choice and express instructions to its registered agent. Such a deliberate decision to avoid judicial process cannot constitute excusable neglect as a matter of law. Indeed, even if Big Lots' policy and instructions had not been a deliberate choice – though Big Lots admits they were and the court so found – the failure of a registered agent to notify a corporate officer of process also cannot be either mistake or excusable neglect justifying vacation of a default order or judgment.

Accordingly, the Grantors respectfully submit that this Court should reverse those portions of the superior court's order identified in the assignments of error.

II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1: The court abused its discretion by holding that: "Neither Big Lots, Inc. nor Big Lots, Stores, Inc. had actual notice of the commencement of this suit," CP 503 at CoL No. 3., and by vacating the default order and judgment based on this holding.

Specific knowledge is not required for notice. Because service of the complaint was effective notwithstanding the misnomer in the caption, CP 500-04 at FoF No. 4 & CoL No. 2, and because service upon the registered agent is service upon the corporation, Big Lots had actual notice of the complaint

Assignment of Error No. 2: The court abused its discretion by vacating the default order and judgment after holding that Big Lots had not "submitted or identified any evidence supporting a prima facie defense to the Grantors' claims, although potential defenses were identified." CP 500-04 at FoF No. 9 & Order A; RP, v.II (Sept. 16, 2011) at 20:22-24, 47:20-22.

The test for vacating a default judgment requires a showing of both excusable neglect and evidence supporting a meritorious defense. A defendant cannot satisfy this test where it presents no evidence supporting a prima facie defense.

Assignment of Error No. 3: The court abused its discretion by holding that: "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent," and by vacating the default order and judgment based on this holding. CP 500-04 at CoL No. 4.; RP, v. II (Sept. 16, 2011) 50:15-18.

The misnomer in the caption was caused by Big Lots, and therefore cannot have constituted excusable neglect by Big Lots. RP, v. II (Sept. 16, 2011) at 39:14-23, 48:21-22. In addition, Big Lots did not rely upon the misnomer as a reason for failing to appear. Big Lots' failure to appear was caused by its policy and instructions to its registered agent not to notify Big Lots' headquarters of complaints containing name variations. CP 500-04 at Findings of Fact Nos. 5 & 6; RP, v.II (Sept. 16, 2011) at 40:11-12, 48:23-49:2. Big Lots' policy choice and affirmative instructions to its registered agent constitute a deliberate decision to avoid judicial process, and cannot meet the test for excusable neglect. Even if Big Lots' instructions to its registered agent had not constituted such deliberate disregard, the failure of an agent to notify corporate headquarters of a complaint does not constitute excusable neglect as a matter of law.

Assignment of Error No. 4: The court abused its discretion by vacating the default order and judgment based on its in finding that: "Mistakes were

made by all parties from the commencement of the claim through the entry of the order of default and default judgment." CP 500-04 at CoL No. 1.

The court found that the misnomer in the caption was caused by Big Lots' mistake in identifying Big Lots, Inc. as the corporate entity. RP, v. II (Sept. 16, 2011) at 39:14-23, 48:21-22. Other mistakes by the Grantors, if any, do not support a finding of excusable neglect by defendant Big Lots.

III. STATEMENT OF THE CASE

On February 29, 2008, Marcy Grantor and her then-two-year old daughter, Malia entered a Big Lots retail store in Burien, Washington. While the Grantors were shopping, a Big Lots assistant manager knocked over a stack of heavy boxes onto Malia from behind, slamming the little girl face first into a metal shelving unit. CP 41-89 at ¶¶ 3-12. Malia's face was cut to the bone, leaving a prominent and permanent facial scar, and subjecting her to significant future emotional distress and pain and suffering as well as medical costs to reduce the scar. *Id.* at ¶¶ 13-26; CP 90-101 at Ex. B.

A. Big Lots Held Itself Out As the Correct Entity

At the time of the incident on February 29, 2009, the assistant manager at the Burien store gave Ms. Grantor a card for the company's

"Risk Management Department," identifying the corporate entity as "Big Lots, Inc." with an address of 300 Phillipi Road, Columbus, Ohio (the corporate headquarters of Big Lots, Inc.). CP 41-89 at ¶ 11 & Ex. A; CP 253-291 at Ex. A. At the hearing on its motion to vacate, Big Lots conceded that this same card "was **in place for years and years and years**." RP, v. II (Sept. 16, 2011) at 15:5-10 (emphasis added). When the Grantors then contacted Big Lots at the address on that card, CP 253-291 at ¶ 3 & Ex. B, Big Lots responded through one of its wholly owned subsidiaries, Big Lots Stores, Inc., communicating with the Grantors' attorney via email and telephone, reviewing the Grantors' documentation, and offering a payment to settle plaintiff's claims. CP 253-291 at ¶¶ 3-5 & Exs. B & C.

In particular, on November 9, 2009, the Grantors emailed a draft complaint to Big Lots, which Big Lots acknowledged receiving. CP 253-291 at ¶ 5 & Ex. C.1. The caption of that draft complaint identified the defendant as "Big Lots, Inc," the same corporate name on the card the store had given to the Grantors and that had been "in place for years and years." *Id.* The body of the complaint also identified the specific Big Lots store at issue by number and address. *Id.* at ¶ 5. Yet, Big Lots never disclosed to the Grantors any purported error in the corporate name. Instead, after receiving that draft complaint, Big Lots made a settlement

offer. *Id.* at Ex. D. When, after negotiations failed, the Grantors asked: "Who is Big Lot's agent for service of process in Washington?" *Id.* at ¶ 6 & Ex. D. Big Lots responded: "The agent is CSC, The United States Corporation Company 800-833-9848." CP 253-291 at ¶ 6 & Ex. D.

Throughout the parties' communications before suit was filed and served (there were none after until the default judgment) defendant held itself out simply as Big Lots and never gave the Grantors any indication that: (a) only a subsidiary, and not the parent, was the proper entity, (b) the draft complaint identified the wrong entity, or (c) service of the complaint on Big Lots, Inc. would somehow be improper. *Id.* at ¶¶ 8-12.

B. The Grantors Properly Served the Complaint and Obtained a Default Judgment When Big Lots Failed to Appear

The Grantors filed their complaint on February 26, 2010. *See* CP 1-4. The caption of the complaint was identical to the draft that the Grantors had earlier sent to Big Lots, naming Big Lots, Inc. as the defendant. *See id.* at 1. On March 1, 2010, as instructed by Big Lots, the Grantors personally served the complaint and summons on Corporation Services Company ("CSC"), and filed the affidavit of service. *See* CP 5-6. CSC was the registered agent for Big Lots' wholly owned subsidiaries operating in Washington, Big Lots Stores, Inc. and PNS Stores, Inc. *See* CP 253-291 at Exs. E & I. Just as in the draft, the final complaint also

specifically alleged that the events giving rise to the Grantors' claims occurred at "Big Lots store No. 4436 at 125 B 148th St., Burien, Washington, 98148." *See* CP 1-4 at ¶ 5.

Despite having held itself out as the correct entity and specifying its agent for service, Big Lots simply ignored the complaint: (a) never making an appearance or filing an answer; (b) never indicating its intent to defend or recognize the action as in court; and (c) never attempting to contact the Grantors before entry of default. *See* CP 255 at ¶ 9.

When Big Lots failed to appear, the Grantors obtained an order of default and a default judgment. *See* CP 25-26, 104-08. Both the order of default and the default judgment were supported by substantial evidence, including substantial evidence of damages, including plaintiff Marcy Grantor's declaration and the declaration and report of an expert witness. *See* CP 14-24, 31-40, 41-89 (Marcy Grantor Decl.) at ¶¶ 8-9, 12-15, 18, 22-26, and CP 90-101 (Haeck Md. Decl.).

C. Big Lots Instructed its Agent Not to Notify its Headquarters of Complaints With Any Form of Name Variation

Big Lots, Inc. is a holding company with two wholly-owned subsidiaries in Washington named Big Lots Stores, Inc. and PNS Stores, Inc. (collectively "Big Lots"). *See* CP 253-291 at Ex. K at Ex. 21; CP 134-135 at ¶¶ 4-5. In moving to vacate the default judgment, Big Lots

(appearing through Big Lots Stores, Inc.) for the first time disclosed that the Burien store was "operated" by PNS Stores, Inc., and argued that PNS was the only proper defendant and that the parent company, Big Lots, Inc., could not be sued in Washington.[1] Big Lots' arguments, however, were directly contradicted by the record.

Big Lots' sworn filings with the Securities and Exchange Commission specifically stated that "Big Lots," rather than any of its subsidiaries, had fully **21** stores in Washington. CP 253-291 at Ex. K at 3. The subsidiaries hold these 21 stores out to the public simply as "Big Lots" stores. For example a search using the "Store Locator" on Big Lots' website, identifies the Burien store as a "Big Lots" store. *See* CP 253-291 at Ex. G.

Indeed, both subsidiaries have the same: (1) corporate offices, (2) top officers and directors, and (3) registered agent in Washington. Schwartz Decl., **Exs. K, H , & I**. In particular, the Big Lots' attorneys responsible for service of process were directly controlled by the parent company, Big Lots, Inc. For example, the attorney for Big Lots Stores, Inc. that testified in support of Big Lots' motion to vacate the default was "staff counsel" to both PNS and Big Lots Stores. CP 134-35 at ¶ 2. He

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[1] PNS Stores, Inc. later stipulated to substitute into the action. *See* RP, v.I (July 22, 2011) at 38:4-10. Thus all three Big Lots entities are referred to collectively

and the other attorneys for Big Lots' subsidiaries in Washington work at the corporate headquarters of the parent company, Big Lots, Inc., in Columbus, Ohio and reported to counsel for the parent company in the same office. CP 332-365 at Ex. M (Big Lots' Depo.) at 7:20-8:14, 14:19-15:22.

Big Lots nonetheless argued that its failure to appear should be excused because registered agent did not notify the lawyers for Big Lots Washington subsidiaries about the service. Big Lots argued this failure was due solely to the misnomer in the caption. As noted below, the court found that this misnomer was caused by the card Big Lots gave to the Grantors. RP, v. II (Sept. 16, 2011) at 39:14-23, 48:21-22. Moreover, after limited discovery as to the reasons for the agent's failure to notify Big Lots, Big Lots and its registered agent admitted that the sole reason CSC did not notify Big Lots' headquarters about the Grantors' complaint was that Big Lots had specifically instructed CSC **not to notify it about complaints containing any variation in Big Lots' name, regardless of how slight**. Specifically:

CSC testified that ordinarily service on it as a company's registered agent constitutes service upon the company. CP 332-65 at Ex. L (CSC Depo.) at 12:19-13:1. As to an error or misnomer in a corporate

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herein as "Big Lots."

defendant's name, which CSC terms a "name variation," CSC would follow its client's instructions. CP 332-65 at 34:14-35:9, 35:22-36:3. Absent such instructions, however, CSC's ordinary practice was to notify its corporate clients about service. CP 332-65 at Ex. L at 37:15-22.

Here, CSC's client contact for Big Lots Stores, Inc. was Chad Reynolds, an attorney for **the parent** company, Big Lots, Inc. Mr. Reynolds' office was at Big Lots' corporate headquarters, 300 Phillipi Rd. in Columbus, Ohio, where he supervised the staff counsel for both Big Lots Stores and PNS Stores, and the Big Lots' employees responsible for responding to service of process. CP 332-65 at Ex. M (Big Lots' Depo.) at 7:20-8:14, 14:19-15:22. This is the same address on the card Big Lots gave to the Grantors at the time of the incident. CP 259. Thus, had the registered agent followed its normal protocol, the Grantors' complaint would have been sent to both the parent, Big Lots, Inc. and the subsidiary, Big Lots Stores, Inc.

Over the past several years, some 20 to 30 complaints against Big Lots have named the wrong subsidiary in the caption. CP 332-65 at Ex. M (Big Lots Depo.) at 52:5-53:15. Yet, at the time the Grantors served their complaint on March 1, 2010, Big Lots' express instruction to CSC, had, for over two years, been to "**reject all** documents that are served on a name variation." CP 332-65 at Ex. N; *id.* at Ex. M (Big Lots Depo.) at

12:9-16, 19:9-18, 20:22-21:3, 22:14-18, 25:8-13; *id.* at Ex. L (CSC Depo.) at 44:7-18.[2]

Big Lots further admits that the instruction not to notify it applied to **any** variation in its name, no matter how slight. For example, Big Lots did not want to be notified by CSC if a complaint misspelled its name as "B-**a**-g Lots," or "Big Lot" in the singular, rather than Big Lots. CP 332-65 at Ex. M (Big Lots Depo.) at 28:10-25, 29:8-21, 30:18-24. CSC testified that the instruction in its records regarding Big Lots could only have come from Big Lots itself. *Id.* at Ex. L (CSC Depo.) at 39:9-15, 45:1-4. Thus, when CSC was served with the Grantors' complaint on March 1, 2010, it followed Big Lots' instruction and did not notify Big Lots' headquarters of the suit. *Id.* at Ex. L (CSC Depo.) at 32:4-33:15.

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[2] CSC did not "reject" service. Instead, it accepted service, saying nothing at the time about any error in the corporate name. CP 366-373 (Nervik Decl.) at ¶¶ 4-6; CP 332-65 at Ex. M (Big Lots Deposition) at 46:3-13; *see also* RP (July 22, 2011) at 14:22-24, 15:12-14. One year later, the agent provided Big Lots with a purported letter to the Grantors' counsel purporting to reject service on March 2, 2010, the day after accepting service. CP 136-39 at Ex. 1. Even assuming such a document was actually sent, however, it was never received by the Grantors' counsel until after the Grantors served the default judgment on Big Lots Stores, Inc. a year later. CP 255 at ¶ 10. Moreover, the letter – which is automated -- has the word "null" in the top right corner. *See id.* In fact, CSC's transaction detail for the purported Rejection of Service shows that the "primary delivery method" was by "messenger," and that there was **no** "secondary delivery method." CP 332-65 at Ex. P (emphasis added). Yet, CSC did not maintain a hard copy of the document and has no document confirming that it was actually sent or delivered by messenger or any other means, CP 332-65 at Ex. L (CSC Depo.) at 53:15-18, 54:10-15, which explains why the purported Rejection of Service states that it is "null" and why the Grantors' counsel never received such a letter.

Moreover, absent specific instructions from a client, CSC did in fact notify its corporate clients about such name variations. CP 332-65 at 37:15-22. And as noted, CSC's primary client contact for service of complaints was Chad Reynolds of "Big Lots, Inc." *Id.* at 48:25-49:4 & Ex. O. Thus, if not for Big Lots' express instruction, CSC would have notified Big Lots of the Grantors' complaint in 2010. *Id.* at Ex. L (CSC Depo.) at 27:7-15, 31:18-32:3.

Significantly, Big Lots changed its instruction to CSC in June 2010, after the Grantors served the complaint in this action, such that CSC would notify Big Lots Headquarters of complaints containing name variations. *Id.*, Ex. M (Big Lots Depo.) at 25:14-15, 26:9-15, 57:14-21. But at the time of the Grantors' service on CSC on March 1, 2010, Big Lots' only instruction to CSC was **not** to notify Big Lots. *Id.* at 27:9-16.

D. The Court Vacated the Default Order and Judgment

On Big Lots' motion to vacate the default order and judgment, the court found that the Grantors' personal service on the registered agent for Big Lots Stores, one of the subsidiaries, was effective notwithstanding the misnomer. CP 502-03 at FoF No. 4 & CoL No. 2. Accordingly, pursuant to CR 60(a), the court revised the caption to identify the corporate names of the subsidiaries as specified by Big Lots. CP 503, Order D.

The court also found that Big Lots had "**instructed its registered agent not to notify it of service** where there was any variation in its name," and that this instruction was the neither the agent failed to tell either the parent or the subsidiary about the Grantors' complaint. CP 500-04 at Findings of Fact Nos. 5 & 6. Finally, the court found that: "Big Lots Stores, Inc. has not submitted or identified any evidence supporting a prima facie defense to plaintiffs' claims." *Id.* at Findings of Fact No. 9.

Despite these findings, the court nonetheless vacated the default judgment and order on the grounds that:

(a) "Neither Big Lots, Inc. nor Big Lots, Stores, Inc. had actual notice of the commencement of this suit." CP 500-04 at CoL No. 3.

(b) "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent." CP 500-04 at CoL No. 4.

As set forth below, vacating the default order and judgment based on these holdings was directly contrary to long settled Washington law, and therefore an abuse of discretion.

IV. STANDARD OF REVIEW

A trial court's ruling on a motion to vacate a judgment is reviewed for abuse of discretion. *Little v. King*, 160 Wn.2d 696, 702 (2007). "Among other things, discretion is abused when it is based on untenable grounds, such as a misunderstanding of law." *Id.* at 703. (affirming denial of motion to vacate).

V. ARGUMENT

While defaults are generally disfavored, Washington courts have repeatedly recognized the necessity of the procedure because "we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules." *Id.* "[W]hen served with a summons and complaint, a party must appear. There must be some potential cost to encourage parties to acknowledge the court's jurisdiction." *Morin v. Burris*, 160 Wn.2d 745, 759 (2007).

The primary – and minimum – showing required to vacate either a default judgment under CR 60, or a default order under CR 55, is that (a) "there is substantial evidence supporting a prima facie defense," and (b) the defendant's "failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect." *Little*, 160 Wn.2d at 704 (2007) (primary factors are substantial evidence supporting a defense and

excusable neglect. Thus, Washington courts have repeatedly affirmed orders of default and default judgments where the defendant presented no evidence of a meritorious defense or failed to establish excusable neglect. *See, e.g., Aecon Bldgs. Inc. v. Vandermolen Const. Co.*, 155 Wn. App. 733, 740 (2009) (affirming denial of motion to vacate where no inequitable conduct by plaintiff); *Little*, 160 Wn.2d at 706 ("Where a party fails to provide evidence of a prima facie defense and fails to show that its failure to appear was occasioned by mistake, inadvertence, surprise, or excusable neglect, there is no equitable basis for vacating judgment."); *Prof'l Marine Co. v. Underwriters at Lloyd's*, 118 Wn. App. 694, 705 (2003) (affirming default notwithstanding misnomer); *Morin*, 160 Wn.2d at 759-60 (default proper where defendant failed to appear and no showing of excusable neglect and meritorious defense).

Here, Big Lots failed to establish either element as a matter of law because it was undisputed, and the court found, that (a) Big Lots' failure to appear was the result of its express instructions to the registered agent, and (b) Big Lots failed to present any evidence whatsoever supporting a meritorious defense.

As an initial matter, however, there was no support for the court's finding that Big Lots had no actual notice.

A. Service Was Effective, and Big Lots Therefore Had Actual Notice of the Grantors' Suit

Big Lots had no valid grounds to challenge service. *See Coughlin v. Jenkins,* 102 Wn. App. 60, 65 (2000) (defendant must prove improper service by clear and convincing evidence where, as here, plaintiff has filed a proper affidavit of service). Big Lots did not dispute that the complaint and summons were actually and personally served on the registered agent for both of its wholly-owned subsidiaries operating in Washington. Nor did Big Lots dispute that its registered agent accepted service, saying nothing to the process server at the time it received the complaint.[3]

Thus, Big Lots' only potential basis for disputing service was the fact of the misnomer in the caption. But Washington law is well settled that a misnomer in a caption does not defeat service. As one treatise explains:

> An objection on the ground of mere misnomer of a party defendant, whether an individual or a corporation, does not render the summons insufficient for the purpose of giving notice to the defendant upon whom it is served, and such misnomer in process and pleadings must be taken advantage of by the

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[3] Even if the agent's purported "Rejection of Service" had actually been sent to plaintiff's counsel on March 2, 2010, the day **after** service, – and the evidence shows it was not delivered – service still was effective. Big Lots cited no authority – and there is none – that a party can reject service **after** it has been validly effected. Nor could the purported rejection constitute excusable neglect justifying Big Lots' failure to appear. Big Lots claimed not to know about the service, and thus could not have relied upon the purported "rejection" letter.

> common-law plea in abatement or its equivalent under the modern codes and practice statutes or rules.

59 AM. JUR. 2d, MISNOMER § 243(2d ed. 1987) (collecting cases).

For nearly 30 years, Washington courts have followed this same rule. In *Entranco*, the court held: "[A]n objection on the ground of a mere **misnomer** of a party defendant . . . **does not render the summons insufficient** for the purpose of giving notice to the defendant upon whom it is served." *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503, 505-06 (1983) (quoting 59 AM. JUR. 2d, PARTIES § 257, at 719 (1971) (emphasis added)).

Accordingly, here, the court below correctly held that service was effective notwithstanding the misnomer, and revised the caption to identify the corporate name as specified by Big Lots. CP 502-03 at FoF No. 4, CoL No. 2, & Order D; *see also Entranco*, 34 Wn. App. at 507 (correcting misnomer in caption pursuant to CR 60(a) after default judgment). The court nonetheless held that Big Lots had not received "actual notice" of the service of the complaint. CP 503 at CoL No. 3. This holding was directly contrary to established Washington law.

Because service was effective notwithstanding the misnomer, Big Lots had "actual notice" of the service. Washington law provides that: "A corporation's registered agent **is the corporation's agent** for service of process, notice, or demand required or permitted by law to be served on

the corporation." RCW 23B.05.040(1) (emphasis added). Thus, pursuant to RCW 4.28.080(9), where a plaintiff serves a corporation through its registered agent, such service "**shall be taken and held to be personal service**." RCW 4.28.080 (emphasis added). Similarly, CR 4(d)(2) provides that personal service is effective when in compliance with RCW 4.28.080(9). The purpose of these statutes and rules is to "(1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants." *Sheldon v. Fettig*, 129 Wn.2d 601, 608 (1996).

While there may have been support for the court to find that the officers at Big Lots' headquarters in Ohio did not have actual "knowledge" of the service knowledge is not the equivalent of "notice." There is no support in law or logic for giving a plaintiff the responsibility to ensure that a corporate defendant's agents actually notify the right person within the corporation about service. To the contrary, the law governing service on corporations squarely places that responsibility upon the corporate defendant. Thus, the Grantors' personal service on Big Lots' registered agent was actual notice to Big Lots – regardless of whether that agent later communicated the fact of service to any particular officers at Big Lots' headquarters. It was an abuse of discretion for the court to rely on the purported lack of actual "notice" to vacate the default.

B. Big Lots' Failure to Present Any Evidence of a Defense Precludes Vacating the Default Judgment

At a minimum, Big Lots had to establish that "there is substantial **evidence** supporting a prima facie defense." *Little*, 160 Wn. 2d at 703-04 (emphasis added). For example, a defendant seeking to vacate the damages award in a default judgment must show that there "was **not** substantial evidence to support the award of damages." *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 242 (1999). In assessing such evidence, the court applies the same standard as in motions to set aside damages awards from trials. *Id.* Under that test, "[ev]idence is substantial if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Little*, 160 Wn. 2d at 704.

As our state Supreme Court has explained: it "is not a prima facie defense to damages that a defendant is surprised by the amount or that the damages might have been less in a contested hearing." *Little*, 160 Wn. 2d at 704; *Shepard Ambulance,* 95 Wn. App. at 240-41 (by "failing to appear and defend in a lawsuit, a defaulting defendant bears the risk of surprise at the size of a default judgment."). Nor is "mere speculation … substantial evidence of a defense." *Little*, 160 Wn.2d at 705. In *Little v. King,* the defendant offered a declaration opining that the plaintiff had a pre-existing

condition as a defense to damages. Because that declaration was conclusory, and therefore did not provide competent evidence that any such pre-existing condition caused the injury, the defendant had failed to meet its burden to justify vacating the default. *Little*, 160 Wn.2d at 704-05. Thus, a defendant cannot simply argue that it believes there is a defense to damages, or identify a potential defense. Instead, the defaulting defendant bears the burden to submit to the court specific and "substantial evidence supporting a prima facia defense." *Id.* at 704.

Here, the court specifically and correctly found that: "Big Lots has not submitted or identified any evidence supporting a prima facie defense to plaintiffs' claims, although potential defenses were identified." CP 502 at FoF No. 9; RP, v.II (Sept. 16, 2011) at 47:20-22 (Big Lots "made no showing of evidence relating to a defense or a diminution in damages"). Indeed, as to each of the purported defenses Big Lots attempted to identify, the court found a complete failure to present any evidence whatsoever.

For example, when Big Lots attempted to argue a defense based on the Grantors' awareness of the danger, the court explained: "You have presented no evidence. You've presented ideas about a prima facie defense. **There is no evidence whatsoever**." RP, v.II (Sept. 16, 2011) at 20:22-24 (emphasis added). The court went on to explain: "I'm saying

there is not a single declaration from somebody who says 'we always put the cones out.' ... I don't see that this mitigates or presents an issue of contributory negligence just because you say so. ... **that's not evidence**." RP, v.II (Sept. 16, 2011) at 24:13-22 (emphasis added); *see also* RP, v.II (Sept. 16, 2011) at 27:6-8 ("I don't actually think in any of your papers there actually is anything that amounts to evidence.")

Similarly, when Big Lots attempted to disparage the Grantors' evidence in support of the damages award, the court found:

> Again, **no evidence, minus**. ... **You didn't present one bit of evidence**, not a note from a doctor, not anything to say that – or from – am I just supposed to make my own assumptions? You presented no evidence from which a jury could conclude that that was wrong. You are – again, there is nothing.

Id. at 36:14-19 (emphasis added). In short, Big Lots' arguments regarding damages were precisely the type of "conjecture" and professed "surprise by the amount" of the judgment Washington courts have rejected as a basis for vacating a default judgment.

While the court specifically held that Big Lots failed to make this showing, it nonetheless vacated the default, explaining: That was not the basis of the Court's ruling." RP, v.II (Sept. 16, 2011) at 50:8-9. Yet because Big Lots failed to present any evidence "whatsoever" supporting a prima facie defense, it failed to meet the first required element to vacate

the default judgment as a matter of law. It was therefore a clear mistake of law and abuse of discretion for the court to vacate the judgment.

C. Big Lots' Deliberate Policy Choice and Affirmative Instruction to its Agent Cannot Be Excusable Neglect as a Matter of Law

As noted above, even if Big Lots had established evidence of a prima facie defense, the first factor, vacating the default judgment under either CR 60 or CR 55 also required a showing of the second factor, "excusable neglect." *Little*, 160 Wn. 2d at 703-04 (emphasis added); *In re Estate of Stevens,* 94 Wn. App. 20, 31 (1999) (if there is no excusable neglect, "any error in also determining that there was no meritorious defense is harmless."); *Shepard Ambulance,* 95 Wn. App. at 239 (excusable neglect required under both CR 55 and CR 60 motions to vacate default).

But Washington courts have long held that there is no "excusable" neglect – and it is error to vacate a default judgment – where failure to appear was willful. "The decision not to participate does not meet the standard required" for excusable neglect. *Little*, 160 Wn.2d at 706; *Johnson v. Cash Store*, 116 Wn. App. 833, 841 (2003); *Commercial Courier Serv. v. Miller*, 13 Wn. App. 98, 106 (1975) (no excusable neglect can be shown where party disregards process); *White v. Holm*, 73 Wn. 2d 348, 352 (1968) (factors can justify vacating default "**provided** the …

failure to properly appear in the first instance was **not willful**") (emphasis added); *Bishop v. Illman*, 14 Wn. 2d 13 (1942) (abuse of discretion to vacate where defendant acted willfully).

Regardless of a defaulting defendant's evidence supporting a prima facie defense,

> where the defaulting party's actions are deemed willful, equity will not afford that party relief, even if the party has a strong or virtually conclusive defense to its opponents' claims. ... **Willful defiance of the court's authority can never be rewarded in an equitable proceeding**.

TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc., 140 Wn. App. 191, 205-06 (2007).

Here, the failure of Big Lots' registered agent to notify officers at Big Lots' headquarters was neither a mistake nor excusable. Instead, it was caused by Big Lots' express instructions not to notify officers at its headquarters about complaints with any "name variation," regardless of how slight. As the court explained: "I will categorize as excusable neglect the policy that I discussed before, which is not accepting the material if there was a misnomer or a spelling mistake." RP, v. II (Sept. 16, 2011) 50:15-18.

Yet, Big Lots' policy was directly contrary to long-standing Washington law. *See Entranco*, 34 Wn. App. at 505-06 (discussed *supra*).

And but for that instruction, CSC would have contacted Big Lots' headquarters about the Grantors' complaint. Significantly, as noted supra, counsel for the parent company, Big Lots, Inc., was the agent's client contact and worked in the same offices as staff counsel for the Washington subsidiaries.

Moreover, Big Lots' policy that its agent disregard any and all name variations was not an irregularity or mishandling limited to the single instance of this action. Rather, Big Lots had consciously adopted an affirmative policy to avoid learning about such complaints since at least January 2008, over two years before the Grantors served this complaint. Big Lots' deliberate disregard for judicial process conclusively defeats any argument for vacating the default judgment. It was therefore contrary to settled law and an abuse of discretion for the court to vacate the default after finding that Big Lots' failure to appear was caused by its own policy and instructions to its registered agent.

D. The Agent's Failure To Notify Big Lots' Headquarters of Service Cannot Be Excusable Neglect as a Matter of Law

Finally, even if Big Lots had presented any evidence of a prima facie defense, and even if Big Lots' failure to appear had not been due to Big Lots' deliberate policy choice – although Big Lots admits it was and the court so found – the registered agent's failure to tell its headquarters

about the suit still could not have been excusable neglect as a matter of law. The court nonetheless held that Big Lots'

> failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent,

CP 503 at CoL No. 4. This holding was contrary to law and an abuse of discretion on both bases.

First, Big Lots cannot establish that its failure to appear was due to any "excusable neglect."[4] Because it expressly instructed its registered agent to reject any materials with a name variation, no matter how slight, and not to notify its headquarters officers, Big Lots cannot contend that its failure to appear was a mistake, inadvertent, or a surprise, let alone excusable. To the contrary, the registered agent did **exactly** what Big Lots told it to do.

Moreover, even if the registered agent had simply lost or failed to deliver the complaint, that still would not constitute excusable neglect. Washington courts have consistently held that such internal failures to recognize or act upon service do not constitute excusable neglect. *See, e.g., TMT Bear Creek,* 140 Wn. App. at 212, (2007) (Washington courts

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[4] Because it expressly instructed the registered agent to reject such service and not to notify its headquarters officers, Big Lots cannot contend that its failure to appear was a mistake, inadvertent, or a surprise. To the contrary, the registered agent did exactly what Big Lots had told it to do.

have "repeatedly" held that a failure to appear due to "breakdown of internal office procedure" is "not excusable."); *Prest v. Am. Bankers Life Assurance Co.,* 79 Wn. App. 93, 100 (1995) (no excusable neglect where defendant misplaced legal process after being reassigned); *Beckman v. DSHS.,* 102 Wn. App. 687, 695-96 (2000) (failure to timely route documents not excusable neglect); *Johnson v. Cash Store,* 116 Wn. App. at 848-49 (that person who accepted service neglected to forward to attorney is not grounds to vacate).

Similarly, the registered agent's failure to notify Big Lots of the service was – at best – a purely internal matter between the corporate defendant and its agent and does not constitute "excusable neglect" as a matter of law. Said differently, there can be no dispute that if the complaint had contained no misnomer, but identified Big Lots Stores and/or PNS as the defendant, then the registered agent's failure to notify the company would not be excusable neglect. Because, as discussed above, service was effective notwithstanding the misnomer, the result here is the same. Indeed, a contrary rule would be patently unjust and entirely without legal support. On Big Lots' theory, a corporate defendant could simply hide behind its registered agent, either intentionally or negligently failing to give adequate instructions as to process about which it should be notified. That is exactly the kind of lengthy delay and refusal to

participate in legal proceedings that the default procedures are designed to avoid.

Second, the only mistake identified – the misnomer in the caption – was not a valid ground for vacating the default judgment. As an initial matter, the court itself specifically found that the misnomer was caused by Big Lots giving the Grantors a card identifying Big Lots, Inc. as the corporate entity, a card that Big Lots itself admitted "was **in place for years and years and years**." RP, v. II (Sept. 16, 2011) at 15:5-10 (emphasis added).

Moreover, the misnomer in the caption goes only to whether service was effective, not whether Big Lots acted with excusable neglect. Perhaps because it held – contrary to law – that Big Lots lacked actual notice, the court may have believed that the error in the caption somehow justified Big Lots' failure to appear. Yet, Big Lots claims not to have known about service of the complaint at all and therefore cannot have relied upon the caption – or any mistake in the form of the default judgment – as a reason for failing to appear.

Entranco is directly on point. There, just as here, the plaintiff served the correct entity, but the caption erroneously identified the entity's parent corporation. 34 Wn. App. at 504. The defendant then sought to vacate the default judgment based on the error in the caption. As the court

explained, however:

> A party who fails to timely raise this issue **waives** any error on the ground of misnomer. **A judgment**, whether **by default** or after full proceedings, **is as conclusive against such a party as it would be if the party were described by its correct name**.

Id. at 506 (emphasis added); *see also Prof'l Marine Co.*, 118 Wn. App. at 705 (affirming default even though defendant incorrectly named in lawsuit where "complaint gives sufficient notice").

The court in *Entranco* then upheld both service **and the entry of default** notwithstanding the misnomer in the caption based on the identical facts present here, *i.e.*, that: (1) the correct entity had been properly served, and (2) the allegations of the complaint made it clear what entity was being sued. *Id.* This case presents exactly the situation in *Entranco*.

Just as in *Entranco*, then, assuming that the caption of the default had to name one (or both) of the Big Lots subsidiaries, the appropriate remedy was not to vacate the default, but rather to correct the judgment pursuant to CR 60(a) to specify the proper the party. As the *Entranco* Court explained:

> CR 60(a) permits correction of "errors ... arising from oversight or omission" as well as correction of "clerical mistakes." Several federal decisions have held that misnomers of party defendants in judgments may be corrected pursuant to Federal Civil Rule

> 60(a). The misnomer here constitutes an "[error] ... arising from oversight or omission" which the trial judge possessed authority to correct under CR 60(a).
>
> As we have determined the default judgment may be enforced against Engineers, despite the misnomer, appropriate amendment of the judgment is necessary to make the record clear.

34 Wn. App. at 507. CR60(a) expressly grants a court the authority to make such corrections "at any time of its own initiative or on the motion of any party and after such notice as the court orders." CR 60(a). Correcting the caption is exactly what the court here did. Thus, any mistake in the caption could not have justified or caused Big Lots failure to appear, and was appropriately corrected by the court.

In sum, vacating the default judgment on the basis of either, or both, the self-imposed lack of knowledge by Big Lots' headquarters officers, or the "mistake" in the caption, was contrary to law and an abuse of discretion.

VI. CONCLUSION

The Grantors' personal service on Big Lots' registered agent was proper and therefore Big Lots had actual notice of the summons and complaint. Big Lots' deliberate policy and express instructions to its registered agent to prevent that notice from being communicated to officers at its headquarters simply does not meet the standards for vacating

a default order or judgment. Indeed, such willful and deliberate disregard for judicial process is directly contrary to the spirit and purpose of those standards and Washington's statutory scheme for service. To rule otherwise would reward Big Lots for its conscious decision to ignore proper service upon its registered agent. Finally, even if Big Lots' failure to appear had not been the result of its own deliberate policy decision, and even if it's agent's failure to forward the complaint to Big Lots' headquarters could be excusable neglect, Big Lots still could not justify vacating the default because it utterly failed to present any evidence supporting its purported defenses.

For the reasons stated herein, this Court should reverse the following portions of the superior court's Order Granting Motion to Vacate Order of Default and Default Judgment:

A. Conclusion of Law No. 3: "Neither Big Lots, Inc. nor Big Lots, Stores, Inc. had actual notice of the commencement of this suit," CP 503.

B. Conclusion of Law No. 4: "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent." CP 503.

C. That portion of the Order vacating the:

- Order of Default, entered on January 27, 2011,
- Default Judgment, entered on February 28, 2011, and
- Judgments in favor of Malia and Marcy Grantor,

  entered on February 28, 2011.

Respectfully submitted,

DATED this 7th day of May, 2012.

By: _____

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DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury under the laws of the State of Washington, that on this day, he caused a true and correct copy of the foregoing to be served via email upon the following counsel of record:

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Signed at Seattle, Washington on this 7th day of May, 2012

_____

Gregory G. Schwartz