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STATE OF WASHINGTON
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No. 99017-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SHAMIM MOHANDESSI; JOSEPH GRACE, individually as residential owners and derivatively on behalf of 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation, and derivatively on behalf of 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation,

Petitioners,

vs.

URBAN VENTURE, LLC, a Washington limited liability company; VULCAN, INC., a Washington corporation; 2200 CONDOMINIUM ASSOCIATION, a Washington non-profit corporation; 2200 RESIDENTIAL ASSOCIATION, a Washington non-profit corporation; GARY ZAK, an individual; BRIAN CROWE, an individual; BRANDON MORGAN, an individual; and JOHN DOES 1-15, individuals,

Respondents.

RESPONDENTS 2200 CONDOMINIUM ASSOCIATION, GARY ZAK, BRIAN CROWE AND BRANDON MORGAN'S ANSWER TO PETITION FOR REVIEW

Milton A. Reimers, WSBA #39390
Lawrence A. Costich, WSBA #32178
Molly J. Henry, WSBA #40818
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3400
Seattle, WA 98101-4010
Attorneys for Respondents 2200 Condominium Association, Gary Zak, Brian Crowe and Brandon Morgan

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I. INTRODUCTION AND IDENTITY OF RESPONDENTS

Petitioners Shamim Mohandessi and Joseph Grace have waged a seemingly endless campaign of litigation challenging the allocation of condominium common expenses dictated by a declaration of covenants that was recorded fifteen years ago. Petitioners now ask this Court to review the Court of Appeals' unremarkable conclusions that (1) Petitioners' claims challenging the 2006 Master Declaration are time barred, (2) Petitioners lack standing to assert derivative claims, and (3) that 2200 Residential Association (the "Residential Association" or "RA") had the authority to bind Petitioners, as unit owners, to a settlement agreement with the condominium developer. There is no basis under RAP 13.4(b) for this Court to accept review.

Respondents 2200 Condominium Association, Gary Zak, Brian Crowe, and Brandon Morgan (collectively the "Master Association" or "MA") respectfully request that the Petition be denied.

II. COUNTERSTATEMENT OF THE CASE

2200 Westlake is a mixed-use development in the South Lake Union area of Seattle. Upon its completion in 2006, developer Urban Venture, LLC recorded a declaration of covenants under the Condominium Act creating a four-unit condominium consisting of: (1)

the Residential Unit (259 condominium units); (2) the Commercial Unit (retail shops); (3) the Hotel Unit (Pan Pacific Hotel); and (4) the Food Store Unit (Whole Foods). CP 10045, 10059, 10103, 10105. 2200 Westlake is governed by and acts through the Master Association, a Washington non-profit corporation. CP 10066. Each of the four units of 2200 Westlake are members of the MA, each unit appoints a representative to the four-person MA Board, and all MA Board decisions are made by unanimous consent of its four directors. CP 10066.

As required by the Condominium Act ("Condo Act"), the MA enacted covenants in the form of a Master Declaration. RCW 64.34.200. As also required by the Condo Act, the 2006 Master Declaration allocated a percentage of undivided interest in the common elements and common expenses of the association to each of the four units. RCW 64.34.224(1); CP 10052, 10080. To do this, the Declaration assigned a "Declared Value" to each unit, then calculated the common interest percentages in accordance with those Declared Values. CP 10052, 10105. The MA Board is required to allocate annual common expenses amongst the four units according to the percentages set forth in the Declaration.[1] CP

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[1] Any changes to the Declaration may only be made through a unanimous vote of the four Units *and* their first mortgagees. CP 12346 (§§ 19.4-19.6).

10070-71, 10080, 10092; *see also* RCW 64.34.360(2) ("all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to RCW 64.34.224(1)").

The Residential Association is a separate non-profit association that governs the Residential Unit, a condo within a condo. CP 10105, 10107, 10126. Each year, the RA prepares a budget covering the amount that each residential unit owner will pay to cover the RA's own common expenses, which include the Residential Unit's payment of common expenses to the MA. CP 10113-14, 10118, 10133-34. The annual budget is ratified at a meeting of the Residential Unit owners. CP 10134.

Petitioners own residential condominium units within the 259-unit Residential Association. They are members of the Residential Association, not the MA. Petitioner Grace purchased his first unit in 2006, and a second unit in 2015. Petitioner Mohandessi purchased his unit in 2010. CP 310, 13766-13758. Petitioner Grace's complaints about the governance and expense allocations at 2200 Westlake began in 2007, shortly after he lost an election to become one of the initial directors of the Residential Association board (he also ran and lost in 2010 and 2011). CP 9468, 13405, 13579. Despite acknowledging in a 2008 email that the "[t]ime (statute of limitations. . .) is against us," Grace took no timely action to challenge the covenants (i.e., common expense allocations) of

which he complained. CP 12418, 12164-65. Instead, Grace stopped paying a portion of his RA assessments in protest, forcing the RA to sue him in 2011 and again in 2013. CP 9413-19, 9422, 9444-51, 13402, 13766. He counterclaimed, alleging that the RA violated its own declaration by charging assessments that only benefit the MA's commercial tenants. CP 9877-79. Grace lost the lawsuit and his claims were dismissed. CP 9439-42, 9469-71, 9473-77.

Undeterred, Petitioners filed this present case in 2015—nine years after the Master Declaration was recorded—alleging a battery of claims against the Residential Association, the MA, the developer, and past individual directors of the MA. With the exception of a claim attacking the enforceability of a 2012 construction defect settlement agreement, all Petitioners' claims are based on the contention that the 2006 Master Declaration's covenant setting the Common Expense Liability allocation violates the Condo Act, the Consumer Protection Act, and other statutory and common law duties. Pet. App. at A-10. Petitioners made their claims individually, derivatively on behalf of the Residential Association, and double derivatively on behalf of the MA. Pet. App. at A-7.

The trial court dismissed all claims challenging the Common Expense Liability set forth in the 2006 Master Declaration as time barred, dismissed the derivative claims for lack of standing, and granted summary

judgment on Petitioners' challenge to the 2012 settlement agreement, which Petitioners had sought to show was void and unenforceable. The court then awarded defendants partial attorney fees under the 2012 settlement agreement for prevailing on that claim. The Court of Appeals affirmed on all grounds.[2] Pet. App. at A-1.

III. ARGUMENT

There are no grounds for review under RAP 13.4(b). The Court of Appeals' application of the statute of limitation to bar Petitioners' challenges to the 2006 covenant allocating common expenses was entirely unremarkable. Petitioners' novel argument that their claims "re-accrue" every year when the MA adopts its budget is contrary to the law and ignores that the MA has no authority to deviate from the allocations in the 2006 Master Declaration. Similarly, the Court of Appeal's ruling that Petitioners lack standing to assert derivative claims on behalf of the MA and Residential Association, both nonprofit entities, was a straightforward application of the Washington Nonprofit Corporation Act ("WNCA"),

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[2] Petitioners improperly assert as fact that the common expense allocation in the Master Declaration "violated the Condominium Act" because it "discriminated in favor of the declarant and were not based on any method or formula." Pet. at 4. As the Court of Appeals explained at note 4, the trial court's statements about the 2006 allocation were dicta, made in the context of dismissing Petitioners claims on other grounds. As a result, the Court of Appeals declined to address the merits of that argument.

RCW 24.03 *et seq.*, and the Court of Appeals' own precedent. Finally, there is no substantial public interest in the order awarding prevailing party fees following Petitioners' unsuccessful attack of the private 2012 settlement agreement. The Court should decline further review of these issues.

A. **The Court of Appeals Correctly Applied the Time Bar to Petitioners' Claims.**

The Court of Appeals followed established Washington law in concluding that Petitioners' claims challenging the Common Expense Liability allocation set forth in the 2006 Master Declaration are time barred. Actions that challenge the validity of a condominium association's declaration are subject to (i) the three-year statute of limitations in RCW 4.16.080(2), in the case of the originally recorded declaration, and (ii) the one-year time bar set forth in both RCW 64.34.264(2) and Article 19.2 of the Master Declaration, in the case of an amendment to the declaration. These time bars begin to run upon recording of the covenant, whether it be the original declaration or a subsequent amendment to the declaration.

RCW 4.16.080(2) sets forth a general three-year limitation for a party to commence an action for "any other injury to the person or rights of another not hereinafter enumerated." *See Stenberg v. Pac. Power & Light Co.*, 104 Wn.2d 710, 709 P.2d 793 (1985). Petitioners' claims challenging

the legality of the Common Expense Liability covenant came nine years after the Master Declaration was recorded and effective. The Court of Appeals correctly applied RCW 4.16.080(2) in affirming dismissal of Petitioners' claims.

The one-year time bar for an amendment to a declaration, set forth in both RCW 64.34.264(2) and Article 19.2 of the Master Declaration, also bars Petitioners' claims. RCW 64.34.264(2) provides: "No action to challenge the validity of an amendment adopted by the association pursuant to this section may be brought more than one year <u>after the amendment is recorded</u>." (underline emphasis). Article 19.2 of the Master Declaration is nearly identical: "No action to challenge the validity of an amendment adopted by the Association pursuant to this Section may be brought more than one (1) year <u>after the amendment is recorded</u> and copies thereof are delivered to all Unit Owners." CP 10099 (underline emphasis). The Court of Appeals did not address this one-year time bar, though it provides an alternative basis to bar to Petitioners' claims.

Since the Master Declaration was recorded in 2006, the MA Board has unanimously adopted four amendments to the Master Declaration, two of which relate to the Petition. The MA adopted and recorded the First Amendment on June 3, 2008, which amended Exhibit B—the Exhibit identifying the Common Expense Liability allocation of the MA Units. CP

14562-65. By amending Exhibit B, the MA reaffirmed that Exhibit B is controlling as to the Common Expense Liability allocation. Any challenge to the Declared Value and corresponding Common Expense Liability was required to be made within one year of the First Amendment's recording.

The MA recorded the Second Amendment on October 28, 2010, which amended Article 10 (Common Expense and Assessments). CP 14567-69. That amendment once again reaffirmed that the Common Expenses Liability allocation was controlling. Any challenge was required to be made within one year of the Second Amendment's recording.

With the one-year time bar set forth in RCW 64.34.264(2), the Legislature made unambiguously clear that the time to challenge a covenant begins accruing on the day that the covenant is recorded. By extension, the three-year time bar under 4.16.080(2) must also be interpreted to begin accruing upon recordation of the original declaration.

In *Bilanko v. Barclay Court Owners Ass'n*, 185 Wn.2d 443, 375 P.3d 591 (2016), this Court applied the statutory time bar set forth in RCW 64.34.264(2) to defeat a challenge to the validity of an association's covenants related to leasing restrictions. *Bilanko* held that the one-year time bar "is intended to prevent challenges to whether an amendment is legally sufficient or binding that are brought more than a year after recording the amendment." *Bilanko*, 185 Wn.2d at 448. Petitioners' argument that a

cause of action against a covenant accrues every time the covenant is applied, whether to pass a budget or impose an assessment, undermines the purpose of these statutes: to provide finality. "To hold otherwise would render the time bar meaningless, for unit owners could challenge amendments years after passage. A statutory time bar is a 'legislative declaration of public policy which the courts can do no less than respect,' with rare equitable exceptions." *Bilanko*, 185 Wn.2d at 451-52. RCW 64.34.264(2) demonstrates the Legislature's intent to bar challenges to the validity of a covenant brought years after recording, whether it be the original declaration or a subsequent amendment.

It is important to distinguish between a challenge to the covenant itself and a challenge to a board's application of a covenant. The Court of Appeals rightly concluded that Petitioners' claims challenge the validity of the 2006 covenants themselves, not the manner of the Board's application:

> Each of plaintiffs' individual causes of action against the MA, Vulcan, and Urban Ventures arises out of its claim that the original master declaration, and specifically the common element liability allocation, violate the Condominium Act, CPA or a statutory or common law duty.

Grace, 13 Wn. App. at 692-93.

The Master Declaration repeatedly and thoroughly covenants that the Unit Owners shall be subject to the Common Expense Allocation set

forth in Exhibit B to the Master Declaration. These covenants mandate that the MA Board allocate common expenses in an exact and specific manner.

- Section 1.7: "Common Expenses are funded by each Owner in accordance with its Allocated Interest[.]" CP 12298.
- Section 1.7: Allocated Interest is "the percentage of liability for Common Expenses, and ownership interest in the Common Elements of each Owner. The Allocated Interest Percentage, as set out on Exhibit B[. . . .]" CP 12298.

The Master Declaration requires the MA Board to adhere to these covenants. CP 10070-71 (§ 8.5.1). As the Court of Appeals rightly noted, "the MA has no discretion or authority to deviate from the Common Expense Liability allocation set forth in the original master declaration and exhibit B," and Petitioners do not contend that it does. Pet. App. at A-11. Under the Master Declaration, the Board must "comply strictly with the provisions of [the MA] Declaration" and "all Common Expenses must be assessed against the Units in accordance with the respected Allocated Interest of each Unit as set forth in Exhibit B." CP 10092, 10080; *see also* RCW 64.34.360(2).

It is only a board's *discretionary* decisions in the application of covenants which may be subject to challenge, not mandatory application of the covenants as written, as was the case here. That is nothing more than a veiled challenge to the covenant itself. Petitioners' argument that the validity of mandatory covenants are subject to a challenge each time that a

new budget is passed would render the statute of limitation on challenges to the covenants meaningless.

To be sure, a party may challenge budgetary decisions over which a board has discretion, but the MA Board made no decisions here. Petitioners' claims are merely attacks on the validity of the underlying 2006 covenants. The Legislature imposed a time bar on challenges to recorded covenants in order to give the covenants themselves, as well as the owners encumbered by those covenants, finality and certainty. To rule otherwise would nullify the statutes of limitation applicable to recorded covenants and permit challenges in perpetuity. Statutes are to be interpreted to avoid such an "absurd" or "anomalous result." *State v. Wofford*, 148 Wn. App. 870, 883-84, 201 P.3d 389 (2009).

Petitioners argue that the time bar did not begin to run until more recently because their "claims could not accrue until the plaintiffs knew or reasonably should have known all essential elements of their cause of action[.] Pet. at 14. This ignores that the Master Declaration was recorded in 2006, giving constructive notice to all purchasers. Moreover, the Common Expense Liability allocation was set forth in the public offering statement and provided to every original buyer at 2200 Westlake before they bought their units. CP 600, 10169, 10175, 10185, 14381. Petitioners had

actual and constructive notice of the Common Expense Liability allocation prior to purchasing their units.

Time bars exist because "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Order of R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944). "The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.* *See also Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). These time bars serve to "instill a measure of certainty and finality into one's affairs by eliminating the fear of threatened litigation." *Wakeman v. Lommers*, 67 Wn. App. 819, 840 P.2d 232 (1992). They are also "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R. Telegraphers*, 321 U.S. at 348-49.

The Court of Appeals served these purposes and followed Washington law by holding that Petitioners' claims were barred. The MA and its four Unit Owners (including the Unit Owners' affected mortgagees) have abided by the Common Expense Liability allocation since 2006 and the subsequent amendments to the Master Declaration since 2008 and 2010,

respectively. There is no conflict of law. The Court should deny review of this issue.

B. **<u>The Court's Holding That Petitioners Lacked Derivative Standing Has Long Been the Law In Washington.</u>**

Petitioners seek to upend 18 years of settled law in order to obtain a better result for themselves in this lawsuit. No Washington court has ever recognized a member's right to assert claims derivatively on behalf of a nonprofit corporation. There are no conflicting cases, and no basis to change the longstanding rule in Washington that such suits are not permitted.

In holding that the WNCA did not authorize Petitioners' derivative claims on behalf of the Residential Association and MA, the Court of Appeals followed *Lundberg v. Coleman,* 115 Wn. App. 172, 60 P.3d 595 (2002), *rev. denied,* 150 Wn.2d 1010, 79 P.3d 446 (2003). It found Petitioners' attempts to distinguish that case unpersuasive. Pet. App. at A-14-16.

Lundberg held that the WNCA does not broadly authorize derivative actions on behalf of nonprofit corporations because the Act "carefully delineates when actions may be brought by a member or director against the corporation." *Lundberg,* 115 Wn. App. at 177-78 (citing RCW 24.03.040; former RCW 24.03.265). The Act itself only

provides two avenues for a member to seek judicial relief on behalf of the nonprofit corporation: a "representative suit" against an officer or director for exceeding their authority, or a suit seeking dissolution of the entity where the directors have acted in a manner that is illegal, oppressive or fraudulent. RCW 24.03.040(2), .266(1)(b),(d). Petitioners did not invoke either of these scenarios.

The *Lundberg* Court went on to expressly reject the idea put forth by Petitioners that, even in the absence of a statutory grant of derivative standing, a court has the equitable power to acknowledge a derivative action on behalf of a nonprofit beyond those permitted by the WNCA. *Id.* at 179-80. "Although a trial court sitting in equity is able to consider or provide equitable remedies, equity itself does not provide standing." *Id.* at 180. Where the legislature did not see fit to provide standing, the court cannot fashion a remedy.

In the eighteen years since *Lundberg* was decided, there has been no disagreement. To the contrary, courts have reinforced its sound logic. In addition to the decision in this case, just last year the Court of Appeals followed *Lundberg*, finding that it was "dispositive" and again holding that a non-profit member lacked standing to bring derivative claims against an association outside of those expressly permitted by RCW

24.03.040(2). *Bangarter v. Hat Island Comty. Ass'n,* 14 Wn. App. 2d 718, 741, 472 P.3d 998 (2020).[3]

Petitioners do not point to any cases that conflict with these decisions, as required by RAP 13.4(b)(1) and (2). Instead, by making the same arguments that Washington courts have repeatedly found unavailing, Petitioners essentially argue that the Courts of Appeal have gotten it wrong. For example, Petitioners argue that alleged "common law derivative standing" can only be abrogated by clear legislative intent and that the WNCA does not clearly disavow such standing. This argument was expressly rejected by *Lundberg,* which explained that RCW 24.03.040(1) defines the narrow circumstances under which a derivative action on behalf of a nonprofit may proceed and courts are not free to expand upon this legislative decision.[4] *Lundberg,* 115 Wn. App. at 177.

Petitioners' assertion that *Lundberg* and its progeny conflict with "common law derivative standing" fails to acknowledge that no Washington court has ever recognized a member's right to assert a

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[3] A Petition for Review is pending before this Court in *Bangarter,* but tellingly, the issue of derivative standing was not raised as an issue. Case. No. 99138-3.

[4] Petitioners have not asserted a claim under RCW 24.03.040(1), which concern ultra vires actions, and have made it clear in briefing that they are not invoking RCW 24.03.040.

derivative claim on behalf of a nonprofit corporation. Petitioners' cited cases all involve for profit entities, not nonprofit corporations governed by the WNCA. *Haberman v. Wash. Pub. Power Supply Sys.,* 109 Wn.2d 107, 149, 744 P.2d 1032 (1987) (derivative suit by bondholder through bond trustee); *Donlin v. Murphy,* 174 Wn. App. 288, 298, 300 P.3d 424 (2013) (shareholder suit on behalf of for profit corporation); *Gustafson v. Gustafson,* 47 Wn. App. 272, 276, 734 P.2d 949 (1987) (same). As explained by the Court of Appeals, the Legislature expressly provided for derivative actions by shareholders of corporations, and chose not to do so for nonprofit entities. Pet. App. at A-15 ("The WBCA expressly authorizes shareholders of for-profit corporations to bring derivative actions on behalf of the corporation. RCW 23B.07.400. . . . The WNCA, in contrast, does not . . . ."). These cases provide no support for Petitioners' contention that there is a common law right for a member to bring a derivative action on behalf of a nonprofit corporation.

Petitioners' contention that a lack of broad derivative standing to act on behalf of nonprofit entities constitutes a "free pass" to nonprofit directors was also squarely dismissed by *Lundberg*. "[T]he legislature has determined that a proper remedy for mismanagement of nonprofit corporations is an injunction, an order of dissolution, or appropriate relief in a proceeding brought by the attorney general. If [Petitioners] believe[]

the remedies set forth by the legislature are insufficient or inappropriate, then [they] must take [their] case to the legislature." *Lundberg,* 115 Wn. App. at 178.

The Court of Appeals' finding that Petitioners' lacked standing to assert derivative claims on behalf of the Residential Association and the MA was a routine application of settled Washington law. The Court should not accept review of this decision under RAP 13.4(b).

C. **The Court's Award of Fees For Upholding the 2012 Settlement Agreement Against Petitioners' Challenge Was Consistent With RCW 64.34.304 and Longstanding Law.**

Petitioners grossly overstate the effect of the Court of Appeals' ruling enforcing the generic prevailing party fee provision in the 2012 Settlement Agreement. CP 19416. The Court of Appeals did not hold that a condominium association can broadly "oblige owners to all manner of personal obligations without the owners' knowledge or consent." Pet. at 16. It merely held that the Residential Association had the authority under RCW 64.34.304 to settle construction defect issues affecting the condominium, and because Petitioners' claim to invalidate the agreement was properly dismissed on summary judgment, the defendants were the prevailing parties and entitled to recover their fees incurred in upholding the agreement. Pet. App. at A-20. This was a routine application of RCW

4.84.330's mutuality of remedy provision and requires no further review by this Court.

To be clear, the Settlement Agreement does not impose any liabilities or obligations on Petitioners as individuals. The provision at issue states nothing more than that the prevailing party is entitled to recover attorney fees arising from the need to take action to enforce the agreement. CP 19416. Had Petitioners not doggedly pursued claims that would have invalidated a multi-million dollar settlement benefitting all 259 Residential Unit owners—including themselves—defendants would not have incurred fees that needed to be reimbursed.

There are no broader due process issues at play in the prevailing party fee provision that would merit review under RAP 13.4(b)(4). It is well established that condominium owners give up a certain degree of freedom in exchange for the benefits of association with other owners. *Lake v. Woodcreek Homeowners Ass'n,* 169 Wn.2d 515, 535 (2010) (internal citations omitted). RCW 64.34.304 grants an association broad power to manage affairs affecting its member units, including the right to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of two or more unit owners" and to "make contracts and incur liabilities." RCW 64.34.304(1)(d) and (e). The statute goes on to provide that an association may also:

> (r) Exercise any other powers conferred by the declaration or bylaws;
>
> (s) Exercise all other powers that may be exercised in this state by the same type of corporation as the association; and
>
> (t) Exercise any other powers necessary and proper for the governance and operation of the association.

The Residential Association's declaration gives it similarly broad authority to settle matters affecting the condominium. CP 1127.

Petitioners' hyper-technical reading of this statute would limit an association's powers to settle claims to those that have been formally filed in litigation. Put another way, Petitioners would *require* an association to file suit before settling a claim, even if the association had already reached an agreement on the terms of the settlement. That is an absurd result that would only serve to encourage costly litigation. *Bellevue Pac. Ctr. Ltd. P'ship v. Bellevue Pac. Tower Condo. Owners Ass'n*, 171 Wn. App. 499, 507, 287 P.3d 639 (2012) (settlements are "strongly favored").

As the Court of Appeals aptly recognized, neither the Condominium Act nor the Residential Association's declaration required the association to seek approval prior to settling claims. Pet. App. at A-20-21. Petitioners cite no authority to the contrary. There is no conflicting authority and no substantial public interest in the routine enforcement of prevailing party fee provision. RAP 13.4(b).

IV. CONCLUSION

This Court should decline review and award the MA its attorney's fees incurred in answering the petition pursuant to RAP 18.1(j).

Dated: January 25th, 2021

SCHWABE, WILLIAMSON & WYATT, P.C.

By: /s/ Molly J. Henry
Milton A. Reimers, WSBA #39390
E-Mail: mreimers@schwabe.com
Lawrence A. Costich, WSBA #32178
E-Mail: lcostich@schwabe.com
Molly J. Henry, WSBA #40818
E-Mail: mhenry@schwabe.com
Attorneys for Respondents 2200 Condominium Association, Gary Zak, Brian Crowe and Brandon Morgan

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on the 25th day of January, 2021, I arranged for service of the foregoing RESPONDENTS 2200 CONDOMINIUM ASSOCIATION, GARY ZAK, BRIAN CROWE AND BRANDON MORGAN'S ANSWER TO PETITION FOR REVIEW to the parties to this action as follows:

Attorneys for Plaintiffs Shahim Mohandessi and Joseph Grace

Hozaifa Y. Cassubhai
BAILEY DUQUETTE
500 Union St Ste 800
Seattle, WA 98101
E-mail:
hcassubhai@baileyduquette.com

Daniel M. Weiskopf
Gregory J. Hollon
Claire Martirosian
Matthew J. Campos
Theresa M. DeMonte
McNAUL, EBEL, NAWROT & HELGREN, PLLC
600 University Street, Suite 2700
Seattle, WA 98101
E-mail:
dweiskopf@mcnaul.com
ghollon@mcnaul.com
cmartirosian@mcnaul.com
mcampos@mcnaul.com
tdemonte@mcnaul.com
ahartzell@mcnaul.com
lnelson@mcnaul.com
tdo@mcnaul.com

Attorneys for Defendant 2200 Residential Association

Jeffrey E. Bilanko
Carroll Biddle & Bilanko, PLLP
801 Second Avenue, Suite 800
Seattle, WA 98104
E-mail: jbilanko@cbblegal.com
shosey@cbblegal.com

Ronald G. Housh
Attorney at Law, PS
1420 5th Avenue, Suite 3000
Seattle, WA 98101-2393
E-mail: ron@housh.org
mallory@housh.org

Catherine W. Smith
Ian C. Cairns
Smith Goodfriend, P.S.
1619 Eighth Avenue North
Seattle, WA 98109
E-mail:
cate@washingtonappeals.com
ian@washingtonappeals.com

Attorneys for Defendant Urban Venture, LLC, and Vulcan, Inc.

John C. Dippold
S. Jay Terry
Michael B. King
Jason W. Anderson
Parker R. Keehn
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, WA 98104
E-mail: dippoldj@carneylaw.com
terry@carneylaw.com
king@carneylaw.com
anderson@carneylaw.com
keehn@carneylaw.com

by:

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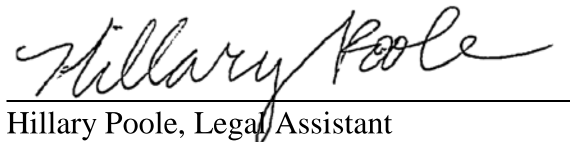

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