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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' REPLY AND OPPOSITION TO CROSS APPEAL

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I. INTRODUCTION

At a minimum, a defendant seeking to vacate a default order or judgment must establish **both** 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 v. King*, 160 Wn.2d 696, 704 (2007). As set forth in the Grantors' Opening Brief, the trial court ignored this standard and vacated the default order and judgment notwithstanding the failure to establish either element by Big Lots (Big Lots Stores, Inc., PNS Stores, Inc., and their parent company, Big Lots, Inc., are collectively referred to as "Big Lots").

In particular, the trial court correctly determined that: (a) service was effective notwithstanding the misnomer, (b) Big Lots' failed to present any evidence supporting a prima facie defense, and (c) Big Lots' failure to appear was caused by its affirmative instructions to its registered agent not to forward complaints with misnomers to Big Lots' corporate headquarters. Significantly, Big Lots failed to assign error to these crucial findings and conclusions by the trial court, and indeed failed to present any authority to the contrary. These holdings necessarily precluded the trail court's order vacating the default, and are fatal to Big Lots' arguments on this appeal.

In addition, Big Lots' cross appeal is without merit. The trial court properly revised the caption pursuant to long-established Washington law. *See* CR 60(a); *Entranco Engineers v. Envirodyne, Inc.*, 34 Wn. App. 503, 507- (1983). Big Lots also waived its contention that the trial court lacked authority or sufficient evidence to award terms by failing to object and submit argument or authority at the court's invitation.

Accordingly, this Court should grant the appeal from the vacation of the default order and judgment, and dismiss Big Lots' cross-appeal.

II. BIG LOTS HAD NO CONCLUSIVE DEFENSE BECAUSE IT WAS PROPERLY SERVED AND THUS HAD NOTICE

In order to vacate either the default order or judgment, Big Lots was required – at a minimum – to present "substantial **evidence** supporting" a meritorious defense. *Little*, 160 Wn. 2d at 703-04 (emphasis added); *Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson,* 95 Wn. App. 231, 242 (1999) (a defendant seeking to vacate a damages award in a default judgment must show that there "was **not** substantial evidence to support the award of damages"). Because the trial court specifically found that Big Lots presented no such evidence, it was a clear abuse of discretion to vacate the default order and judgment.

Big Lots nonetheless argues that it had a "conclusive" defense to the Grantors' claims because (it wrongly contends) the misnomer in the

caption meant there was no service on its wholly owned subsidiaries and thus no jurisdiction over them. Respondents Brief ("Resp. Brief") at 14-16. Big Lots waived this argument, and it is entirely without merit.

First, the trial court specifically held that service **was** effective notwithstanding the misnomer. CP 500-04 at FoF No. 4 & CoL No. 2. Significantly, Big Lots failed to assign error to this determination by the trial court in its cross appeal, nor did it clearly disclose its intent to appeal the determination in an associated issue.

> A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

RAP 10.3(g). This rule applies to conclusions of law as well as findings of fact. *See, e.g., King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993) ("An unchallenged conclusion of law becomes the law of the case.); *Strother v. Capitol Bankers Life Ins. Co.*, 68 Wn. App. 224, 244-45, 842 P.2d 504 (1992) (failure to cross appeal dismissal of claim precluded challenge to factual finding negating essential element of claim) rev'd on other grounds, 124 Wn. 2d 1, 873 P.2d 1185 (1994). Accordingly, Big Lots cannot challenge the effectiveness of service on appeal.

Second, even if it could challenge service on this appeal, Big Lots' contention fails. As set forth at length in the Grantors' Opening Brief, *see* Appellants' Opening Brief ("Opening Brief") at 8-9, 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 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. Instead, Big Lots makes only a conclusory assertion that there was no "actual notice" because its registered agent did not forward the complaint to its officers at the corporate headquarters in Ohio. Resp. Brief at 14. But that is precisely the clear error of law at issue on this appeal.

"Notice" does not mean "knowledge," and Big Lots offers no authority that the failure of its registered agent to tell its headquarters officers about the suit somehow defeats service. Indeed, Big Lots simply ignores the overwhelming authority that service on a registered agent **is service on the corporation**. *See* RCW 23B.05.040(1) ("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 4.28.080(9) (service on the registered agent of a corporation "shall be taken and held to be personal service"); CR 4(d)(2) (personal service pursuant to RCW 4.28.080(9) is effective).

Because the Grantors' personally served the complaint on the correct corporate representative for both of Big Lots' wholly-owned subsidiaries in compliance with Washington law, they properly effected service on those entities notwithstanding the misnomer in the caption. That effective service constituted "actual notice" as a matter of law. "[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, Big Lots had "actual notice" of the suit.

Here, just as in *Entranco*: (1) the correct entity was properly served, and (2) the allegations of the complaint made it clear what entity was being sued.[1] *Id.*, at 504. Thus, just as in *Entranco*, service was effective and default judgment was properly entered notwithstanding the misnomer. *Id.* at 506 ("**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**." (emphasis added)); *see also*

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[1] The fact that the complaint does not use the name "Big Lots Stores, Inc." or "PNS Stores, Inc." is therefore irrelevant. The allegations of the complaint unquestionably identified the intended defendant – specifying the exact location

Prof'l Marine Co. v. Underwriters at Lloyd's, 118 Wn. App. 694, 705 (2003) (affirming default even though defendant incorrectly named in lawsuit where "complaint gives sufficient notice").

Big Lots' reliance on *Lee v. Western Processing*, 35 Wn. App. 466, 667 P.2d 638 (1983)) and *Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (1983) is inapt because in both cases the plaintiff failed to properly serve the complaint on the correct person. *See Lee*, 35 Wn. App. at 469 (no service on any of the "only three people who could have received service"); *Gerean*, 108 Wn. App. at 969-70 (finding no substitute service under RCW 4.28.080(15) because plaintiff failed to deliver the complaint at the defendants "usual abode."). But here there is no dispute that the Grantors properly served the complaint by personal service on the registered agent for both of the Big Lots' subsidiaries in question.

Similarly without merit is Big Lots' argument that service was not effective because its registered agent purportedly sent a letter of "rejection of service" to the Grantors' the day after service. Respondents' Brief at 5. The registered agent did not "reject" service; rather it accepted service without objection. 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-

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of the store and referring to the defendant as "Big Lots," which defendants admit was the trade name for the subsidiary that owned the store. Resp. Brief at 3.

24, 15:12-14. Big Lots admitted at oral argument there was no evidence its agent rejected service when the complaint was served. RP (July 22, 2011) at 14:15-15:14). Big Lots further admits that the purported rejection letter (which was never received[2]) could not have been sent until the day **after** service was effected. Resp. Brief at 5. Big Lots cites no authority that service can be "rejected" once it has been validly effected, and there is none. Thus, the agent's purported rejection letter is entirely irrelevant to the question of whether service was properly made.

Furthermore, Big Lots' contention that this letter "clearly establishes that CSC could not validly accept service for BLI," Resp. Brief at 25, is both wrong and misunderstands the issue. The question is whether service was properly made on the subsidiaries that Big Lots now contends were the only proper entities.[3] Because it is undisputed that CSC was the registered agent for both subsidiaries, and was personally served, the only issue is whether the misnomer in the caption somehow defeats

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[2] The only evidence in the record shows that this letter was neither sent nor received. CP 136-39 at Ex. 1; CP 255 at ¶ 10; CP 332-65 at Ex. P; *id.* at Ex. L (CSC Depo.) at 53:15-18, 54:10-15.

[3] While not directly at issue on this appeal, Big Lots' assertion that its parent company does not do business in Washington, and thus is not subject to personal jurisdiction, Resp. Br. at 17, is dubious. As set forth in the Opening Brief, the parent company operates in Washington through its wholly owned subsidiaries, all entities share corporate officers and offices, and Big Lots' corporate filings with the SEC represent that the **parent** company had fully 21 stores in Washington at the time. Opening Brief at 9-10.

service. It did not under settled Washington law. *Entranco*, 34 Wn. App. at 505-06.

Finally, Big Lots' contention that PNS Stores, Inc. was not served or subject to default, Resp. Br. at 16, is not well made. In seeking to vacate the default, Big Lots represented that it typically volunteered to substitute PNS Stores into actions where the plaintiff named the wrong Big Lots affiliate and stipulated that it would do so in this action if the default were vacated. *See* RP, v.I (July 22, 2011) at 38:4-10, 41:1-25. Moreover, Big Lots admits that PNS holds itself out in Washington by the trade name "Big Lots" and was "doing business at the store in question as "Big Lots." Resp. Brief at 3; RP (July 22, 2011) at 37:21-22. Nor did Big Lots ever disclose the existence of PNS until after the default. Leaving these facts aside, however, PNS was properly served and subject to default for the same reasons as Big Lots Stores, Inc. under *Entranco* – i.e., PNS Stores' registered agent was properly served and the complaint clearly identified the exact store at issue.

In sum, because service was effective notwithstanding the misnomer, Big Lots had "notice," and its contentions regarding a "conclusive" defense fail.

III. BIG LOTS FAILED TO PRESENT ANY EVIDENCE SUPPORTING A PRIMA FACIE DEFENSE

Nor did Big Lots establish the fundamental requirement of "substantial evidence supporting a prima facie defense." *Little*, 160 Wn. 2d at 703-04 (emphasis added). Argument of counsel and "mere speculation" does not not constitute "substantial evidence." *Id.*, at 705.

Big Lots' contentions that it presented evidence supporting its purported defenses ignores the trial court's finding that it failed to present any such evidence "whatsoever." 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"). Big Lots did not assign error to this finding in its cross appeal, nor does it provide authority or argument why it should not be bound by that finding. *See* RAP 10.3(g).

Perhaps recognizing its failure to properly raise this issue on appeal, Big Lots misleadingly quotes only a portion of the trial court's order and mischaracterizes the statements of the court at oral argument. Big Lots asserts that the trial court held that "potential defenses were identified." Resp. Brief at 18. The trial court's actual finding of fact – unchallenged by Big Lots – was that: "Big Lots Stores, Inc. **has not submitted or identified any evidence supporting a prima facie defense**

to plaintiffs' claims, although potential defenses were identified. CP 500-04 at FoF No. 9 & Order A (emphasis added).

While the court's final order controls, Big Lots also mischaracterizes the trial court's statements at the hearings on the motion to vacate, wrongly contending that the court found a prima facie defense but then "questioned" some of the defenses. Resp. Brief at 18. The trial court could not have been more clear in finding that Big Lots utterly failed to present any such evidence. At the second hearing, Big Lots wrongly stated that the trial court had earlier found that there was substantial evidence supporting its prima facie defenses. In no uncertain terms, the trial court responded: "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 20:14-24 (emphasis added).

For example, Big Lots contends it presented a prima facie defense to premises liability because the Grantors were – it wrongly contends – aware of the danger. Resp. Br. at 17-18. But the court specifically found that Big Lots presented no evidence supporting this defense. *See, e.g.,* RP, v.II (Sept. 16, 2011) at 20:22-24 ("You have presented no evidence. You've presented ideas about a prima facie defense. **There is no evidence whatsoever**." (emphasis added)); RP, v.II (Sept. 16, 2011) at 24:13-22 ("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**." (emphasis added)); 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.")

In fact, Big Lots admitted that it had failed to present any evidence supporting this purported defense. "[A]s you [the judge] point out, **I have nothing in the record for you to look at today**, short of the photographs that are not very good." RP v.II (Sept. 16, 2011) at 25:4-9 (emphasis added). The photographs Big Lots referred to could not be viewed at all, and thus gave neither the court nor the Grantors any indication of what they might have shown. CP 535-537. In fact, the trial court was forced to ask Big Lots what legible photographs **would have** shown. RP v.II (Sept. 16, 2011) at 25:10-13. Counsel's representations to the court about what photographs might have shown are speculation – not evidence.

Similarly, Big Lots' contention that the Grantors' own "pleadings acknowledge that they knew about and understood the alleged risk," Resp. Br. at 18, citing CP 1-4 and 56-60, is another mischaracterization of the record.[4] Neither the complaint nor Ms. Grantor's declaration that Big Lots

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[4] Big Lots also falsely asserts that a representative of its subsidiary, Big Lots Stores, Inc., told the Grantors that CSC was the agent **for that subsidiary**.

cite anywhere state that the Grantors saw or were aware of any risks. CP 1-4 & 56-60. It is surprising that Big Lots persists in making this incorrect contention when the error was specifically pointed out in the proceedings below. RP (July 22, 2011) at 31:8-18.

Big Lots also contends that it presented a prima facie defense to the amount of the damage award.[5] Resp. Brief at 19. Here again, the trial court specifically found that Big Lots presented no evidence to dispute the amount of damages.

> 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). Big Lots' conjecture and speculation that such evidence might exist cannot save the trial court's clear abuse of discretion in vacating the default without that required showing. It "is not a prima facie defense to damages that a defendant is surprised by the

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Respondents' Brief at 4 & 25, fn. 18. But the actual communication shows that the Grantors asked: "Who is **Big Lot's** agent for service of process in Washington?" and the Big Lots' representative answered: "The agent is CSC, the United States Corporation Company 800-833-9848." CP 253-291 at ¶ 6 & Ex. D (emphasis added). Neither the question nor the answer identified one of the subsidiaries rather than the parent as the proper defendant. Indeed, the Grantors had initially written to the parent company, Big Lots, Inc., and the response appeared to come from the subsidiary on behalf of the parent. *Id.*

[5] Big Lots contends that the Grantors failed to establish evidence supporting their damages. Resp. Brief at 19-20. The argument simply ignores the substantial

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.").

Big Lots contends that the four factors used to assess vacation of a default will "vary in dispositive significance." Resp. Brief at 14. As the Washington Supreme Court explained in 2007, however, evidence of a meritorious defense and excusable neglect are the primary factors – and the essential minimum – of this standard. *Little*, 160 Wn. 2d at 703-04 (emphasis added). Accordingly, the trial court's finding that Big Lots submitted no evidence supporting a prima facie defense precludes vacating the default order and judgment as a matter of law.

IV. BIG LOTS' FAILED TO ESTABLISH EXCUSABLE NEGLECT OR ANY OTHER FACTOR JUSTIFYING VACATION OF THE DEFAULT ORDER AND JUDGMENT

A. Big Lots' Willful Disregard Precluded Vacating the Default

Even if Big Lots had established a meritorious defense, it still would have had to show that its failure to appear was caused by excusable neglect in order to vacate the default order or judgment. *Little*, 160 Wn.

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evidence presented by the Grantors. *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.).

2d at 703-04; *see also 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 a defendant cannot make such a showing where its failure to appear was willful. *Little*, 160 Wn.2d at 706 ("The decision not to participate does not meet the standard required.") As even the 1968 case of *White v. Holm*, 73 Wn. 2d 348, 352 (1968) – upon which Big Lots heavily relies – held, excusable neglect can only justify vacating a default "**provided** the … failure to properly appear in the first instance was **not willful**" (emphasis added)).

Here, the trial court specifically found that Big Lots' failure to appear was caused by its instruction to its registered agent **not** to forward complaints with misnomers to its corporate headquarters. CP 500-04 at Findings of Fact Nos. 5 & 6; RP, v.II (Sept. 16, 2011) at 39:14-23, 40:11-12, 48:23-49:2. The trial court further held that this instruction was a deliberate policy adopted by Big Lots. Id. at 40:11-13, 48:18-49:2. 50:15-18.

Big Lots once again fails to assign error to the trial court's findings on this point, or even submit authority or argument to the contrary. Big Lots attempts to gloss over its instructions to the registered agent, making

only a conclusory assertion that its failure to appear was not willful, but instead was excused by the purported lack of valid service and lack of knowledge by its corporate headquarters. Resp. Brief at 20. Yet, as discussed above, service was properly made and constituted "notice" regardless of the fact that Big Lots' headquarters officers lacked knowledge.

Moreover, despite knowing that plaintiffs frequently named the wrong corporate entity in suits against it, Big Lots' specific and express instruction to its registered agent not to forward complaints with misnomers was in place for over two years before the Grantors served the complaint in this action. CP 332-65 at Ex. M (Big Lots Depo.) at 52:5-53:15; *id.*, 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. In short, Big Lots' instruction to its registered agent was a conscious choice– a deliberate policy – to disregard service. Even if Big Lots' instruction had not been willful, the registered agents' failure to forward the complaint to the headquarters officers cannot constitute excusable neglect as a matter of law. *See* Opening Brief at 26-29. Accordingly, the trial court abused its discretion in holding that Big Lots' deliberate policy of ignoring complaints with misnomers and even trivial spelling errors, and

the lack of knowledge by its headquarters officers constituted excusable neglect.

B. There Was No Mistake, Inadvertence or Irregularity Justifying Vacation of the Default

Big Lots also argues that its failure to appear was justified by purported mistakes, inadvertence, and irregularities. Resp. Brief at 22-23. None of these arguments have merit, and none can save the trial court's clear error of law in vacating the default order and judgment.

As an initial matter, Big Lots' failure to appear was not a mistake or inadvertent for the same reasons that it cannot have been excusable neglect – *i.e.*, the failure to appear was the result of a conscious policy decision. Said differently, the agent did exactly what Big Lots told it to do.

Nor did any of the purported mistakes or irregularities cause Big Lots' failure to appear or justify vacating the default. The undisputed evidence is that, but for Big Lots' specific instruction, the registered agent **would have forwarded** the Grantors' complaint to Big Lots' headquarters officers. CP 332-65 at Ex. L at 37:15-22; *id.* at 48:25-49:4 & Ex. O (CSC's primary client contact for service of complaints on the subsidiary Big Lots Stores, Inc., was Chad Reynolds of Big Lots, Inc.); CP 332-65 at Ex. L (CSC Depo.) at 27:7-15, 31:18-32:3; CP 332-65 at Ex. M (Big Lots Depo.) at 27:9-16. Thus, the trial court correctly found that the Big Lots'

own instruction to its agent caused the failure to appear. CP 500-04 at Findings of Fact Nos. 5 & 6.

Big Lots nonetheless argues (wrongly) that the Grantors made a knowing mistake[6] in seeking a default against one of the wholly-owned subsidiaries, Big Lots Stores, Inc. Again, this purported mistake or irregularity had no effect Big Lots' failure to appear. Big Lots claims not to have known about the suit, and failed to appear long before the Grantors sought a default.

In addition, entry of default against the subsidiary Big Lots Stores, Inc., and the later correction of the caption, was proper under long-settled Washington law. As the court explained in *Entranco*, where a party has been properly served despite a misnomer in a caption: "**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**." 34 Wn. App. 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"). Thus, Big Lots is plainly wrong in arguing that the misnomer in the

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[6] Big Lots wrongly contends that the fact that the Grantors filed a second suit after the default somehow admits a mistake. But that second complaint specifically alleges that it was filed merely as precaution and that they would stay the action. CP 274-278 at ¶ 1.

caption identifying the parent company meant default "could not legally have been" entered against its subsidiaries. Resp. Br. at 6 & 14.

Accordingly, there was nothing improper about the Grantors' obtaining a default judgment rather than – as Big Lots suggests – notifying Big Lots or attempting to reserve an already properly served complaint. The Grantors followed settled law in obtaining the default judgment. Big Lots took the risk of deliberately ignoring process, presumably in the hopes that it would be able to vacate any default. Big Lots has no one but itself to blame for the consequences of that policy choice. "[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); *see also Little*, 160 Wn.2d at 702 ("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").

V. BIG LOTS' CROSS APPEAL OF THE ORDER CORRECTING THE CAPTION IS WITHOUT MERIT

Big Lots cross appeals the trial court's order revising the caption to name Big Lots Stores, Inc. and PNS Stores, Inc. as the party defendants. As discussed above, the trail court properly revised the caption to name these subsidiaries pursuant to well-established Washington law. *See* CR

60(a) (expressly granting the court 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"); *Entranco*, 34 Wn. App. at 507 (correcting misnomer in caption pursuant to CR 60(a) after default judgment).

Big Lots ignores CR 60(a), and its cross appeal should be denied on that ground alone. In addition, Big Lots' attempt to distinguish *Entranco* is without merit. As discussed at length above, Big Lots was properly served and therefore had notice of the complaint. Big Lots also unsuccessfully attempts to distinguish *Entranco* on the ground that the court there noted that, on remand, the subsidiary could still bring its own motion to vacate. Resp. Brief at 39. Big Lots misreads the opinion in suggesting that the possibility of a new motion was the reason – or even a factor – in the *Entranco* court's holding. Instead, the court was simply noting that the subsidiary had not joined the earlier motion and might still do so "on any proper grounds." *Entranco*, 34 Wn. App. at 508. At most, that portion of the Entranco opinion simply recognized that the subsidiary might have grounds to argue excusable neglect or meritorious defenses independent of the parent company.

Here, Big Lots' subsidiaries have been involved throughout the proceedings, and Big Lots has specifically advanced arguments relating to the subsidiaries' interest in vacating the default. Indeed, Big Lots does not

identify any arguments or circumstances that might warrant a renewed motion to vacate by one of the subsidiaries. In any event, such arguments – even if they had been advanced – would not be a reason to reverse the trial court's revision of the caption.

Accordingly, Big Lots' cross appeal of the order revising the caption should be dismissed.

VI. BIG LOTS WAIVED ITS RIGHT TO CROSS APPEAL THE TRIAL COURT'S AWARD OF TERMS

Finally, Big Lots cross appeals the trial court's award of terms. Big Lots concedes that the trial court had authority to award those terms pursuant to CR 60(b), but nonetheless contends that CR 60(b) prohibits courts from making such an award *sua sponte* and that the court lacked sufficient evidence to support the award. Resp. Brief at 31.

The Grantors dispute Big Lots' contention that there was anything improper about obtaining a default order and judgment under long-established and controlling Washington law. The Grantors also dispute the suggestion that they somehow caused Big Lots' failure to appear when Big Lots' failure was caused by a deliberate policy and express instructions to its registered agent that had been in place for two years before the Grantors' served this action.

This Court, however, need not resolve Big Lots' contentions about the Grantors' purported responsibility for the chain of events leading to the default judgment because Big Lots waived any such arguments. Big Lots never objected to the award of terms, never submitted any authority or argument to contest the award of terms, and never asked for or submitted anything to contest the amount of the award. Big Lots concedes that it had the opportunity to contest the terms and failed to do so. Resp. Brief at 35. Indeed, as Big Lots itself quotes at length, the trial court specifically invited the parties to present argument or request evidence: "So if somebody wants to present additional paperwork, if have grossly exceed a figure that you think is reasonable, ... you can provide the paperwork to me." *Id.* But as Big Lots admits: "Neither party submitted any such "additional paperwork." *Id.*

One can only assume that Big Lots did not want to challenge the trial court's order vacating the default judgment, and saw the terms as the price of obtaining that order. Big Lots cannot have it both ways. Having chosen to accept the vacatur without objection, Big Lots cannot now seek to reverse the award of terms. In any event, a parties' failure to raise an issue below waives its right to appeal that issue.

VII. CONCLUSION

For the reasons stated herein and in the Grantors' Opening Brief, the Grantors' respectfully submit that this Court should reverse those portions of the trial court's Order Granting Motion to Vacate Order of Default and Default Judgment identified in the Grantors' assignment of error, including:

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.

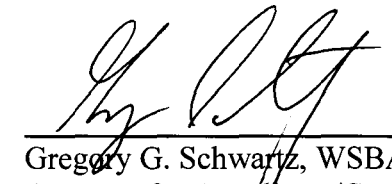
B. Conclusion of Law No. 4: "Big Lots, Inc.'s and/or Big Lots Stores, Inc.'s failure to appear was excusable neglect under CR 60(b) because of the misnomer in the caption and because of Big Lots Stores, Inc.'s instruction to its registered agent." CP 503.

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 1st day of August, 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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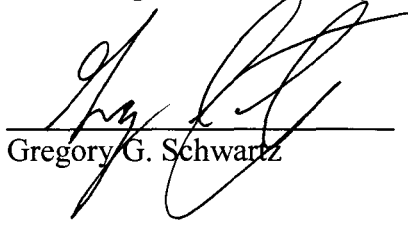
Signed at Seattle, Washington on this 1st day of August, 2011.



Gregory G. Schwartz