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No. 70916-0-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GALLEON HOMEOWNERS ASSOCIATION,

Plaintiff-Respondent

v.

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., and
NATIONSTAR MORTGAGE LLC

Defendants-Appellants

ON APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
(The Honorable George N. Bowden)

NATIONSTAR AND MERS' REPLY BRIEF

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TABLE OF CONTENTS

| | <u>Page</u> |
|---|-------------|
| INTRODUCTION | 1 |
| ARGUMENT..... | 1 |
| A. Nationstar Has Preserved its Right of Redemption | 1 |
| B. The New Statute Prospectively Applies to the Unexpired Redemption Period. | 4 |
| 1. The New Statute has immediate prospective application..... | 5 |
| 2. The regulated event is the notice of redemption and subsequent redemption process, not the judicial sale. | 6 |
| 3. The regulated event may be preceded by other events..... | 9 |
| 4. The absence of an effective date in the New Statute is significant..... | 10 |
| C. Even if the New Statute Applies Retroactively, Nationstar is Still Entitled to Redeem. | 11 |
| 1. The New Statute is curative and applies to a remedial statute. | 12 |
| 2. No vested rights would be improperly eliminated. | 13 |
| D. Even if the New Statute Does Not Apply Retroactively, a Proper Interpretation of the Prior Statute Allows Nationstar to Redeem..... | 16 |
| E. Nationstar Properly Moved to Intervene and the Judgment is Void to the Extent it Differs from the Complaint. | 17 |

| | | |
|----|--|----|
| 1. | As a Party Claiming an Interest in Subject Property, Nationstar Should Have Been Allowed to Intervene as a Matter of Right. | 17 |
| 2. | Vacation Is Proper Under the 4-Factor <i>White</i> Test. | 19 |
| 3. | Vacation is Also Proper to the Extent that the Judgment Expands the Relief Originally Sought in the Complaint. | 19 |
| F. | The Association’s Attorney Fees and Costs Award Should Be Vacated. | 22 |
| G. | The Association Is Not Entitled to its Attorney Fees on Appeal. | 23 |
| | CONCLUSION..... | 25 |

TABLE OF AUTHORITIES

| <u>CASES</u> | Page(s) |
|--|----------------|
| <i>BAC Home Loans Servicing, LP v. Fulbright</i> , 174 Wn. App. 352, 298 P.3d 779 (2013)..... | 1, 12, 16 |
| <i>Bain v. Metropolitan Mortg. Group, Inc.</i> , 175 Wash.2d 83, 285 P.3d 34 (2012) | 17 |
| <i>Buck Mountain Owner’s Ass’n v. Prestwich</i> , 174 Wn. App. 702, 308 P.3d 644 (2013)..... | 24 |
| <i>City of Tacoma v. Perkins</i> , 42 Wn.2d 80, 253 P.2d 957 (1953)..... | 8 |
| <i>Conner v. Universal Utils.</i> , 105 Wn.2d 168, 712 P.2d 849 (1986)..... | 18 |
| <i>Diversified Indus. Dev. Corp. v. Ripley</i> , 82 Wn.2d 811, 514 P.2d 137 (1973)..... | 2 |
| <i>Geddis v. Packwood</i> , 30 Wash. 270, 70 P. 481 (1902) | 11 |
| <i>Health Ins. Pool v. Health Care Auth.</i> , 129 Wn.2d 504, 919 P.2d 62 (1996)..... | 16 |
| <i>HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep’t of Planning & Land Servs.</i> , 148 Wn.2d 451, 61 P.3d 1141 (2003)..... | 16 |
| <i>In re Estate of Bergau</i> , 103 Wn.2d 431, 693 P.2d 703 (1985)..... | 12 |
| <i>In re Estate of Haviland</i> , 177 Wn.2d 68, 301 P.3d 31 (2013)..... | passim |
| <i>In re Marriage of Leslie</i> , 112 Wn.2d 612, 772 P.2d 1015 (1989)..... | 18 |

| | |
|--|--------------|
| <i>In re Marriage of Leslie</i> , 112 Wn.2d 618, 772 P.2d 1013 (1989)..... | 20 |
| <i>Martin v. Hadix</i> , 527 U.S. 343 (1999)..... | 10 |
| <i>Miebach v. Colasurdo</i> , 102 Wn.2d 170, 685 P.2d 1074 (1984)..... | 14, 15 |
| <i>Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash.</i> , 162 Wn. App. 495 254 P.3d 939 (2011)..... | 4 |
| <i>Pape v. Dep't of Labor & Indus.</i> , 43 Wn.2d 736, 264 P.2d 241 (1953)..... | 5 |
| <i>Prince v. Savage</i> , 29 Wn. App. 201, 627 P.2d 996 (1981)..... | 8 |
| <i>Robinson v. Brooks</i> , 31 Wash. 60, 71 P. 721 (1903) | 21 |
| <i>Saddle Mountain Minerals, L.L.C. v. Joshi</i> , 152 Wn.2d 242, 95 P.3d 1236 (2004)..... | 2 |
| <i>Salts v. Estes</i> 133 Wn.2d 160, 943 P.2d 275 (1997)..... | 22 |
| <i>Severson v. Penski</i> , 36 Wn. App. 740, 677 P.2d 198 (1984)..... | 5, 6, 14, 15 |
| <i>Singly v. Warren</i> , 18 Wash. 434, 51 P. 1066 (1898) | 15 |
| <i>Swak v. Dep't of Labor & Indus.</i> , 40 Wn.2d 51, 240 P.2d 560 (1952)..... | 3 |
| <i>Tesoro Refining and Marketing Co. v. Dep't. of Rev.</i> , 173 Wn.2d 551, 269 P.3d 1013 (2012)..... | 16 |
| <i>W.T. Watts, Inc. v. Sherrer</i> , 89 Wn.2d 245, 571 P.2d 203 (1977)..... | 15 |

| | |
|---|----|
| <i>Wash. State Farm Bureau Fed. v. Gregoire</i> , 162 Wn.2d 284, 174 P.3d 1142 (2007)..... | 12 |
| <i>White v. Holm</i> , 73 Wn.2d 348, 438 P.2d 581 (1968)..... | 19 |

STATUTES AND COURT RULES

| | |
|-------------------------|---------|
| CR 24(a)(2)..... | 18 |
| CR 54(c)..... | 18 |
| CR 60..... | 23 |
| ER 201..... | 3 |
| RAP 9.11..... | 3 |
| RAP 18.1(a)..... | 23 |
| RCW 6.21..... | 10 |
| RCW 6.21.120..... | 14 |
| RCW 6.21.130..... | 14 |
| RCW 6.23..... | 10 |
| RCW 6.23.010..... | 1, 4, 8 |
| RCW 6.23.010(1)..... | 5 |
| RCW 6.23.010(1)(b)..... | 5 |
| RCW 6.23.020..... | 3 |
| RCW 6.23.020(1)..... | 4 |
| RCW 6.23.080..... | 4 |
| RCW 6.23.090-.120..... | 9 |
| RCW 6.24.145..... | 15 |

| | |
|-----------------------------------|--------|
| RCW 64.34.070 | 22 |
| RCW 64.34.364(3)..... | 19, 20 |
| RCW 64.34.364(14)..... | 22 |
| RCW 64.34.400(2)(b) and (d) | 23 |
| RCW 64.34.455 | 23 |

MISCELLANEOUS

| | |
|---------------------------------------|--------|
| 18 Wash. Practice § 19.5 | 21 |
| Senate Bill 5541 | 2 |
| Uniform Condominium Act of 1980 | 12, 13 |

INTRODUCTION

The most straightforward resolution of this appeal is a ruling that Nationstar is entitled to redeem the Unit because the New Redemption Statute¹ applies prospectively to the unexpired portion of the redemption period.² The redemption statutes regulate delivery of the sheriff's deed by allowing lienholders like Nationstar a second chance to avoid forfeiture through a year-long redemption process. The regulated, operative event for the application of the redemption statutes is the post-sale redemption process itself. Nationstar's redemption does not impinge on The Condo Group LLC (Condo Group)'s right, which is limited to the repayment of the sale price plus associated expenses. The New Statute is also curative because it clarifies the category of lienholders who may exercise the redemption remedy.

ARGUMENT

A. Nationstar Has Preserved its Right of Redemption.

The Condo Group argues that Nationstar did not try to redeem before the trial court ruled on its Motion to Vacate, so the trial court "did not have authority to consider, let alone determine, whether Nationstar is

¹ RCW 6.23.010. Sometimes referred to hereinafter as "New Statute."

² This case differs from *BAC Home Loans Servicing, LP v. Fulbright*, 174 Wn. App. 352, 298 P.3d 779 (2013), where the lender provided a notice of redemption and the sheriff refused to issue a certificate of redemption in April 2011 -- two years before the Legislature passed the New Statute in April 2013.

entitled to redeem,” causing the determination to be “premature” and “not ripe for review.” Brief of Condo Group, LLC (Condo Group Br.) at 27-28.³

The record belies the Condo Group’s new ripeness argument. In fact, the Condo Group concedes that the parties “did not address ripeness and focused on the substantive issue of whether Nationstar was entitled to redeem.” *Id.* at 28. Nationstar’s motion to vacate invoked redemptioner status under both the prior statute and “Senate Bill 5541, which becomes effective on July 28, 2013.” CP 243-244. Although the Condo Group had not moved to intervene in the suit, it filed a brief asserting that Nationstar did not have redemptioner status under the prior redemption statute and that the New Redemption Statute did not apply. Brief of Condo Group, LLC (Condo Group Br.) at 7-12. After oral argument, the trial court denied the motion to vacate and ruled that Nationstar “may not exercise any rights of redemption of the subject property.” CP 54.

³ Condo Group Resp. Br. at 27-28. The decisions the Condo Group cites are wholly distinguishable. See *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 514 P.2d 137 (1973) (reversing declaratory judgment brought by lessor against tenants in connection with accident on the premises to a social guest who was a minor; holding no justiciable controversy was presented where no claim for damages for minor guest’s injury had been made or was threatened); *Saddle Mountain Minerals, L.L.C. v. Joshi*, 152 Wn.2d 242, 252, 95 P.3d 1236 (2004) (a property owner’s taking claim is not ripe until the property owner has sought a variance or waiver from a land use restriction and the government entity reaches a final decision regarding the application of the regulations to the property).

Nationstar and MERS appealed the denial of the motion to vacate along with the erroneous ruling that that it may not exercise any rights of redemption. *See* CP 1-8. RCW 6.23.020 provides that the right of redemption in this case expires within one year from the date of sale. *See also* CP 304.

To preserve its redemption right pending appeal, Nationstar provided the Snohomish County Sheriff with a notice of redemption, brought an action against the purchaser at the judicial sale (the Condo Group), and deposited the estimated redemption funds into the court registry.⁴ On appeal, the Association takes no position on whether Nationstar should be allowed to redeem. Brief of Galleon Homeowners Association (Assoc. Br.) at 9 n. 3.

Nationstar was not required to formally tender notice of intent to redeem below. Its redemption period had not expired and the Condo Group had already staked out the position that: “Nationstar Is Not Entitled to Redeem Under Redemption Statute.” CP 126. “The law does not require someone to do a useless act,” when “the other party will not

⁴ Nationstar’s action for declaratory relief has been filed under Snohomish County Superior Court Cause No. 14-2-02610-1 and it has deposited the estimated redemption sum of \$25,000 with the Court. *See* Appendix (App.) Exs. A, B; Appendix to Appellants’ Opening Brief (Op. Br. App.), Ex. E. This Court can judicially notice the action and the filings therein. *See* ER 201; RAP 9.11; *Swak v. Dep’t of Labor & Indus.*, 40 Wn.2d 51, 53, 240 P.2d 560 (1952) (court may take “judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it.”)

perform ...” *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Wash.*, 162 Wn. App. 495, 505 & n. 13 254 P.3d 939 (2011). The Condo Group’s later refusal to provide Nationstar with the estimated redemption amount as required by RCW 6.23.080 demonstrates that the bona fide dispute persists.⁵ Contrary to the Condo Group’s claim, this is not a case involving a hypothetical claim that may never ripen into a bona fide dispute. *See* Condo Group Br. at 27-28. Nationstar has done all it can to effectuate and preserve its redemption right by bringing this appeal, instituting a declaratory judgment action, and tendering the estimated redemption sum to confirm its right and toll the expiration of the redemption period.

B. The New Statute Prospectively Applies to the Unexpired Redemption Period.

The Sheriff’s sale was on March 1, 2013; therefore, the one-year redemption period would have expired on March 1, 2014. CP 115; RCW 6.23.020(1). During the redemption period, the Legislature adopted the new version of RCW 6.23.010 in April 2013 and Nationstar moved to vacate the default judgment on July 26, 2013.⁶ The New Statute became effective on July 28, 2013 – nearly eight months before the redemption

⁵ App. Ex. C.

⁶ Opp. Br. App. Ex. B at 1; CP 228.

period would have expired on March 1, 2014.⁷

1. The New Statute has immediate prospective application.

The New Statute overturns the *Summerhill* decision's holding that a holder of a deed of trust lien recorded prior to an assessment lien was not a qualified redemptioner under the prior RCW 6.23.010(1). The New Statute omits the word "time" and inserts the word "priority," clarifying that "[a] creditor having a lien by ... deed of trust ... subsequent in priority to that on which the property is sold" is a redemptioner. RCW 6.23.010(1)(b).

"A retrospective law, in the legal sense, is one which takes away or impairs vested rights acquired in the existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 740–41, 264 P.2d 241 (1953) (emphasis added). Here, the redemption process is ongoing; it is not "already past." *Id.*

The New Statute has no express restriction on its temporal reach and none should be implied. Therefore, the New Statute has "immediate prospective application" to the unexpired redemption period as in *Severson v. Penski*, 36 Wn. App. 740, 745, 677 P.2d 198 (1984). In *Severson*, the legislature had amended the redemption statute to require

⁷ App. Br. App. Bat 1; CP 304.

periodic notices be sent to the judgment debtor during the redemption period. There, the court concluded the amendment applied to the remaining period left on the judgment debtor's redemption period when the amendment was adopted. *Id.* at 742, 744-745. The court observed: "This interpretation of the new statute, does not give it retroactive application but gives it immediate prospective application in accordance with the principles herein stated." *Severson*, 36 Wn. App. at 745.

The Condo Group responds that the "immediate prospective" application of the amendment to the redemption statute applies solely to procedural amendments and not to the "substantive rights of Condo Group," which were "established by the Judgment/Decree and resulting sale." Condo Group Br. at 32-33. As explained below, however, The Condo Group is mislabeling the nature of the statutory amendment and mischaracterizing the nature of its rights.

2. **The regulated event is the notice of redemption and subsequent redemption process, not the judicial sale.**

Relying on *In re Estate of Haviland*, 177 Wn.2d 68, 301 P.3d 31 (2013), the Condo Group argues that the New Statute cannot apply "prospectively" because the regulated event is the sheriff's sale. *See* Br. of Condo Group at 29-33. The Condo Group is incorrect. The regulated event is the redemption process itself, including Nationstar's formal

redemption notice in January 2014, which occurred within the unexpired redemption period.

The holding and analytic framework in *Haviland* wholly supports Nationstar's position. In the *Haviland* decision, the appellate court reversed the trial court's ruling that the elder abuse statutes could not be applied to disinherit Ms. Haviland from benefits from the Haviland estate, "because the statutes are triggered by financial abuse, which would require improper retroactive application of the statutes." 177 Wn.2d at 71. The supreme court disagreed, concluding: "the abuser statutes intend to regulate the receipt of benefits, not the financial abuse itself. Thus, despite the fact that the abuse occurred prior to the amendments, the triggering event is the attempt by the abuser to receive property or any other benefit from the estate of the abused person." *Id.* at 78. The supreme court held that "the filing of the abuser petition during probate triggers the statutes" – "not the financial abuse itself." 177 Wn.2d at 71

This Court must determine the event "precipitating" or "triggering" for the purpose of the operation of the statute on Nationstar's notice of redemption. Under the *Haviland* approach:

[The Court] look[s] to the subject matter regulated by the statute and consider its plain language to determine the precipitating or triggering event...The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then

the court must give effect to that plain meaning as an expression of legislative intent.

177 Wn.2d at 75-76 (citation omitted, emphasis added). “[T]he proper triggering event is that which the statute intends to regulate” – the regulated event. *Id.* at 77.

Here, the redemption statutes regulate the redemption process, including the notice of redemption and eventual delivery of the sheriff’s deed by establishing a mandatory process preceding that conveyance and allowing a second chance for the judgment debtor and affected lienholders to restore their interest. “Redemption is the process of canceling and annulling a defeasible title, such as is created by a mortgage or a tax sale, by paying the debt or fulfilling other conditions.” *City of Tacoma v. Perkins*, 42 Wn.2d 80, 85, 253 P.2d 957 (1953)) (emphasis added). “A judgment debtor is the fee owner of the property and remains the fee owner during the entire period of redemption and until the sheriff’s deed issues to the purchaser or last redemptioner after expiration of the redemption period.” *Prince v. Savage*, 29 Wn. App. 201, 205, 627 P.2d 996 (1981).

The redemption statutes regulate who may redeem, the time to redeem, the notice of redemption, the amounts the redemptioner must pay, the redemption procedure, and successive redemptioners. RCW 6.23.010,

.011, .020-.80. The statutes also regulate possession, restraining waste, rents and profits, and sales during the period of redemption. RCW 6.23.090-.120. The “precipitating” event is not the date of the sheriff’s sale, but the entire period in which a redemptioner may exercise its redemption rights, including the notice of redemption. The redemption statute is intended to primarily benefit lienholders like Nationstar. The Condo Group’s construction of the statute thwarts the statutory remedies granted to redemptioners. The redemption statute’s purpose is to facilitate the avoidance of a forfeiture of a property right by granting the affected lienholder a second bite at the apple that makes the purchaser whole, not to facilitate a windfall for the purchaser.

3. The regulated event may be preceded by other events.

The fact that the sheriff’s sale starts the redemption period does not make it the “triggering event.” A statute “is not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect [or] because some of the requisites for its actions are drawn from a time antecedent to its passage or because it fixes the status of a person for the purposes of its operation.” *Haviland*, 177 Wn.2d at 75 (internal quotations omitted). “[A] statute operates prospectively when the precipitating event for operation of the statute occurs after enactment, even when the precipitating event originated in a situation existing prior to

the enactment of the statute.” *Haviland*, 177 Wn.2d at 75. The proper analysis “demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment.” *Martin v. Hadix*, 527 U.S. 343, 357-358 (1999) (emphasis added).

In this case, the relevant event – the redemption process – is still in progress. While the sheriff’s sale initiates the period triggering redemption rights, the sheriff’s sale itself is not the regulated event. Sheriffs’ execution sales are regulated by Chapter 6.21 RCW. Instead, the regulated event is the redemption process, which is governed by Chapter 6.23 RCW and culminates in the conveyance of a sheriff’s deed, an event which is postponed until redemptioners like Nationstar have had an one-year opportunity to restore their position, avoiding a forfeiture.

4. **The absence of an effective date in the New Statute is significant.**

In *Haviland*, the court found it significant that the legislature did not specify an effective date for the amendments as contrasted with other provisions which do have effective dates. *Haviland*, 177 Wn.2d at 77. The same result should follow here, particularly because the Legislature has amended redemption laws in the past to specifically limit the amendment’s applicability to sales occurring after the amendment’s

effective date. *See Geddis v. Packwood*, 30 Wash. 270, 271-72, 70 P. 481 (1902) (stating that the 1897 amendment to the redemption statute granting creditors redemptioner status included a provision that “the rights of redemption from sales upon judgments prior thereto shall remain unaffected” and the 1899 Act had a similar reservation “that such rights conferred shall not be applicable to judgments entered before their enactment.”) In dispositive contrast, the 2013 amendment enacting the New Statute does not contain a similar reservation, and none should be implied.

The triggering event for the operation of the New Statute is the redemption process, which had not ended when the legislature adopted the New Statute. Therefore, the New Statute prospectively applied to Nationstar’s rights, and this Court is not required to reach the issue of the retroactive application of the New Statute.

C. Even if the New Statute Applies Retroactively, Nationstar is Still Entitled to Redeem.

Nationstar should be allowed to redeem under the New Statute. However, if the Court disagrees, it should still permit Nationstar to redeem.

1. **The New Statute is curative and applies to a remedial statute.**

An amendment that “clarifies or technically corrects an ambiguous statute” is curative. *Wash. State Farm Bureau Fed. v. Gregoire*, 162 Wn.2d 284, 303, 174 P.3d 1142 (2007). The Condo Group argues that because *Summerhill* held that the prior Statute was unambiguous, the New Statute cannot be curative. Condo Group Br. at 40.

However, whether the prior Statute is unambiguous is a matter that is open for debate and will presumably be resolved in the Washington Supreme Court’s *Fulbright* decision. Indeed, there was a latent ambiguity in the prior Statute caused by the interplay between the former Uniform Condominium Act and the redemption statute.⁸ The Washington Condominium Act is based on the Uniform Condominium Act of 1980. In 1982, the National Conference adopted the Uniform Common Interest Ownership Act (UCIOA) combining in a single comprehensive law prior uniform acts including the Uniform Condominium Act. 7 Pt. B U.L.A 440 (2009) (Prefatory Note to UCIOA of 1994). In 1994, the National Conference revised Section 3-116(a) of the renamed act to delete from the assessment lien provision the phrase “from the time of assessment ...

⁸ *Accord, In re Estate of Bergau*, 103 Wn.2d 431, 436-37, 693 P.2d 703 (1985) (describing a latent ambiguity as one not apparent on the face of the document but apparent when applied to the facts as they exist).

became due” because it had caused confusion about lien priority. *Id.* at 572 (Comments to Section 3-116).

The Uniform Law Committee amended the Uniform Act to delete the language “from the time the assessment or fine became due,” explaining that “Commentators have observed ... that the language caused confusion with respect to priority issues. The intention of the statute, as demonstrated by the Comments, was that the inchoate statutory lien was the functional equivalent of real estate taxes ... The deletion of the language as suggested makes clear that the lien arises immediately upon ... recording of the declaration[.]”⁹ And for the reasons below, the Condo Group’s right is not of the nature that would preclude retroactive application of the New Statute. Notably, the Condo Group does not address Nationstar’s position that the New Statute can also be considered remedial.

2. No vested rights would be improperly eliminated.

The Condo Group’s claim that applying the New Statute to Nationstar’s unexpired period would impermissibly divest it of a vested

⁹ The Condominium Act is based on the Uniform Condominium Act of 1980. In 1982, the National Conference adopted the Uniform Common Interest Ownership Act (UCIOA) combining in a single comprehensive law the prior uniform acts including the Uniform Condominium Act. 7 Pt. B U.L.A 440 (2009)(Prefatory Note to UCIOA of 1994). In 1994, the National Conference revised Section 3-116(a) of the renamed act to delete from the assessment lien provision the phrase “from the time of assessment ... become due” because it had caused confusion about lien priority. *Id.* at 572 (Comments to Section 3-116).

right is equally unavailing. *See* Condo Group Br. at 31-32. The Condo Group purchased the Unit with the statutory notice that the conveyance process would not be completed for more than a year, at which point it *might* receive a sheriff's deed. RCW 6.21.120 (Sheriff's deed provision in the execution statute).¹⁰ The Condo Group always had merely an inchoate right that may be divested and its only vested right was to be repaid the sales price.

The Condo Group's vested rights argument rests in part on dictum in *Miebach v. Colasurdo*, 102 Wn.2d 170, 173-74, 180-81, 685 P.2d 1074 (1984). Condo Br. at 31-32. In *Miebach*, the supreme court set aside a judicial sale on several bases including the lack of bona fide purchaser status and a grossly inadequate price paid. Separately, the court denied the judgment debtor's request for the retroactive application of an amendment to the redemption statute, when the request was made outside the redemption period – two months after the conveyance of the property by sheriff's deed.

Although *Miebach* refers in dictum to a “vested rights given with an order of confirmation,” that decision also acknowledges the holding in *Severson* that a “certificate of sale executed by a sheriff does not vest title,

¹⁰ Even if the Condo Group were to receive the sheriff's deed, it bears the risk that the judgment authorizing the sheriff's sale and the later rulings could be reversed or vacated, leaving the Condo Group with a claim for repayment. RCW 6.21.130 (permitting purchaser to recover from plaintiff the price paid, costs, and disbursements).

being at most evidence of an inchoate estate that may or may not ripen into an absolute title.” *Compare Miebach*, 102 Wn.2d at 181 *with Severson*, 36 Wn. App. at 744.¹¹ Although a confirmation order may vest the purchaser with a conditional right, that right is not a right to vested title; the property is always subject to redemption. A purchaser at a judicial foreclosure sale is entitled to possession, rents and profits of the property, he does not hold title “until he receives a deed in pursuance of the sale.” *Singly v. Warren*, 18 Wash. 434, 445, 51 P. 1066 (1898). The Sheriff has not issued a deed to the Condo Group. Rather, the Condo Group has only a certificate of sale (CP 257), which does not convey title or amount to a vested right. *See W.T. Watts, Inc. v. Sherrer*, 89 Wn.2d 245, 248, 571 P.2d 203 (1977).

The Condo Group’s only vested right is to be repaid; its due process or separation of powers arguments lack merit and are not properly developed to warrant review. *See* Condo Group Br. at 34. The Condo Group simply states that these violations would occur, but fails to explain how or why. *See id.* at 34-35. These are not issues this Court should consider. First, “[i]t is well established that if a case can be decided on

¹¹ *Compare Severson*, 36 Wn. App. at 742 (RCW 6.24.145 became effective on July 26, 1981) with *Miebach*, 102 Wn.2d at 173 (after judgment was not paid during the one-year redemption period, the property was conveyed by sheriff’s deed in August 1979). *Severson*, 36 Wn. App. at 744 (distinguishing *Miebach* “where all redemption rights had expired and the sheriff’s deed had been issued almost two years before the effective date of the new law.”)

nonconstitutional grounds, an appellate court should decline to consider the constitutional issues.” *HJS Dev., Inc. v. Pierce Cnty. ex rel. Dep’t of Planning & Land Servs.*, 148 Wn.2d 451, 469 n. 74, 61 P.3d 1141 (2003). *See also Tesoro Refining and Marketing Co. v. Dep’t. of Rev.*, 173 Wn.2d 551, 559, 269 P.3d 1013 (2012) (“We need not address the constitutional issue of retroactivity because of the principle that a court should decide a case on nonconstitutional grounds if at all possible.”). Second, the Condo Group did not raise either of these issues at the trial court level. CP 120-131. Although constitutional issues may in some circumstances be raised for the first time on appeal, parties raising them “must present considered arguments...naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 511, 919 P.2d 62 (1996) (internal citations and quotations omitted).

D. Even if the New Statute Does Not Apply Retroactively, a Proper Interpretation of the Prior Statute Allows Nationstar to Redeem.

Nationstar and MERS disagree with the Condo Group’s characterization of their briefing on this issue. Nonetheless, both parties appear to recognize that this issue will be resolved by the Washington Supreme Court’s decision in *Fulbright*. For the reasons set forth at pages 28-29 of its opening brief, Nationstar should also be permitted to redeem

under the Prior Statute. A proper interpretation of that statute reveals that Nationstar's lien was actually subsequent in time to the Association's lien.

E. Nationstar Properly Moved to Intervene and the Judgment is Void to the Extent it Differs from the Complaint.

Despite the Condo Group and the Association's arguments to the contrary, Nationstar properly moved to intervene to set aside the underlying Judgment and Decree of Foreclosure, which varied materially from the original complaint. *See* Condo Group Br. at 23-26; Assoc. Br. at 15-16. Because Nationstar should have been allowed to intervene, it was an abuse of the trial court's discretion not to allow it to do so.

1. As a Party Claiming an Interest in Subject Property, Nationstar Should Have Been Allowed to Intervene as a Matter of Right.

When Nationstar moved to intervene, the trial court incorrectly and prejudicially ruled that it lacked standing and the time to intervene had long passed. CP 55. Nationstar had demonstrated that it was the holder of the note secured by the deed of trust lien eliminated by the foreclosure of the Association's lien. CP 159; 198. As such, it was also the beneficiary of the deed of trust under *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34 (2012). Because Nationstar held an interest in the real property at issue in the Association's lawsuit, it should have been allowed to intervene as a matter of right as an "applicant claim[ing] an

interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest[.]” CR 24(a)(2).

The motion to intervene was also timely, because “void judgments may be vacated irrespective of the lapse of time.” *In re Marriage of Leslie*, 112 Wn.2d 612, 618, 772 P.2d 1015 (1989) (citing *In re Marriage of Hardt*, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985)). CR 54(c) means what it says: “A judgment by default shall not be different in kind from ... that prayed for in the demand for judgment.” Assoc. Br. at 19 (quoting CR 54(c)). The purpose of this restriction is to ensure that “the defendant may choose to allow the entry of a default judgment secure in the knowledge that the judgment cannot exceed the demand in the complaint.” *Conner v. Universal Utils.*, 105 Wn.2d 168, 172, 712 P.2d 849 (1986). As the Association concedes, “[a] defendant has a due process right to assume that a default judgment will not ... substantially differ from the demand stated in the complaint.” *Id.* at 173; Assoc. Br. at 19. For the following reasons, the Judgment should be vacated and found was void to the extent the relief obtained by the Association differed from that requested in the complaint.

2. Vacation Is Proper Under the 4-Factor *White* Test.

As set forth at pages 31-38 of Nationstar and MERS' opening brief, the trial court erred by not vacating the judgment under the 4-factor test in *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). The first factor, the presence of a prima facie defense, is met because the complaint sought an amount in excess of the six-month period of assessments for common expenses authorized under RCW 64.34.364(3). See CP 240-243. The second factor, mistake, inadvertence or excusable neglect, is met because Nationstar's failure to appear in its own right or defend the lien through its agent MERS was a result of administrative error, not willful neglect. CP 188. The third factor, due diligence, is met because Nationstar immediately sought to intervene and vacate the judgment after learning of the default. CP 149-150; 56-67; 228-254; 185-227. The fourth factor, lack of substantial hardship, is met because the Association would be paid in full and suffer no hardship if Nationstar is allowed to redeem (or to set aside the judgment and pay off the lien).

3. Vacation is Also Proper to the Extent that the Judgment Expands the Relief Originally Sought in the Complaint.

Contrary to the Condo Group and the Association's suggestion, Nationstar and MERS argued below that the Association had included new language in its default judgment to get around problems with the

assessment lien having merely limited priority over Nationstar's deed of trust lien. *See* CP 240-241 (quoting judgment's language about the "rights of defendant mortgage lenders.") Specifically, Nationstar and MERS pointed to the new category of "defendant mortgage lenders" in the judgment and the six-month, super-priority provision for the assessment lien. CP 241; App. Br. at 32-37. This is significant because "[a] judgment different in kind from that requested in the complaint is void[,] [t]o the extent a default judgment exceeds relief requested in the complaint, that portion of the judgment is void." *In re Marriage of Leslie*, 112 Wn.2d 618, 772 P.2d 1013 (1989). The Association's Judgment suffers from this flaw.

The complaint did not apprise MERS or its principal Nationstar that the Association was (1) invoking the specific super-priority provision of RCW 64.34.364(3) or (2) taking the position that there was no right of redemption and that the forfeiture of the deed of trust lien was complete if the correct sums were not tendered before the sheriff's sale. *See* CP 344-347. The Judgment impermissibly and silently added the operative super-priority provision without reference to RCW 64.34.364(3). CP 304. Moreover, unlike the complaint, the Judgment uses the term "defendant mortgage lenders" *Compare* CP 344-347 *with* CP 304. By expanding the description, the Association was making an impermissible de facto

amendment of the complaint that results in a void judgment.

The Association also incorrectly contends that “the complaint contained the exact language recommended by Professors Stoebeck and Weaver for pleading a judicial foreclosure.” Assoc. Br. at 17; *See also id.* at 19 (“contained the recommended plain language ...”). For example, the professors recommend that the complaint provide “the appropriate complete redemption period,” but the complaint failed to allege the period for the “mortgage lenders.” 18 Wash. Practice § 19.5 at 380.

Further, the professors’ recommendations apply to the judicial foreclosure of a deed of trust, and they state the complaint should describe “any special features” in the mortgage and usually the note, mortgage and assignments are made exhibits to the complaint.¹² The Association’s complaint to foreclose a statutory lien does not describe any special features of the deed of trust or the recorded assessment lien. Also, the Association elected not to attach the recorded instruments to the complaint. *See* CP 344-347. As a result, those instruments do not expand the complaint or cure the intrinsically defective and overbroad lien described in the complaint. *Accord, Robinson v. Brooks*, 31 Wash. 60, 71 P. 721 (1903) (nullifying a bad faith lien).

¹² 18 Wash. Practice at 379. The Association also cites to a form complaint for a mortgage foreclosure that includes the instruments as exhibits. Assoc. Br. at 18 (citing 9 David E. Beskin, *Wash. Practice: Civil Procedure Forms and Commentary* § 8.50 at 250-51 (2d ed. 2000)).

The Washington Condominium Act acknowledges that: “The principles of law and equity, ... the law relative to ... principal and agent, ... invalidating cause supplement the provisions of this chapter, except to the extent inconsistent with this chapter.” RCW 64.34.070. Nationstar is an aggrieved party who is entitled to equitable relief vacating the order of default and default judgment.

F. The Association’s Attorney Fees and Costs Award Should Be Vacated.

As explained in detail in Nationstar and MERS’ opening brief, none of the bases for the trial court’s fee award are supportable as a matter of law, mooted the question of whether the amount awarded was reasonable. First, the fees and costs recoverable under RCW 64.34.364(14) “must be incurred in connection with the collection of delinquent assessment” or “in the enforcement of the judgment.” RCW 64.34.364(14). The Association asks this Court to add additional language to this statute because the Condominium Act is to be liberally construed. *See* Br. of Assoc. at 25. However, this Court cannot “change the wording of the statute...by judicial proclamation in the guise of liberal construction.” *Salts v. Estes* 133 Wn.2d 160, 162, 943 P.2d 275 (1997). The Association simply ignores the fact that it completed collection efforts and stopped enforcing its judgment by May 1, 2013, when it recorded a

Full Satisfaction of Judgment. CP 255. The fees and costs incurred after that date are not recoverable under this statute because there was no assessments or judgment to collect. Indeed, there was no judgment against Nationstar at all because it was not named in the judgment. Second, RCW 64.34.455 cannot support the fees and costs award; it is simply inapplicable. The Association avoids any direct discussion of RCW 64.34.400(2)(b) and (d), which plainly state that RCW 64.34.455's attorney fees provision "shall not apply in the case of...a conveyance pursuant to court order...[or] by foreclosure. Thus, it was clear error to award fees under this statute as well. Third, CR 60 equitable grounds cannot support the fees and costs award. Rather than allow Nationstar to intervene, set aside the judgment and pay off the lien the Association had foreclosed, the Association chose to vigorously defend its decision to sell the Unit for a fraction of its value and only a few thousand dollars more than the delinquency. As a result, the Association cannot now complain that the lienholder damaged by this conduct has vigorously pursued its rights.

G. The Association Is Not Entitled to its Attorney Fees on Appeal.

RAP 18.1(a) permits a party prevailing on appeal to recover appellate attorney fees if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review." For all of the

reasons above and in Nationstar and MERS' opening brief, the Association should not prevail. Even if the Association otherwise prevails, it is clear that the statutes on which its appellate attorney fees request must depend do not support such an award for all of the reasons set forth in Subsection F above. The necessary underlying statutory basis for an appellate attorney fees award against any party is simply not present. *See Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 731, 308 P.3d 644 (2013).¹³

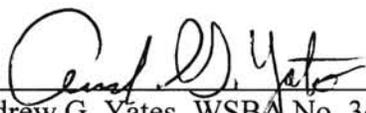
¹³ Nationstar and MERS appealed the entire attorney fee award; the Association's claim to the contrary is unavailing. *See* CP 1, 7-8. Nationstar and MERS' arguments in their brief are couched with reference to Nationstar because it was the party that was improperly denied intervention as a matter of right; it was the litigation of this issue that precipitated the attorney fees and costs award. Nationstar and MERS jointly seek to have the Association's attorney fees and costs award vacated in this appeal.

CONCLUSION

For the reasons above, Nationstar and MERS respectfully request that this Court remand with instructions to vacate the default judgment and decree of foreclosure or to allow Nationstar to redeem, vacate the attorney fees and costs award, and clarify that MERS was entitled to service of the Association's lawsuit.

DATED this 7th day of March, 2014.

LANE POWELL, PC

By: 
Andrew G. Yates, WSBA No. 34239
David C. Spellman, WSBA No. 15884

Attorneys for Appellants Nationstar
Mortgage LLC and Mortgage Electronic
Registration Systems, Inc.

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APPENDIX

EXHIBIT A: Conformed copy of Page 1 of the Complaint for Declaratory Relief filed in Snohomish County Superior Court, Cause No. 14-2-02610-1, *Nationstar Mortgage LLC v. The Condo Group, LLC*;

EXHIBIT B: Conformed copy of the Notice of Deposit of Redemption Sum filed in Snohomish County Superior Court, Cause No. 14-2-02610-1, *Nationstar Mortgage LLC v. The Condo Group, LLC*;

EXHIBIT C: January 30, 2014 letter from the Snohomish County Sheriff's Office;

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 7th day of March 2014, I caused a true and correct copy of NATIONSTAR AND MERS' REPLY BRIEF to be served on the following via the method indicated below as indicated below:

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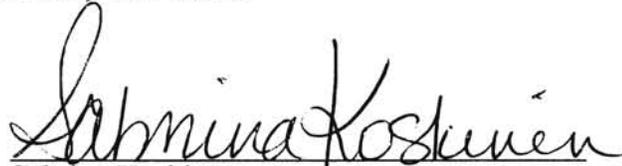
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Sabrina Koskinen
Sabrina Koskinen

FILED

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NATIONSTAR MORTGAGE LLC, a Texas
limited liability company,

Plaintiff,

v.

THE CONDO GROUP LLC, a Washington
limited liability company,

Defendant.

No. 14202010-1

**COMPLAINT FOR DECLARATORY
RELIEF**

I. PARTIES

1. Nationstar Mortgage LLC (Nationstar) is a Delaware limited liability company and authorized to bring this action in this Court.

2. The Condo Group LLC is a Washington limited liability company.

II. JURISDICTION AND VENUE

3. The Superior Court has original jurisdiction over this lawsuit pursuant to RCW 2.08.010.

3. Venue is appropriate in Snohomish County pursuant to RCW 4.12.010(1) as the subject real property is located in Snohomish County, Washington.

COMPLAINT FOR DECLARATORY RELIEF - 1
No.

128018.0001/5927529.1

**COPY
EXHIBIT A**

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P.O. BOX 91302
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206.223.7000 FAX: 206.223.7107

FILED

FEB 25

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SUPERIOR COURT OF WASHINGTON FOR SNOHOMISH COUNTY

NATIONSTAR MORTGAGE LLC, a Texas
limited liability company,

Plaintiff,

v.

THE CONDO GROUP LLC, a Washington
limited liability company,

Defendant.

No. **14 2 02610 1**
**NOTICE OF DEPOSIT OF
REDEMPTION SUM**

Notice is hereby given that Plaintiff, Nationstar Mortgage LLC, hereby deposits into
the Snohomish County Superior Court registry the estimated redemption sum of \$25,000.00.

DATED this 21st day of February 2014.

LANE POWELL PC

By *Andrew G. Yates*
Andrew G. Yates, WSBA No. 34239
Attorneys for Nationstar Mortgage LLC

NOTICE OF DEPOSIT OF REDEMPTION SUM - 1
No.

128018.0001/5946979.1

**COPY
EXHIBIT B**

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SEATTLE, WA 98111-9402
206.223.7000 FAX: 206.223.7107



SNOHOMISH COUNTY SHERIFF'S OFFICE
INTEGRITY · DIGNITY · COMMITMENT · PRIDE

LANE POWELL, ATTORNEY
ATN: ANDREW YATES
1420 FIFTH AVENUE, SUITE 4100
SEATTLE, WA 98101-2338

RE: NOTICE TO REDEMPTIONER
SNOHOMISH COUNTY SUPERIOR COURT Cause # 12 2 04938 4

To: GALLEON HOMEOWNERS ASSOCIATION, Redemptioner,

Please be advised that the total amount needed for redemption in the above entitled matter was not provided by The Condo Group, LLC. I was advised this matter is waiting for a ruling that is now on appeal. Attached is a copy of the Order Denying Nationstar Mortgage, LLC's Motion to Vacate Default/Summary Judgment, Order, and Foreclosure Decree.

Dated January 30, 2014

SNOHOMISH COUNTY SHERIFF'S OFFICE

A handwritten signature in cursive script that reads "M. Richardson".

M. Richardson, Civil Deputy

Docket # 14000123

Copy to The Condo Group, LLC.

EXHIBIT C