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No. ~~70607-7-1~~

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION ONE

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TOWNE OWNERS ASSOCIATION, Plaintiff,

v.

BRIAN D. BECKMANN, et al., Defendants.

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DCR SERVICES, LLC, Third-Party Plaintiff/Appellant

v.

THE CONDO GROUP, LLC, et al., Third-Party Defendants/Respondents.

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APPELLANT'S REPLY BRIEF

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Christopher I. Brain (WSBA #5054)  
Email: cbrain@tousley.com  
Cale L. Ehrlich (WSBA #44359)  
Email: cehrlich@tousley.com  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
206.682.5600

Attorneys for DCR Services, LLC, Third-  
Party Plaintiff/Appellant

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## I. INTRODUCTION

The Condo Group, LLC (“Condo Group”) does not generally dispute the essential facts related to DCR Services, LLC’s (“DCR”) redemption. The Sheriff conducted a sheriff’s sale of the property that is the subject of this lawsuit (the “Property”) on August 5, 2011; the Condo Group was the high bidder at the sale. The sale was subject to a one-year redemption period. Following the sale, but before the expiration of the redemption period, DCR loaned \$2,500 to Brian Beckmann, the owner of the Property, and secured that loan with a deed of trust against the Property (the “Deed of Trust”). Under Washington law, title remained vested in Beckmann during the redemption period, giving him the right to encumber his property.

On July 7, 2012, DCR delivered notice of its intent to redeem the Property based on the Deed of Trust. The Deed of Trust was subsequent to the lien for condominium assessments on which the Property was sold, making DCR a redemptioner under the law at the time of the sale.<sup>1</sup> Seven days later, DCR tendered redemption funds to the Sheriff, completing

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<sup>1</sup> The legislature amended the redemption statute effective July 28, 2013, but because the actions that are the subject of this appeal took place before July 28, 2013, that amendment is not relevant to this dispute.

redemption. At that point, DCR was entitled to a certificate of redemption from the King County Sheriff. However, because the Condo Group objected to DCR's redemption, the Sheriff tendered the dispute to the courts for resolution.

Rather than dispute the facts, the Condo Group raises a number of defenses aimed at convincing the Court that 1) even though Beckmann retained title to the Property during the redemption period, he could not grant a valid deed of trust; or 2) despite the fact that the Deed of Trust was subsequent in time to that on which the Property was sold, it did not make DCR a redemptioner. These arguments are not convincing.

First, so long as an owner retains title to property, he remains free to convey or encumber that title. As a judgment debtor, Beckmann retained title to the Property until the end of the redemption period, and he granted the Deed of Trust before the redemption period expired. Second, the redemption statute imposes no requirements on a redemptioner other than that it have a lien by deed of trust (or some other lien) that is subsequent in time to that on which the Property was sold. DCR's Deed of Trust satisfies this requirement.

DCR is a proper redemptioner and redeemed the Property. The superior court erred in holding that DCR was not a redemptioner. DCR

respectfully requests that this Court reverse the decision of the superior court granting summary judgment in favor of the Condo Group as against DCR, and because the facts are undisputed, requests that this Court remand with instructions to enter judgment in favor of DCR.

## II. REPLY

### A. **DCR Was A Proper Redemptioner And Redeemed The Property**

The basis for DCR's redemption is fully laid out in its opening brief, but before addressing the Condo Group's myriad defenses to redemption, the straightforward nature of DCR's redemption bears repeating.

#### 1. The Property Was Sold At Sheriff's Sale Subject To A One-Year Redemption Period

On March 7, 2011, the Towne Owners Association ("Towne") brought the underlying action against Beckmann seeking judicial foreclosure of a lien against the Property. (CP 1-4). The lien arose out of unpaid condominium assessments, including common area assessments. (CP 3-4). Towne also sought judgment against Mortgage Electronic Registration Systems, Inc. to foreclose its junior lien against the Property. (CP 2, 6).

The defendants failed to answer the complaint, and the superior court entered default judgment on May 19, 2011. The Property was sold at sheriff's sale on August 5, 2011 (CP 45-47). The Condo Group was the high bidder at the sale. Id. The Property was subject to a one-year redemption period.

2. Beckmann Granted A Valid Deed Of Trust To DCR

On April 18, 2012, after the sale but before the expiration of the redemption period, DCR loaned Beckmann \$2,500 to be secured by the Deed of Trust. (CP 400). On the same day, Beckmann executed and DCR recorded the Deed of Trust. (CP 248-50). Following the execution of the Deed of Trust, DCR obtained a quit claim deed from Beckmann, conveying any remaining interest in the Property to DCR. (CP 574).

The Deed of Trust is valid. For more than 100 years, the law in Washington has been that a judgment debtor retains title to his property until the redemption period expires. See Singly v. Warren, 18 Wash. 434, 444-45, 51 P. 1066 (1898) (“A certificate of sale executed by a sheriff does not pass title. At most, it is only evidence of an inchoate estate . . . [the purchaser] cannot be said to hold the title until he receives a deed in pursuance of the sale”). This rule has been reaffirmed numerous times. See e.g., Prince v. Savage, 29 Wn. App. 201, 205, 627 P.2d 996 (1981)

“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.”); W.T. Watts, Inc. v. Sherrer, 89 Wn.2d 245, 248, 571 P.2d 203 (1977) (noting that the sheriff’s certificate of purchase does not pass title to the purchaser); Ford v. Nokomis State Bank, 135 Wash. 37, 45, 237 P. 314 (1925) (“ . . . in this state we have consistently held . . . that a certificate of sale executed by a sheriff does not vest title. . .”); Cochran v. Cochran, 114 Wash. 499, 503, 195 P. 224 (1921) (“It has become the well-settled law of this state that . . . the *mortgagor is not by such [foreclosure] sale divested of his title to the land prior to the expiration of the redemption period*, and can even then be divested of his title only upon his failure to redeem during that period.” (Emphasis added)); Carroll v. Hill Tract Imp. Co., 44 Wash. 569, 574, 87 P. 835 (1906) (“Pending the redemption period, the certificate of sale did not pass title. . .”); De Roberts v. Stiles, 24 Wash. 611, 618, 64 P. 795 (1901) (“A certificate of sale executed by a sheriff does not pass title.”) At least one commentator has noted the ability of judgment debtors to encumber their property during the redemption period, creating additional redemptioners. Washington Real Property Deskbook, 2d Ed., WSBA, Mortgages, § 48.79

("[i]t also appears that throughout the period from the filing of the lis pendens to the end of the statutory redemption period following the sheriff's sale, *the mortgagor can create additional redemptioners by mortgaging the property. . .*") (emphasis added).

It is a basic fact of property law that the owner of property may convey or encumber his interest, even if that interest is limited by another party's potential future interest. On April 18, 2012, Beckmann remained the owner of the Property. He encumbered his ownership interest by granting the Deed of Trust to DCR. The Deed of Trust is a valid lien against the Property.

3. The Deed Of Trust Rendered DCR A Redemptioner

The redemption statute as it existed during the redemption period provided that:

(1) Real property sold subject to redemption . . . may be redeemed by the following persons, or their successors in interest:

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(b) A creditor having a lien by . . . deed of trust . . . on any portion of the property . . . subsequent in time to that on which the property was sold.

RCW 6.23.010 (2012).<sup>2</sup> There is no dispute that DCR's Deed of Trust, dated April 18, 2012, is subsequent in time to the lien for condominium assessments, which arose in 2011.

The redemption statute imposes no further requirements on a redemptioner. It does not require that the lien arose prior to the sheriff's sale, nor does it require that the lien be extinguished by the sale. Rather, any party meeting the definition of a redemptioner may redeem within the year following the date of the sheriff's sale. RCW 6.23.020(1)(b).

DCR had a Deed of Trust subsequent in time to that on which the Property was sold. It was a proper redemptioner.

#### 4. DCR Redeemed The Property

Before expiration of the redemption period, DCR delivered notice of its intent to redeem the Property. The Condo Group objected and refused to provide payoff figures, so DCR tendered redemption funds, along with all required documents, based on the amounts it could ascertain owing for redemption. (CP 259). Because the Condo Group refused to provide payoff figures, DCR satisfied the redemption statute by tendering

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<sup>2</sup> The legislature amended the redemption statute effective July 28, 2013 to change "subsequent in time" to "subsequent in priority." As this amendment did not take effect until after the redemption period had expired, the new definition is not relevant to this

the amount it could determine due. See, e.g., Millay v. Cam, 135 Wn.2d 193, 199-204, 955 P.2d 791 (1998) (discussing generally the rule that if the purchaser will not cooperate in redemption, the redemptioner need only tender the amounts that it can determine would be due).

DCR obtained a valid Deed of Trust from Beckmann. The Deed of Trust was subsequent in time to that on which the Property was sold, making DCR a redemptioner. DCR properly redeemed before the redemption period expired. DCR is entitled to issuance of a redemption certificate. The Superior Court erred in granting summary judgment for the Condo Group.

**B. The Condo Group's Defenses Are Not Convincing**

DCR's case for redemption is straightforward. It obtained a Deed of Trust against the Property. The Deed of Trust satisfied the statutory requirements to make DCR a redemptioner. DCR redeemed based on the Deed of Trust. In response, the Condo Group raises no less than seven potential defenses, hoping that one may persuade the Court to disregard DCR's redemption rights.

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case. All citations to RCW Chapter 6.23 are to the chapter as it existed before this amendment.

1. DCR's Non-Recourse Loan To Beckmann Is A Valid Loan

First, the Condo Group argues that DCR is not a redemptioner because “Beckmann did not actually grant a valid underlying loan interest . . . because the loan was non-recourse.” Resp’s Brief at 16. Although it does not cite to the statute, the Condo Group appears to argue that DCR is not a redemptioner because a non-recourse loan does not make DCR a “creditor” as required by RCW 6.23.010(1)(b).

The Condo Group cites no authority supporting its position that a non-recourse loan is not a valid loan, and its position is not correct. A non-recourse loan is one in which the creditor limits its remedies for default to proceeding against the security for the loan, rather than seeking a personal judgment against the debtor. The lender is still a creditor and the recipient of the funds still a debtor; the lender is simply limited in its remedies. Any loan, whether recourse or non-recourse, is sufficient to render a party a “creditor” for purposes of the redemption statute. Indeed, because the creditor in a non-recourse is limited to proceeding against the property, redemption rights are more important for non-recourse lenders than for recourse lenders.

2. The Deed Of Trust Did Not Merge With Beckmann's Underlying Interest In The Property

The Condo Group next argues that the Deed of Trust is invalid because it is nothing more than a lien against DCR's own property and "it is axiomatic that a party cannot secure a loan to another by placing a 'lien' on their own property." Resp's Brief at 16. This argument is based on the fact that Beckmann quit claimed his remaining interest in the Property to DCR after DCR obtained the Deed of Trust. Although it does not use the term "merger," essentially the Condo Group argues that DCR's Deed of Trust merged with Beckmann's interest when DCR obtained the quit claim deed.

As an initial matter, the Condo Group should not be permitted to argue merger before this Court because at the superior court, it acknowledged that merger did not occur. In response to Towne, the Condo Group stated that "Towne argues that the Beckmann Deed of Trust interest 'merged' with Beckmann's right to redeem as the judgment debtor upon assignment to DCR. To the contrary, DCR and Beckmann clearly agreed that these interests would not merge." (CP 413) (emphasis in original). A party may not raise an issue on appeal that it did not raise in the trial court, North Pac. Bank v. Pierce County, 24 Wn.2d 843, 858, 167

P.2d 454 (1946), and this rule should apply with even more force when the party conceded the issue.

Further, the Supreme Court has already foreclosed the Condo Group's line of argument. In Burwell & Morford v. Seattle Plumbing Supply Co., 14 Wn.2d 536, 128 P.2d 859 (1942), the Supreme Court addressed merger in the context of redemption. Burwell's agent had purchased four judgment liens against a piece of property, then obtained a quit claim deed from the property's owner, then redeemed based on the judgment liens. Id. Just as here, the purchaser who opposed redemption did not use the term "merger," but the Supreme Court concluded that merger was the basis for the purchaser's opposition. The Supreme Court noted that courts do not find merger unless merger was intended and then ruled that no merger occurred. Id.

The same result should obtain here. DCR acquired a lien by Deed of Trust against the Property. It then obtained a quit claim deed from the Property's owner and redeemed based on the Deed of Trust. Just as in Burwell & Morford, no merger occurred.

3. The Deed Of Trust Was Not A Naked Transfer Of The Right of Redemption

The Condo Group next argues that the Deed of Trust is invalid because it is a naked assignment of Beckmann's redemption rights. Resp's Brief at 17. The assignment of redemption rights independent of the judgment debtor's fee interest, a so called "naked" assignment, is not permitted in Washington. Fidelity Mutual v. Mark, 112 Wn.2d 47, 53, 767 P.2d 1382 (1989). The Condo Group's argument glosses over an essential fact – the Deed of Trust cannot be a naked assignment of Beckmann's redemption rights because it did not assign Beckmann's redemption rights at all.

The Deed of Trust did not assign any redemption rights to anybody. Rather, it created a lien against Beckmann's interest in the Property, and gave DCR the right to foreclose on Beckmann's interest in the Property if Beckmann defaulted on the loan. Had it foreclosed the Deed of Trust, DCR then would have received Beckmann's right of redemption along with his fee title – exactly the type of transfer permitted by Fidelity Mutual.

Although it did not assign any redemption rights, the Deed of Trust did create a *new* redemption right in DCR, because the Deed of Trust was

a lien against the Property that was subsequent in time to the lien on which the Property was sold. RCW 6.23.010(1)(b). This was not an assignment of Beckmann's right; it was the creation of an entirely separate right. The redemption statute specifically distinguishes between the redemption rights of a judgment debtor such as Beckmann, RCW 6.23.010(1)(a), and the redemption rights of a redemptioner such as DCR, RCW 6.23.010(1)(b).

While the granting of the Deed of Trust could not be an assignment of Beckmann's redemption rights, the Condo Group suggests that the combination of granting of the Deed of Trust and granting of the quit claim deed somehow created a naked assignment of redemption rights. Resp's Brief at 17. The argument that a redemptioner may not redeem if he later obtains a quit claim deed from the judgment debtor was already dismissed in Burwell & Morford. 14 Wn. 2d at 537.

DCR obtained a Deed of Trust against the Property. The Deed of Trust was not an assignment of any redemption rights, much less a naked assignment of the judgment debtor's right to redeem. The Deed of Trust is valid.<sup>3</sup>

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<sup>3</sup> There is some suggestion in the Condo Group's response that the Deed of Trust is invalid because it was allegedly granted after the quit claim deed. This contention, that

4. Beckmann Retained The Right To Encumber The Property During The Redemption Period

The Condo Group next argues that Beckmann did not have the ability to grant the Deed of Trust because “research does not reveal any authority which allows a judgment debtor to grant a deed of trust or any other lien interest during the redemption period.” Resp’s Brief at 23. Id. By focusing on whether any authority specifically grants the judgment debtor the ability to encumber his property during the redemption period, the Condo Group reverses the presumption.

As discussed extensively above, during the redemption period, the judgment debtor retains ownership of his property. Prince v. Savage, 29 Wn. App. 201, 205, 627 P.2d 996 (1981). The presumption is that an owner has the right to encumber or otherwise transfer that which he owns. Given that, the question is not what specific authority grants the owner the right to encumber his property, but what authority supports denying the owner that right.

The Condo Group acknowledges that it can point to no authority supporting its position. Resp’s Brief at 25. Instead, it attempts to compare

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DCR granted itself the Deed of Trust after receiving the quit claim deed, is not supported by the record. To the extent that the Condo Group’s argument turns on a factual contention not supported by the record, its motion for summary judgment should not have been granted.

the Judgment Debtor to the holder of a defeasible interest in the Property, or the vendor in a real estate contract. Resp's Brief at 25-29. But the Condo Group also acknowledges that the holder of a defeasible interest or the vendor in a real estate contract *retains the right to encumber its interest*. Resp's Brief at 28. By analogy, a judgment debtor would also be able to encumber its interest.

The Condo Group acknowledges that Beckmann is analogous to the vendor in a real estate contract *and* acknowledges that the vendor in a real estate contract can encumber its interest. To escape the box it created for itself, the Condo Group argues that because it also has an inchoate interest in the Property, "a lien based on a debtor-granted Deed of Trust could only attach if the debtor ultimately exercises his/her right to redeem." Resp's Brief at 29. The Condo Group supports this contention by conflating whether the end of the redemption period may terminate the Deed of Trust with whether the Deed of Trust is valid before the redemption period ends.

The Judgment Debtor retains title to the Property during the redemption period and has valuable property rights during that time. For example, it has the right to receive any excess proceeds from the sheriff's sale. It has the right to redeem as the judgment debtor. If the property is

listed and sold during the redemption period, the judgment debtor has the right to receive excess funds from that sale. RCW 6.23.120(2).

By obtaining the Deed of Trust, DCR obtained a lien against the Property, including a lien against these rights during the redemption period. Had DCR foreclosed the Deed of Trust during the redemption period, it would have received fee title and would have held these rights itself. If the redemption period passed without any redemption, Beckmann would have lost title to the Property and the Deed of Trust would have terminated, but that does not render the Deed of Trust invalid during the redemption period.

5. The Language Of The Default Judgment Cannot Rob Beckmann Of Title During The Redemption Period

The Condo Group next argues that Beckmann's inability to lien the Property is "supported by the foreclosure decree" because it provides that "[t]he rights of . . . Beckmann . . . will be forever foreclosed and extinguished" if Towne's judgment is not paid. Resp's Brief at 30. Because the judgment was not paid prior to the sale, the Condo Group argues that Beckmann's rights in the Property were extinguished by the sale and he could not grant a Deed of Trust. Id. at 30-31. Essentially, the Condo Group argues that by placing magic words in a default judgment, a

judgment creditor can fundamentally alter Washington's redemption laws.

This position is incorrect.

Foreclosure and redemption are statutory procedures under Washington law. See generally RCW 6.23 *et. seq.* and RCW 61.12 *et. seq.* Each step of the foreclosure process has a defined legal effect under Washington law, and, most importantly, the sheriff's sale and issuance of certificate of sale does not divest the judgment debtor of title. Title remains vested in the judgment debtor until the expiration of the redemption period. Prince, 29 Wn. App. at 205. A judgment creditor may not change the well defined legal consequences of the foreclosure and redemption regime by inserting language into a default judgment; any more than such language could eliminate the judgment debtor's redemption rights.

6. The Redemption Statute Does Not Require That DCR's Deed Of Trust Be Extinguished By The Sheriff's Sale

The Condo Group next argues that DCR may not redeem because its lien was not extinguished by the sheriff's sale. The requirement that a lien be extinguished by the sheriff's sale in order to create redemption rights is contrary to the express language of the redemption statute. The redemption statute provides that real property "may be redeemed by . . . A

creditor having a lien by . . . deed of trust . . . subsequent in time to that on which the property was sold.” RCW 6.23.010(1)(b). The statute defines a redemptioner, and provides that anyone meeting that definition may redeem.

Nowhere does the statute require that a redemptioner’s lien be extinguished by the sheriff’s sale. In fact, the word “extinguish” does not appear in the entire redemption chapter. RCW Chapter 6.23 *et. seq.*

The Condo Group should not be able to impose requirements on redemption that are outside of the statute. The redemption statute is unambiguous in defining redemptioners. Summerhill Village Homeowners Ass’n v. Roughley, --- Wn. App. ---, 289 P.3d 645, 649 (2012) (“the language of the [redemption] statute is unambiguous”) (published opinion, Wn. App. citation not yet available). No basis exists to add the additional requirement that the redemptioner’s lien must have been extinguished by the sale.

7. The Court Should Not Be Persuaded By The Condo Group’s Policy Arguments

For more than 100 years, the rule in Washington has been that the judgment debtor retains title to his property during the redemption period. A necessary consequence of retaining title during the redemption period is

the ability to encumber that title. Similarly, Washington has a clearly defined statutory redemption procedure, under which a creditor holding a lien that is subsequent in time to that on which the property was sold may redeem the property.<sup>4</sup> The Condo Group's policy concerns should not serve as a substitute for the long standing law in Washington.

Additionally, the Condo Group's actual policy concerns about allowing post-sale issuance of deeds of trust are overblown. For example, the Condo Group claims that DCR's position "taken to its logical conclusion, [means that] even an invalid lien confers redemption benefits on its holder." Resp's Brief at 3. That result would be absurd, but it is unrelated to DCR's arguments. As the judgment debtor, Beckmann retained the right to grant a valid lien against the Property by Deed of Trust. That the owner of the property may create a redemptioner by granting a valid lien against his property in no way suggests that an unrelated third party could create redemptioners by granting invalid liens against properties in which it holds no interest.

The Condo Group also claims that "DCR's 'literal' interpretation would allow a party in Beckmann's position to convey a right of

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<sup>4</sup> This statute was amended effective July 28, 2013 to change "subsequent in time" to "subsequent in priority", but the fact remains that Washington's redemption procedures

redemption . . . even after title fully vests in the purchaser . . .” Resp’s Brief at 21. Again, such an absurd result does not follow from DCR’s application of the plain language of the redemption statute.

First, once title vests in the purchaser, rather than the judgment debtor, the judgment debtor has no remaining interest in the property. A person obviously cannot grant a deed of trust against property in which he or she has no interest. During redemption, the judgment debtor remains the owner of the property and can grant a deed of trust. After the redemption period, assuming the judgment debtor does not redeem, the judgment debtor loses title to the property and can no longer grant a deed of trust.

Second, RCW 6.23.020 clearly limits redemption rights to “within one year after the date of the sale” (or eight months in certain situations not applicable here). RCW 6.23.020(1)(b). This period may be extended under RCW 6.23.040, but once the redemption period expires, by definition it becomes impossible to create new redemptioners.

The Condo Group’s concerns that unrelated third parties will create redemptioners based on invalid liens or that a judgment debtor will

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are defined by statute.

create redemptioners years after the redemption period has expired are baseless. Neither result is implied by DCR's position.

The Condo Group's other policy concerns are also overblown. Indeed, other states allow redemption based on post-sale liens and do not appear to have faced dire consequences. See, e.g., Davis Mfg. and Supply Co. v. Coonskin Properties, Inc., 646 P.2d 940, 942 (Colo. App. 1982) (involving redemption based on judgment liens created "subsequent to the sale but prior to the expiration of the . . . redemption period."); Alliance Mortgage Co. v. Pastine, 104 P.3d 405, 413 (Kan. Ct. App. 2005) (noting that Kansas law provides for redemption by any creditor whose claim becomes a lien prior to the expiration of the redemption period).

**C. Summary**

Beckmann remained the fee owner of the Property during the redemption period. As the fee owner, Beckmann retained the right to grant valid liens against the Property. Beckmann granted such a lien to DCR, through the Deed of Trust. The Deed of Trust made DCR a redemptioner because the Deed of Trust was a lien against the Property that was subsequent in time to the lien on which the Property was sold. DCR properly redeemed the Property based on the Deed of Trust. The superior court erred in holding that DCR was not a redemptioner.

To deny DCR redemption rights requires finding 1) a judgment debtor may not lien his property despite retaining title during the redemption period or 2) that when the redemption statute says “subsequent in time” it does not mean “subsequent in time.” The Condo Group has offered insufficient justification to support either of these extraordinary conclusions, and DCR respectfully requests that the Court reverse the superior court’s denial of its motion for summary judgment and remand for entry of judgment in its favor as against the Condo Group.

### **III. CONCLUSION**

For the reasons mentioned above, DCR respectfully requests that:

- 1) the Court reverse the summary judgment ruling of the superior court holding that DCR was not a redemptioner, that the redemption period has expired, and quieting title in favor of the Condo Group as against DCR;
- 2) the Court reverse the summary judgment ruling of the superior court denying its motion for summary judgment; and
- 3) the Court remand for further proceedings.

DATED this 13th day of November, 2013.

TOUSLEY BRAIN STEPHENS PLLC

By   
Christopher I. Brain, WSBA #5054  
Email: cbrain@tousley.com  
Cale L. Ehrlich, WSBA #44359  
Email: cehrlich@tousley.com  
1700 Seventh Avenue, Suite 2200  
Seattle, Washington 98101  
Tel: (206) 682-5600  
Fax: (206) 682-2992

*Attorneys for DCR Services, Third-Party  
Plaintiff/Appellant*

**CERTIFICATE OF SERVICE**

I, Betty Lou Taylor, hereby certify that on the 13th day of November, 2013, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

Michael G. Fulbright, WSBA #11821       U.S. Mail, postage prepaid  
LAW OFFICE OF MICHAEL FULBRIGHT       Hand Delivered  
11820 Northup Way, Suite E200       Overnight Courier  
Bellevue, WA 98005       Facsimile  
*Attorneys for Plaintiff,*       Electronic Mail  
*Towne Owners Association*

---

Christopher G. Varallo, WSBA #29410       U.S. Mail, postage prepaid  
Steven J. Dixon, WSBA #38101       Hand Delivered  
WITHERSPOON KELLEY       Overnight Courier  
422 W. Riverside Avenue, Suite 1100       Facsimile  
Spokane, WA 99201       Electronic Mail  
*Attorneys for Third-Party Def.,*  
*Bank of America, N.A*

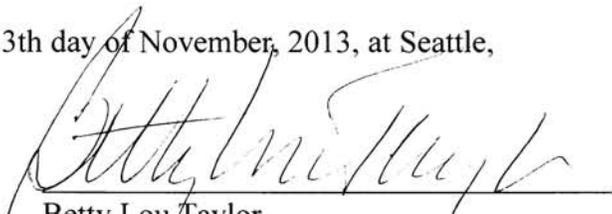
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*Respondent, The Condo Group, LLC*

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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 13th day of November, 2013, at Seattle, Washington.

  
Betty Lou Taylor