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No. 71227-6-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JPMORGAN CHASE BANK, N.A.,

Respondent,

v.

THE CONDO GROUP, LLC

Appellant,

ZION SERVICES LLC, V

Defendant.

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE JEAN RIETSCHEL

---

BRIEF OF APPELLANT

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## I. INTRODUCTION

The legislature may not retroactively create a new right to obtain title to real property in derogation of the rights of another. Following entry of a final judgment in a condominium lien foreclosure action, in which respondent JPMorgan Chase Bank, N.A., was served but did not appear or answer, appellant the Condo Group, LLC, as high bidder at an August 2012 sheriff's sale, purchased the property for \$35,000, and obtained an order confirming the sale. At the time, Chase, a secured lender with a deed of trust on the property, had no statutory right of redemption because its deed of trust was not "subsequent in time to that on which the property was sold" to the Condo Group. Former RCW 6.23.010.

As a result of pressure from the mortgage industry, the 2013 Legislature amended RCW 6.23.010. The new law expands the class of persons who may redeem real property from judicial foreclosure sale to include a mortgage lender whose lien is extinguished by the foreclosure of a condominium association assessment lien that is senior in priority to the lender's lien. Laws 2013, ch. 53, § 1 The new law went into effect on July 28, 2013, almost eleven months after the August 17, 2012 sheriff's sale, and

more than ten months after the Order Confirming Sale to the Condo Group. The Legislature did not state its intent to apply the amended statute retroactively to foreclosure sales conducted before the new law went into effect. Ten days after the new redemption statute became effective, Chase claimed a right of redemption under the amended statute.

The trial court recognized that the Condo Group's interest in the property was a substantive, and not a procedural, right and that applying the new statute here would modify its rights, which are based upon the antecedent event of the foreclosure sale. But the trial court nonetheless held that the amendment to RCW 6.23.010 to expand the class of persons entitled to redeem to include Chase was not an impermissible retroactive application of the new law so long as Chase sought to redeem the property within one year of the sale. This court should reverse because the trial court erred in eliminating the Condo Group's substantive rights through retroactive application of the amendment to RCW 6.23.010.

## **II. ASSIGNMENTS OF ERROR**

The trial court erred in entering its Order on Cross-Motions for Summary Judgment (CP 706-09) (Appendix A) and its Order

Granting JP Morgan Chase Bank, NA Summary Judgment (CP 710-13) (Appendix B).

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether an amendment to RCW 6.23.010 that became effective after a foreclosure sale retroactively expanded the class of persons granted the right of redemption in derogation of the interests of the foreclosure sale purchaser? (Argument §C)

2. Whether retroactive application of the new redemption statute would violate the Condo Group's right to due process by disturbing the Condo Group's vested rights, impair its contract rights, or violate constitutional principles of separation of powers by overruling the published Court of Appeals' decisions in *Summerhill* and *Fulbright*? (Argument §D)

### **IV. STATEMENT OF THE CASE**

**A. Chase financed the purchase of the property secured by a deed of trust with notice under the recorded condominium declaration that an assessment lien may arise should the property owner default in payment of dues.**

The Onyx Condominium Declaration, governing the Onyx Condominiums on Capitol Hill in Seattle, was recorded on June 8, 2006. (CP 307, 312-19) On August 18, 2006, Hai Poon borrowed \$162,180.00 from respondent Chase's predecessor, Washington

Mutual Bank F.A. (“Chase”), to finance the purchase of unit 310 of the Onyx Condominiums. (CP 299-301, 470-74) The loan was secured by a deed of trust in favor of Washington Mutual and recorded with the King County Auditor. (CP 293, 469, 475-97)

Under Washington’s Condominium Act, the recording of a condominium declaration “constitutes record notice and perfection of the lien for assessments” that may arise against a particular unit. RCW 64.34.364(7). Accordingly, by virtue of the Onyx Condominium Declaration, Chase was on notice that an assessment lien may arise should its borrower Hai Poon default on his Onyx Condominium assessments.

**B. The Association obtained a lien for the owner’s delinquent assessments in August 2010, when the assessment was due.**

Hai Poon became delinquent on condominium assessments due the Onyx Homeowner Association (“Onyx”) in August 2010. (CP 311-12, 320-21) From that point forward, Hai Poon remained in arrears on assessments owed to Onyx. (CP 312)

Under the Condominium Act, “[t]he association’s lien on a unit for any unpaid assessment “attaches to that unit and arises “from the time the assessment is due.” RCW 64.35.364(1). Onyx’s lien against Hai Poon’s unit for unpaid assessments therefore arose

in August 2010. See *BAC Home Services, LP v. Fulbright*, 174 Wn. App. 352, 356-58, ¶¶ 17-20, 298 P.3d 779, rev. granted, 178 Wn.2d 1001 (2013).

On March 14, 2012, Onyx commenced a foreclosure action against Hai Poon in King County Superior Court, seeking a judgment for \$10,491.01 in delinquent assessments and to foreclose its condominium lien on the unpaid assessments against Onyx unit 310. (CP 306-09)

**C. The Association foreclosed its lien after naming Chase, which did not appear, did not answer, and did not attempt to satisfy the judgment before it was sold to the Condo Group at the sheriff's sale, eliminating Chase's rights under former RCW 6.23.010.**

In its lien foreclosure action, Onyx named as defendants and served Washington Mutual and Chase as its successor in interest, Chase. (CP 306) Onyx sought to foreclose against Chase's interest in Onyx unit 310 based on the "superpriority" the Condominium Act gives a homeowner's association lien:

(2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) *a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent*; and (c) liens for real property taxes and other governmental assessments

or charges against the unit. A lien under this section is not subject to the provisions of chapter 6.13 RCW.

(3) ... *the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee . . .*

RCW 64.34.364 (emphasis added). *See Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 628-29, ¶¶ 9-11, 270 P.3d 639, 289 P.3d 645 (2012) (condo association lien entitled to superpriority under RCW 64.34.364).

Despite receiving notice of the lien foreclosure action, Chase did not pay the superpriority lien amount necessary to secure its release from the foreclosure action – \$1,414.86, an amount equal to the last six months of delinquent assessments. *See* RCW 64.34.364(3). Chase did not appear or answer Onyx's complaint. Neither did Hai Poon. On May 19, 2012, the trial court entered a Default Judgment and Order of Foreclosure Decree against Hai Poon. (CP 323-25) The Onyx Foreclosure Decree provided for entry of a principal judgment in the amount of \$9,950.61 against

Hai Poon. It also established the validity of the Onyx Lien. (CP 323-24)

In addition, the Onyx Foreclosure Decree directed that the Sheriff sell the property, thereby extinguishing the rights of all subordinate lienholders, including those of Chase under its deed of trust:

...plaintiff's lien may be foreclosed as a mortgage and Onyx Unit 310 described herein be sold by the Sheriff of King County at foreclosure sale in the manner provided by law, extinguishing all interest of said defendants...

\*\*\*

...that the rights of all defendants, including mortgage lenders, be adjudged inferior and subordinate to the plaintiff's lien and be forever foreclosed except only for the statutory right of redemption allowed by law, if any,

\*\*\*

...the period of redemption shall be one year from the date of the Sheriff's Sale after which time the Sheriff shall issue the Sheriff's Deed to the purchaser.

(CP 324-25)

Neither Hai Poon nor Chase paid the Judgment in favor of Onyx. As a result, on June 22, 2012, the superior court issued a Praecipe for an Order of Sale directing the Sheriff of King County, Washington (the "Sheriff") to seize and sell Onyx unit 310. (CP 330, 332-37, 345-47) The Condo Group learned of the pending

Sheriff's sale of Onyx unit 310 through public notices published in The Daily Journal of Commerce on July 2, 9, 16, 23 and 30, 2012. (CP 246, 340-41)

On August 17, 2012, the Sheriff sold Onyx unit 310 at public auction to the Condo Group, the highest bidder, for \$35,000.00. (CP 250-52, 332-47) The superior court confirmed the sale on September 13, 2012. (CP 349-350) Consistent with the Onyx Foreclosure Decree and RCW 6.21.100, the sheriff's Certificate of Purchase specified a one year redemption period from the August 17, 2012 sale; *i.e.* through August 17, 2013. (CP 251)

**D. The Legislature amended the redemption statute effective July 2013, giving condominium lenders such as Chase redemption rights against foreclosure sale purchasers that they did not previously have.**

When the Condo Group purchased the property in August 2012, Washington's redemption statute authorized the property owner, as well "the judgment debtor," and "[a] *creditor having a lien by judgment, decree, deed of trust, or mortgage*, on any portion of the property, or any portion of any part thereof, separately sold, *subsequent in time to that on which the property was sold,*" to redeem the foreclosed property for the price paid at the sale. Former RCW 6.23.010(1)(b) (emphasis added).

Interpreting the plain language of this statute, this court held in *Summerhill* that “[t]o qualify as a redemptioner [under RCW 6.23.010], the holder of a lien by deed of trust must have acquired that lien ‘subsequent in time’ to the one being foreclosed.” *Summerhill*, 166 Wn. App. at 630.

By contrast, the redemption statute did not grant a right of redemption to a lender whose deed of trust is prior in time to the date of the delinquencies that give rise to the Association’s lien. Accordingly, under the statutory scheme existing when the property was sold at sheriff’s sale to the Condo Group in 2012, Chase, whose deed of trust was not “subsequent in time” to the Onyx lien, had no right to redeem. RCW 6.23.010(1)(b).

At the urging of the mortgage banking industry, the 2013 Legislature amended the redemption statute, RCW 6.23.010, to grant a redemption right to “[a] creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, *subsequent in time* priority to that on which the property was sold.” Laws 2013, ch. 53, § 1. The purpose of the amendment was to allow condominium lenders, whose financing liens were not prior to the superpriority liens of homeowner associations under the

Condominium Act, a right of redemption – a right that they did not previously have under *Summerhill*. S.B. 5541, Final Bill Report, 2013 Reg. Sess. The new redemption statute became effective on July 28, 2013, almost eleven months after the August 17, 2012 Sheriff's sale, and ten months after the Order Confirming Sale to the Condo Group.

**E. The Condo Group rejected Chase's attempt to redeem, but the trial court held on summary judgment that the new redemption statute gave Chase a "substantive right" to redeem ten months after the amendment became effective.**

Less than two weeks after the new redemption statute became effective, Chase sought to exercise this newly created right of redemption. On August 9, 2013, Chase delivered a redemption request letter and supporting documentation to the King County Sheriff. (CP 279-84)

On August 14, 2013, the Condo Group responded that Chase was not an authorized redemptioner, and did not provide the redemption payoff amount to Chase. (CP 248) On August 16, 2013, Chase deposited into court an estimated redemption sum of \$43,596.72, and commenced this lawsuit for a declaratory judgment that it is an authorized redemptioner under RCW 6.23.010(1)(b) and that it timely attempted to redeem. (CP 9)

The parties agreed that the dispositive issue was one of law and filed cross-motions for summary judgment. (CP 200, 220) On November 15, 2013, King County Superior Court Judge Jean Rietschel (“the trial court”) held that Chase was authorized to redeem the property from the 2012 foreclosure sale based upon the 2013 amendment to RCW 6.23.010. (CP 706-13) (App. A, B)

While recognizing that the statute operates upon “antecedent facts,” the trial court held that the precipitating event was not the foreclosure sale, but Chase’s attempt to exercise its newly created right to redeem 11 months after the foreclosure sale. (RP 52, citing *Severson v. Penski*, 36 Wn. App. 740, 677 P.2d 198, *rev. denied*, 101 Wn.2d 1015 (1984)). Further, while finding that the Condo Group’s interest acquired at the foreclosure sale was a substantive, and not a procedural, right, the trial court nonetheless held that interest was not retroactively impaired because it “is less than a full title right:”

Looking at the issues involving Chase, we start with the very simple principle that a Sheriff’s sale does not vest title. It’s evidence of an inchoate estate that may or may not ripen into absolute title. *It’s clearly not a procedural right. It’s some kind of substantive right that is less than a full title right.*

(RP 51) (emphasis added)

The Condo Group timely appealed. (CP 714-25)<sup>1</sup>

## V. ARGUMENT

### A. Summary of argument.

The trial court erred in applying the new redemption statute retroactively to divest the Condo Group of its substantive rights in the real property that it acquired as the successful bidder at the foreclosure sale, and that were confirmed by the superior court's decree confirming the sale.

A statute operates retroactively where it modifies or changes the legal effect of events or transactions that occurred before the statute became effective. *Landgraf v. USI Film Products*, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 1499, 128 L.Ed.2d 229 (1994) (“whether the new provision attaches new legal consequences to events completed before its enactment”). “A legislative enactment is presumed to apply prospectively only. . . .” *Gilmore v. Hershaw*, 83 Wn.2d 701, 705, 521 P.2d 934 (1974). “Courts disfavor

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<sup>1</sup> Zion Services, LLC, is a judgment creditor of the Poon under an April 20, 2012 judgment in the amount of \$4,092.68, which it acquired by assignment. Zion's April 2012 judgment lien is subsequent in time to the August 2010 Onyx Homeowner's Association lien. Zion also delivered a redemption request letter to the Sheriff. (CP 256-261) Zion has appealed the trial court's order that Zion was not an authorized redemptioner (CP 726-37) 728-35), in Case No. 71228-4-I, which is linked with the instant case for purposes of oral argument only.

retroactivity because of the unfairness of impairing a vested right or creating a new obligation with respect to past transactions.” *Matter of Estate of Burns*, 131 Wn.2d 104, 110, 928 P.2d 1094 (1997), citing *Landgraf*, 511 U.S. at 265. “The presumption against retroactive application of a statute or amendment ‘is an essential thread in the mantle of protection that the law affords the individual citizen.’” *State v. Smith*, 144 Wn.2d 665, 673, 30 P.3d 1245, 39 P.3d 294 (2001), quoting *Lynce v. Mathis*, 519 U.S. 433, 439, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997).

The presumption against retroactivity can be overcome only if the Legislature intended for the statute to apply retroactively, the statute is curative, or the statute is remedial. *Smith*, 144 Wn.2d at 673. A statute is not remedial and thus will not be applied retroactively where it affects a substantive or vested right, rather than deals with the procedure by which existing rights or obligations are enforced. See *Densley v. Dept. of Retirement Systems*, 162 Wn.2d 210, 223-24, ¶ 24, 173 P.3d 885 (2007) (“A remedial statute is one which relates to practice, procedures and remedies...”). A statute is not curative where it was enacted to change existing law. *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002).

The Legislature did not direct that the new redemption statute be applied retroactively. The new redemption statute is not remedial because it expands the class of persons who may redeem property after their lien rights have been extinguished by the foreclosure sale and decree, rather than provide the remedies by which existing rights are enforced. It is not curative because it was passed for the express purpose of changing the law as it was interpreted in *Summerhill*.

The Condo Group obtained a substantive property interest that vested at the time of the foreclosure sale, as confirmed by the order approving the sale. That substantive right could not be divested by a lender that did not have the right to redeem at the time of the foreclosure sale. The trial court's retroactive application of this new law to deprive the Condo Group of its interest acquired at the sale and confirmed by the court's order confirming sale violates fundamental principles of due process of law, the prohibition against impairment of contracts, and separation of powers.

**B. Standard of review: this court determines de novo whether the statute operates retroactively.**

This Court reviews the trial court's summary judgment de novo. *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 776, ¶ 12, 249 P.3d 1044, *rev. denied*, 172 Wn.2d 1013 (2011) (citation omitted). Whether a new statute will operate retroactively is a question of law reviewed de novo. *See Estate of Haviland*, 177 Wn.2d 68, 75, ¶ 10, 301 P.3d 31 (2013); *Clemency v. State*, 175 Wn.2d 549, 562, ¶ 23, 290 P.3d 99 (2012).

**C. The new redemption statute cannot retroactively expand the class of lien holders entitled to redeem and thereby divest the foreclosure sale purchaser of its interest in real property.**

- 1. The trial court applied the new redemption statute retroactively because the foreclosure sale at which Chase's rights were eliminated was an antecedent event, occurring before the statute took effect.**

The trial court applied the new redemption statute retroactively because the newly created redemption right was triggered by an antecedent event – the underlying foreclosure sale – that eliminated Chase's rights and established the Condo Group's interest in the property as the successful foreclosure sale purchaser. Because the Condo Group acquired its interest in the property at a foreclosure sale occurring before the statute's effective date, this

Court should hold that the application of the new redemption statute here would be a retroactive, and not prospective, application of a new law.

Under Washington law, application of a new statute is retroactive if the precipitating event that triggers its application occurs before the statute's effective date. *See Estate of Burns*, 131 Wn.2d at 110-11. To determine what event triggers application of the statute, the court looks to the statute's "plain language" and "to the subject matter regulated by the statute." *In re Estate of Haviland*, 177 Wn.2d 68, 75-76, ¶ 11, 301 P.3d 31 (2013); *State v. T.K.*, 139 Wn.2d 320, 330, 987 P.2d 63 (1999).

In *Estate of Burns*, the Court considered whether a statutory amendment that eliminated a \$50,000 exemption from the State's recovery of Medicaid benefits from a decedent's estate could apply where the decedent had received the benefits before the statute's effective date, but died after the statute went into effect. The Court held that the precipitating event was the receipt of the Medicaid benefits because the statutory provisions regulated the collection of a debt that was created upon the receipt of the benefits, not the death of the beneficiary. *Burns*, 131 Wn.2d at 115. The Court held that the statute "cannot be applied retroactively to impose on

Medicaid recipients new obligations. with respect to past transactions.” 131 Wn.2d at 120.

By contrast, in *Haviland*, the Court held that an amendment to the slayer statute to disinherit persons who had financially exploited the decedent while alive could bar an abuser’s inheritance from the estate of a testator who had died before the statute became effective. Reasoning that “the proper triggering event is that which the statute intends to regulate,” 177 Wn.2d at 77, ¶ 16, the *Haviland* Court held that the statute did not regulate the financial exploitation itself, which the Legislature had addressed in other laws that provided criminal and civil remedies for the act of elder abuse. Because the purpose of the amendment was to regulate the rights of individuals in decedents’ estates by divesting those committing financial exploitation from their interests in the estate, the Court held that the precipitating act was the personal representative’s petition to disinherit the abuser, rather than the antecedent events of the decedent’s death or his financial exploitation. 177 Wn.2d at 76-77 ¶¶ 12-13.

The Redemption Act regulates the rights of individuals claiming an interest in property sold at foreclosure sale. It regulates how “real property sold . . . may be redeemed” and defines

the class of persons who may do so. RCW 6.23.010(1). The next section of the Redemption Act also reflects the fact that its operative event is the sheriff's sale, as it specifies that the time for redemption runs "one year after the date of sale." RCW 6.23.020(1). The sheriff's foreclosure sale of real property is the act precipitating the right to redeem established by the statute.

The new redemption statute not only "relates to prior facts or transactions" – the sheriff's foreclosure sale and superior court decree confirming that sale – it also "chang[es] their legal effect." *Haviland*, 177 Wn.2d at 75, ¶ 10. The trial court's application of the new redemption statute to alter the rights of parties following a foreclosure sale was not a prospective application of the law, but a retroactive application that altered both Chase's and the Condo Group's rights and liabilities.

**2. The Legislature did not intend its new redemption statute to apply to foreclosure sales that had been completed and confirmed before the statute's effective date.**

The 2013 Legislature did not intend to apply the amendment retroactively to the remainder of an unexpired redemption period. *See* RCW 6.23.010. Where the Legislature does not expressly

provide for retroactivity, a statute is presumed to operate only prospectively. *Densley*, 162 Wn.2d at 223, ¶ 25.

Where the Legislature has intended to apply a statute retroactively it has made its intent clear. For instance, when the Legislature amended the Law Against Discrimination to change the definition of “disability” in RCW 49.60.040(25)(a), it provided that the amendment “is remedial and retroactive, and applies to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after the effective date of this act.”). Laws of 2007, ch. 317, § 3. Sentencing and tax statutes are another example: *See* Laws of 2010, 1st Sp. Sess., ch. 23, §§ 401(4), 402 (amending RCW 82.04.423 “retroactively to conform the exemption to the original intent of the legislature”); Laws of 2009, ch. 375, §20 (RCW 9.94A.701(8) “applies retroactively and prospectively . . .”).

The Legislature did not express its intent to make the new redemption statute retroactive. This court should hold that it does not apply retroactively to foreclosure sales that occurred and were confirmed before the law’s effective date in July 2013.

**3. The new redemption statute broadened the class of lienholders that could redeem the property sold at foreclosure sale and is neither a curative nor a remedial law.**

Courts disfavor the retroactive application of new laws to upset the parties' rights and obligations that have become settled under prior law. Retroactivity analysis is guided by the fundamental tenet that "individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Loeffelholz v. Univ. of Washington*, 175 Wn.2d 264, 272, ¶ 16, 285 P.3d 854 (2012), quoting *Landgraf v. USI Film Prods.*, 511 U.S. at 265.

While the case law sometimes distinguishes between "substantive" and "remedial" statutes, the distinction "is frequently blurred." *State v. T.K.*, 139 Wn.2d at 333. The statutory amendment should therefore be viewed in terms of what it does and how it functions on existing rights and obligations. See *State v. Hodgson*, 108 Wn.2d 662, 667, 740 P.2d 848 (1987), cert. denied, 485 U.S. 938 (1988). The new redemption statute broadens the class of persons entitled to redeem, restricts the rights of foreclosure sale purchasers, and does not deal exclusively with the procedural aspects of the foreclosure sale.

**a. The new redemption statute grants the right to redeem to an entirely new class of lien holders.**

The new redemption statute broadens the class of persons who are entitled to redeem from the purchaser at a foreclosure sale by including within that class a secured lender whose deed of trust has priority to the delinquencies that give rise to the Association's lien. A statute that grants a creditor rights that were extinguished before the law went into effect will not be applied retroactively. *See American Discount Corp. v. Shepherd*, 160 Wn.2d 93, 99-100, ¶¶ 12-14, 156 P.3d 568 (2007) (legislature may not revive expired judgment by retroactively extending right to apply for extension).

Where, as here, an amendment grants a new right to a class that was not previously entitled to it, the presumption against retroactive application is strengthened:

Densley wants this amendment applied retroactively precisely *because* it provides him with a new substantive right: it would provide him with service credit to which he was not previously entitled.

*Densley v. Dep't of Ret. Sys.*, 162 Wn.2d at 224, ¶ 27 (emphasis added) (statutory amendment increasing retirement credit to PERS members would not be applied to credit military service occurring before statute became effective). *See also, Loeffelholz*, 175 Wn.2d at 272, ¶ 15 (statutory amendment expanding Law Against

Discrimination to include sexual orientation would not be applied to persons whose claim arose before statute's effective date); *Johnston v. Beneficial Management Corp. of America*, 85 Wn.2d 637, 641-42, 538 P.2d 510 (1975) (amendment to Consumer Protection Act granting private right of action not applied retroactively to acts alleged to have occurred before statute's effective date).

The trial court's retroactive application of the new redemption statute gave Chase a new right to redeem that did not exist when the property was sold at the foreclosure sale. Chase had notice of the Onyx claim and judgment, but failed to exercise its right to preserve its lien or satisfy the judgment prior to the sale. Under the law then in effect, Chase had no legitimate expectation to redeem the property once it was sold at foreclosure sale. The trial court erred in applying the new redemption statute retroactively to provide Chase with a right that it did not have under prior law.

**b. The new redemption statute takes away the rights of foreclosure sale purchasers.**

The statute not only gives a new class of lienholders a right of redemption that did not previously exist, but, under the trial court's interpretation, it also eliminates rights previously granted to

judicial foreclosure sale purchasers under an order approving the purchaser's right to possession as the highest bidder at the foreclosure sale. While the purchaser does not obtain full legal title, *Atwood v. McGrath*, 137 Wash. 400, 408, 242 P. 648 (1926), the Washington Supreme Court has long held that a foreclosure sale purchaser has more than a mere expectancy. The purchaser obtains a substantive property right that vests upon entry of an order confirming the sale. See *Miebach v. Colasurdo*, 102 Wn.2d 170, 181, 192, 685 P.2d 1074 (1984); *In re Spokane Sav. Bank*, 198 Wash. 665, 672, 89 P.2d 802 (1939); *Diamond v. Turner*, 11 Wash. 189, 39 Pac. 379 (1895).

The Legislature gave a judicial foreclosure sale purchaser enforceable rights in the purchased property from the date of the sale. The purchaser is entitled to "possession of the property purchased" that begins "from the day of sale until a resale or redemption," as well as all "rents or the value of the use and occupation thereof during the period of redemption." RCW 6.23.090(1), 110(1). The purchaser's rights are also entitled to just compensation against the State's claim of eminent domain. *Petition of City of Seattle*, 18 Wn.2d 167, 170, 138 P.2d 667 (1943), citing *Diamond*, 11 Wash. at 192.

In *Diamond*, the Supreme Court refused to allow a collateral attack on the “substantial title” of a foreclosure sale purchaser that was confirmed by judicial order, even though the subsequent sheriff’s deed was void because it was executed in the name of a dead man:

The certificate of purchase and confirmation of sale were alone essential to pass the substantial title of the defendant in the execution to the purchaser at the sale. The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer . . .

*Diamond*, 11 Wash. at 192.

Similarly, in *Spokane Savings Bank*, the Court refused to allow a collateral attack on a sheriff’s sale, characterizing the “vested” right of the purchaser as akin to that under an “executed contract” or any other final judgment:

An order confirming or refusing to confirm a judicial sale is a final and conclusive judgment to the same extent as any other adjudication of a court of competent jurisdiction. After confirmation of a judicial sale the rights of the purchasers are vested, and nothing except fraud or mistake will avoid the sale.

. . .

The importance which attaches to the confirmation of a judicial sale is shown by the rights and duties which are the purchaser's from that date. After confirmation it is an executed contract, and, if not tainted by fraud or otherwise vitiated by other wrongful acts or conduct participated in by the bidder, such

confirmation relates to, and vests title in him from, the date of the sale.

*Spokane Sav. Bank*, 198 Wash. at 672-73 (citations and internal quotation omitted).

When the new redemption statute took effect on July 28, 2013, the Condo Group already possessed a substantive and vested property right established by the August 17, 2012 foreclosure sale and the September 10, 2012 order confirming sale. (CP 349-50) The Condo Group exercised that right by taking immediate possession of the purchased property following the foreclosure sale. (CP 246) The trial court's retroactive application of the new law upset the Condo Group's firmly rooted right to possess property based on existing law.

**c. The new redemption statute is not remedial because it does more than regulate procedure.**

The presumption against retroactivity may be rebutted where a statute is considered "remedial." *See Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 562, 663 P.2d 482 (1983). However, by granting a new right of redemption where none previously existed, in derogation of the rights of foreclosure sale purchasers, the new redemption statute does much more than regulate the procedure by which redemption occurs, and therefore

is not remedial. The trial court properly recognized that the new redemption statute was not merely a procedural or remedial law. (RP 51) This court should hold that it may not be applied retroactively.

“The right to redeem property sold under execution is a creature of statute and depends on the provisions of the statute creating the right.” *GESA Fed. Credit Union v. Mutual Life Ins. Co. of New York*, 105 Wn.2d 248, 252, 713 P.2d 728 (1986); *Graves v. Elliott*, 69 Wn.2d 652, 657, 419 P.2d 1008 (1966); *Kuper v. Stojack*, 57 Wn.2d 482, 483, 358 P.2d 132 (1960). In holding that the substantial compliance doctrine does not apply, the Court in *Millay v. Cam*, 135 Wn.2d 193, 204-05, 955 P.2d 791 (1998), held that the statutory “substantive right of redemption” is not remedial.

Rather than granting new rights to parties who had none under prior law, a procedural or remedial law is one that expands or modifies the *existing* right of a party to obtain relief. Expanding the notice rights of parties already protected by the redemption statute is one way in which a statutory amendment may operate procedurally. *See GESA Fed Credit Union*, 105 Wn.2d at 255 (“The notice clause, however, is like any other timely filing requirement; ‘it is not a substantive element of a right of action, but is merely a

procedural step necessary to enforce a claimant's right to recover.”)  
(citation omitted)

*Severson v. Penski*, 36 Wn. App. 740, 677 P.2d 198, *rev. denied*, 101 Wn.2d 1015 (1984), relied upon by the court below (RP 51-52), is an example of a statutory amendment to notice provisions that does not expand the class of lienholders entitled to redeem. The Court of Appeals characterized as “procedural” the amendment to former RCW 6.24.145 that required the foreclosure sale purchaser to send written notice to the judgment debtor every two (2) months. 36 Wn. App. at 745. The new statute became effective five months before the redemption period expired. The *Severson* court held that the new statute was not being applied retroactively to require, upon its effective date, notice to the judgment debtor because “the sheriff’s sale, the certificate of sale, order confirming sale and the running of some 7 of the 12-month redemption period are not affected.” 36 Wn. App. at 744.

By contrast, the new redemption statute manifestly affects substantive rights, and is not like the prior “procedural” amendment of the Redemption Act that was given “immediate prospective” application in *Severson*. Here, the new redemption statute would retroactively give a lender a right of redemption that

did not previously exist in derogation of the Condo Group's substantive rights, which vested following the precipitating event of the foreclosure sale.

**d. The new redemption statute is not curative.**

The presumption against retroactive application of the new redemption statute applies here for the additional reason that the amendment is not curative. A "curative" amendment "clarifies or technically corrects an ambiguous statute *without changing prior case law constructions of the statute.*" *Barstad*, 145 Wn.2d at 537 (emphasis added). "Subsequent enactments that only clarify an earlier statute can be applied retrospectively." *McGee Guest Home, Inc. v. Department of Social and Health Services of State of Wash.*, 142 Wn.2d 316, 324, 12 P.3d 144 (2000).

As the *Summerhill* court noted, the Legislature that enacted the 1991 Condominium Act understood that lenders must pay the six month delinquent assessments given superpriority or risk the elimination of their lien interest. 166 Wn. App. at 629, n.6, ¶ 10, *citing* 2 Senate Journal, 51st Leg., Reg., Sess., App. A, at 2080 (1990); 1 Senate Journal, 51st Leg. Sess. Reg. Sess., at 376 (1990). The new redemption statute was enacted to effect a substantive

change to the law as it was interpreted in *Summerhill*, not to clarify an ambiguous law. See SB 5541, Final Bill Report, 2013 Reg. Sess.

In holding that RCW 6.23.010 does not give a redemption right to a condominium lender whose deed of trust is not subsequent in time to a condominium association's lien, this court in *Summerhill* held that "the language of the statute [RCW 6.23.010(1)(b)] is unambiguous." *Summerhill*, 166 Wn. App. at 632, ¶ 18. See also *Fulbright*, 174 Wn. App. at 357-58, ¶ 20. The 2012 Legislature's amendment to this unambiguous statute is not "curative:"

[L]egislative enactments which respond to judicial interpretations of a prior statute, and which materially and affirmatively change that prior statute, are not "clarifications" of original legislative intent. Rather, such enactments are amendments to the statute itself.

*Marine Power & Equip. Co. v. Washington State Human Rights Comm'n Hearing Tribunal*, 39 Wn. App. 609, 616, 694 P.2d 697 (1985). The trial court erred in applying the new redemption statute retroactively.

**D. Retroactive application of the new redemption statute violates constitutional principles of due process, impairment of contract, and separation of powers.**

Applying the new redemption statute retroactively would violate constitutional principles of due process, impairment of contract and separation of powers. The due process clause of the 14<sup>th</sup> Amendment prohibits “changes to the law that retroactively affect rights which vested under the prior law.” *In re Carrier*, 173 Wn.2d 791, 811-13, ¶¶ 43-46, 272 P.3d 209 (2012) (vested right in a vacated conviction). For due process purposes, “[a] vested right, entitled to protection from legislation, must be something more than a mere expectation based upon an anticipated continuance of the existing law; it must have become a title, legal or equitable, to the present or future enjoyment of property, a demand, or a legal exemption from a demand by another.” *Carrier*, 173 Wn.2d at 811, ¶ 42, quoting, *Godfrey v. State*, 84 Wn.2d 959, 963, 530 P.2d 630 (1975).

The Condo Group had more than a “mere expectation.” As the foreclosure sale purchaser, the Condo Group acquired enforceable rights that could be divested only by Hai Poon’s redemption. Applying the new redemption statute violates due

process principles by upsetting the Condo Group's reasonable expectations in reliance on the law in existence at the time it purchased the property at the foreclosure sale. (CP 259-260) *See Caritas Services, Inc. v. Dept. of Soc. Health Services*, 123 Wn.2d 391, 413-14, 869 P.2d 28 (1994) (once nursing homes performed services under state contract, their right to reimbursement under existing statutory rates "became something more than a mere expectation"); *Tesoro Refining and Marketing Co. v. Dept. of Revenue*, 159 Wn. App. 104, 118-19, ¶¶ 25-28, 246 P.3d 211 (2010) (amendment to unambiguous statute cannot be applied retroactively because "it is in direct conflict with the reasonable expectations of qualifying taxpayers."), *rev'd on other ground*, 173 Wn.2d 551, 269 P.3d 1013 (2012).

The constitutional prohibition against impairment of contracts also prohibits retroactive application of the new redemption statute. The Condo Group's interest in the purchased property is the same as one taking under an executed contract. *Spokane Sav. Bank*, 198 Wash. at 672-73. The contract clause under the Fourteenth Amendment prevents the impairment of such contractual rights based on the retroactive application of a new law.

*In re F.D. Processing, Inc.*, 119 Wn.2d 452, 460, 832 P.2d 1303 (1992); *Carritas*, 123 Wn.2d at 413-14.

Likewise, to the extent the Legislature enacted the new redemption statute to change the law by retroactively overruling the published Court of Appeals' decisions in *Summerhill* and *Fulbright*, its application here also violates the separation of powers principle:

Any attempt by the Legislature to contravene retroactively this Court's construction of a statute "is disturbing in that it would effectively be giving license to the [L]egislature to overrule this [C]ourt, raising separation of powers problems."

*Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997), quoting *Johnson v. Morris*, 87 Wn.2d 922, 926, 557 P.2d 1299 (1976).

The new redemption statute cannot apply retroactively to authorize a lienholder, that had no right of redemption at the time of sale, to deprive the Condo Group of its interest in property purchased at foreclosure sale. This Court should reverse the trial court's order and direct dismissal of Chase's declaratory action.

## **VI. CONCLUSION**

The trial court erred in applying the new redemption statute retroactively to grant a new substantive right of redemption to a condominium lender who had no redemption rights at the time of

the foreclosure sale. The Condo Group's rights, confirmed by a judicial order, vested at the time of the foreclosure sale. The new redemption statute is neither remedial nor curative legislation and contains no language overcoming the presumption against retroactivity. This Court should reverse and hold that Chase is not an authorized redemptioner under RCW 6.23.010.

Dated this 19<sup>th</sup> day of March, 2014.

HECKER WAKEFIELD  
& FEILBERG, P.S.

By:



Jordan M. Hecker,  
WSBA 14374  
Joshua D. Brittingham,  
WSBA 42061

SMITH GOODFRIEND, P.S.

By:



Howard M. Goodfriend  
WSBA No. 14355

Attorneys for Appellants

**DECLARATION OF SERVICE**

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

That on March 19, 2014, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Jordan Hecker Joshua D. Brittingham Hecker Wakefield & Feilberg, P.S. 321 First Avenue West Seattle, WA 98119	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Robert J. Bocko Philip R. Lempriere Daniel J. Park Keesal, Young & Logan 1301 Fifth Avenue, Suite 3300 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Cale L. Ehrlich Christopher I. Brain Tousley Brain Stephens PLLC 1700 7th Ave., Suite 2200 Seattle, WA 98101-4416	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 19th day of March, 2014.

  
\_\_\_\_\_  
Victoria K. Vigoren

**FILED**  
KING COUNTY, WASHINGTON

NOV 15 2013

**SUPERIOR COURT CLERK**

DAVID WITTEN

The Honorable Jean A. Rietschel  
Hearing Date: November 15, 2013  
Hearing Time: 10:00 a.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

v.

THE CONDO GROUP LLC; a Washington  
Limited Liability Company; and ZION  
SERVICES, LLC, a Washington Limited  
Liability Company,

Defendants.

No. 13-2-29726-4 SEA

ORDER ON CROSS-MOTIONS FOR  
SUMMARY JUDGMENT OF THE  
PLAINTIFF, JPMORGAN CHASE  
BANK, N.A., THE DEFENDANT,  
THE CONDO GROUP LLC, AND  
THE DEFENDANT, ZION  
SERVICES LLC

**(Clerk's Action Required)**

**THIS MATTER** having come before the Honorable Jean A. Rietschel of the King  
County Superior Court upon the Cross-Motions for Summary Judgment of the Plaintiff,  
JPMorgan Chase Bank, N.A. ("Chase"), the Defendant, The Condo Group LLC ("Condo  
Group"), and the Defendant, Zion Services LLC ("Zion"); and the Court having reviewed the  
following:

1. Chase's Motion for Summary Judgment (Dkt. No. 15);
2. Declaration of John Koss (Dkt. No. 11);
3. Declaration of Brian Sommers (Dkt. No. 12);
4. Condo Group's Motion for Summary Judgment Against Chase (Dkt. No. 18);
5. Condo Group's Motion for Summary Judgment Against Zion (Dkt. No. 19);
6. Declaration of Ray G. Stevenson (Dkt. No. 20);
7. Declaration of Jordan M. Hecker (Dkt. No. 21);

ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT OF JPMORGAN CHASE BANK, N.A.,  
THE CONDO GROUP LLC, AND ZION SERVICES LLC - I

LAW OFFICE OF  
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 ORIGINAL

App. A

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- 8. Zion's Combined Motion for Summary Judgment Against Condo Group and Chase (Dkt. No. 26);
- 9. Declaration of Gary Deboer (Dkt. No. 27);
- 10. Declaration of Cale Ehrlich (Dkt. No. 28);
- 11. Zion's Opposition to Chase's Motion for Summary Judgment (Dkt. No. 30);
- 12. Zion's Opposition to Condo Group's Motion for Summary Judgment (Dkt. No. 32);
- 13. Condo Group's Response to Chase's Motion for Summary Judgment (Dkt. No. 34);
- 14. Condo Group's Response to Zion's Motion for Summary Judgment (Dkt. No. 35);
- 15. Response of Chase to Condo Group's Motion for Summary Judgment (Dkt. No. 37);
- 16. Response of Chase to Zion's Motion for Summary Judgment (Dkt. No. 38);
- 17. Reply of Chase to Condo Group's Opposition to Motion for Summary Judgment (Dkt. No. 40);
- 18. Reply of Chase to Zion's Opposition to Motion for Summary Judgment (Dkt. No. 41);
- 19. Zion's Reply In Support Of Its Combined Motion for Summary Judgment Against Condo Group and Chase (Dkt. No. 43);
- 20. Condo Group's Reply to Chase's Response to Condo Group's Motion for Summary Judgment (Dkt. No. 45);
- 21. Condo Group's Reply to Zion's Opposition to Condo Group's Motion for Summary Judgment (Dkt. No. 46);

and having heard oral argument of counsel and after otherwise being duly informed, hereby

**ORDERS, ADJUDGES AND DECREES** as follows:

- 1. ~~Condo Group's Motion for Summary Judgment Against Chase (Dkt. No. 18) is~~  
~~GRANTED~~
- 2. Condo Group's Motion for Summary Judgment Against Zion (Dkt. No. 19) is  
GRANTED.
- 3. Chase's Motion for Summary Judgment (Dkt. No. 15) is ~~DENIED~~. *Graded an*
- 4. Zion's Combined Motion for Summary Judgment Against Condo Group and  
Chase (Dkt. No. 26) is DENIED. *DP*

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT OF JPMORGAN CHASE BANK, N.A., THE CONDO GROUP LLC, AND ZION SERVICES LLC - 2

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1 5. ~~Chase and Zion~~ <sup>15</sup> are not authorized under any version of RCW Ch. 6.23 to  
2 redeem the subject real property, commonly known as 1125 East Olive Street, Unit 310,  
3 Seattle, Washington 98122 (the "Property"), and legally described as follows:

4 Onyx Unit 310, Onyx Condominiums, a Condominium, according to the  
5 Condominium Declaration recorded under Recording Number  
6 20060608000615, and Amendments thereto, if any, and in Volume 218 of  
7 Condominiums, Page(s) 21 through 31, inclusive, in King County,  
8 Washington.

8 Tax Parcel No. 639550-0320-02.

9 6. ~~The statutory redemption period for the Property has expired and is not tolled.~~

10 7. ~~Title to the Property is quieted in favor of Condo Group as against Chase and~~

11 ~~Zion.~~

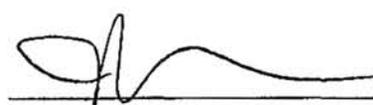
12 8. ~~Chase's claims against Condo Group are dismissed with prejudice.~~

13 9. Zion's cross-claims against Condo Group are dismissed with prejudice.

14 **DONE IN OPEN COURT** this 14<sup>th</sup> day of November, 2013.

15  
16  
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18   
19 Hon. Jean A. Rietschel  
20 King County Superior Court Judge

21 **PRESENTED BY:**

22   
23 \_\_\_\_\_  
24 Jordan M. Hecker WSBA No. 14374  
25 Joshua D. Brittingham WSBA No. 42061  
26 HECKER WAKEFIELD & FEILBERG, P.S.  
Attorneys for Defendant The Condo Group LLC

ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT OF JPMORGAN CHASE BANK, N.A.,  
THE CONDO GROUP LLC, AND ZION SERVICES LLC - 3

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*[Handwritten notes and signatures on the right margin]*

1 **COPY RECEIVED; APPROVED AS TO FORM;**  
2 **NOTICE OF PRESENTATION WAIVED:**

3   
4 \_\_\_\_\_

5 Robert J. Bocko WSBA No. 15724  
6 Philip R. Lempriere WSBA No. 20304  
7 Daniel J. Park WSBA No. 43748  
8 KEESAL, YOUNG & LOGAN  
9 Attorneys for Plaintiff

10 **COPY RECEIVED; APPROVED AS TO FORM;**  
11 **NOTICE OF PRESENTATION WAIVED:**

12   
13 \_\_\_\_\_

14 Cale Erlich WSBA No.44359  
15 Christopher Brain WSBA No. 5054  
16 TOUSLEY BRAIN STEPHENS PLLC  
17 Attorney for Defendant Zion Services LLC  
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ORDER ON CROSS-MOTIONS FOR SUMMARY  
JUDGMENT OF JPMORGAN CHASE BANK, N.A.,  
THE CONDO GROUP LLC, AND ZION SERVICES LLC - 4

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**FILED**  
KING COUNTY, WASHINGTON

NOV 15 2013

SUPERIOR COURT CLERK

DAVID WITTEN

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JPMORGAN CHASE BANK, N.A.,

Plaintiff,

v.

THE CONDO GROUP LLC, a  
Washington limited liability company;  
ZION SERVICES LLC, a Washington  
limited liability company,

Defendants.

No. 13-2-29726-4 SEA

**ORDER GRANTING  
JPMORGAN CHASE BANK, N.A.  
SUMMARY JUDGMENT**

THIS MATTER having come before the Honorable Judge Jean Rietschel upon Plaintiff's Motion for Summary Judgment. The Court has reviewed the following:

1. Plaintiff's Motion for Summary Judgment;
2. Declaration of Brian S. Sommer with attached exhibits;
3. Affidavit of John Koss with attached exhibits;
4. Defendant Zion Services LLC's Opposition to Plaintiff's Motion for Summary Judgment;
5. Defendant The Condo Group LLC's Response to Plaintiff's Motion for Summary Judgment;

ORDER GRANTING JPMORGAN  
CHASE BANK, N.A. SUMMARY  
JUDGMENT - 1

KEESAL, YOUNG & LOGAN  
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SEATTLE, WASHINGTON 98101  
(206) 622-3790

1           6.     Reply of Plaintiff to Condo Group's Opposition to Motion for Summary  
2 Judgment;

3           7.     Reply of Plaintiff to Zion Service LLC's Opposition to Motion for  
4 Summary Judgment;

5           8.     Oral argument from counsel for all litigants; and

6           9.     The materials listed in the accompanying  
7 order on the Condo Group's motion

E  
JP

9 —  
10           This Court has determined that material facts are not in dispute, trial is not  
11 necessary, and Plaintiff is entitled to summary judgment as a matter of law. NOW  
12 THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

13           1.     Plaintiff is an authorized redemptioner under RCW 6.23.010;

14           2.     The court record establishes that Plaintiff timely and properly tendered  
15 its redemption request to the Sheriff of King County on August 9, 2013, which is at  
16 least five (5) days before the redemption period expired;

17           3.     All statutory, legal and equitable rights, obligations and duties  
18 conferred to litigants under RCW 6.23 *et seq.* are tolled in order to complete the  
19 redemption process (including but not limited to The Condo Group LLC's obligation  
20 to provide Plaintiff with the accounting requested under RCW 6.23.090);

21           4.     The Clerk of the Court is to disburse the \$42,110 deposited by Chase  
22 into the court registry on August 16, 2013 back to Chase in order for Chase remit the  
23 proper redemption amount due to The Condo Group LLC, the Clerk's check made  
24 payable to the order of Keesal Young & Logan  
RCO Legal, P.S.

EV  
2PI

25           5.     Upon the Sheriff of King County receiving the redemption sum due, the  
26 Sheriff is ordered to issue a Sheriff's Deed to Plaintiff;

ORDER GRANTING JPMORGAN  
CHASE BANK, N.A. SUMMARY  
JUDGMENT - 2

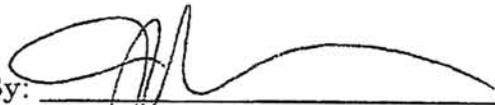
KEESAL, YOUNG & LOGAN  
1301 FIFTH AVENUE, SUITE 3300  
SEATTLE, WASHINGTON 98101  
(206) 622-3790



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Acknowledged by:

**HECKER WAKEFIELD & FEILBERG, P.S.**

By: 

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