

No. 70916-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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GALLEON HOMEOWNERS ASSOCIATION

Plaintiff-Respondent

v.

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

Defendants-Appellants

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GALLEON HOMEOWNERS ASSOCIATION'S RESPONSE BRIEF

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## INTRODUCTION

This appeal arises from yet another case in which Mortgage Electronic Registration Systems, Inc. (“MERS”), and one of its members, in this case Nationstar Mortgage, LLC (“Nationstar”), failed to respond to service of process in a condominium assessment lien foreclosure lawsuit, which resulted in the Deed of Trust that encumbered the property (the “Deed of Trust”) being eliminated by a sheriff’s sale. Well after the litigation was complete and the sheriff’s sale took place, MERS and Nationstar attempted to have it all undone and were not successful. They now appeal.

This case began in May of 2012, when Galleon Homeowners Association (the “Association”) filed a lawsuit to judicially foreclose its lien for unpaid condominium assessments against unit number 605 in the Galleon condominium (the “Unit”). The Association’s lien has priority over deeds of trust pursuant to the Washington Condominium Act (the “Act”).<sup>1</sup> The Association served MERS with the summons and complaint because MERS was identified as having the beneficial interest in the Deed of Trust that encumbered the Unit according to public land records. The

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<sup>1</sup> In the interest of clarity, it is worth pointing out that MERS and Nationstar use different names to reference the Act throughout their brief, such as the Uniform Condominium Act. Op. Br. at 6. The applicable statute is the “Washington Condominium Act.” See RCW 64.34.900. Although the Washington Condominium Act is similar to the Uniform Condominium Act, its provisions, including the lien priority provision, are not identical.

complaint requested that the Association's lien be declared in first position and to foreclose all defendants' interests in the Unit.

The parties agree that MERS was the proper party to serve and chose not to appear in the lawsuit. Instead, MERS emailed the summons and complaint to Nationstar, a non-party with no publically recorded interest in the Unit. Nationstar also did not respond to the summons and complaint or try to intervene in the lawsuit to defend against the Association's claim. Nationstar speculated that the reason it did not respond was because it was too busy at the time servicing other loans.

Subsequently, the Association obtained a summary judgment against the owner of the Unit and a default judgment against MERS. Pursuant to the judgment, the Snohomish County sheriff sold the real property at public auction to a third party bidder, The Condo Group, LLC. The sheriff's sale eliminated all junior liens, including the Deed of Trust.

Nearly seven months after the judgment was entered and over two months after the sheriff's sale eliminated the Deed of Trust, Nationstar accepted and recorded an assignment of the Deed of Trust from MERS. There is no evidence in the record as to the identity of the true owner of the note during the relevant times of this lawsuit or on whose behalf MERS was acting when it purported to assign the Deed of Trust to Nationstar. Nationstar claimed an interest in the Unit solely as the

successor in interest to MERS, a party that acknowledged it never held the note.

Nearly nine months after the judgment was entered and nearly five months after the sheriff's sale, both MERS and Nationstar filed a motion to vacate the judgment under CR 60(b)(1), arguing that their failure to appear was due to "excusable neglect" and/or "irregularities." In the alternative, they argued that Nationstar should be allowed to redeem the Unit. Nationstar did not try to get an order allowing it to intervene in the lawsuit prior to filing its motion to vacate.

The trial court denied the motion to vacate on five separate grounds and awarded the Association its attorney fees and costs against both MERS and Nationstar for defending against their unsuccessful motion.

Now, MERS and Nationstar appeal the trial court's denial of their motion to vacate and the award of attorney fees. Tellingly, MERS and Nationstar have abandoned every issue and argument they raised at the trial court. Seemingly out of desperation, on appeal MERS and Nationstar raise procedural due process as an issue for the first time.<sup>2</sup>

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<sup>2</sup> MERS and Nationstar also appeal the trial court's ruling that Nationstar cannot redeem the Unit from The Condo Group pursuant to the redemption statute. The Association takes no position on the issue of redemption.

The Association respectfully requests that the court (1) affirm the trial court's denial of the motion to vacate, (2) affirm the trial court's award of attorney fees against both MERS and Nationstar, and (3) award the Association its attorney fees incurred on appeal.

#### STATEMENT OF THE CASE

**A. The Association's Judicial Foreclosure of its Lien for Unpaid Condominium Assessments.**

On May 27, 2004, Maria Berglund ("Berglund") purchased the Unit. CP 191. The condominium is governed by the Declaration of Covenants, Conditions and Restrictions Establishing the Condominium to be known as Galleon, and any amendments thereto (the "Declaration"). CP 311, 314-19.

On January 7, 2007, the Deed of Trust was recorded against the Unit with the Snohomish County Auditor's Office. CP 203-25. The Deed of Trust expressly provides that "**MERS is the beneficiary under this Security Instrument.**" (emphasis in the original.) CP 204.

Berglund defaulted on her condominium assessment obligation in April of 2011. CP 320. On May 8, 2012, the Association filed a lawsuit for a personal judgment against Berglund and to foreclose its lien against the

Unit.<sup>3</sup> CP 342-47. Relying on the Snohomish County public records, the Association named MERS as a defendant due to its purported beneficial interest in the Deed of Trust. *Id.*

MERS was served with process on May 16, 2012. CP 159, 381-82. Rather than defend its purported interest, MERS purposely chose not to appear in the lawsuit and instead emailed the summons and complaint to Nationstar. CP 159. Although Nationstar is not mentioned in the Deed of Trust or anywhere else in the Snohomish County Auditor's records until after the Sheriff's sale was complete, MERS forwarded the summons and complaint to Nationstar because Nationstar was servicing the loan. CP 159, 187.

After receiving the summons and complaint, Nationstar did not attempt to intervene in the lawsuit or otherwise respond to the summons and complaint. CP 188. Nationstar did not even know why it failed to respond, stating that "[I]t is unclear what, [sic] exactly happened with [the summons and complaint]." *Id.* Nationstar could only speculate as to the source of its neglect, surmising that it was just too busy servicing other loans to respond. *Id.* Nationstar characterized its failure to appear in the lawsuit as an "unfortunate and routine administrative error." CP 237.

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<sup>3</sup> The Association has a statutory lien for unpaid assessments from the time the assessments are due. RCW 64.34.364(1). The lien has super-priority over mortgages/deeds of trust. RCW 64.34.364(3).

A default order was entered against MERS on August 24, 2012. CP 333-34. Berglund appeared and contested the lawsuit. CP 360-61. The Association obtained a summary judgment against Berglund and a default judgment against MERS. CP 301-05. Pursuant to the judgment, the Snohomish County sheriff sold the Unit at public auction on March 1, 2013. CP 275-76. There was competitive bidding, and The Condo Group bid the highest amount. *Id.* An order confirming the sheriff's sale and disbursing sale proceeds to the Association was entered on April 17, 2013. CP 259-60. The judgment was satisfied from the sale proceeds. *Id.*, CP 255.

**B. MERS and Nationstar Appear and File a Motion to Vacate the Judgment.**

More than 14 months after receiving the summons and complaint, nine months after the judgment was entered, and more than two months after purportedly being assigned the Deed of Trust, MERS and Nationstar, as "successor in interest" to MERS, filed a motion for an order to show cause as to why the judgment should not be vacated. CP 151-54. An order to show cause was entered on July 26, 2013. CP 149-50. MERS and Nationstar obtained the show cause order *ex parte*, without notice to the

Association, Berglund, or The Condo Group and without Nationstar intervening in the lawsuit beforehand.<sup>4</sup> CP 151-54.

A show cause hearing on MERS and Nationstar's motion to vacate the judgment was held on August 20, 2013. CP 55. MERS and Nationstar argued that the judgment should be vacated for "excusable neglect" and/or "irregularities" under CR 60(b)(1), or in the alternative, that Nationstar be allowed to redeem the Unit under the redemption statute. CP 232-45.

Nationstar did not file its motion to intervene until August 19, 2013, on the afternoon before the show cause hearing. CP 57. The motion was embedded in MERS and Nationstar's reply to the motion to vacate and consisted of two sentences. *Id.*

The court denied MERS and Nationstar's motion to vacate, ruling that (1) they did not have a meritorious defense to the Association's claims, that (2) they did not act with excusable neglect, that (3) the Association would suffer substantial hardship if the judgment was vacated, that (4) Nationstar did not timely intervene or otherwise comply with CR 24, and that (5) MERS and Nationstar did not hold the beneficial interest in the Deed of Trust at the relevant times to the lawsuit and were therefore

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<sup>4</sup> It is unclear how or why the Commissioner granted the *ex parte* motion without first requiring Nationstar to intervene and without providing prior notice to any of the other parties. Based on Nationstar's motion, it did not disclose to the Commissioner that it was not a party to the lawsuit. Counsel's supporting declaration referred to Nationstar as a "defendant." CP 153.

not entitled to service of process in the lawsuit. CP 52-55. The court also ruled that Nationstar could not redeem the Unit. *Id.* Last, the court granted the Association leave to file a motion for its attorney fees and costs for defending against MERS and Nationstar's motion. *Id.*

**C. The Association is Awarded its Attorney Fees and Costs Against both MERS and Nationstar.**

Eight days after the trial court denied MERS and Nationstar's motion to vacate, the Association filed a motion for its attorney fees and costs for defending against the motion. CP 45-49. While Nationstar contested the motion, MERS did not. CP 24. On September 6, 2013, the court granted the motion and awarded the Association \$8,868.50 in fees and \$386.00 in costs against both MERS and Nationstar. CP 9-10. Specifically, the court ruled that the Association was entitled to its fees and costs pursuant to RCW 64.34.364(14), RCW 64.34.455, and CR 60. *Id.* The court also found the amount of the fee request to be reasonable. *Id.*

**D. MERS and Nationstar's Purported Interests in the Unit.**

Nationstar states in its brief that it has held the note since 2007. Op. Br. at 39. However, the record only establishes that Nationstar held the note as of July 23, 2013. CP 187. There is no evidence in the record as to when Nationstar received the note, from whom it received the note, or if it still has the note.

According to Snohomish County land records, MERS purported to assign the beneficial interest in the Deed of Trust to Nationstar after the sheriff's sale, on May 24, 2013. CP 227. However, MERS never held the beneficial interest in the Deed of Trust and acknowledged it was merely acting as an agent for the true owner of the note. Op. Br. at 41. There is no evidence in the record as to the identity of the principal for whom MERS was acting when it assigned the Deed of Trust to Nationstar or on whose behalf Nationstar serviced the note. In an effort to obtain information as to who owned the note at the relevant times to these proceedings, counsel for the Association asked counsel for MERS and Nationstar for "documentation or information as to who held the promissory note and when from loan origination to the present." CP 71. That information was never provided. *Id.* Presumably, MERS and Nationstar have chosen to keep the identity of the entity or entities for whom they are acting a mystery.

Regardless, it is undisputed that MERS holds itself out as the beneficiary of the Deed of Trust in public land records "for purpose of receiving notice of lawsuits..." and that MERS "is entitled to service of process." Op. Br. at 40-41.

**E. Nationstar Finally Attempts to Redeem; MERS and Nationstar File This Appeal.**

Nationstar did not attempt to redeem the Unit through the Snohomish County Sheriff's Office until January 6, 2014, the day it filed its Opening Brief in this appeal. *See* Op. Br. at App., Ex. E.

MERS and Nationstar both appeal the trial court's denial of the motions to vacate and intervene and the award of attorney fees against Nationstar.<sup>5</sup> Significantly, MERS and Nationstar completely abandon the issues and arguments they raised to the trial court pertaining to "excusable neglect" or "irregularities" under CR 60(b)(1), and instead, they raise a brand new issue on appeal – whether the judgment is void because it exceeds the relief sought in the Complaint. Op. Br. at 30-38. MERS and Nationstar also appeal the trial court's ruling that Nationstar is not a qualified redemptioner. *Id.* at 15-30

**ARGUMENT**

**A. Nationstar Was Not Entitled to Intervene.**

Denial of a motion to intervene for untimeliness is reviewed for abuse of discretion. *Kreidler v. Eickenberry*, 111 Wn.2d 828, 832, 766 P.2d 438 (1989).

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<sup>5</sup> MERS did not challenge the Association's request for attorney fees at the trial court. Nationstar and MERS do not appeal the attorney fee award against MERS. Op. Br. at 6, 42.

In order to intervene as a matter of right under CR 24(a), the intervenor must satisfy four criteria: (1) the application to intervene must be timely, (2) the applicant claims an interest that is the subject of the action, (3) the disposition will likely adversely affect the applicant's ability to protect that interest, and (4) the applicant's interest is not adequately protected by the existing parties." *DeLong v. Parmelee*, 157 Wn. App. 119, 163-64, 236 P.3d 936 (2010); CR 24(a). "Where a person seeks to intervene after judgment, the court should allow intervention only upon a strong showing after considering all circumstances, including prior notice, prejudice to the other parties, and reasons for and length of the delay." *Kreidler*, 11 Wn.2d at 832-33. Timeliness is a critical requirement of CR 24. *Id.* at 832, (citing *Martin v. Pickering*, 85 Wn.2d 241, 243, 533 P.2d 380 (1975)).

1. The Motion to Intervene was Untimely.

Tellingly, Nationstar and MERS do not address or even disclose in their Opening Brief the fact that the motion to intervene was not filed until the day before the hearing on their motion to vacate. CP 56-57. In fact, the motion to intervene was embedded in page two of their reply brief. *Id.* Nationstar's motion to intervene did not comply with CR 6(d), which requires that motions be served not later than five days before the date of the hearing. Nationstar did not get an order to shorten time as required by

SCLCR 7(b)(2)(10)(D). By filing the motion to intervene the afternoon before the hearing date, Nationstar and MERS deprived the Association of its ability to submit a written response to the motion outlining how Nationstar had no interest that would warrant intervention. In addition, the motion was untimely considering Nationstar found out about the judgment by at least May 30, 2013. CP 188. For whatever reason, it took it 81 days to file a motion to intervene. CP 57. Given these facts, no reasonable person could conclude that the trial court's denial of the motion was manifestly unreasonable or exercised on untenable grounds.

2. The Motion to Intervene Did Not Address Any of the Factors Provided in CR 24.

In addition to the untimeliness of the motion, the trial court denied the motion for failure to comply with CR 24. CP 53, 55. The motion to intervene is so skeletal it can be set forth here in its entirety:

While there is no order allowing Nationstar to intervene, Nationstar has an interest in this property that would have required them [sic] to be served and notified of the action initially had that interest been recorded. Nationstar should be allowed to intervene in this action for purposes of its Motion to Vacate.

CP 57.

Nationstar's motion does not contain detailed allegations and facts to satisfy the four requirements of CR 24. For example, the motion failed to address how Nationstar, as a mere loan servicer, had an interest in the

Unit. Notably, Nationstar appeared as “successor in interest” to MERS. CP 24, 151, 228. However, MERS acknowledged it never owned the note or had an interest in the Unit other than to act as mortgagee of record for purposes of receiving service of process. CP 159; Op. Br. at 40-41. As a result, Nationstar’s claim to be a “successor in interest” to MERS did not establish it had a legitimate interest in the proceedings.

MERS’s purported assignment of the Deed of Trust to Nationstar likewise does not establish that Nationstar had an interest in the lawsuit. MERS acknowledged it merely acts as agent for the true owner of the note. Op. Br. at 40-41. Agency requires a specific principal that is accountable for the acts of the agent. *Bain v. Metropolitan Mortg. Group, Inc.*, 175 Wn.2d 83, 107, 285 P.3d 34 (2012); *see also Rucker v. Novastar Mortg. Inc.*, 177 Wn. App. 1, 311 P.3d 31 (2013) (“[W]here an entity fails to identify a lawful principal who controls its actions, it has not established that it is an agent for purposes of the [Deed of Trust Act.]”).

In this case, despite a request from the Association’s counsel to do so (CP 71), MERS and Nationstar never disclosed who truly owned the note during the relevant times of this lawsuit. Therefore, they did not establish MERS’s authority to assign the beneficial interest in the Deed of Trust to Nationstar. As a result, MERS’s purported assignment of the Deed of Trust does not establish that Nationstar received any interest in

these proceedings.<sup>6</sup> And even if it had made that showing, Nationstar did not establish how its interest was not adequately protected by MERS's involvement in the lawsuit.

Given that the motion did not meet or even address any of the prongs of CR 24(a), the trial court's denial of the motion to intervene was not manifestly unreasonable or exercised on untenable grounds.

3. Nationstar's Alleged Status as a Redemptioner is Not Relevant to Whether Nationstar Can Intervene.

MERS and Nationstar claim "the court's finding of untimeliness was incorrect because it is undisputed that Nationstar sought to redeem the property – an interest that still has not expired." Op. Br. at 30. The record contradicts that statement; Nationstar did not attempt to redeem through the sheriff until January 6, 2014, long after the court denied their motion to intervene and this appeal was filed. Op. Br. at App., Ex. E. Furthermore, this was not the reason the trial court denied the motion to intervene. Rather, it was denied due to its untimeliness and its failure to address the factors listed in CR 24. CP 53, 55.

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<sup>6</sup> In fact, the trial court correctly ruled that MERS and Nationstar never held the beneficial interest in the Deed of Trust and therefore were not entitled to receive service of process. CP 53. The Association still properly served MERS because it held itself out as owning the note as the mortgagee of record.

**B. The Judgment is Not Void.**

The Association does not dispute MERS and Nationstar's assertion that this Court reviews the trial's courts denial of the motion to vacate for abuse of discretion. Op. Br. at 30; *TMT Bear Creek Shopping Ctr., Inc., v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 199, 165 P.3d 1271 (2007); *Showalter v. Wild Oats*, 124 Wn. App. 506, 510, 101 P.3d 867 (2004).

In arguing that the trial court abused its discretion, MERS and Nationstar list a series of irrelevant and inconsequential objections to the form of the Complaint. Specifically, Nationstar and MERS contend that "the Complaint failed to annex recorded instruments (the condominium declarations, deeds of trusts, and lien claims) or to provide citations to recording numbers for them, depriving the mortgagee of fair notice that the priority of its lien would be forfeited." Op. Br. at 37. They also argue that the complaint "failed to plead the time when MERS or Nationstar were notified of the lien, when they receive [sic] notice of its super-priority, and when they received notice that "defendant mortgage lender ... rights are forever foreclosed." *Id.* at 36. Nationstar and MERS's arguments are without merit as they do not take into account the language of the complaint or the liberal notice pleading requirements of this state.

1. The Complaint Gave Clear Notice to MERS and Nationstar of the Association's Claim.

A complaint must contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which he deems himself entitled. CR 8(a). There are no technical forms of pleading, and pleadings should be construed so as to do substantial justice. CR 8(e)(1), (f).

A complaint simply must give sufficient notice to the defendant of the nature of the claim being sought. *Adams v. King County*, 164 Wn.2d 640, 657, 192 P.3d 891 (2008), (citing *Lightner v. Balow*, 59 Wn.2d 856, 858, 370 P.2d 982 (1962) (“Pleadings are primarily intended to give notice to the court and the opponent of the general nature of the claim asserted.”)).

In this case, the complaint provides clear notice of the claims asserted. For instance, the complaint states that Berglund owed unpaid condominium assessments and that the Association had a lien against the Unit for same. CP 344-45. The complaint also contains the legal description and parcel number of the Unit. *Id.* With respect to MERS, the complaint identifies MERS as a defendant because it “claims some right, title, or interest in the [Unit].” CP 345. Notably, the complaint goes on to

plainly state that the interests in the Unit of the defendants, including MERS, are junior to that of the Association:

Defendants MARIA BERGLUND and JOHN DOE BERGLUND, wife and husband, and their marital community; **MERS**, and all other persons or parties known or unknown claiming any right, title estate, lien or interest in the real property described in the Complaint, **have or claim some interest in, or lien upon, the real property and premises or some part thereof. These interests or liens, if any, are inferior, subordinate and subject to the plaintiff's lien.**

(bold type added.) CP 346. Indeed, the complaint contained the exact language recommended by Professors Stoeck and Weaver for pleading a judicial foreclosure. *See*, 18 William B. Stoeck and John W. Weaver, *Washington Practice. Real Estate Transactions*, § 19.5 at 378-79 (2d ed. 2004) (providing that the complaint merely state “the identity . . . of all defendants” and “that all defendants’ interests are junior to those of the plaintiff.”)

Similarly, the complaint’s demand for relief was crystal clear. For example, the complaint prayed that “plaintiff’s lien be declared a valid first lien upon the land and premises described herein...” and that

the rights of each of the defendants and persons claiming by, through or under them, **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.**

(emphasis added.) CP 347. Again, the demand for relief is nearly identical to what is recommended by recognized Washington authorities. *See, e.g.*, 9 David E. Breskin, *Washington Practice, Civil Procedure Forms and Commentary*, § 8.50 at 250-51 (2d ed. 2000) (“Plaintiff requests that the court enter judgment as follows: Providing that by such foreclosure and sale, the rights of defendants and persons claiming by, through or under them subsequent to the execution of the mortgage be adjudged inferior and subordinate to plaintiff’s mortgage lien and be forever foreclosed except only for the statutory right of redemption.”)

Against this backdrop, MERS and Nationstar’s list of perceived failings in the complaint are both trivial and immaterial. They cite no requirement that the Association annex the condominium declaration, deed of trust, and recorded lien to the complaint or reference their recording numbers therein.<sup>7</sup> In fact, the Association clearly does not have to attach its recorded lien because it does not even have to record a lien in the public land records to perfect it.<sup>8</sup> In addition, the contention that MERS and Nationstar were not given notice of the lien or its alleged

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<sup>7</sup> To the extent MERS and Nationstar claim the Declaration’s recording number was omitted from the complaint, this is inaccurate. The recording number is located in the Unit’s legal description, which is in the complaint. CP 344-45.

<sup>8</sup> The Association’s lien is perfected without the necessity of recording a paper lien with the county. RCW 64.34.364(7).

priority over MERS's interest is preposterous because notice was provided when MERS was served with the complaint.

In short, the complaint contained the recommended plain language for a judicial foreclosure. It clearly articulated that the Association had a lien that the Association alleged was senior to MERS's interest, and the complaint requested that MERS's interest be foreclosed. MERS and Nationstar were apprised of the claims against them when MERS was properly served with process. Any perceived failing of the complaint was not why they find themselves in this position today. Rather, the true reason is because MERS simply chose not to respond to the lawsuit and Nationstar was too busy to do so.

2. The Relief Obtained in the Judgment Did Not Exceed the Relief Requested in the Complaint.

“A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.” CR 54(c). A defendant has a due process right to assume that a default judgment will not exceed or substantially differ from the demand stated in the complaint. *Conner v. Universal Utils.*, 105 Wn.2d 168, 174, 712 P.2d 849 (1986).

MERS and Nationstar claim that the judgment added a reference to RCW 64.34.364(3) and added a so-called “forfeiture provision.” Op. Br. at

32. However, MERS and Nationstar's argument ignores the plain language of the complaint and fails to articulate how the relief obtained "exceeded" or "substantially differed" from that requested in the complaint.

The relief obtained in the judgment was the relief sought in the complaint. For instance, and as described above, the complaint sought that the Association's lien be declared a valid first lien and to foreclose the interests of all defendants, including MERS. CP 347. Correspondingly, the judgment provided that the interests of the defendants, both mortgage lenders and otherwise, were junior to the Association's lien and would be foreclosed by any sheriff's sale conducted pursuant to the judgment. The judgment provided in pertinent part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED **that the rights of defendant mortgage lenders be adjudged inferior and subordinate to the plaintiff's lien** to the extent of assessments for common expenses 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 any sheriff's sale conducted pursuant to this foreclosure decree;

...

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that if the **defendant mortgage lenders**, and the persons claiming by, through, or under them, do not satisfy the Association's lien priority as described in the preceding paragraph prior to any sheriff's sale conducted pursuant to this foreclosure decree, **their rights are forever foreclosed;**

...  
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the rights of the **remaining defendants** and persons claiming by, through or under them, be adjudged inferior and subordinate to the plaintiff's lien and **be forever foreclosed by the sheriff's sale conducted pursuant to this foreclosure decree except only for the statutory right of redemption allowed by law, if any;**

(emphasis added.) CP 304.

If anything, the relief obtained is less than the relief requested as to mortgage lenders because it gives them until the date of the sheriff's sale to satisfy the Association's statutory lien priority rather than simply declaring that their interests are foreclosed upon entry of the judgment with the court.

Critically, the language in the judgment mirrors the Act (RCW 634.364(3)) and is consistent with the basic principle that a foreclosure sale of a senior lien eliminates junior liens. *See, e.g. Summerhill Village Homeowners Ass'n v. Roughley*, 166 Wn. App. 625, 629, 270 P.3d 639, *amended by and recon. denied by* 289 P.3d 645 (2012) (noting that the "loan servicer did not facilitate payment of the [condominium] assessment lien prior to the sheriff's sale" and therefore "[t]he sale extinguished the deed of trust") (emphasis added); *see also Kennewick Irrigation District v. 51 Parcels of Real Property*, 70 Wn. App. 368, 372, 853 P.2d 488 (1993) ("If the amount of judgment is paid at any time before *the day of the*

*foreclosure sale*, foreclosure proceedings must be abandoned.”) (emphasis added.) There is simply no new relief in the judgment that was not requested in the complaint.

To the extent MERS and Nationstar are arguing that their interests were not foreclosed because they are not mortgage lenders, they ignore the paragraph in the judgment (cited above) that provides that the interests of the “remaining defendants” would be foreclosed by the sheriff’s sale. This relief is also consistent with the relief requested in the complaint.<sup>9</sup> Therefore, the judgment foreclosed their interests regardless of whether they claim to be something other than mortgage lenders.

### 3. MERS was the Correct Party to Serve with Process.

Without expressly raising service of process as an issue on appeal, MERS and Nationstar claim that the reference to “defendant mortgage lenders” in the judgment was a “de facto” amendment to the complaint that required process service on the original lender, Fremont. Op. Br. at 33. They cite no supporting authority for this proposition.

In fact, the suggestion that Fremont should have been served is disingenuous. First and foremost, the parties agree that MERS was the proper party to serve. Op. Br. at 39. (“Association accepting with approval MERS’ and Nationstar’s acknowledgement that MERS was the proper

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<sup>9</sup> This language is also consistent with RCW 64.34.364(2), which provides that the Association’s lien is senior to any other interest MERS and Nationstar could be claiming.

party to serve.”) It also contradicts their claims that MERS was purposely designated to act as mortgagee of record “for purposes of receiving notice of lawsuits that are served on junior lienholders, such as the Association’s lien foreclosure here.” Op. Br. at 40-41. Indeed, MERS and Nationstar concede that, “as mortgagee of record and agent for the note holder, MERS is entitled to service of process when a the [sic] holder of senior lien attempts to foreclose the note holder’s Deed of Trust lien.” Op. Br. at 40.

Second, there is absolutely nothing in the public land records or court record to suggest Fremont owned the note or had an interest in the Unit at any relevant time during the lawsuit. In fact, this notion does not square with MERS and Nationstar’s (unsupported) statement that Nationstar held the note since 2007. Op. Br. at 39.

And third, the Association is entitled to rely on the public land records, which identified MERS as the mortgagee of record. The purpose of the recording statute is to give constructive notice to parties of encumbrances on land. *See* RCW 65.08.070 (race-notice recording act); *see also Koch v. Swanson*, 4 Wn. App. 456, 459, 481 P.2d 915 (1971) (“Where existing property is described, the index and the recorded document give notice only as to the matters within its chain of title. Thus, one searching the index has a right to rely upon the index and recorded

documents and is not bound to search the record outside the chain of title of the property...”) *Id.* It is not incumbent upon the Association to ferret out the true note holder from sources outside the public land records to serve with process in addition to serving MERS.

Bottom line, the parties agree that MERS was the proper party serve. MERS and Nationstar admit that MERS acts as agent for the true note holder, in part, to receive notice of condominium assessment lien foreclosures. MERS was properly served, chose not appear in the lawsuit, and the Deed of Trust was eliminated by the sheriff’s sale.

**C. The Association Is Entitled to its Attorney Fees and Costs Against Nationstar.**

Whether a statute authorizes an award of attorney fees is reviewed *de novo*. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 785-86, 197 P.3d 710 (2008). Generally, "attorney fees may be awarded when authorized by a contract, a statute, or a recognized ground in equity." *Kaintz*, 187 Wn. App. at 785 (citing *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986)).

The trial court awarded the Association’s attorney fees on three grounds: RCW 64.34.364(14), RCW 64.34.455, and the court’s equitable authority under CR 60. CP 10. Each of these bases supports the award.

1. The Association is Entitled to its Attorney Fees Pursuant to RCW 64.34.34(14).

The Washington Condominium Act (the “Act”) is clear that condominium associations are entitled to their attorney fees in recovering delinquent condominium assessments and enforcing judgments for same.

The Act provides:

The association **shall be entitled to recover any costs or reasonable attorneys’ fees incurred in connection with the collection of delinquent assessments**, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association **shall** be entitled to recover costs and reasonable attorneys’ fees if it prevails on appeal **and in the enforcement of a judgment**.

(emphasis added.) RCW 64.34.364(14). The Act also directs courts to administer its remedies liberally "to the end that the aggrieved party is put in as good a position as if the other party had fully performed." RCW 64.34.100; *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wn. App. 697, 713, 9 P.3d 898 (2000). “A statute's mandate for liberal construction includes a liberal construction of the statute's provision for an award of reasonable attorney fees.” *Progressive Animal Welfare Society v. Univ. of Washington*, 114 Wn.2d 677, 683, 790 P.2d 604 (1990).

The judgment entered and enforced in this case was for unpaid condominium assessments. Had Nationstar and MERS prevailed on their motion to vacate, all the enforcement action previously taken by the

Association would have been undone. In fact, the Association may have had to disgorge the sale proceeds it received from The Condo Group had the judgment been vacated.<sup>10</sup> Therefore, the attorney fees incurred defending against the motion to vacate were clearly incurred “in connection with the collection of delinquent assessments” and “in the enforcement of a judgment.” Moreover, the judgment itself included attorney fees pursuant to RCW 64.34.364(14). It is logical that if a judgment itself included an award of attorney fees, such an award would be appropriate for defending that judgment under the same statute.

And finally, in accordance with the Act’s directive to administer its remedies liberally, including its attorney fee provision, the Association should be put in as good as position as it would have been had MERS and Nationstar not filed their unsuccessful motion.

2. The Association is Entitled to its Attorney Fees Pursuant to RCW 64.34.455.

The Act provides:

If a declarant or any other person subject to this chapter fails to comply with any provision hereof or any provision of the declaration or bylaws, any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief. The court, in an appropriate case, may award attorney’s fees to the prevailing party.

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<sup>10</sup> RCW 6.21.130 provides that a purchaser may recover his or her bid in the event of a reversal of judgment.

RCW 64.34.455. “The fee-shifting provision in RCW 64.34.455 thus serves the general purpose of most fee-shifting statutes, which is to punish frivolous litigation and to encourage meritorious litigation.” *Eagle Point*, 102 Wn. App. at 713. The statute affords the trial court “broad discretion” to decide whether an award of fees is “appropriate” in a particular case. *Id.* at 714.

MERS and Nationstar argue that RCW 64.34.455 was enacted to protect condominium unit purchasers and does not apply to conveyances of units pursuant to court orders or foreclosure sales. Op. Br. at 44. However, the plain language of RCW 64.34.455 does not limit its applicability to resales of condominium units. Rather, the statute is clearly applicable to violations of the “chapter,” which is defined as the entire Act.<sup>11</sup>

The trial court correctly determined that this was an “appropriate case” to award attorney fees and costs to the Association. For example, the fees and costs were solely precipitated by MERS and Nationstar’s failure to respond to service of process, which the trial court determined was the result of inexcusable neglect. MERS willfully chose not to appear in the lawsuit and Nationstar could not even explain why it did not appear other than speculating it was too busy servicing other loans. As a result, the

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<sup>11</sup> RCW 64.34.900 provides that “this *chapter* shall be known and may be cited as the Washington condominium act or the condominium act.” (emphasis added.)

Court denied their motion on five separate grounds, one of which was due to the fact that Nationstar did not even bother to try to intervene in the action until it embedded a motion to intervene in its reply brief submitted the day before the show cause hearing.

Given the facts above, the trial court was well within its authority to exercise its “broad discretion” to determine that this was an “appropriate case” in which to award attorney fees to the prevailing party under RCW 64.34.455.

3. The Association is entitled to its attorney fees pursuant to CR 60.

Proceedings under CR 60 are equitable in nature. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 691, 271 P.3d 925 (2012). When ruling on CR 60 motions, courts have the authority to impose “such terms as are just.” CR 60(b).

It would be inequitable for the Association to suffer the costs of MERS and Nationstar’s unsuccessful motion. It would have a staggering effect on the ability of non-profit condominium associations to collect unpaid assessments if mortgage lenders who did not bother to appear in underlying lawsuits were allowed to appear months later to unsuccessfully challenge judgments while not having to pay the condominium associations’ resulting attorney fees.

Importantly, it was MERS and Nationstar (or their principal, whoever that is) that created this situation to begin with by making a loan to Berglund who apparently could not afford the Unit. Unlike MERS and Nationstar, the Association had no role in placing Berglund in the Unit and was an involuntary creditor of hers. Also, the Association is a blameless litigant that diligently prosecuted its case. The sole reason it was forced to incur the attorney fees at issue was because of MERS and Nationstar's neglect for not responding to service of process. And finally, it would not constitute sound public policy to allow mortgage lenders to file unsuccessful motions to vacate occasioned by their own neglect under CR 60 without holding them accountable for the other parties' resulting attorney fees.

For example, the Association has incurred attorney fees defending against the motion to vacate that are very nearly equal the amount of its underlying judgment, and it had no choice but to do so. While the amount of fees at issue is presumably a pittance to MERS and Nationstar, it is a significant amount to the Association. If the Association is not awarded its fees, it would fall on the other owners in the condominium to cover the shortfall – a very inequitable and unjust result solely caused by an inability of large corporate entities to respond to process.

These fees were necessary and reasonably incurred by the Association, and they should be awarded pursuant to the Court's inherent equitable powers to apply "such terms as are just" under CR 60.

4. The Fees Requested Were Reasonable.

The amount of an attorney fee award is reviewed for abuse of discretion. *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). The total hours an attorney has recorded for work in a case can be discounted for time spent on "unsuccessful claims, duplicated effort, or otherwise unproductive time." *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983).

Nationstar's argument to the trial court regarding reasonableness of the amount of the requested attorney fees was as follows:

The reasonableness and necessity of Galleon's attorneys' fees is not proven by its counsel's conclusory opinion to that effect. Nationstar respectfully requests that if attorneys' fees are awarded, they be reduced by half, and awarded against Condo Group.

CP 34. Nationstar's request that the fees be cut in half was completely arbitrary as it did not point to a single line item in the Association's invoices (CP 13-16) that it claimed was duplicated effort or unproductive. Furthermore, the Association was successful in defending against the motion, meriting an award of its attorney fees and costs.

On appeal, MERS and Nationstar still do not contend that any of the specific fees were unjustified. Rather, for the first time, MERS and Nationstar argue that the fees are unreasonable because they exceeded the amount of the underlying judgment. Op. Br. at 46. However, the amount of the underlying judgment, supplemental judgment, post-judgment interest, and sheriff's costs as of the date of the sheriff's sale was \$11,525.87, which was more than the combined fees and costs of \$9,254.50 that were awarded. CP 275. Also, this argument does not take into account the fact that the fees were necessary for successfully defending against the 18-page motion to vacate. Otherwise, the Association likely would have had to disgorge the sheriff's sale proceeds it received had it done nothing. As a result, the trial court did not abuse its discretion in awarding the amount of fees and costs that it did.

**D. The Association requests its fees and costs on appeal.**

Pursuant to RAP 18.1, the Association respectfully requests an award of its attorney fees and costs incurred on appeal against both MERS and Nationstar based on RCW 64.34.364(14), RCW 64.34.455, and CR 60. Regardless of how this Court rules on the attorney fee award against Nationstar, MERS did not challenge the fee request at the trial court level nor has the award against MERS been appealed by MERS or Nationstar.

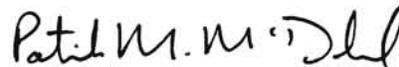
The Association is therefore, at a minimum, entitled to its fees incurred on appeal against MERS.

**CONCLUSION**

The Association respectfully requests that this Court (1) affirm the trial court's denial of MERS and Nationstar's motion to vacate, (2) affirm the trial court's award of attorney fees and costs to the Association, and (3) award the Association its attorney fees and costs for responding to this appeal. The Association takes no position on the issue of Nationstar's alleged statutory right to redeem.

Dated this 5<sup>th</sup> day of February, 2014.

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**DECLARATION OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the 5<sup>TH</sup> day of February 2014, I caused a true and correct copy of Galleon Homeowners Association's Response Brief to be served on the following via the method indicated below:

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