IN THE SUPREME COURT OF THE STATE OF NEVADA

WEST SUNSET 2050 TRUST, Appellant, vs. NATIONSTAR MORTGAGE LLC, A Foreign Limited Liability Company Respondent.	Case No. 70754

APPEAL

from the Eighth Judicial District Court, Department XXIV
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-691323-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Nationstar Mortgage LLC (**Nationstar**) is a Delaware limited liability company with its principal place of business in Lewisville, Texas. Nationstar's members are Nationstar Sub1, LLC and Nationstar Sub2, LLC. Nationstar Sub1, LLC and Nationstar Sub2, LLC are both wholly-owned subsidiaries of Nationstar Mortgage Holdings, Inc., a Delaware corporation that is publicly traded.

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STATEMENT OF THE CASE

The district court properly granted summary judgment in favor of Nationstar because the sale, wrought with errors, was improper. First, the district court's finding that deed in lieu of foreclosure was a false recording was proper. When the purported deed in lieu of foreclosure, New Freedom, the entity to which the property was purportedly conveyed, no longer in existed. Accordingly, purported conveyance had no effect on the deed of trust. Second, it is undisputed the parties entitled to receive notice of the sale received nothing from the HOA's Trustee. Third, the HOA lacked standing to foreclose, and the sale is void, because First 100 LLC's (**First 100**) purchase of the payment rights impermissibly split the payment rights from the lien pursuant to the Court's decision in *Edelstein*. *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 259 (Nev. 2012). Finally, even if the sale were facially proper (and it was not), it was subject to invalidation due to the grossly inadequate sale price.

The district court also correctly rejected Sunset West's primary counter-argument—that it was an innocent *bona fide* purchaser. This argument is unsupported in law or fact. Sunset West failed to carry its substantial burden on this implead defense. Moreover, the weight of the record belies the claim. Given the extremely low price and the recorded interests (which Sunset West is charged

with knowing), and the apparent abnormalities in the sale Sunset West cannot possibly be a *bona fide* purchaser. The district court should be affirmed.

STATEMENT OF THE FACTS

A. Tablante obtains a $176,760.00 loan to purchase a home.

Stephanie Tablante purchased the property located at 7255 W. Sunset Road, Unit 2050, Las Vegas, Nevada (the **Property**) on December 2, 2005 by obtaining a loan from New Freedom Mortgage Corporation in the amount of $176,760.00 secured by a senior deed of trust recorded against the Property. (*Id*.). (JA302). The senior deed of trust was assigned to Bank of America, N.A. (**BANA**) on July 29, 2011. (JA306)

B. Tablante Records a False Deed in Lieu of Foreclosure.

Tablante contacted BANA in 2011 in hopes of obtaining a deed in lieu of foreclosure on her property, but never received approval to proceed. (JA624-57). Instead, Tablante's attorney unilaterally recorded a deed in lieu to New Freedom Mortgage Corporation (**New Freedom**). (JA305). However, New Freedom no longer existed after 2008, having merged into iFreedom Direct Corporation. (JA659). The deed was facially invalid because it was not signed by New Freedom or BANA, the actual beneficiary at the time of its recording. (JA567). Further, the cover page of the deed clearly indicated the "deed in lieu" was to be returned to Tablante's counsel upon recording, *not* New Freedom Mortgage Corporation.

(JA564). BANA assigned the senior deed of trust to Nationstar on March 20, 2013. (JA306-07).

C. The HOA Factoring Agreement and HOA Sale

Red Rock Financial Services (**RRFS**) recorded a notice of delinquent assessment lien on April 4, 2012. (JA588). The notice incorrectly lists New Freedom as the owner. (*Id.*). RRFS subsequently recorded a Notice of Default (JA590). RRFS did **not** provide any foreclosure notices to BANA, despite the fact that BANA was the beneficiary of record for the senior deed of trust. (JA294-95).

Following notice of default by RRFS, the HOA contracted to sell its right to payment on a number of liens to First 100, LLC (**First 100**) (**The Factoring Agreement**). (JA696-722). The Factoring Agreement provides at Section 2.01 that the HOA will sell to First 100 its interest in accounts receivables pertaining to delinquent assessments owed by various unit owners. *Id.* The HOA at Section 4.02(a) agreed it would promptly remit to First 100 all payments of delinquent assessments. *Id.* The HOA at Section 4.02(h) agreed it would also cease any collection activity. *Id.* The HOA at Section 4.02(i) renounced its ability to credit bid for the Property in the event of foreclosure. Per the agreement, First 100 assumes all risk relating to the collectability of the accounts receivable. *Id.* First 100's security was the right to file a UCC-1 Financing Statement to protect First 100's rights in the accounts receivable subject to the Factoring Agreement. *Id.*

First 100 paid the association $1,476 for the payment rights on the lien on the subject property – equal to nine months' common assessments at $164 per month. (JA719; 735-37)**.** The lien, however, remained with the association and was not sold to First 100. (JA696). The sale of payment rights to First 100 required the HOA to retain United Legal Services (**United Legal**) as foreclosure trustee. (*Id.*) First 100 covered all of the collections costs charged by RRS and United Legal. (*Id.*)

United Legal recorded a Notice of Foreclosure Sale, setting the sale for June 22, 2013 listing the amount due to the HOA as $7,806.42. (JA592). Further the notice of sale listed New Freedom as the owner of record even though the senior deed of trust had been assigned to Nationstar by that time. (*Id.*; JA306-07)

On June 22, 2013 United Legal auctioned the Property. (JA415). Despite the Notice of sale indicating the debt owed to the HOA was $7,806.42, the opening bid was a mere $99. (JA306-07 and 86). The total sale price for the property amounted to just $7,800. (JA427). West Sunset obtained the property (worth at least $63,280.00) for just 12% of its value. (JA417).

Though the trustee's deed contains boilerplate recitals regarding the sale's purported compliance with the requirements of the law, United Legal took no measures to ensure the accuracy of the recitals and did not review the prior HOA Trustee's file for compliance. (JA431). And, those recitals are demonstrably

incorrect, because RRFS failed to provide the Notice of Default to either BANA or Nationstar. (JA679-80).

Still, West Sunset commenced this action for declaratory relief seeking a windfall in the form of outright title to the property. (JA002). The parties filed opposing summary judgment motions (JA302; 600), and the district court ruled for BANA and Nationstar. (JA809). The well-reasoned order concluded that the fraudulent deed in lieu did not affect the rights of the senior lienholder. (JA811). The district court further held that the senior lienholder was entitled to notice, but no notice was given—meaning the purported foreclosure sale did not extinguish the deed of trust. (JA811-12). This appeal followed.

ARGUMENT

A. There was no Lien to Foreclose Due to the Factoring Agreement

1. The HOA's Lien Was Unenforceable Under *Edelstein*.

Factoring is defined as the sale of accounts receivable at a discounted price. 35 C.J.S. Factors § 1 (2009). This particular Factoring Agreement was a true sale of the HOA's accounts receivable because First 100 expressly assumed the risk of non-collection and First 100 had no recourse against HOA if the unit owner, the borrower, did not pay. *See Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 544-45 (3d Cir. 1979). First 100 may have entered into a valid factoring agreement, but its agreement violates Nevada's rules on lien splitting

announced in *Edelstein v. Bank of New York Mellon*, 286 P.3d 249, 258 (Nev. 2012).

In *Edelstein*, Nevada's Supreme Court held that a lender's initial designation of MERS as a beneficiary in the deed of trust split the deed of trust from the payment right promised in the note. 286 P.3d at 259. The court went on to hold, even though the note and deed of trust were split at loan's inception, they could be reunited through negotiation or assignment. 286 P.3d at 260-261. The court in *Edelstein* then stated "both the promissory note and the deed must be held together to foreclose; '[t]he [general] practical effect of [severance] is to make it impossible to foreclose the mortgage.'" 286 P.3d at 258. *Edelstein* is relevant here. A deed of trust is merely a lien on property just like the statutory HOA lien created by NRS 116.3116(1).

A lien has no separate existence from the debt it secures. 51 Am.Jur.2d, Liens § 1. First 100 and the HOA under the Factoring Agreement intentionally split the borrower's assessment debt from the lien securing that debt. The lien itself remained the property of the HOA, and was never assigned. The foreclosure was completed by the HOA. But, the HOA lacked standing to foreclose because it no longer possessed the payment rights under the lien at the time of the sale. The foreclosure sale was void under *Edelstein*.

2. The Factoring Agreement Violates NRS 116.3102(p) and CC&Rs

NRS 116 delineates the powers of a homeowners association. *See* NRS 116.3102. There is one provision dealing with the sale of the right to collect assessments. A homeowners association may "assign its right to future income, including the right to receive assessments for common expenses, but only to the extent the declaration expressly so provides." NRS 116.3102(p). This means that a homeowners association's power to enter into a factoring agreement is dependent upon *express authorization* from the homeowners association's CC&Rs.

This HOA's CC&Rs do not grant the HOA that power. Sunset West concedes the point and cannot point to any provision (express or implied) addressing contractual authority to enter into Factoring Agreement. While the CC&Rs provide for the right to charge assessments when they are due, parties' right to receive notice of a delinquency, and the powers of the association to foreclose (*see generally* JA483 *et seq*.), there is no provision that would permit the HOA to enter a purchase and sale agreement, in violation of *Edelstein*, to sell its accounts receivable pertaining to overdue assessments.

B. The Notice was Defective

It is undisputed that the holder of the duly-recorded senior deed of trust—BANA—was not notified of the HOA's foreclosure sale. The district court properly found that BANA should have been notified, and this failure of notice

invalidated the sale. (JA809). Sunset West argues that the sale can be upheld as the notice was proper given the recorded deed in lieu. (AOB 16-17). But these arguments do not withstand even the slightest level of scrutiny.

The deed in lieu that RRFS relied upon in the foreclosure process was fraudulent, as the district court properly found pursuant to the record evidence. It did not affect BANA's entitlement to notice as holder of the recorded deed of trust, and RRFS's reliance was improper as the deed was not delivered to New Freedom—a non-existent entity at the time. The deed was also unsigned by New Freedom or BANA, meaning that the purported "deed in lieu" transaction the instrument sought to reflect was unenforceable on its face. *See* NRS § 111.220 (providing that contracts affecting an interest in land are void unless reduced to writing and signed by the person to be charged); *accord Wiley v. Cook*, 583 P.2d 1076, 94 Nev. 558, 564 (Nev. 1978).

The importance of the lack of notice cannot be overstated. It is tantamount to a due process violation, as BANA had a fundamental right to be notified of the HOA's foreclosure and given an opportunity to preserve the validity of its lien. See *Consolidated Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 100 S. Ct. 2326, 65 L.Ed. 2d 319 (1980); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). As the district court properly found, BANA was deprived of this opportunity, which rendered the purported sale

facially invalid. (JA811-12). The HOA foreclosure sale did not affect the deed of trust.

C. Gross Inadequacy of Price Invalidated the HOA's Sale.

While not raised in the Opening Brief, Nationstar argued in the district court that even if the sale could stand on its face (and it cannot) the incredible discrepancy between the sale price and the property value invalidated the sale because it was commercially unreasonable. (JA600; 891). This position represents the modern view of the law espoused by the Restatement (Third) of Property, § 8.3 (1997), which this Court applied in *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp*, 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016).

The Restatement approach allows a court to grant relief from foreclosure if the price paid by the purchaser is grossly inadequate. While "gross inadequacy" is not precisely definable, the Restatement provides that generally, "a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value, and, absent other defects, is usually not warranted in invalidating a sale that yields in excess of that amount." *Id.* The Restatement was favorably cited in *Shadow Wood*, and its analysis compels affirmance due to the gross inadequacy of the sales price paid by Sunset West.

Current Nevada law espouses the "price-plus" test set forth in *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963), and *Long v. Towne*, 98 Nev. 11, 639

P.2d 528 (1982). But this case and others demonstrate the infirmities in that jurisprudence. Rigid application of the "price-plus" rule might lend judicial approval to the inequitable windfall pursued by Sunset West—ignoring the circumstances and radically low sales price they paid. The Restatement approach, on the other hand, provides the flexibility to invalidate extremely inequitable sales like this one, while simultaneously preserving the traditional rule immunizing the vast majority of foreclosure sales from low price challenges. *See* Restatement (Third of Prop.: Mortgages § 8.3, cmt. b ("[O]nly rarely will a court be justified in invalidating a foreclosure sale based on substantial price disparity alone.").

The Arizona Supreme Court's opinion in *In re Krohn*, 203 Ariz. 205, 52 P.3d 774 (2002) illustrates the wisdom of the Restatement approach in practice. The *Krohn* court faced a similar fact pattern, and sought to harmonize case law espousing the "price-plus" rule with the Restatement approach. The court concluded that the Restatement approach is substantively the same. "We believe **gross** inadequacy **is** proof of unfairness, and as we have seen, gross inadequacy, as defined in [the Restatement] is more than inadequacy." *Krohn*, 52 P.3d at 781 (emphasis in original). As the court explained, "At its core, this is a case about inequity on one hand and unjust enrichment on the other." *Id*. at 782.

The same conflict lies at the core of this case—inequity on one hand (an attempt to strip Nationstar of a deed of trust securing a six-figure loan that enjoys

priority over the HOA lien) and unjust enrichment on the other (seeking free and clear title to a property where Sunset West paid just 12% of its value). Approving the sale with strict application of the price-plus rule would not properly resolve this case. "Windfall profits, like those reaped by bidders paying grossly inadequate prices at foreclosure sales, do not serve the public interest and do no more than legally enrich speculators" like Sunset West. *Krohn*, 52 P.3d at 779.

The Restatement avoids an inequitable outcome here by allowing the sale to be set aside for the additional reason that the sale was fundamentally unfair. While the district court was not required to consider the gross inadequacy of the sales price (the Factoring Agreement, fraudulent deed, and the lack of notice invalidated the sale with nothing further) the principles outlined in this section lend further support to the district court's judgment.

D. Sunset West is not a *Bona Fide* Purchaser for Value

In an effort to avoid the effects of the invalid sale, Sunset West's primary appellate argument claims it was an innocent *bona fide* purchaser, entitled to rely on the foreclosure deed recitals, however deficient they may be. (AOB 11-16). The district court properly rejected this argument, and the judgment should be affirmed before this Court.

First, because the sale was void, nor voidable, under *Edelstein*, Sunset West's status as a bona fide purchaser is irrelevant because HOA could not transfer

any valid title. *See Alamo Rent-a Car, Inc. v. Mendenhall*, 937 P.2d 69, 74 (1997); *see also Cox v. Eight Judicial Dist. Court of State*, 124 Nev. 918, 2008 WL 4453167 (2008).

Second, Sunset West never pled that it was a *bona fide* purchaser in its answer to the counterclaim. (JA043). Nor did it present any evidence that it was a bona fide purchaser for value. This was insufficient as a matter of law. The bona fide purchaser doctrine is an affirmative defense, and so the party claiming the defense—in this case, Sunset West—bears the burden of proof. *W. Charleston Lofts I, LLC v. R & O Const. Co.*, 915 F. Supp. 2d 1191, 1195 (D. Nev. 2013) (citing *Berge v. Fredericks*, 591 P.2d 246, 247-48 (Nev. 1979)).

Regardless, the undisputed facts reflect that Sunset West is not an innocent purchaser—they had (at minimum) constructive notice of the competing deed of trust. *See Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1086-88 (D. Nev. 2012) (purpose of Nevada's recording statute is providing constructive notice of all recorded instruments to any subsequent purchaser or mortgagee). A party qualifies as a *bona fide* purchaser only if it lacked notice of any "competing or superior interest in the same property." *Berge*, 591 P.2d at 247. Here, the recorded deed of trust was, at the very least, a "competing" interest.[1] This Court recently confirmed

[1] Whether Sunset West had actual knowledge or notice of the recorded documents is irrelevant. Sunset West was on record notice, and as the purchaser of real estate following an HOA sale, had ample reason to investigate before

that notice of a deed of trust is sufficient to defeat bona fide purchaser status. *Telegraph Rd. Trust v. Bank of Am., N.A.*, No. 67787, 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished) (affirming district court decision that rejected the bona fide purchaser defense because the purchaser was on inquiry notice of a deed of trust). Further, the vast discrepancy between the stated debt in the notice of sale- $7,806.42- and the opening bid- $99- should have put Sunset West on notice that there was a material change in the status lien. (JA306-07 and 86).

Sunset West's argument that it was entitled to blindly rely on the foreclosure deed recitals (AOB 13-16)—ignoring all other circumstances—should be similarly rejected. The argument was put to rest by this Court in *Shadow Wood*.

In *Shadow Wood*, this Court made clear that the "conclusive" deed recitals found in HOA foreclosure deeds do not bar mortgagees or homeowners from challenging the validity of an HOA foreclosure sale. *Shadow Wood*, 336 P.3d at 1111. This Court noted that the deed recitals outlined in NRS 116.3116. even those concerning "default, notice, and publication of the" notice of sale, do **not** conclusively establish the matters recited. *Id.* ("[W]hile it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default justifying a foreclosure when, in fact, no default occurred, such a reading

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consummating the purchase transaction. *See Allen v. Webb*, 485 P.2d 677, 682 (Nev. 1971) ("[T]he mere fact of the record notice does not provide sufficient basis for holding the Allens to have had notice **unless they had reason to check the real estate records."**) (emphasis added).

would be breathtakingly broad and is probably legislatively unintended."). This Court thus rejected the Sunset West's argument that the conclusive recitals alone prevent invalidation of the foreclosure sale. *Id.* at 1112.

And, it bears repeating that in this case, the foreclosure deed recitals pertaining to notice were demonstrably false. As a matter of undisputed record fact, neither RRFS, or any other entity, provided notice in any form to either BANA or Nationstar. (JA679-80). Sunset West's *bona fide* purchaser arguments do not overcome the invalidity of the purported foreclosure sale.

CONCLUSION

For all of the above reasons, the district court should be affirmed.

DATED this 21st day of June, 2017.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 3,811 words.

FINALLY, I HEREBY CERTIFY that I have read this **RESPONDENTS ANSWERING BRIEF**, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 21st day of June, 2016.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on this 21st day of June, 2017, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

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[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

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