IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE LLC,

Appellant,

v.

WEST SUNSET 2050 TRUST,

Respondent.

Case No. 79271
Related Case No. 70754

APPEAL

From the Eighth Judicial District Court, Department XIII
The Honorable Elizabeth Gonzalez, District Judge
District Court Case No. A-13-691323-C

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a):

Nationstar Mortgage LLC, a Delaware limited liability company, is an indirect, wholly-owned subsidiary of a publicly-traded company, Mr. Cooper Group Inc. (formerly known as WMIH Corp.), a Delaware corporation. Nationstar is directly owned by two entities: (1) Nationstar Sub1 LLC (**Sub1**) (99%) and (2) Nationstar Sub2 LLC (**Sub2**) (1%). Both Sub1 and Sub2 are Delaware limited liability companies. Sub1 and Sub2 are both 100% owned by Nationstar Mortgage Holdings Inc.. NSM Holdings is a wholly-owned subsidiary of Mr. Cooper. More than 10% of the stock of Mr. Cooper is owned by KKR Wand Investors Corporation, a Cayman Islands corporation.

Nationstar is represented on appeal by Akerman LLP through undersigned counsel. The following current and former Akerman attorneys appeared for Nationstar below and during the first appeal: Ariel E. Stern, Esq., Melanie D. Morgan, Esq., Donna M. Wittig, Esq., Allison R. Schmidt, Esq., and Thera A. Cooper, Esq.

These representations are made so this court may evaluate possible disqualification or recusal.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 13

STATEMENT OF FACTS.....14

I. FACTUAL BACKGROUND.....14

A. A Freddie Mac Deed Secured Tablante's Loan.....14

B. Tablante Fraudulently Recorded a Deed in Lieu 14

C. BANA Serviced the Loan on Behalf of Freddie Mac.....15

D. Red Rock Failed to Mail to Notice of Default to BANA.....15

E. Red Rock Would Have Rejected BANA's Superpriority Tender.....16

F. Nationstar Became Servicer of the Loan on Behalf of Freddie Mac.....16

G. The Superpriority Amount Was $1,476.....17

H. F100 Paid the Superpriority Amount Before the Sale 17

I. Nationstar Did Not Receive ULS's Notice of Sale 19

J. Sunset Purchased the Property at a Bid-Cheated Saturday Sale.....20

II. PROCEDURAL POSTURE.....21

A. Quiet Title Litigation.....21

B. Summary Judgment in Nationstar's Favor 22

C. The Remand 22

D. Nationstar Disclosed Freddie Mac Loan Ownership Documents.....22

E. The District Court Extinguished Freddie's Deed of Trust After Trial 24

ARGUMENT 26

I. STANDARD OF REVIEW 28

II. THE DEED IN LIEU WAS FRAUDULENTLY CONVEYED WITHOUT CONSENT.....29

A. A Deed in Lieu of Foreclosure Requires Consent of the Loan Owner 29
B. There is No Evidence that Anyone Consented 31
C. The District Court Previously Found the Deed in Lieu Invalid....34
III. FREDDIE MAC OWNS THE LOAN AND DID AT THE TIME OF THE SALE....35
A. BANA: Freddie Mac Owns the Loan....36
B. Nationstar: Freddie Mac Owns the Loan 37
C. Evidence that Freddie Mac Owns the Loan 38
IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRECLUDING ADDITIONAL EVIDENCE OF FREDDIE MAC'S INTEREST 39
A. Standard of Review for Discovery Sanctions 40
B. The District Court Abused its Discretion in Denying Nationstar's Motion in Limine 40
V. THE DISTRICT COURT FAILED TO CONDUCT AN EQUITY ANALYSIS 48
A. Sunset Purchased the Property at an 88% Discount 49
B. There is More than Very Slight Evidence of Unfairness....49
C. The District Court Did Not Conduct a BFP Analysis....57
VI. F100 DID NOT FORECLOSE ON THE SUPERPRIORITY LIEN 60
VII. F100 PAID THE SUPERPRIORITY AMOUNT BEFORE THE SALE 62
A. Others Besides Financial Institutions May Tender....62
B. The Superpriority Lien is $1,476, the Same Amount F100 Paid....63
C. Public Policy Supports Payment to the HOA From Any Source....64
D. The Foreclosed Lien Had No Superpriority Component....65
VIII. RED ROCK DID NOT PROVIDE STATUTORILY REQUIRED NOTICE AND, EVEN IF IT HAD, RED ROCK WOULD HAVE REJECTED BANA'S TENDER....65
CONCLUSION....68
CERTIFICATE OF COMPLIANCE 69
CERTIFICATE OF SERVICE....71

TABLE OF AUTHORITIES

Page(s)

Cases

7510 Perla Del Mar Ave. Tr. v. Bank of Am.,
136 Nev. Adv. Op. 6 (Nev. Feb. 27, 2020) 67

Azevedo v. Minister,
86 Nev. 576, 471 P.2d 661 (1970).....32

Bank of Am., N.A. v. Madeira Canyon Homeowners' Ass'n,
2019 WL 5963936 (D. Nev. Nov. 13, 2019).....50

Bank of Am. v. LVRR,
No. 76914, 2019 WL 6119134 (Nev. Nov. 15, 2019) (unpublished) 65

Bank of Am. v. SFR Invs. Pool 1, LLC,
134 Nev. 605, 427 P.3d 113 (2018) 50, 62

Bank of New York Mellon v. Christopher Communities,
2019 WL 1209082 (D. Nev. March 14, 2019) 55

Bank of New York Mellon v. Vegas Prop. Servs. Inc.,
2019 WL 4168734 (D. Nev. Aug. 30, 2019).....67

Berge v. Fredericks,
95 Nev. 183, 591 P.2d 246 (1979).....57

Besnilian v. Wilkinson,
117 Nev. 519, 25 P.3d 187 (2001).....45

Building & Constr. Trades v. Public Works,
108 Nev. 605, 839 P.2d 633 (1992).....44

CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC,
No. 70237, 2019 WL 289690 (Nev. Jan. 18, 2019) (unpublished).....38

CitiMortgage, Inc. v. TRP Fund VI, LLC,
No. 71318, 2019 WL 1245886 (Nev. March 14, 2019) (unpublished).....57

Country Exp. Stores, Inc. v. Sims,
943 P.2d 374 (Wash. Ct. App. 1997).....55

Daisy Tr. v. Wells Fargo Bank, N.A.,
135 Nev. Adv. Op. 90, 445 P.3d 846 (2019).....36, 38

Deutsche Bank National Tr. v. Vegas Property Servs., Inc.,
No. 74139, 2019 WL 1932124 (Nev. April 29, 2019) (unpublished).....61, 62

Diakonos Holdings, LLC v. Nationstar Mortg. LLC,
No. 75620, 2019 WL 3034856 (Nev. July 10, 2019) (unpublished).....51

Dredge Corp. v. Wells Cargo, Inc.,
80 Nev. 99, 389 P.2d 394 (1964).....45

Edelstein v. Bank of N.Y. Mellon,
128 Nev 505 249 (2012).....passim

Emerson v. Eighth Judicial Dist. Court,
127 Nev. 672, 263 P.3d 224 (2011).....47

Fannie Mae v. Vegas Prop. Servs., Inc.,
2018 WL 5300389 (D. Nev. Oct. 25, 2018).....58

Federal Home Loan Mortg. Corp. v. Mirage Property, LLC,
2019 WL 2078767 (D. Nev. May 10, 2019).....57

FH Partners, LLC v. Leany,
2014 WL 3853806 (D. Nev. Aug. 6, 2014).....29

Fire Ins. Exchange v. Zenith Radio Corp.,
103 Nev. 648, 747 P.2d 911 (1987).....40

Fort Apache Homes v. JPMorgan Chase Bank,
No. 72257, 2019 WL 4390833 (Sept. 12, 2019) (unpublished).....43

Foster v. Dingwall,
126 Nev. 56, 227 P.3d 1042 (2010).....40, 41

Hansen v. Universal Health Servs.,
112 Nev. 1245, 924 P.2d 1345 (1996).....35

Hennessey v. Bell,
775 S.W.2d 650 (Tex. Ct. App. 1988).....30

Hill v. Wells Fargo Bank,
2015 WL 232127 (N.D. Ill. Jan. 16, 2015).....29

Home Sav. Ass'n v. Bigelow,
105 Nev. 494, 779 P.2d 85 (1989).....45, 46

Horizon at Seven Hills Homeowners Ass'n, Inc. v. Ikon Holdings, LLC,
132 Nev. 362, 373 P.3d 66 (2016).....62, 64

Interim Capital LLC v. Herr Law Group, Ltd.,
2011 WL 7047062 (D. Nev. Oct. 21, 2011).....66

JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2,
No. 73196, 2019 WL 2339537 (Nev. May 31, 2019) (unpublished).....57

In re Kern,
107 Nev. 988, 823 P.2d 275 (1991).....32

Lahrs Family Trust v. JPMorgan Chase Bank, N.A.,
No. 74059, 2019 WL 4054161 (Nev. Aug. 27, 2019) (unpublished).....passim

Lanigir v. Arden,
82 Nev. 28, 409 P.2d 891 (1966).....45

M&T Bank v. Wild Calla Street Tr.,
No. 74715, 2019 WL 1423107 (Nev. March 28, 2019) (unpublished).....38

Memory Gardens v. Pet Ponderosas,
88 Nev. 1, 492 P.2d 123 (1972).....44

Mortgage Fund IVC Trust 2016-RN5 v. Brown,
2019 WL 4675757 (D. Nev. Sept. 24, 2019).....53

Mullane v. Cent. Hanover Bank & Tr. Co.,
339 U.S. 306 (1950).....34

Nationstar Mortg., LLC v. Sahara Sunrise Homeowners Ass'n,
2019 WL 1233705 (D. Nev. March 14, 2019).....50, 51

Nationstar Mortg. LLC v. Springs at Spanish Trail Ass'n,
2019 WL 2250264 (D. Nev. May 24, 2019).....67

Nationstar Mortgage, LLC v. Guberland LLC-Series 3,
No. 70546, 2018 WL 3025919 (June 15, 2018) (unpublished).....38, 42, 58

Nationstar Mortgage LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon,
133 Nev. 740, 405 P.3d 641 (2017).....passim

Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC,
133 Nev. 247, 396 P.3d 754 (2017).....41

Nationstar Mortgage, LLC v. Vegas Property Services, Inc.,
2019 WL 1429619 (D. Nev. March 30, 2019) 42

Nevada Sandcastles, LLC v. Nationstar Mortg., LLC,
2019 WL 427327 (D. Nev. Feb. 4, 2019).....58

Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.,
526 F.2d 1196 (9th Cir. 1975) 66

Perry Capital LLC v. Mnuchin,
864 F.3d 591 (D.C. Cir. 2017).....57, 58

Resources Grp, LLC v. Nevada Ass'n Servs.,
135 Nev. 48, 347 P.3d 154 (2019).....59

State v. Rosenthal,
107 Nev. 772, 819 P.2d 1296 (1991).....44

San Florentine Ave. Tr. v. JPMorgan Mortg. Acquisition Corp.,
No. 73684, 2018 WL 4697260 (Nev. Sept. 28, 2018) (unpublished) 49, 53

Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae,
134 Nev. 270, 417 P.3d 363 (2018).....36

Saticoy Bay LLC Series Magic Mesa St. Tr. v. JPMorgan Chase Bank, N.A.,
No. 73627, 2019 WL 4611759 (Nev. Sept. 20, 2019) (unpublished) 39

Saticoy Bay Series 2141 Golden Hill v. JP Morgan Chase Bank, N.A.,
No. 71246, 2017 WL 6597154 (Nev. Dec. 22, 2017) (unpublished)25, 61, 62, 63

SFR Investments Pool 1 v. Green Tree Servicing,
No. 71176, 2018 WL 6829002 (Nev. Dec. 27, 2018) 43

SFR Invs. Pool 1, LLC v. Bank of New York Mellon,
134 Nev. 483, 422 P.3d 1248 (2018).....49

Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc.,
132 Nev. 49, 366 P.3d 1105 (2016).....56

State Schools Credit Union v. Oella Ridge Trust,
No. 76382, 2019 WL 3061742 (Nev. July 11, 2019) (unpublished).....61, 62

Summa Corp v. Greenspun,
96 Nev. 247, 607 P.2d 569 (1980).....32

Town of Babylon v. FHFA,
699 F.3d 221 (2d Cir. 2012) 43, 58

U.S. Bank, N.A. v. Resources Group, LLC,
135 Nev. Adv. Op. 26, 444 P.3d 442 (2019).....48, 49, 59, 65

Webster-Whyte v. Wells Fargo Bank, N.A.,
2019 WL 2354991 (N.D. Ga. Feb. 14, 2019).....30

Weddell v. H2O, Inc.,
128 Nev. 94, 271 P.3d 743 (2012).....28

Wells Fargo Bank, N.A. v. SFR Invs. Pool 1, LLC,
2019 WL 243646 (D. Nev. June 12, 2019) 67

West Sunset 2050 Tr. v. Nationstar Mortg., LLC,
134 Nev. 352, 420 P.3d 1032 (2018).....passim

Young v. Johnny Ribeiro Bldg.,
106 Nev. 88, 787 P.2d 777 (1990).....27, 40, 41, 45

Statutes

12 U.S.C. § 4617(j)(3) 35

NRS 11.205(1) 32

NRS 47.250.....52, 66

NRS 107.080(4) 52

NRS 107.090(3)(b) & (4).....49

NRS 116.....passim

Rules

NRAP 3A(b)(8).....11

NRCP 37 .....passim

Other Authorities

74 Am. Jur. 2d Tender § 4 (2012).....67

59 C.J.S. Mortgages § 443 (2020) 29, 30

JURISDICTIONAL STATEMENT

The district court entered judgment for West Sunset 2050 Trust (**Sunset**) on July 17, 2019, declaring Federal Home Loan Mortgage Corporation's (**Freddie Mac** or **FHLMC**) deed of trust extinguished. JA 1745-56. Nationstar appealed on July 22, 2019. JA 1782-84. There is jurisdiction under NRAP 3A(b)(1).

ROUTING STATEMENT

This court should retain this appeal since it is familiar with the underlying facts. *See West Sunset 2050 Tr. v. Nationstar Mortg., LLC,* 134 Nev. 352, 420 P.3d 1032 (2018) (***W-S***). This court should also retain this appeal as the issues have statewide importance and for consistency purposes. *See* NRAP 17(a)(12).

ISSUES

Fraudulent Conveyance: Whether the district court erred in reversing itself without notice and concluding the borrower extinguished Freddie Mac's deed of trust prior to the sale by fraudulently recording a deed in lieu without consent.

Federal Foreclosure Bar: Whether Nationstar presented sufficient evidence and testimony at trial establishing Freddie Mac owned the loan at the time of the sale. Even though there was sufficient evidence and testimony, whether the district court abused its discretion by prohibiting certain evidence of Freddie Mac's ownership disclosed two months after the close of discovery, and then erroneously deciding at trial that it would not consider the Federal Foreclosure Bar at all.

Equity: Whether the district court erred in failing to consider equitable grounds for setting aside the sale under *Nationstar Mortgage LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 405 P.3d 641 (2017), and whether this court should remand for an equity analysis under *Shadow Canyon* and *Lahrs Family Trust v. JPMorgan Chase Bank, N.A.*, No. 74059, 2019 WL 4054161 (Nev. Aug. 27, 2019) (unpublished). Whether the district court erred in concluding Sunset was a BFP without any factual or legal support.

Edelstein: Whether the district court erred in failing to consider the factoring agreement and how its application affected the relationship between the borrower and the HOA, such that there was no superpriority lien at the time of the sale. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev 505, 286, P.3d 249 (2012).

Superpriority Tender: Whether the district court erred in concluding there was not a pre-sale tender where First 100 (**F100**) paid the HOA's superpriority amount prior to the sale and the HOA applied F100's payments to that component of the outstanding balance by writing off the remaining debt.

Notice/Prejudice: Whether the district court erred in concluding notice was sufficient when the HOA's agent failed to mail the notice of default to Nationstar's predecessor-in-interest, Bank of America, N.A. (**BANA**), which would have tendered the superpriority portion of the lien prior to the sale. Whether the district court erred in not considering that Red Rock would have rejected BANA's tender.

STATEMENT OF THE CASE

This NRS 116 quiet title case has an unconventional posture and the cumulative facts are one-of-a-kind. The district court initially granted summary judgment for Nationstar. Sunset appealed and this court reversed and remanded. After a pre-trial ruling and trial, the district court granted judgment for Sunset. The court declared Freddie Mac's deed of trust extinguished years before the sale, and consequently Sunset purchased the property free and clear of the deed of trust.

This court should reverse because: (1) the borrower caused a fraudulent deed in lieu of foreclosure to be recorded without consent from Freddie Mac or its servicer, and the district court reconsidered the effect of the deed in lieu without notice; (2) the only evidence at trial was that Freddie Mac owned the loan at the time of the sale such that the Federal Foreclosure Bar protected Freddie Mac's interest; (3) the district court mistakenly turned a pre-trial evidentiary ruling into prohibition against all issues regarding Fannie Mae's ownership; (4) the district court failed to conduct an equity analysis under *Shadow Canyon* and did not have the benefit of *Lahrs*, a case addressing the unfairness around F100 sales; (5) there was no superpriority lien because the HOA received payment of an amount equal to the superpriority portion of its lien and wrote off the remaining assessment balance prior to the sale; and (6) Nationstar was prejudiced by the lack of pre-sale notice because BANA would have tendered the superpriority amount.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. A Freddie Mac Deed Secured Tablante's Loan

In December 2005, Stephanie Tablante obtained a $176,760 loan from New Freedom Mortgage Corporation (**NFM**) to buy a condominium within an HOA. JA 1174, 1386-1404.[1] A deed of trust securing the loan was recorded against the property. JA 1380-84. The deed of trust was on a "Freddie Mac UNIFORM INSTRUMENT" and states the note together with the deed of trust can be sold. JA 1386, 1396, 1402. The deed of trust identified NFM as the lender and Mortgage Electronic Registration Systems, Inc. (**MERS**) as the deed of trust beneficiary. JA 1386-87. NFM was never the deed of trust beneficiary. JA 1311. NFM no longer existed after 2008 having merged with iFreedom Direct Corporation. JA 659, 818.

B. Tablante Fraudulently Recorded a Deed in Lieu

In March 2011, Tablante through her now deceased counsel unilaterally recorded a false deed in lieu of foreclosure, purporting to convey the property to

[1] The HOA is governed by its CC&Rs. JA 315-69, 1221. The CC&Rs required borrowers to pay monthly assessments. JA 334, 349, 520. The CC&Rs also required the HOA to give prompt written notice to deed beneficiaries of any delinquency in the payment of assessments and give "reasonable notice of its intent to foreclose" in the case of a non-judicial foreclosure under NRS 116. JA 351. The CC&Rs indicated that security interests may be owned by Freddie Mac and Fannie Mae. JA 345, 356.

NFM. JA 818-19, JA 1406-10.[2] The deed in lieu is not signed by NFM or Freddie Mac, and there was no evidence at trial of an agreement by these entities to convey the property to NFM. JA 1309-10, 1406-10, 1638. Tablante re-recorded the deed in lieu in June 2011. JA 631, 1406-10. Sunset was aware of the deed of trust and the "unusual" deed in lieu prior to the sale. JA 1186, 1192, 1197-98.

C. BANA Serviced the Loan on Behalf of Freddie Mac

In July 2011, MERS assigned the deed of trust to BAC Home Loans. JA 1419-20. BANA is successor by merger to BAC. JA 1427-29. BANA became servicer for the loan's owner, Freddie Mac. JA 1263-66, 1267, 1720-23. When servicing transferred to BANA, it sent Tablante a welcome letter identifying Freddie Mac, referred to by its acronym FHLMC, as the "creditor to whom the debt is owed." JA 1267, 1272, 1277-78, 1720-23. The letter explained Freddie Mac was the owner, not BANA. JA 1720-23. BANA confirmed at trial it never had an ownership interest in the loan. JA 1266. At all times BANA serviced the loan, and Freddie Mac was the loan owner. JA 1279.

D. Red Rock Failed to Mail to Notice of Default to BANA

Red Rock Financial Services acted as collection agent for the HOA. JA 285, 1208, 1229. It was responsible for providing statutorily required notice. JA 285.

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[2] A deed in lieu of foreclosure, as explained by Nationstar at trial, is "where [the] borrower who's in default deeds their ownership interest in the house back to the lender to satisfy a deed in lieu in foreclosure." JA 1310. Consent is required to move forward with a deed in lieu. JA 1311.

In April 2012, Red Rock recorded a notice of delinquent assessment lien. T7. Red Rock mailed the notice to whom it believed from the assessor's website to be the homeowner, NFM. JA 1237-38, 1253-54, 1695, 1698-99.

In May 2012, Red Rock recorded a notice of default. JA 1426. Red Rock *did not* mail the notice of default to BANA. JA 295, 1239, 1314. BANA did not receive a copy of the notice. JA 1281, 1284-85, 1288-89. Neither the notice of delinquent assessment lien nor the notice of default identified the superpriority amount or indicated whether Red Rock was conducting a superpriority or subpriority sale. JA 1424, 1426.

E. Red Rock Would Have Rejected BANA's Superpriority Tender

Had BANA received the notice of default, it would have hired counsel at Miles, Bauer, Bergstrom & Winters to tender the superpriority portion of the HOA's lien to Red Rock, as was BANA's customary practice. JA 1281-83, 1369. Had Red Rock received the tender check, it would have rejected the check as it did for many other properties. JA 298, 1714-15. And had Red Rock received the tender check, it would have sent a form letter to Miles Bauer explaining its reasoning for rejecting the tender. JA 1242-48, 1255-56, 1713-18.

F. Nationstar Became Servicer of the Loan on Behalf of Freddie Mac

In February/March 2013, Nationstar began servicing the loan for Freddie Mac, and BANA, successor by merger to BAC, assigned the deed of trust to

Nationstar. JA 1282, 1288, 1295, 1298, 1301, 1317, 1428-29. This is just one of "[h]undreds and thousands" of loans being transferred from BANA to Nationstar at the same time. JA 1301. The assignment did not transfer ownership of the loan, which remained with Freddie Mac. JA 1289. When servicing transferred to Nationstar, it sent a welcome letter identifying Freddie Mac as the loan owner: "we look forward to servicing your loan on behalf of Freddie Mac." JA 1298.

Nationstar remains the loan servicer today, and has never had an ownership interest in the loan. JA 1291, 1293, 1295, 1299. Nationstar has monthly contact with the loan owner, Freddie Mac, since February 2013. JA 1293, 1303. Nationstar followed Freddie Mac's servicing guide governing the rights and responsibilities Nationstar had as loan servicer for Freddie Mac. JA 1303. Nationstar has always serviced this loan on behalf of Freddie Mac. *Id.*

G. The Superpriority Amount Was $1,476

The HOA's monthly assessment in 2011 and 2012 was $164, so the maximum superpriority amount is $1,476. JA 1241, 1474-77, 1685-86. There was no nuisance abatement or maintenance charges. JA 1474-77, 1753.

H. F100 Paid the Superpriority Amount Before the Sale

In May 2013, F100 and the HOA entered into an agreement, whereby F100 paid the HOA the amount of the superpriority lien ($1,476) and in exchange the HOA would sell its sale proceeds to F100. JA 718-19, 1183, 1334-35. The price

F100 paid the HOA "in many cases . . . was set at being nine times the assessments." JA 105, 1337.

It was part of F100's sales pitch to HOAs that "we just pay you ***right now*** for nine months' worth of assessments and plus collections costs." JA 1352. "F100 came around to [the HOA], explained that they will buy the debt from us, *pay the super lien, which is nine months* . . . and they would also pay whatever our collections costs for Red Rock was [*sic*] if we would sign off and let them do the collection on these." JA 1213-15 (emphasis added), 1219-20, 1548.

The HOA received a check from F100 prior to the sale for the amount of the superpriority lien ($1,476) and the HOA "zeroed out" Tablante's account. JA 1215-16, 1218-19, 1221, 1226-27. In other words, the HOA, through a board vote, "wr[ote] off the rest of the debt" by applying the payment to the assessments that came due in the nine months preceding notice of lien and closed the account prior to the foreclosure. JA 1216-18, 1226-27. Tablante no longer owed the amount comprising the superpriority lien. JA 1219.

The May 2013 agreement was a contract extension to a March 2013 tri-party purchase and sale agreement (**factoring agreement**) between F100, the HOA, and United Legal Services (**ULS**). JA 66-67, 696-716, 1212-13, 1326, 1527-47. Under the agreement, F100 would "promptly pay" the HOA upon execution of the agreement. JA 1530.

The factoring agreement required transfer of collection services from Red Rock to ULS. JA 65, 1340. ULS was contractually obligated to set the opening bid at $99 to ensure investors would purchase the properties. JA 86-87. F100's "business model" ensured investors could buy properties for less than or equal to the amount of the total lien. JA 87.

Red Rock sent its collection file to ULS, but ULS did not take independent steps to verify Red Rock's compliance with NRS 116 and 107's notice requirements (i.e., to verify Red Rock mailed the notice of default to BANA). JA 73-74, 97, 1329, 1331. According to ULS, it was not its responsibility to do so—this was just a "lousy little condo[]." JA 96-97, 1343.

I. Nationstar Did Not Receive ULS's Notice of Sale

On May 29, 2013, ULS recorded a notice of sale. JA 1431. The notice identified the total lien amount as $7,806, but did not identify the superpriority amount. *Id.* The notice of sale revealed the sale "will be made without covenant or warranty." *Id.*

ULS scheduled the sale on Saturday, June 22, 2013. *Id.* ULS claims to have mailed the notice of sale to Nationstar on May 28, 2013, but there was no conclusive evidence at trial ULS mailed the notice of sale to Nationstar. While Nationstar is listed on a USPS address list in ULS's file, there is no certified mail receipt like there are for the other entities ULS mailed notices. JA 1452-53, 1461.

ULS did not mail the notice of sales with delivery confirmation. JA 79. ULS claims it had "no statutory duty whatsoever to send [the notice of sale] out with delivery confirmation or certified mail or anything." JA 425.

Nationstar did not receive the notice of sale from ULS or any source. JA 77-79, 1304-05, 1461. Nationstar did not receive the notice of delinquent assessment lien or the notice of default. JA 295, 1303, 1307, 1314. Nationstar would have been aware of these notices had Red Rock or ULS mailed them to BANA. JA 1301-02. Nationstar was not aware of the sale until after it occurred. JA 1317.

J. Sunset Purchased the Property at a Bid-Cheated Saturday Sale

On ***Saturday***, June 22, 2013, ULS sold the property to Sunset for $7,800. JA 1433-35. ULS opened bidding at $99. JA 1171, 1345. There were two bidders at the sale, Sunset and F100. JA 89, 1182, 1325, 1350-51, 1753.

It was part of F100's scheme to bid against investors at its own sales. JA 1171. F100 would bid up properties, but then immediately stop bidding once the bidding neared the total amount owed. JA 1171, 1192-93. "[A]s usual," the winning bid in this case ($7,800) was less than the total amount owed ($7,806). JA 107, 1350, 1431, 1433-35. F100 received excess proceeds after the sale. JA 1341.

ULS did not market or advertise its sales, nor did it have a website where the public could look up forthcoming sales. JA 82-83. ULS held HOA sales on Saturdays because it "didn't want a bunch of people wandering around [a] law

office during normal business hours." JA 1345.

Sunset recorded a foreclosure deed the day after the sale. JA 1433-35. The deed was accompanied by a declaration of value listing the property value at $63,280. JA 1193, 1433-35, 1346-47. ULS drafted the foreclosure deed and copied specific language from NRS 116.31166(1): "[a]ll requirements of law have been complied with, including . . . the mailing of copies of the notice of Lien of Delinquent Assessment, and Notice of Default…." JA 92, 98-99, 1433-35. ULS had no personal knowledge to attest to this statement, and assumed without any confirmation Red Rock complied with the law. JA 100-01.

Sunset rented the property from the June 2013 sale until trial. JA 1169, 1175, 1193, 1195-96, 1725-33. Sunset knew it would not be able to obtain title insurance and knew it would wind up in litigation. JA 1181-82.

II. PROCEDURAL POSTURE

A. Quiet Title Litigation

In November 2013, Sunset filed a quiet title action against Nationstar and BANA. JA 2-6. BANA answered and asserted an affirmative defense that Sunset's interest is subordinate to the deed of trust. JA 12-19.[3] Nationstar countersued and asserted a similar defense. JA 33-42. Sunset answered and lodged a defense that Nationstar was the owner of the loan. JA 43-52.

[3] BANA was later dismissed. JA 1030-36.

Sunset did not undertake any discovery relating to ownership of the loan. JA 1120. It served no written discovery and did not notice any depositions. It did not ask any questions at the ULS and Red Rock depositions noticed by Nationstar. *Id.* Nationstar, on the other hand, timely disclosed witnesses—BANA and Nationstar—that could testify regarding the ownership of the loan, as well as the deed of trust on a "Freddie Mac UNIFORM INSTRUMENT." *See* JA 1086-94, 1099-1108, 1386.

B. Summary Judgment in Nationstar's Favor

In June 2015, Sunset and Nationstar moved for summary judgment. JA 738-55, 600-737. In February 2016, the district court granted Nationstar's motion. JA 813-20. The court found Tablante unilaterally recorded a false deed in lieu and concluded the deed in lieu did not strip the beneficiary of the deed of trust of its property rights. JA 818-19. The court found Red Rock did not provide statutorily required notice to BANA, and as a result, the sale did not extinguish the deed of trust. JA 818, 820. Sunset appealed. JA 917-35.

C. The Remand

In June 2018, this court reversed and remanded for further proceedings based on the limited summary judgment record before it. *See W-S.*

D. Nationstar Disclosed Freddie Mac Loan Ownership Documents

On remand, the district court set February 22, 2019 as the close of discovery. JA 1117. In mid-April 2019, Nationstar's counsel became aware of Freddie Mac's

ownership as a result of settlement discussions with Sunset. *Id.* On April 22 and 23, 2019, Nationstar served supplemental disclosures adding Freddie Mac as a witness, and disclosing business records from Freddie Mac, BANA, and Nationstar establishing Freddie Mac's loan ownership. JA 1118, 1122. Nationstar and Sunset held a meet and confer regarding the newly disclosed documents. JA 1118. Nationstar proposed a brief reopening of discovery and offered to cover the costs of any discovery related to Freddie Mac's ownership. *Id.* Sunset refused. *Id.*

On April 26, 2019, Nationstar served its pretrial disclosures. JA 1086-94.[4] Sunset objected to certain Freddie Mac loan ownership documents as untimely. JA 1095-98. Sunset did not object to business records from Nationstar and Freddie Mac's MIDAS system as untimely. *Id.* Sunset did not object at all to the welcome letters from BANA and Nationstar, nor did it object to Nationstar's business records. JA 1086-94, 1095-98, 1273-74.

On May 22, 2019, Nationstar and Sunset jointly filed a pretrial memorandum. JA 1129-46. Sunset did not object to any documents, including any of the Freddie Mac documents. JA 1135-38, 1273-74.

On May 14, 2019, Nationstar preemptively filed a motion in limine to introduce the documents disclosed just two months after the close of discovery. JA

[4] Pursuant to NRCP 16.1(a)(3)(C), Nationstar served its pretrial disclosures with the Freddie Mac documents more than 30 days before trial. JA 1086-94, 1165. It did so as part of its continuing duty to supplement and disclose evidence. NRCP 16(f); NRCP 26(e).

1115-1128. Sunset opposed. JA 1147-57. The district court denied Nationstar's motion to admit but did not provide analysis—besides untimeliness—for doing so. JA 1158, 1275-76, 1754. The court did not (at this time) prohibit Nationstar from raising the Federal Foreclosure Bar at trial. JA 1158. But, at trial, the court refused to consider Freddie Mac's ownership despite "know[ing] who owns the loan." JA 1278-80. The court turned an evidentiary ruling regarding documents into a blanket prohibition against Freddie Mac.

E. The District Court Extinguished Freddie's Deed of Trust After Trial

The district court held a bench trial in summer 2019. JA 1165-1379. During trial, the court admitted approximately two dozen documents, including the Red Rock letter and BANA's 2011 welcome letter identifying "FHLMC" as "the creditor to whom the debt is owed." JA 1712-23. The parties proffered testimony from Sunset, the HOA, Red Rock, BANA, Nationstar, and ULS. In closing, Nationstar addressed many of the issues in this appeal, and emphasized equitable balancing under *Shadow Canyon*. JA 1362-72, 1375-77. In rebuttal, Sunset declared the deed in lieu is "not central to this case." JA 1374.

On July 10, 2019, Nationstar submitted a proposed post-trial order. JA 1757-71. Nationstar urged the district court to declare Freddie Mac's deed of trust survived because (1) Tablante fraudulently recorded a deed in lieu; (2) the Federal Foreclosure Bar prevents Freddie Mac's interest from extinguishment; (3) the price

paid by Sunset was unreasonable and there was sufficient evidence demonstrating unfairness under *Shadow Canyon*; (4) F100's payment satisfied the superpriority portion of the HOA's lien and preserved Freddie Mac's deed of trust under *Saticoy Bay Series 2141 Golden Hill v. JP Morgan Chase Bank, N.A.*, No. 71246, 2017 WL 6597154 (Nev. Dec. 22, 2017) (unpublished) (***Golden Hill***); and (5) the HOA deprived BANA from tendering the superpriority amount in advance of the sale by not providing notice. *Id.*

On July 17, 2019, the district court entered its post-trial order. JA 1745-56. The court concluded, contrary to the summary judgment order and out of the blue, that NFM became the owner of the property when Tablante filed the false deed in lieu, unilaterally extinguishing Freddie Mac's deed of trust without consent. JA 1406-10, 1412-17, 1755. The district court found no credible evidence to disregard the fraudulent deed in lieu's purported ownership transfer to NFM, despite Nationstar's testimony that it retained counsel to contest the validity of that deed, the admission of correspondence from Nationstar's counsel to Tablante's counsel challenging authority to record that deed, and testimony that neither Freddie Mac nor its servicers consented to that deed. JA 1282, 1307, 1309-1310, 1639.

The court confused its pre-trial decision regarding admittance of certain Freddie Mac ownership documents with preclusion of Freddie Mac altogether. JA 1158, 1754. As a result, the court did not address Freddie Mac's ownership despite

the dual welcome letters from Nationstar and BANA, and despite testimony from Nationstar and BANA that Freddie Mac was the owner of the loan. JA 1267, 1272, 1277-80, 1282, 1298, 1720-23, 1751. The court also did not address equity under *Shadow Canyon*, and found Sunset to be a BFP without any analysis. JA 1753. The court found no entity—even F100—paid the superpriority portion of the HOA's lien, which is contrary to the testimony presented by the HOA at trial that F100 paid the superpriority portion and the HOA wrote off the remaining balance. JA 1215-16, 1218-21, 1226-27, 1753-54. Further, the court did not address prejudice to Nationstar since BANA would have tendered in accordance with its custom and practice, nor did it address Red Rock's practice of rejecting superpriority tenders. JA 1281-83. Nationstar appealed. JA 1782-84.

ARGUMENT

The district court erred in many respects.

First, the court promoted fraudulent conveyances in the recorder's index by concluding Tablante's deed in lieu extinguished Freddie Mac's deed of trust prior to the foreclosure. The court disregarded all of the testimony and documentary evidence establishing the deed in lieu was fraudulently conveyed to an out-of-business lender without Freddie Mac's consent. The court also disregarded its summary judgment order declaring the deed in lieu fraudulent and reconsidered the issue without notice or an opportunity for Nationstar to object.

Second, the only evidence at trial was that Freddie Mac owned the loan at the time of sale. BANA and Nationstar testified Freddie Mac owned the loan and welcome letters from both documented ownership prior to the HOA sale. There was no contrary evidence that anyone but Freddie Mac owned the loan.

Third, even though there was sufficient evidence at trial that Freddie Mac owned the loan, the court should have allowed additional documents establishing Freddie Mac's interest, disclosed two months after the close of discovery. The district court prohibited these documents from trial without any analysis of NRCP 37(c)(1) and the *Young* factors. *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 93, 787 P.2d 777, 780 (1990). Moreover, the court mistakenly confused its pre-trial evidentiary ruling with a prohibition of Freddie Mac ownership altogether.

Fourth, the court failed to conduct an equity analysis under *Shadow Canyon*; but even if it had, it did not have the benefit of *Lahrs*. Had the court followed *Shadow Canyon*, it would have found a grossly inadequate price at a sale fraught with unfairness, including the lack of notice, Red Rock's representation that the sale would not impact the deed of trust's priority position, and a number of "problems" surrounding F100 sales, including setting the opening bid at $99 and the lack of competitive bidding. *Lahrs*, 2019 WL 4054161, at *1. Instead of conducting the appropriate analysis, the court just determined Sunset was a BFP.

Fifth, the court did not consider Nationstar's *Edelstein* argument even though testimony was presented at trial—testimony that was not part of the first appeal—that the factoring agreement and its application affected the relationship between Tablante and the HOA. That agreement caused the HOA to zero-out Tablante's account before the sale.

Sixth, the court ignored the testimony of both the HOA and ULS that F100 paid the superpriority portion of the HOA's lien prior to the sale and that the HOA applied that payment to the superpriority portion of the outstanding balance.

Lastly, the court did not consider prejudice under the two-pronged notice test. Prejudice exists because BANA would have tendered the superpriority portion of the HOA's lien had Red Rock served the notice of default. Red Rock would have rejected BANA's tender even if notice was proper.

I. STANDARD OF REVIEW

This court reviews the district court's legal conclusions *de novo*, including issues involving statutory and contractual interpretation. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). Post-trial findings of fact "will be upheld if not clearly erroneous and if supported by substantial evidence," i.e. evidence "which a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotations omitted).

II. THE DEED IN LIEU WAS FRAUDULENTLY CONVEYED WITHOUT CONSENT

In its summary judgment order, the district court found Tablante unilaterally recorded a false deed in lieu. JA 818-19, 1406-10. This court echoed this finding in *W-S*: "[Tablante] appears to have unilaterally executed a deed in lieu of foreclosure to [NFM]." 134 Nev. at 354 n.1, 420 P.3d at 1035 n.1. Notwithstanding, the district court concluded the deed of trust was extinguished upon recordation and that NFM became the owner of the property. JA 1753. There is not substantial evidence to support this finding; rather, this finding is contrary to the evidence and testimony presented at trial, the summary judgment order, and public policy. The deed in lieu's effect was not even at issue at trial and "not central to [Sunset's] case." JA 1374. Reconsidering the issue, and for the first time in its post-trial order, is error or alternatively an abuse of discretion.

A. A Deed in Lieu of Foreclosure Requires Consent of the Loan Owner

A deed in lieu is the functional equivalent of a formal foreclosure, whereby a loan owner or servicer accepts the deed from the borrower without a public sale as part of a contractual transaction in exchange for a release of certain obligations under the loan. *See FH Partners, LLC v. Leany*, 2014 WL 3853806, at *2 (D. Nev. Aug. 6, 2014); *Hill v. Wells Fargo Bank*, 2015 WL 232127, at *7 (N.D. Ill. Jan. 16, 2015) (a deed in lieu is a "contractual release").

"Ordinarily, *in the absence of an intention to the contrary*, a transfer of the mortgage or mortgage debt to the owner or other person having an interest in the mortgaged premises may result in a merger of the two estates and precludes the mortgage from being kept alive as a subsisting lien since, if a merger occurs, it extinguishes the mortgage debt." 59 C.J.S. Mortgages § 443 (2020) (emphasis added). "There can be no merger where . . . merger would cause injustice or violate equitable principles." *Id.* It would be an injustice to rid Freddie Mac of its deed of trust through a unilateral act of Tablante, particularly where the evidence produced at trial shows, not only an absence of consent, but express disavowment of the deed in lieu by BANA and Nationstar on behalf of Freddie Mac.

Borrowers cannot unilaterally record deeds in lieu without consent of the loan owner or servicer, and the records have no legal effect. JA 1310-11; *see Webster-Whyte v. Wells Fargo Bank, N.A.*, 2019 WL 2354991, at *3-4 (N.D. Ga. Feb. 14, 2019) (recognizing borrowers cannot unilaterally revoke power of sale granted in a security deed); *see also* 15 Tex. Prac., Texas Foreclosure Law & Prac. § 2.35 (2019) (a unilateral reconveyance of property by mortgagor to mortgagee does not release secured debt and deed of trust (citing *Hennessey v. Bell*, 775 S.W.2d 650 (Tex. Ct. App. 1988)[5]).

[5] In *Hennessey*, the mortgagor unilaterally reconveyed the mortgaged property to the mortgagee, and subsequently brought a declaratory judgment action seeking cancellation of the promissory note and the deed of trust securing the note. 775

Recording a deed in lieu unilaterally is akin to executing a contractual loan modification—another form of loss mitigation—without the consent of the loan owner or servicer. Allowing borrowers to unilaterally excuse their loan obligations by recording a deed in lieu without consent would cause substantial injustice to financial institutions and lead to havoc in the real estate market.

B. There is No Evidence that Anyone Consented

Sunset did not present any evidence—let alone substantial evidence—the original lender, loan servicers, or the loan owner consented to the deed in lieu. The only evidence at trial was that Tablante through her now deceased attorney unilaterally recorded the deed in lieu. JA 1406-10, 1412-17.

First, as Sunset recognized, the financial institution on the deed was the original lender not the loan owner or servicer. JA 1198. There was ample reason to "have questioned why it was back to [NFM]" when all NFM did was originate the mortgage. JA 1198, 1265. It did not own the loan nor did it service the loan.

Second, NFM no longer exited after 2008, having merged into iFreedom. JA 659, 818. NFM could not have consented to a deed in lieu in 2011 because it

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S.W.2d at 651. The district court entered summary judgment for the mortgagee, and the court of appeals affirmed, because there was no evidence the mortgagee accepted the deed in satisfaction of the debt and deed of trust. *Id.* at 650-51. The court declared the unilateral conveyance void. *Id.* at 650. The facts here are indistinguishable from *Hennessey*.

was not in business, at least under that name. Had there been any consent, it would have been from iFreedom, an entity which is absent from the deed in lieu.

Third, even if NFM was reincarnated in 2011, there are "no agreements, other than [the deed in lieu] between the parties hereto with respect to the property hereby conveyed." JA 1406-10, 1412-17. Tablante expressly states there is no agreement between her and NFM evidencing the lack of consent from NFM.

Fourth, even if NFM had any interest in the loan in 2011, it did not sign the deed of lieu or the declaration of value pages. JA 1406-10, 1412-17. Nevada's statute of frauds applies "where there is a definite possibility of fraud." *Azevedo v. Minister*, 86 Nev. 576, 580, 471 P.2d 661, 663 (1970). It also applies to the "surrender of a deed of trust." *Summa Corp v. Greenspun*, 96 Nev. 247, 252, 607 P.2d 569, 272 (1980). The statute of frauds provides "[n]o estate or interest in lands . . . shall be created, granted, assigned . . . unless by act or operation of law, or by deed or conveyance, in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by the party's lawful agent thereunto authorized in writing." NRS 11.205(1). The agreement was not signed by the party to be bound, NFM. *See In re Kern*, 107 Nev. 988, 991-92, 823 P.2d 275, 277 (1991). The lack of signature from NFM, who purportedly waived whatever remained of the $176,760 loan, is substantial evidence the deed in lieu is facially invalid.

Fifth, the county recorder's index provides additional evidence of invalidity since documents filed by financial institutions seldom include marks like "PAPER OVER 10 POUNDS" and "NOTARY STAMP IN LEFT MARGIN." JA 149.

Sixth, it appears Tablante contacted BANA in July 2012, after the fraudulently conveyed deed in lieu, in hopes of obtaining *another* deed of lieu. JA 1628-30. There is little reason Tablante would contact BANA if the deed of trust was extinguished by the deed in lieu. And, as the district court pointed out: "why on earth would [BANA] want a deed in lieu of foreclosure to go to the benefit of [NFM] who is not even involved anymore?" JA 763-64, 767. "[E]veryone knows [NFM] doesn't have an interest in this anymore." JA 764.

Seventh, Nationstar retained counsel after the HOA's sale to contest the validity of the deed in lieu. JA 1307-08. Nationstar's counsel sent correspondence to Tablante's counsel, stating: "We are unaware of any agreement by [NFM] that a conveyance of the Property to [NFM] would satisfy the obligations of the deed of trust." JA 1639. ***Relatedly***, BANA and Nationstar testified there were no documents in their record systems showing that BANA or NFM consented to the deed in lieu. JA 1282, 1307, 1309-10.

The district court's post-remand findings were clearly erroneous since there is no evidence the deed of lieu was effective. All of the testimony and evidence

points to it being fraudulently recorded, as the district court previously found and as noted in *W-S*. This court should conclude the deed in lieu was invalid.

C. The District Court Previously Found the Deed in Lieu Invalid

The district court prior to *W-S* concluded the deed in lieu did not extinguish the deed of trust since Tablante unilaterally recorded a false deed in lieu. JA 818-19. Three years later, the district court reconsidered and reversed the court's invalidity finding in its post-trial order, concluding NFM—an entity not in business and which did not consent to the deed of trust extinguishment—became the owner of the property. JA 1751, 1755. The court concluded as such despite testimony from both BANA and Nationstar that Freddie Mac owned the loan, and despite no argument by Sunset that the deed in lieu extinguished Freddie Mac's deed of trust. JA 1267, 1279, 1282, 1303.

The district court exceeded its authority when it reconsidered the effect of the deed in lieu for the first time in its post-trial order. ***First***, Sunset did not ask for rehearing under EDCR 2.24. ***Second***, Sunset did not ask for relief from the district court's judgment as it pertained to the deed in lieu under NRCP 60. ***Third***, Sunset did not intend to raise this issue at trial as it is absent from the pretrial memorandum. JA 1129-46. ***Lastly***, the deed in lieu's effect was never at issue at trial because, as Sunset said, it was "not central to this case." JA 1374.

The district court reconsidered the issue in its post-trial order without any provocation by Sunset and without advance notice to Nationstar. "An elementary and fundamental requirement of due process in any proceeding . . . is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The district court violated Nationstar's right to due process by affording no notice it would reconsider the effect of the deed in lieu. Nationstar had no reason to object to the district court's summary judgment order at trial, and the only evidence adduced at trial bolsters this court's observation that "[Tablante] appears to have unilaterally executed a deed in lieu of foreclosure to [NFM]." *W-S*, 134 Nev. at 354 n.1, 420 P.3d at 1035 n.1.

There was no substantial evidence to support the court's reconsideration. This court should reinstate the district court's original invalidity findings, which are consistent with *W-S*'s footnote one and the testimony at trial.

III. FREDDIE MAC OWNS THE LOAN AND DID AT THE TIME OF THE SALE

The district court denied Nationstar's motion in limine to admit certain documents evidencing Freddie Mac's loan ownership. JA 1158. At trial, the court mistakenly turned this evidentiary ruling into a blanket refusal to consider Freddie

Mac's ownership.[6] JA 1754. This case should not be based on the court's confusion; instead, it should be decided on its merits to protect Freddie Mac's interest in to the property. *Hansen v. Universal Health Servs.*, 112 Nev. 1245, 1247-48, 924 P.2d 1345, 1346 (1996).

All of the evidence at trial was that at the time of the sale, Freddie Mac owned the deed of trust. Sunset did not offer any contrary evidence. A federal statute, 12 U.S.C. § 4617(j)(3), or the Federal Foreclosure Bar, protects Freddie Mac's property interests while it is under the conservatorship of the Federal Housing Finance Agency. The sale did not extinguish Freddie Mac's deed of trust, preventing Sunset from claiming a free and clear interest in the property. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. Adv. Op. 90, 445 P.3d 846, 850 (2019); *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 134 Nev. 270, 272-74, 417 P.3d 363, 367-68 (2018).

A. BANA: Freddie Mac Owns the Loan

Matthew Labrie, an assistant vice president for BANA, testified BANA "[was] the servicer on behalf of Freddie Mac." JA 1263, 1265. Mr. Labrie could testify as such because he "reviewed the loan on [BANA's] system of record and the documents relating to that loan in [BANA's] documents management portal."

[6] It was a due process violation to preclude the issue of Freddie Mac's ownership where Nationstar had no advance notice it would do so. Sunset did not file a motion to preclude all issues regarding Freddie Mac's ownership; if it did, Nationstar would have had an opportunity prior to trial to object.

JA 1263. Mr. Labrie confirmed Freddie Mac owed the loan at all times BANA serviced the loan. JA 1267, 1279, 1282. During Mr. Labrie's testimony, the court said it "know[s] who owns it" too. JA 1278.

Mr. Labrie reviewed the BANA welcome letter prior to the trial—this letter was located in BANA's records system. JA 1266-67, 1270, 1720-23. BANA sent this letter to Tablante in July 2011 when it became servicer of the loan. JA 1267, 1720-23. This letter states "[t]he name of the creditor to whom the debt is owed: FHLMC." JA 1720-23. FHLMC is an acronym for Freddie Mac. JA 1277-78. The letter further states BANA does not own the loan. JA 1278, 1720-23.[7]

B. Nationstar: Freddie Mac Owns the Loan

Nationstar's witness, Aaryn Richardson, verified Freddie Mac owned the loan at the time of the sale and still owned it at the time of trial. JA 1303. Mr. Richardson testified Nationstar does not own the loan and frequently services loans it does not own. JA 1292, 1305. Mr. Richardson further testified Nationstar serviced the loan on behalf of Freddie Mac and has been in communication with Freddie Mac on a monthly basis. JA 1291-93.

Mr. Richardson reviewed the Nationstar welcome letter prior to the trial—this letter was located in Nationstar's loan servicing platform. JA 1293, 1296. Like the BANA welcome letter, this letter said, "we look forward to servicing your

[7] Sunset did not object to the welcome letters prior to trial and therefore waived any objections. JA 1095-98, 1135-38; *see* EDCR 2.67(b)(5).

loan on behalf of Freddie Mac." JA 1298.

On cross-examination, Mr. Richardson testified Nationstar followed the "Freddie Mac Servicers Guide that governs all of the rights and responsibilities that Nationstar has as a loan servicer for Freddie Mac." JA 1302-03.[8]

C. Evidence that Freddie Mac Owns the Loan

In addition to the welcome letters, Nationstar presented other evidence of Freddie Mac's ownership, including the deed of trust printed on a "Freddie Mac UNIFORM INSTRUMENT." JA 1386, 1402. These template instruments are used for originating loans for subsequent sale to Freddie Mac, and provide record notice that the loan might be sold to Freddie Mac. *See Nationstar Mortgage, LLC v. Guberland LLC-Series 3*, No. 70546, 2018 WL 3025919, at *2 n.2 (Nev. June 15, 2018) (***Guberland 3***) (unpublished) ("The record also includes a deed of trust . . . which states it is a 'Fannie Mae/Freddie Mac UNIFORM INSTRUMENT—WITH MERS.' Other courts have reasoned that similar language provided 'some record notice that the loan might be sold to Fannie Mae.'").

Nationstar introduced sufficient evidence of Freddie Mac's ownership through the two welcome letters, a deed of trust printed on a Freddie Mac template

[8] Sunset prompted Mr. Richardson to emphasize Nationstar serviced the loan and Freddie Mac owned the loan. JA 1302-03, 1318. Even if Nationstar was precluded from all issues relating to Freddie Mac's loan ownership, Sunset opened the door during cross-examination to Freddie's ownership, or alternatively, waived any the right to contest Freddie Mac's ownership. JA 1316.

document, and trial testimony from both BANA and Nationstar based on review of business records. *See Daisy Trust*, 445 P.3d at 849-51; *see also M&T Bank v. Wild Calla Street Tr.*, No. 74715, 2019 WL 1423107, at *1 (Nev. March 28, 2019) (unpublished) (Freddie Mac presented evidence of its ownership through an employee affidavit, internal database printouts, and a deed of trust printed on Freddie Mac template document); *CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019 WL 289690, at *1 n.2 (Nev. Jan. 18, 2019) (unpublished) (Fannie Mae owned the loan since "[CitiMortgage's] witness attested that Fannie Mae continually owned the loan after the January 2010 transfer, which she presumably confirmed based on her review of the relied-upon business records").

Nationstar presented ample evidence demonstrating Freddie Mac owned the loan and Nationstar was the record beneficiary and servicer of loan at the time of the sale. Sunset offered no evidence rebutting these facts. This court should conclude the Federal Foreclosure Bar prevented the sale from extinguishing Freddie Mac's deed of trust.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN PRECLUDING ADDITIONAL EVIDENCE OF FREDDIE MAC'S INTEREST

The testimony and documents presented at trial sufficiently establish Freddie Mac's ownership. *See Saticoy Bay LLC Series Magic Mesa St. Tr. v. JPMorgan Chase Bank, N.A.*, No. 73627, 2019 WL 4611759, at *1-2 (Nev. Sept. 20, 2019)

(unpublished) (holding Freddie Mac owned the loan based on testimony and documents, despite omission of *another* document evidencing ownership). Nationstar intended to admit *additional* evidence of ownership, but the district court prohibited such admission because certain documents were disclosed two months after the close of discovery. JA 1754. This was not done willfully. JA 1118. The district court failed to conduct a proper NRCP 37/*Young* analysis in precluding these documents from trial. This court should reverse to the extent additional documents, beyond the testimony and documents at trial, are necessary prove ownership.

A. Standard of Review for Discovery Sanctions

NRCP 37 authorizes discovery sanctions where there has been willful noncompliance with a discovery order. *Fire Ins. Exchange v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 913 (1987). This court generally reviews a district court's imposition of a discovery sanction for abuse of discretion. *Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).

B. The District Court Abused its Discretion in Denying Nationstar's Motion in Limine

1. The District Court Failed to Conduct an NRCP 37/Young Analysis

Nationstar acknowledges it disclosed additional documents evidencing Freddie Mac's deed of trust ownership two months after the close of discovery. Because of this, the district court *sua sponte* issued a potentially case-altering

sanction—that Nationstar would not be permitted to "raise all issues related to Freddie Mac ownership interest" at trial. JA 1754. The district court provided no rationale for its decision other than finding the disclosure "very late." *Id.* The district court did not address NRCP 37(c)(1) or the *Young* factors, consider Nationstar, BANA, and the deed of trust were timely disclosed or that the welcome letters were not objected to.

Simply because a party discloses witnesses or documents after the close of discovery does not necessarily mean the party cannot use the document. Rather, if a party fails to comply with the disclosure requirements of NRCP 16.1, the party cannot use any witness or information not so disclosed unless the party shows a substantial justification for the failure to disclose or unless the failure is harmless. *See also* NRCP 16.1(e)(3)(B). In *Young*, this court articulated factors a court must consider when determining whether NRCP 37 sanctions are appropriate, some of which are addressed deblow. Any discovery sanction must "be supported by an express, careful and preferably written explanation of the court's analysis" of the *Young* factors. *Id.*

2. There was a substantial justification for the late disclosure

Nationstar was substantially justified in disclosing Freddie Mac as a witness and documents establishing Freddie Mac's ownership two months after the close of discovery in April 2019. When this case was initiated in 2013, there was no

Nevada case authority concerning whether the Federal Foreclosure Bar prevented extinguished of liens owed by Freddie Mac following a NRS 116 sale.

This court addressed the Federal Foreclosure Bar for the first time in June 2017 when it published *Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 396 P.3d 754 (2017). As of June 2017, this case had been on appeal for nearly a year. This court has since addressed the Federal Foreclosure Bar in more than fifty decisions. The development of the Federal Foreclosure Bar over the past few years justifies Nationstar's late disclosure.

The Federal Foreclosure Bar was added to many cases after the 2017 *Nationstar* decision. In turn, servicers in many cases disclosed Federal Foreclosure Bar witnesses and evidence either late in the discovery process or even after discovery ended. For example, Nationstar first raised the defense in a countermotion to summary judgment in *Guberland 3*. The district court, like here, precluded Nationstar from raising the Federal Foreclosure Bar. *Guberland 3*, 2018 WL 3025919, at *1. This court noted that, like here, Nationstar timely disclosed witnesses for Nationstar and BANA who would testimony about Fannie Mae's loan ownership. *Id.* The court found the investor was put on notice that the loan might be sold to Fannie Mae because the deed of trust was printed on a Fannie Mae template. *Id.* This court ultimately reversed, concluding the investor had reasonable notice and an opportunity to respond. *Id.* According to this court, the

investor could have requested a continuance if it believed additional discovery would lead to evidence supporting its case. *Id.*

The same posture is found in *Nationstar Mortgage, LLC v. Vegas Property Services, Inc.*, 2019 WL 1429619, at *3 (D. Nev. March 30, 2019). The court noted that "based on the evidence submitted by Nationstar . . .the Federal Foreclosure Bar would likely be dispositive in this matter." *Id.* at *3. The court permitted the investor to conduct discovery for 60 days, at which time the parties could re-file summary judgment motions. *Id.* The court did not sanction Nationstar for its untimely disclosure. Two other decisions from this court are in accord. *Fort Apache Homes v. JPMorgan Chase Bank*, No. 72257, 2019 WL 4390833, at *1 (Nev. Sept. 12, 2019); *SFR Investments Pool 1 v. Green Tree Servicing*, No. 71176, 2018 WL 6829002, at *1 n.1 (Nev. Dec. 27, 2018) (both unpublished).

3. Sunset was not prejudiced by the late disclosure

The untimely disclosure here was harmless. Nationstar and BANA were disclosed as witnesses in Nationstar's initial disclosures and the pretrial disclosure such that they could (and did) testify regarding Freddie Mac's loan ownership. JA 1086-94. The deed of trust and the CC&Rs, which identified Freddie Mac as a possible owner, disclosed at the outset of litigation put Sunset on notice that Freddie Mac may have purchased the loan. JA 345, 356, 1381-84. Freddie Mac

purchased millions of mortgages nationwide, including hundreds of thousands in Nevada. *See Babylon*, 699 F.3d at 225. Sunset chose not to undertake any discovery on this point.

Even if Sunset was somehow surprised by the late disclosure, Sunset could have requested a trial continuance once it learned of Freddie Mac's interest. There was no NRCP 41(e)(4) issue and Nationstar agreed to accommodate any discovery, including flying in witnesses for depositions and covering Sunset's costs for any discovery deemed necessary. JA 1118. And even if Sunset did not want to continue trial, it still had over a month to conduct tailored discovery before trial.

Sunset did not take any affirmative discovery either before or after remand—on Freddie Mac's ownership or any other issue. JA 1124. It did not serve any written discovery. It did not depose a single witness. Although Nationstar deposed ULS and Red Rock, Sunset did not ask any questions. JA 55-57, 109, 277-78, 300. ULS testified about Fannie Mae owned properties, putting Sunset on additional notice during discovery that an enterprise may own the loan. JA 55, 108.

4. Laches does not apply

The district court erroneously and *sua sponte* found the untimely disclosure was a "textbook of example of laches." JA 1754. ***First***, laches is only a defense to claims in equity. ***Second***, even if laches applied to discovery delays, it is only

available where delay by one party results in a disadvantage to the other such that the party asserting laches had a change in circumstances which would make granting relief to the delaying party inequitable. *Building & Constr. Trades v. Public Works*, 108 Nev. 605, 839 P.2d 633, 637 (1992). The delay must cause actual prejudice and cannot be illusory. *Memory Gardens v. Pet Ponderosas*, 88 Nev. 1, 6, 492 P.2d 123, 125 (1972). The condition of the party asserting laches must become drastically altered, whereby it cannot be restored to its former state. *State v. Rosenthal*, 107 Nev. 772, 778, 819 P.2d 1296, 1301 (1991). There is no laches where the person claiming the defense could have obtained records on its own. *Besnilian v. Wilkinson*, 117 Nev. 519, 523, 25 P.3d 187, 190 (2001).

Laches is not available here because the two-month delay did not cause actual prejudice. Any alleged prejudice is illusory because Freddie Mac has owned the loan at all relevant times and there was ample evidence before the April 2019 disclosure—such as the deed of trust, the CC&Rs, the ULS deposition, and the fact Freddie Mac has purchased thousands of loans in Nevada—that put Sunset on notice that Freddie Mac may own the loan.

As this court has stated, "[e]specially strong circumstances must exist to sustain a laches defense when the statute of limitations has not run." *Lanigir v. Arden*, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966). A statute of limitations has not run because limitation periods do not run against defenses. *Dredge Corp. v. Wells*

Cargo, Inc., 80 Nev. 99, 102, 389 P.2d 394, 396 (1964). There are no strong circumstances to apply laches here, especially in the district context and since it would result in a windfall for Sunset. *See Home Sav. Ass'n v. Bigelow*, 105 Nev. 494, 779 P.2d 85, 86-87 (1989).

5. The Young Factors Weigh in Favor of Nationstar

The district court did not address the *Young* factors. To the extent this court does not remand, Nationstar offers the following analysis of the relevant factors.[9]

Degree of willfulness: There was no willfulness by Nationstar or its counsel for its untimely disclosure. Nationstar's counsel became aware of Freddie Mac's loan ownership as a result of settlement discussions with Sunset in April 2019. JA 1118. Nationstar immediately supplemented its disclosures and offered to cover the costs of any related discovery Sunset may undertake. *Id.* Nationstar nor its counsel willfully withheld this information, nor did it have any reason to.

Prejudice by a lesser sanction: Sunset purchased a property subject to Freddie Mac's deed of trust. Sunset was on notice of Freddie Mac's potential loan ownership through the deed of trust and CC&Rs, as well as the fact Freddie Mac purchased hundreds of thousands of loans in Nevada. It was also on notice that ownership would be at issue through the pleadings and its own affirmative defense

[9] Nationstar addressed the federal counterpart to the *Young* factors in its *limine* motion. JA 1123 (citing *Lanard Toys Ltd. v. Novelty*, 375 Fed.Appx. 705, 714 (9th Cir. 2010)).

about ownership. JA 2-6, 12-19, 33-42, 43-52. But Sunset did nothing. Considering Sunset was on notice, the district court could have imposed a lesser sanction given the untimely disclosure of documents Sunset had access to through discovery it could have conducted. For example, the court could have struck all of the documents objected to on timeliness grounds, but still considered testimony and documents establishing ownership. The court heard this testimony and reviewed BANA's welcome letter but refused to consider it. Sunset would not have been prejudiced by a lesser sanction.

Severity of the Sanction Relative to Nationstar's Conduct: A district court may only impose sanctions that are reasonably proportionate to the litigant's misconduct. *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 681, 263 P.3d 224, 230 (2011). The district court's sanction precluding ***all issues*** relating to Freddie Mac is not proportionate to Nationstar's conduct. While the supplemental pretrial disclosure was late, Nationstar timely disclosed witnesses who could testify about Freddie Mac's ownership. The late disclosure still afforded sufficient time for discovery prior to trial.

Feasibility of Less Severe Sanctions: This court could have issued any number of sanctions before precluding Freddie Mac's ownership interest from the case. The court could have disallowed certain documents or could have ordered Nationstar to pay for discovery related to ownership.

Policy Favoring Adjudication of the Merits: The district court's sanction frustrated this court's long-standing policy to hear cases on their merits. The court heard testimony and reviewed documents showing Freddie Mac owned the loan. It even "know[s] who owns the loan." JA 1278. Yet, it refused to adjudicate the case on its merits.

Unfair Prejudice to Nationstar for its Counsel's Conduct: Nationstar knew all along that Freddie Mac owned the loan. Freddie Mac owned the loan before Nationstar became servicer, including at the time of the sale. The sanction imposed punished Nationstar, and more importantly Freddie Mac, for counsel's disclosure just two months after the close of discovery.

Need to Deter Similar Abuses: This court ran into several cases where loan documents were untimely disclosed. The failure to disclose ownership documents in 2020 is much different than it was years ago, before this court weighed in on the Federal Foreclosure Bar.

V. THE DISTRICT COURT FAILED TO CONDUCT AN EQUITY ANALYSIS

In *Shadow Canyon*, this court recognized where there is inadequate sale price, a party challenging a foreclosure sale need only present "'very slight" evidence of unfairness to succeed. 133 Nev. at 749, 405 P.3d at 648. The inadequacy of price is based on "fair-market-value," *U.S. Bank, N.A. v. Resources*

Group, LLC, 135 Nev. Adv. Op. 26, 444 P.3d 442, 449 (2019), and additional evidence of unfairness could come in various forms, including "an HOA's failure to mail a deed of trust beneficiary the statutorily required notices" and "an HOA's representation that the foreclosure sale will not extinguish the first deed of trust," *Shadow Canyon*, 133 Nev. at 749 n.11, 405 P.3d at 648 n.11.

The district court refused to conduct an equity analysis, despite Nationstar's arguments at trial the sale should be set aside under the equity balancing test. JA 1362, 1366, 1369-72, 1376-77. This was error.

A. Sunset Purchased the Property at an 88% Discount

In *Shadow Canyon*, this court confirmed the "fair-market-value" disparity determines whether the inadequacy of the price is great. 133 Nev. at 748, 405 P.3d at 648. This court recently confirmed a price "somewhere between 10% and 15% of its fair market value" was "grossly inadequate." *Resources Group*, 444 P.3d at 449; *San Florentine Ave. Tr. v. JPMorgan Mortg. Acquisition Corp.*, No. 73684, 2018 WL 4697260, at *1 (Nev. Sept. 28, 2018) (unpublished) (12% ratio was "grossly inadequate").

Sunset paid $7,800 where the fair market value of the property was $63,280. JA 1433-35, 1753. Twelve percent of market value is a grossly inadequate price.

B. There is More than Very Slight Evidence of Unfairness

1. Lack of notice to both BANA and Nationstar

In *Shadow Canyon*, this court recognized "an HOA's failure to mail a deed of trust beneficiary the statutorily required notices" is evidence of unfairness to grant equitable relief. 133 Nev. at 749 n.11, 405 P.3d at 648 n.11. The HOA was required to send notices to "all holders of subordinate interests, even when such persons or entities did not request notice." *SFR Invs. Pool 1, LLC v. Bank of New York Mellon*, 134 Nev. 483, 489, 422 P.3d 1248, 1253 (2018); *see also* NRS 107.090(3)(b) & (4) (requiring notice of default and notice of sale be mailed to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust"). Such persons with interest undoubtedly included BANA and Nationstar when they respectively acted as deed beneficiary. JA 1418-20, 1427-29.

Lack of Notice to BANA: This court already recognized, and Red Rock admitted at trial, it did not mail the May 29, 2012 notice of default to BANA. *W-S*, 134 Nev. at 353, 420 P.3d at 103; JA 1239, 1689-90.[10] The lack of notice to BANA is evidence of unfairness and prejudice. BANA had a business practice of responding to notices of default through Miles Bauer. JA 1281. Had Red Rock sent BANA the notice of default, as the law requires, BANA would have followed its regular course of conduct by tendering the superpriority portion of the HOA's

[10] In addition to the statutory violation, it was also a violation of the CC&Rs not to provide notice to BANA. JA 351 ("In the case of foreclosure under [NRS 116], the Association shall give reasonable notice of its intent to foreclose to each lien holder").

lien to Red Rock. JA 1377-79; *see Bank of Am. v. SFR Invs. Pool 1, LLC*, 134 Nev. 605, 612, 427 P.3d 113, 121 (2018) (***Diamond Spur***).

Courts routinely set aside sales under *Shadow Canyon* where the notice of default was not mailed to the deed beneficiary. *See Bank of Am., N.A. v. Madeira Canyon Homeowners' Ass'n*, 2019 WL 5963936, at *4-5 (D. Nev. Nov. 13, 2019); *Nationstar Mortg., LLC v. Sahara Sunrise Homeowners Ass'n*, 2019 WL 1233705, at *3 (D. Nev. March 14, 2019). In *Sahara Sunrise*, the court set aside the sale because like here (1) the notice of default was not mailed to BANA, and (2) "Nationstar explain[ed] that the HOA's failure to properly serve the notice of default deprived BANA of the opportunity to tender payment—as BANA routinely did prior to notice of a foreclosure sale, during the relevant time periods—to protect its various deed of trusts from extinguishment." 2019 WL 1233705, at *3.

When ULS took over foreclosure activities for the HOA, it took no independent steps to verify BANA received the notice of default. JA 73. As an HOA trustee, ULS had the responsibility and duty under the law to make sure deed beneficiaries received notice. *See Diakonos Holdings, LLC v. Nationstar Mortg. LLC*, No. 75620, 2019 WL 3034856, at *1 (Nev. July 10, 2019) (affirming district court's decision to declare sale void when the HOA failed "to make any effort to locate the unit owner's successor in interest such that the statutorily required foreclosure notices could be successfully delivered") (unpublished).

ULS should have realized BANA did not receive notice and, as a result, should have started the foreclosure process from scratch to ensure statutorily required foreclosure notices were successfully delivered. ULS ignored everything Red Rock did (or did not do) and marched to sale. ULS's blind eye perpetuated the lack of notice to BANA. Together, ULS and Red Rock obstructed BANA's business practice to tender the superpriority amount of the lien. JA 1281-83.

Lack of Notice to Nationstar: The sole evidence that ULS mailed the notice was that ULS claimed to have mailed it to Nationstar. But while Nationstar is listed on a USPS address list in ULS's file, there is not a certified mail receipt like there are for other entities ULS mailed. JA 1452-53, 1461; *see also* NRS 107.080(4) (requiring a return receipt). For instance, there exists a certified mail receipt for NFM and the "owner or occupant." JA 1452-53. ULS even admits there was no proof of receipt or proof of delivery. JA 78.

The lack of receipt is evidence of non-mailing. The district court did not address the lack of receipt in its post-trial order, nor did it consider that Nationstar's testimony rebutted the presumption of mailing. *See* NRS 47.250(13). The court failed to reconcile the lack of receipt in its post-trial order. The evidence presented at trial is not substantial evidence that ULS mailed the notice of sale to Nationstar. Even there was substantial evidence that the notice of sale was mailed, Nationstar

did not receive it.[11] And even if Nationstar received it, it would have only had three weeks before the sale to take action, which is an insufficient time for an institutional client to take action (route, assess, obtain counsel, determine the superpriority amount, etc.). JA 771. The lack of notice to Nationstar is further evidence of unfairness, especially where the servicer not once, but twice, did not receive notice.

2. The Red Rock letter

In *Shadow Canyon*, this court confirmed a "representation that the foreclosure sale will not extinguish the first deed of trust" is evidence of unfairness. 133 Nev. at 749 n.11, 405 P.3d at 648 n.11. This court cited *ZYZZX2 v. Dizon*, a case that contained the same Red Rock letter admitted in this case. 2016 WL 1181666 (D. Nev. March 25, 2016).

The same unfairness was present in *San Florentine*, where this court set aside the sale when Red Rock mailed the same letter "stating that the HOA's lien was subordinate to respondent's deed of trust, with the implication being that any ensuing foreclosure sale would not extinguish respondent's deed of trust." 2018

[11] ULS allegedly mailed the notice of sale to Nationstar at an address in Texas on May 28, 2013. JA 1461. Assuming ULS mailed the notice, and with the holiday weekend, Nationstar would have likely received the notice of sale on June 3, 2013, just 19 days before the sale. The whole rationale for early notice is to permit sufficient time to act. That is why the legislature implemented a floor of 111 days from a notice of default through the sale, and provided two opportunities to receive notice. NRS 116.31162(1)(a), NRS 116.31162(1)(b) and subsections (2)–(3).

WL 4697260, at *1; *see Mortgage Fund IVC Trust 2016-RN5 v. Brown*, 2019 WL 4675757, at *5 (D. Nev. Sept. 24, 2019); *Lahrs*, 2019 WL 4054161, at *1.

The district court admitted the same Red Rock letter at trial, as well as a declaration from Red Rock's witness, Julie Thompson. JA 1712-1718. Ms. Thompson testified she authored the letter and many others in response to letters and checks from Miles Bauer. JA 1338-39, 1342, 1712-1718. The Red Rock letter, just like the one in *San Florentine*, states the HOA's lien was subordinate to the deed of trust. JA 329, 1712-1718. This court declare Freddie Mac's deed of trust survived the sale based on the same letter and the same percentage of fair market value.

3. F100 sold the property on a Saturday and bid at its own sale

The district court did not have the benefit of *Lahrs* at the time it entered its post-trial order. This court should address equity or remand, not only because the district court failed to conduct a *Shadow Canyon* analysis, but because the court did not have the benefit of *Lahrs*.[12]

[12] The district court also did not have the benefit of *U.S. Bank, N.A. v. Nevada Sandcastles, LLC*, and did not consider other "[p]otential irregularities" sufficient to set aside the sale: (1) "selling property in a manner that prevents it from selling for full value", (2) "preventing bidders from attending the auction", and (3) "collusive conduct benefitting the purchaser." No. 75341, 2019 WL 4447343, at *2 (Nev. Sept. 16, 2019) (unpublished). All three of these irregularities are present here. F100's sale prevented the property from being sold at its "full value" by starting bidding at $99, stopping internal bidding at the total lien amount, and selling the property on a Saturday. By holding the sale on Saturday, it prevented

To the extent this court addresses *Lahrs* in the first instance, it should conclude just as it did in that case. This court recognized for the first time that F100 sales are unfair by their very nature. The initial problem is the factoring agreement required ULS to set the opening bid at $99. *Lahrs*, 2019 WL 4054161, at *1. ULS started bidding at $99 as it did in *Lahrs*. JA 1171, 1345.

The second problem is that bidding is capped at F100 sales. *Lahrs*, 2019 WL 4054161, at *1. Because there was a second bidder (F100), bidding stopped at the total amount of owed; F100 refused to bid any higher than that amount. JA 1171, 1192-93. Sunset's winning bid was $7,800 and the total owed was $7,806. JA 1431, 1433-35. F100's practice to intentionally hold down prices at its own sale is "one type of chilled bidding." *Id.*; *see Country Exp. Stores, Inc. v. Sims*, 943 P.2d 374, 378 (Wash. Ct. App. 1997) (noting that one type of chilled bidding "is intentional, occurring where there is collusion for the purpose of holding down the bids"); *see F100*, 2019 WL 919585, at *4 n.3 ("it seems fundamentally unfair that the HOA agreed to limit the range of the bidding price at a foreclosure sale . . .."). [13]

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bidders from attending. The collusive conduct between the HOA and F100 benefitted Sunset since Sunset purchased a property at 12% of fair market value.

[13] The federal court highlighted a clause from the factoring agreement that propagated chilled bidding: the HOA promised that it would not send anyone to the foreclosure sale to bid in any amount in excess of the opening bid of $99. *Bank of New York Mellon v. Christopher Communities*, 2019 WL 1209082, at *1 (D. Nev. March 14, 2019).

Because the HOA credit bid at the *Lahrs* sale, this court did not contemplate the third problem—that F100 was collusively bidding at its very own NRS 116 sale. *See generally F100, LLC*, 2019 WL 919585, at *4 (finding collision between an HOA and F100 when F100 bid on the property and ultimately purchased it).

This court rejected *Edelstein* because the property owner remained indebted to the HOA, and the HOA retained the exclusive right to collect that debt, such that there was no alteration of the relationship between the property owner and the HOA. 134 Nev. at 357, 420 P.3d at 1037. As a result, there was no irrevocable split between the payment obligation and the lien rights. This court's decision was based upon the face of the factoring agreement. But the evidence adduced at trial proves that language of the factoring agreement was a sham. The HOA testified when it received the payment from F100, it wrote off the homeowner's remaining debt and closed the account. JA 1218-19, 1221. This action by the HOA changed the relationship between Tablante and the HOA because there was no longer a debtor/creditor relationship. The HOA was not, in fact, running the sale. The only party remaining was F100. F100 was both the seller and the buyer. It is *per se* unfair for a selling party to bid at its own sale, especially where that seller was retaining proceeds from the sale. JA 1341. This is artificial bid-cheating.

This court also did not contemplate the fourth problem—that F100 sales were conducted ***on Saturdays***, and ULS refused to market or advertise the sale. JA

82-83, 1431. ULS claims it held HOA sales on Saturdays—a non-business day and religious day for some—because it "didn't want a bunch of people wandering around [a] law office during normal business hours." JA 1345, 1370-71. In other words, ULS wanted to keep people away from its sales. It worked. There were only two bidders at the sale—West Sunset and F100—and the property sold for less than the amount allegedly owed. JA 89, 1182, 1325, 1350-51, 1753.

C. The District Court Did Not Conduct a BFP Analysis

The district court also erred in concluding Sunset was a BFP without any legal analysis or factual support. JA 1753. Sunset is not a BFP and cannot satisfy its burden of providing such status. *See Shadow Wood Homeowners Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc*., 132 Nev. 49, 64, 366 P.3d 1105, 1115 (2016); *Berge v. Fredericks*, 95 Nev. 183, 187, 591 P.2d 246, 248 (1979).

First, bidding for a $63,000 property started at $99. JA 1185, 1191. It is unrealistic that an investor could purchaser a property free and clear of a $176,760 loan for .001% of fair market value.

Second, Sunset "[p]ossibly" reviewed the public records, including the deed of trust, prior to purchasing the property. JA 1186. But regardless, Sunset had constructive notice of the deed of trust on a Freddie Mac uniform instrument, with provisions that the loan could be sold. JA 1386, 1396, 1402. *See CitiMortgage, Inc. v. TRP Fund VI, LLC*, No. 71318, 2019 WL 1245886 at *1 (Nev. March 14,

2019) (unpublished); *Federal Home Loan Mortg. Corp. v. Mirage Property, LLC*, 2019 WL 2078767, at *2 (D. Nev. May 10, 2019).[14]

Sunset could and should have anticipated there was a significant chance a property sold at an HOA sale was encumbered by an Enterprise lien. In 2008, the Enterprises' "mortgage portfolios had a combined value of $5 trillion and accounted for nearly half of the United States mortgage market." *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-600 (D.C. Cir. 2017). Since 2012, "Fannie and Freddie, among other things, collectively purchased at least 11 million mortgages." *Id.* "The position held in the home mortgage business by Fannie Mae and Freddie Mac make[s] them the dominant force in the market." *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012). In purchasing a property at a steep discount at an NRS 116 sale, Sunset accepted a foreseeable risk the property was encumbered by Freddie Mac's lien.[15]

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[14] This court rejected the argument an HOA sale purchaser had no notice of an Enterprise's interest because the deed of trust was recorded in the name of the Enterprise's servicer: because "Nevada law does not require the deed of trust to name the note owner," the HOA sale purchaser "had notice of the deed of trust and was not a bona fide purchaser." *JPMorgan Chase Bank, N.A. v. Guberland LLC-Series 2*, No. 73196, 2019 WL 2339537, at *2 (Nev. May 31, 2019) (unpublished).

[15] Even if Sunset was a bona fide purchaser, the Federal Foreclosure Bar preempts Nevada law. *Guberland 3*, 2018 WL 3025919, at *2 n.3; *see, Nevada Sandcastles, LLC v. Nationstar Mortg., LLC*, 2019 WL 427327, at *3 (D. Nev. Feb. 4, 2019); *Fannie Mae v. Vegas Prop. Servs., Inc.*, 2018 WL 5300389, at *2 (D. Nev. Oct. 25, 2018).

Third, Sunset testified it reviewed the fraudulent deed in lieu and assignments prior to sale. JA 1186-87, 1198. Despite finding it "a little bit unusual," it made the incorrect assumption that "the mortgage was no longer encumbering the property." JA 1197-98. Sunset ignored the deed in lieu was not signed by NFM, and made no effort to contact anyone about the deed in lieu's import. JA 1188-90. Had it completed even a barebones investigation, it would have discovered NFM did not exist in 2008, having merged with another entity. JA 659, 818, 1456.

Fourth, Sunset admits it did not know what it was buying. All it knew was that it would not be able to obtain title insurance on the property and that it was purchasing a lawsuit. JA 1180-82.

Fifth, Sunset purchased the property "without covenant or warranty" and knew it was purchasing a warrantless interest before the sale. JA 1431.

Sixth, there were only 2 bidders at the sale and Sunset obtained the property at an 88% discount. JA 1182, 1325, 1350-51, 1753. Sunset should have known that bidding would be impacted by a Saturday sale.

Seventh, Sunset knew F100 "sales were slightly different than other sales from other foreclosing agents." JA 1184. Sunset explained it would bid and [someone from F100] would bid against me up to a certain amount, and then they would stop." JA 1184, 1199-1200. It further explained F100 sales were different

because opening bidding started at $99, which was below the lien amount. JA 1185. Considering F100 sales were different than other NRS 116 sales, it should have sparked Sunset to investigate why bidding started so low and why the foreclosing agent was bidding against him.

Lastly, Sunset is managed by sophisticated investors. JA 436. Jay Lefkowitz testified he purchased approximately 75 properties at NRS 116 sales. JA 1175-77, 1179; see JA 85 (Lefkowitz was a "regular" at ULS sales). This court gives substantial weight to a purchaser's real estate investment experience when determining whether a purchaser is a BFP. *Resources Grp.*, 444 P.3d at 449. Sunset purchased the property at its own peril and cannot be deemed a BFP. *Resources Grp, LLC v. Nevada Ass'n Servs.*, 135 Nev. 48, 53, 347 P.3d 154, 159 (2019) ("[o]ne who bids upon property at a foreclosure sale does so at his peril")).

VI. F100 DID NOT FORECLOSE ON THE SUPERPRIORITY LIEN

This court is familiar with the F100 factoring agreement: F100 and the HOA intentionally split assessment debt from the lien securing that debt. But what happens in a situation, like here, where the debt is wiped out before the sale?

F100's sale was invalid to the extent it foreclosed a superpriority lien because of the way the factoring agreement was implemented: the superpriority portion of the lien was satisfied prior to the foreclosure and Tablante was no longer indebted to the HOA. Consequently, there was no superpriority lien to enforce.

The district court refused to consider Nationstar's *Edelstein* argument in light of *W*-S. But *W-S* should not be dispositive here—that case was decided on a sparse record, without the benefit of a trial on the merits. While this court correctly recognized that "Nationstar accurately analogize[d] the HOA's superpriority lien to a deed of trust," this court did not have the full picture when considering the circumstances surrounding the factoring agreement with *Edelstein*'s transfer of a promissory note. 134 Nev. at 356-57, 420 P.3d at 1036-37.

This court stated: "[u]nlike the transfer of a promissory note, the factoring agreement did not affect the relationship between debtor and lender. That is, [Tablante] remained indebted to the HOA . . . and the HOA retained the exclusive right to collect that debt." *Id.* at 357, 420 P.3d at 1037. This is not true, at least as applied here. As the HOA testified, Tablante was not indebted to the HOA because the HOA wrote off the remaining debt before the sale. JA 1218-19, 1221 ("the homeowner's debt was wipe[d] out . . .by F100"). The HOA did not "continue its collection efforts on the past-due assessments" as this court assumed happened. *Id.* at 357, 420 P.3d at 1037. Like the transfer of a promissory note in *Edelstein*, the factoring agreement and the application of that agreement affected First 100's right to foreclose on the superpriority portion of the HOA's lien.

Even if "the factoring agreement oblige[d] the HOA, through its agent to continue its collection efforts on the past-due assessments," that is not what

occurred. The HOA severed its lien from the cancelled debt and, thus, F100 who assumed the risk of loss, lost any standing it had foreclose on the superpriority lien. The two will ***never*** be reunified because the HOA wiped out Tablante's debt prior to the sale. *Edelstein* applies under these facts.

VII. F100 PAID THE SUPERPRIORITY AMOUNT BEFORE THE SALE

Others besides financial institutions may tender. *State Schools Credit Union v. Oella Ridge Trust*, No. 76382, 2019 WL 3061742 (Nev. July 11, 2019) (***Oella***) (unpublished); *Deutsche Bank National Tr. v. Vegas Property Servs., Inc.*, No. 74139, 2019 WL 1932124 (Nev. April 29, 2019) (***VPS)*** (unpublished); *Golden Hill*, 2017 WL 6597154. When a person or entity tenders the superpriority portion of the HOA's lien, the investor purchases the property subject to the deed of trust. *Golden Hill*, 2017 WL 6597154 at *1; *see Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121. The district court erred in finding that no entity, including F100, paid the superpriority portion of the HOA's lien. JA 1753.

A. Others Besides Financial Institutions May Tender

In *Golden Hill*, this court confirmed that anyone, even a homeowner, may tender so long as the HOA applied the tender payment to the superpriority component of the homeowner's outstanding balance. 2017 WL 6597154 at *1. This court recognized on rehearing that that while the UCIOA presupposed a lender satisfying the superpriority lien, nothing in the UCIOA prohibits others

from doing so. The *en banc* court denied reconsideration. This court recognized homeowner tender two more times after *Golden Hill*. *VPS*, 2019 WL 1932124, at *1; *Oella*, 2019 WL 3061742 at *1. Although these cases involve homeowner tender, they apply equally to any tender involving a person or entity who is not a financial institution.

B. The Superpriority Lien is $1,476, the Same Amount F100 Paid

The maximum superpriority lien granted by NRS 116.3116(2) is nine months of common expense assessments before foreclosure. *Horizon at Seven Hills Homeowners Ass'n, Inc. v. Ikon Holdings, LLC*, 132 Nev. 362, 371, 373 P.3d 66, 72 (2016). The maximum superpriority amount is $1,476 since the monthly assessment rate was $164. JA 1241, 1474-77, 1641-42.

The factoring agreement required F100 to pay $1,476 to the HOA before the sale. JA 1548, 1599, 1752 ("[t]he Agreement required First to pay the HOA $1,476"). F100 was giving "money up front" to the HOA just like BANA would have done if it received notice. JA 1183.

F100 marketed to HOAs that it would pay them nine months' worth of assessments before the sale. ULS testified F100 sold the HOA on the following: "we just pay you ***right now*** for nine months' worth of assessments and plus collections costs." JA 1352. According to the HOA, "F100 came around to [the HOA], explained that they will buy the debt from us, *pay the super lien, which is*

nine months . . . and they would also pay whatever our collections costs for Red Rock was if we would sign off and let them do the collection on these." JA 1213-15 (emphasis added).

The HOA further testified it "got nine months superpriority" and then the HOA board voted to write off the remainder of the outstanding assessments. JA 1218-19 ("F100 took care of [the superpriority amount]"), 1226-27. Tablante no longer owed a superpriority amount after F100 paid the HOA. JA 1219. There is undisputed evidence the HOA applied F100's payments to the superpriority portion of Tablante's outstanding balance. JA 1218-19, 1226-27. The district court erred in not applying *Golden Hill* to the facts of this case.

C. Public Policy Supports Payment to the HOA From Any Source

The legislature adopted the non-judicial foreclosure sale statute, NRS 116.3116, so homeowner associations would have "cash" to "meet their perpetual upkeep obligations." *W-S*, 134 Nev. at 357, 420 P.3d at 1037. It does not matter where that cash comes from—whether that be a financial institution, a borrower, or an entity like F100.

This court should not adopt an artificial roadblock for persons other than the financial institution and borrower to tender. Doing so would, as this court says, "frustrate [associations'] efforts to attain cash needed to maintain their communities." *Id.*

D. The Foreclosed Lien Had No Superpriority Component

Even if this court rejects the concept of tender from third-parties, the foreclosed lien had no superpriority component at the time of the sale. In other words, F100 lost standing to foreclose on the HOA's superpriority lien because no such lien existed. Like the HOA testified, it wrote off the remaining balance and Tablante no longer owed any money, much less the superpriority amount. JA 1218-19. Because no assessments were due at the time of foreclosure, the sale had no power to affect Freddie Mac's deed of trust. *See Ikon Holdings*, 132 Nev. at 371, 373 P.3d at 72 (a superpriority lien "is limited to an amount equal to the common expense assessments ***due*** **during the nine months** ***before*** **foreclosure**" (emphasis added)).

The sale was also a subpriority sale because ULS treated it as such. ULS remitted the excess proceeds to F100. JA 1341. If the sale extinguished Freddie Mac's deed of trust, Nationstar would have been entitled to proceeds, not F100. *See Bank of Am. v. LVRR*, No. 76914, 2019 WL 6119134 (Nev. Nov. 15, 2019) (unpublished); *see* NRS 116.31164.

VIII. RED ROCK DID NOT PROVIDE STATUTORILY REQUIRED NOTICE AND, EVEN IF IT HAD, RED ROCK WOULD HAVE REJECTED BANA'S TENDER

Red Rock on behalf of the HOA failed to mail the notice of default to BANA. BANA, and now Nationstar, is prejudiced because, like BANA testified,

BANA would have retained outside counsel to tender. JA 1281-83.

This second prong—prejudice—was absent from the parties' 2015 summary judgment briefing, and consequently missing this court's purview when it published *W-S*. Since this court's prior ruling, the court has clarified NRS 116 sales should be declared void, under a substantial compliance analysis, where (1) the deed beneficiary does not receive timely notice, and (2) is prejudiced as a result. *Resources Group,* 444 P.3d at 448.

This court in *W-S* already concluded Red Rock did not mail the notice of default to BANA, satisfying the first prong. *W-S*, 134 Nev. at 353, 420 P.3d at 103. The second prong—prejudice—was highlighted at trial through BANA's testimony, but missing from this court's post-trial order. JA 1366, 1368, 1745-1756. BANA testified Miles Bauer would have tendered the superpriority portion of the HOA's lien pursuant to its regular course of conduct had BANA received Red Rock's notice of default. JA 1281-83.[16] This is unquestionable and verified by the number of tender cases involving Miles Bauer before this court.

Red Rock prejudiced BANA as servicer and deed beneficiary for Freddie Mac. Red Rock consequently prejudiced Nationstar which stepped into BANA's shoes upon the March 2013 assignment. *See Pacific Coast Agr. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1208 (9th Cir. 1975) (an assignee "steps into

[16] The law presumes the ordinary consequences of one's act, and that the regular course of business is followed. *See* NRS 47.250(2) & (18)(c).

the shoes" of an assignor); *Interim Capital LLC v. Herr Law Group, Ltd.*, 2011 WL 7047062, at *6 (D. Nev. Oct. 21, 2011) ("It is well established that an assignee 'stands in the shoes' of the assignor and succeeds to all right of the assignor").

Nationstar is also prejudiced because Red Rock would have rejected BANA's tender which was would have been delivered had BANA received notice. JA 1281. Red Rock recognized this business practice testifying it "already received correspondence from Miles Bauer concerning Red Rock's collection efforts on a large number of other properties that were delinquent on HOA assessments on a number of occasions." JA 1714. In response, Red Rock sent letters back to Miles Bauer explaining deed of trusts are superior to HOA superpriority liens. JA 1344, 1351-52, 1718.

Even if the admitted letter cannot be construed as rejection, Red Rock testified, not once but twice, that it would have rejected Miles Bauer's superpriority tender upon delivery. JA 298, 1715. Rejection is consistent with Red Rock's known policy during the relevant time. S*ee Bank of New York Mellon v. Vegas Prop. Servs. Inc.*, 2019 WL 4168734, at *1 (D. Nev. Aug. 30, 2019); *Wells Fargo Bank, N.A. v. SFR Invs. Pool 1, LLC*, 2019 WL 243646, at *2 (D. Nev. June 12, 2019); *Nationstar Mortg. LLC v. Springs at Spanish Trail Ass'n*, 2019 WL 2250264, at *2 (D. Nev. May 24, 2019).

The sale did not extinguish the deed of trust because it would have been futile for BANA to tender the superpriority portion of the HOA's lien when it knew in advance that Red Rock would have rejected it. *See 7510 Perla Del Mar Ave. Tr. v. Bank of Am.*, 136 Nev. Adv. Op. 6 (Nev. Feb. 27, 2020); 74 Am. Jur. 2d Tender § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted.").

BANA would have tendered the superpriority lien had it received notice. But regardless of whether BANA received notice, tender to Red Rock was futile and therefore excused.

CONCLUSION

Freddie Mac's deed of trust was ***never*** extinguished. This court should reverse or alternatively remand.

DATED this 28th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY 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 this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 13,755 words.

FINALLY, I CERTIFY I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 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.

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

DATED this 28th day of February, 2020.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on February 28, 2020, the foregoing **APPELLANT'S OPENING 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.

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[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[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.

/s/ Carla Llarena
An employee of Akerman LLP