IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE LLC, Appellant, vs. 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

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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

Respondent, WEST SUNSET 2050 TRUST (the "Trust"), is a privately held Trust and there is no publicly traded company that is the trustor, trustee or beneficiary of the Trust. Further, there is no publicly held company that owns 10% or more of the Trust.

In District Court, the Trust was represented by LUIS A. AYON, ESQ., and MARGARET E. SCHMIDT, ESQ., of AYON LAW, PLLC and MAIER

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GUTIERREZ AYON. On appeal, the Trust is represented by LUIS A. AYON, ESQ. and STEVEN H. BURKE, ESQ. of AYON LAW, PLLC.

DATED this 4th day of May, 2020.

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JURISDICTIONAL STATEMENT

Respondent West Sunset 2050 Trust agrees that this Court has jurisdiction under NRAP 3A(b)(1). The District Court entered judgment for West Sunset 2050 Trust on July 17, 2019, declaring Federal Home Loan Mortgage Corporation's ("Freddie Mac") deed of trust extinguished. JA 1745-56. Nationstar appealed on July 22, 2019. JA 1782-84.

INTRODUCTION

Contrary to Nationstar's contention, this case is not about whether federal law preempts state law. This case does not involve tender of any sort. Instead, this case presents a situation whereby a Deed of Lieu of Foreclosure was recorded against the Property nearly two years prior to the sale, and yet no entity associated with the loan or deed of trust disputed the validity of the Deed in Lieu. Under the merger doctrine, at the time of the Association sale there was no deed of trust, rather New Freedom was the title owner who failed to pay the Association lien prior to the sale.

Irrespective of the Deed in Lieu, Nationstar, the recorded beneficiary of the deed of trust at the time of the sale, did nothing to protect the deed of trust despite receiving notice of the Association sale. Additionally, after five years of litigation, an appeal, and a remand, an additional 120-days of discovery post remand, Nationstar, on the eve of trial, and well after the close of discovery, attempted to offer documents purportedly showing Freddie Mac's ownership of the loan. Rightfully so, the District Court rejected these attempts. After a bench trial, the District Court concluded the Association sale was valid, and that the sale extinguished the deed of trust. This Court should affirm.

ISSUES PRESENTED

1) Valid Conveyance – Whether the District Court correctly ruled the Deed in Lieu of Foreclosure was a valid conveyance?
2) Sufficiency of the Evidence - Whether the District Court correctly excluded certain evidence of Freddie Mac's purported ownership and correctly decided to not consider the Federal Foreclosure Bar at trial?
3) Equity – Whether the District Court correctly refused to set the sale aside under *Nationstar Mortgage LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 405 P.3d 641 (2017) and this court should not remand the case 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). The District Court correctly ruled the Trust was a bona fide purchaser.
4) *Edelstein* – Whether the district court correctly refused to consider the factoring agreement under *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286, P.3d 249 (2012).
5) Superpriority Tender – Whether the district correctly ruled there was no pre-sale tender by First 100.

6) Sufficiency of Notice – Whether the district correctly ruled the notice provisions were sufficient. The district court correctly refused to consider a futility of tender argument.

STATEMENT OF FACTS

The property at issue in this case is located at 7255 W. Sunset Road, Unit 2050, Las Vegas, Nevada 89113, APN 176-03-510-102 (hereinafter "Property"). The Property is located within a common-interest community governed by NRS Chapter 116[1] and subject to the declaration of covenants, conditions and restrictions (the "CC&Rs") recorded by Tuscano Homeowner's Association (the "HOA") on April 5, 2005. JA 315-369. The CC&Rs include monthly assessments, which at all relevant times were $164.

On or about November 29, 2005, Stephanie Tablante ("Tablante") purchased the Property through a $176,760 loan from New Freedom Mortgage Company ("the Loan"). JA 1174. A Deed of Trust securing the Loan was recorded on December 7, 2005 and identified Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee-beneficiary. JA 1380-87.

[1] Statutory references of NRS 116.3116 *et. seq*. are made as it existed during the years relevant to this matter.

On March 1, 2011, Tablante transferred the Property to New Freedom Mortgage Company ("New Freedom") in "full satisfaction of all obligations secured by the Deed of Trust" by executing a Deed in Lieu of Foreclosure. JA 1406-18. Despite there being no deed of trust to assign, on or about July 29, 2011, MERS purportedly executed an assignment of the Deed of Trust to BAC Home Loans Servicing, LP ("BANA"). JA 1419-20.

On April 4, 2012, New Freedom as the record owner of the Property, failed to pay HOA Assessments, and as a result, the HOA recorded a Lien for Delinquent Assessments ("Lien"). JA 1237-40, 1253-43, 1691-1703. The Lien complied with NRS Chapter 116 *et seq*. and was mailed to New Freedom, BANA, and Nationstar. *Id*. *See also,* JA 1461. On May 29, 2012, Red Rock Financial Services, on behalf of the HOA, recorded a Notice of Default and Election to Sell ("NOD"), which complied with NRS 116 *et seq*. JA 1426. The evidence at trial established BANA and Nationstar received the NOD. JA 1237-40, 1253-43, 1752.

In or about March, 2013, the HOA contracted with First 100, LLC to sell accounts receivables on a number of liens. JA 718-19, 1183, 1334-35. On March 20, 2013, BANA purportedly assigned its interest, if any, in the Deed of Trust to Nationstar. JA 1282, 1288, 1295, 1428-29. On May 29, 2013, the HOA's agent, United Legal Services, Inc. ("ULS"), on behalf of the HOA, recorded a Notice of Foreclosure Sale ("NOS"), which complied with NRS 116 *et seq*. JA 1431. The

NOS was mailed to Nationstar. JA 1237-40, 1253-43, JA 1752. On June 22, 2013, ULS, on behalf of the HOA conducted a publicly held foreclosure sale on the Property and The Trust was the highest bidder and purchased the Property for $6,900.00. JA 1433-35.

PROCEDURAL BACKGROUND

On November 6, 2013, The Trust initiated this matter by filing a quiet title action against Nationstar and BANA. JA 2-6. In June 2015, the Trust and Nationstar moved for summary judgment. JA 738- 55, 600-737. In February 2016, the District Court granted Nationstar's motion, finding the former homeowner, Tablante unilaterally recorded the Deed in Lieu of Foreclosure, which did not strip Nationstar of its Deed of Trust. JA 813-20. The court also found Red Rock did not provide required notice to BANA, and as a result, the sale did not extinguish the Deed of Trust. JA 818, 820. The Trust appealed. JA 917-35.

In June, 2018, this court reversed and remanded the District Court's judgment in favor of Nationstar. After remand, discovery was re-opened for an additional four months. Nearly five years after The Trust initiated this action, and two months after the close of discovery, Nationstar served supplemental disclosures which purportedly included documents of Freddie Mac's ownership of the loan. JA 1118, 1122. The Trust objected to Nationstar's untimely disclosure. JA 1095-98. Thereafter, the district court denied Nationstar's motion in limine to preadmit the

Freddie Mac ownership documents as untimely. JA 1158, 1275-76, 1754. At trial, the district court properly exercised its discretion in refusing to consider the late disclosed Freddie Mac documents. JA 1278-80.

After a bench trial that began on June 6, 2019 and ended on July 12, 2019, the district court correctly concluded the Deed of Trust was extinguished by the Deed in Lieu of Foreclosure under the merger doctrine, the Deed of Trust was extinguished by the HOA's non-judicial foreclosure sale, and title to the Property is quieted in favor of the Trust. JA 1750, 1755.

SUMMARY OF THE ARGUMENT

No aspect of the District Court's decision should be overturned. The District Court, in a thorough analysis, properly applied the law in issuing its Findings of Fact and Conclusions of Law.

The District Court appropriately ruled the Deed of Trust was extinguished upon recordation of the Deed in Lieu of Foreclosure and New Freedom became the owner of the Property. JA 1743. The District Court also properly ruled irrespective of the deed in lieu, the Deed of Trust was still extinguished by the legally and properly held HOA's non-judicial foreclosure sale. *Id.* The District Court properly excluded Nationstar's late disclosed documents that allegedly evidenced Freddie Mac's ownership of the loan because it was extremely untimely. JA 1742. There is

no evidence of fraud, oppression or unfairness as the HOA complied in all aspects with NRS Chapter 116. JA 1743. Neither is there any other equity or policy reason to reverse the District Court's holding. Lastly, Nationstar and/or BANA was not excused for its failure to submit the superpriority lien amount before the HOA's sale. Thus, the foreclosure sale included the HOA's superpriority lien amount and extinguished all junior liens, including Nationstar's purported interest in the Deed of Trust. Therefore, the Trust purchased the Property and acquired its interest free and clear of Nationstar's alleged interest in the Deed of Trust.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews a district court's findings of fact to see if they are supported by substantial evidence. *See Cty. of Clark v. Sun State Props., Ltd,* 72 P.3d 954, 957 (Nev. 2003); *see In re Estate of Bethurem,* 313 P.3d 237, 242 (Nev. 2013) (explaining findings of facts reviewed for substantial evidence). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Jones v. Sun Trust Mortg., Inc.,* 274 P.3d 762, 764 (Nev. 2012).

"In general, discovery orders are reviewed for an abuse of discretion." *Johnson v. Wells Fargo Bank Nat'l Ass'n*, 132 Nev. ___, 382 P.3d 914, 916 (2016)

citing Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012).

II. THE DISTRICT COURT CORRECTLY RULED THE DEED IN LIEU OF FORECLOSURE EXTINGUISHED THE DEED OF TRUST

A. The Deed in Lieu of Foreclosure was a Valid Conveyance

The District Court correctly determined that New Freedom became both the fee simple owner of the Property and holder of the Deed of Trust by virtue of the Deed in Lieu of Foreclosure, which Deed of Trust was extinguished by way of merger. JA 1755. Nationstar contends, without any evidence, Tablante fraudulently recorded the Deed in Lieu without consent.

In this case, the Deed in Lieu was recorded twice: once identifying the Property by its common address, and a second time correcting the document to identify the Property by its legal description. JA 1406-1417. Upon recordation, the Property transfer tax was paid and the mailing return address was New Freedom. JA 1410, 1417. At no time did New Freedom take any action to correct this supposed fraud. After the recordation of the Deed in Lieu on March 1, 2011, New Freedom became the record owner of the Property, and remained the owner until its interest was divested by the June 24, 2013 Association sale. During this time, all notices of the HOA lien, Notice of Default, and the Notice of Foreclosure were mailed to New Freedom. JA 1237-40, 1253-43, 1461, 1691-1703, 1752. Over its two years as record owner, New Freedom never disputed it had accepted the Deed

in Lieu in full satisfaction of the underlying debt and was the property owner of the Property. Nevertheless, Nationstar claimed an interest in the Property stemming from a void Assignment of Deed of Trust from MERS to BANA in July 29, 2011 and a subsequent void Corporation Assignment of Deed of Trust from BANA to Nationstar on March 20, 2013. At the time of both void assignments, BANA and Nationstar were on notice of New Freedom's ownership of the Property via the prior recorded of the Deed in Lieu.

In an action for quiet title like the action brought by Nationstar herein, the court must determine who holds superior title to real property. *McKnight Family LLP v. Adept Mgmt. Servs*., 310 P.3d 555, 559 (Nev. 2013). When considering a quiet title claim, the record title is presumed valid. *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996); *see also Biasi v. Leavitt*, 101 Nev. 86, 90, 692 P.2d 1301, 1304 (1985) (referring to the "presumption that possession of the land is under the regular title"). Here, the Deed in Lieu extinguished the interests of Tablante and New Freedom as lienholder and thus, neither BANA nor Nationstar were assigned anything. The HOA foreclosure sale thereafter extinguished the ownership interest of New Freedom. As such, the Trust is the record title holder and its title is presumed valid and superior to Nationstar. As such, the District Court correctly ruled the Deed of Trust was extinguished by the Deed in Lieu under the Merger Doctrine.

In the first appeal in this case, although the parties disputed at length regarding the validity of the Deed in Lieu, this Court refrained from settling this issue because its resolution did not affect the outcome of reversing Nationstar's judgment based on the notice issue. At trial in this matter, The Trust's 30(b)(6) witness, Jacob Lefkowitz was asked many questions about the validity of the Deed in Lieu on direct and cross-examination, in which he testified that the Trust paid more for the Property knowing that it was a fairly good chance that the mortgage was no longer encumbering the Property as a result of the Deed in Lieu. JA 1197-1198.

Also, during trial in this matter, Nationstar's 30(b)(6) witness, Aaryn Richardson testified about a letter that Nationstar's counsel, Cooper Castle sent to John Peter Lee, Esq. regarding the recordation of the Deed in Lieu, which evidences that Nationstar was aware of the Deed in Lieu at least as early as December, 2013. JA1307-1310, JA1639. If Nationstar believed that the Deed in Lieu was fraudulent as it asserts herein, then why did it inquire about its validity from another attorney? Although Nationstar contends that it did not accept the Deed in Lieu, it admits the Deed in Lieu was recorded and they had notice of it, along with the Cooper Castle letter, which was contained in their system of record, FileNet. *Id*.

As such, in its findings, the District Court correctly ruled the Trust holds superior title because the Deed in Lieu extinguished the interests of Tablante and

New Freedom under the merger doctrine, which occurs when the fee interest and a charge, such as a deed of trust encumbrance, vest in the possession of one person. JA 1743. Here, by virtue of the Deed in Lieu, New Freedom became both the fee simple owner of the Property and holder of the Deed of Trust. *Id*. As such, the Deed of Trust was extinguished by way of merger. *Id*.

B. The District Court Correctly Reversed its Prior Ruling

The District Court did not exceed its authority in reconsidering the effect of the Deed in Lieu. Nationstar argues: 1) the Trust did not seek rehearing under EDCR 2.24; 2) the Trust did not ask for relief under the district court's judgment under NRCP 60; 3) the Trust did not intend to raise the issue at trial as it is absent from the pretrial memorandum; and 4) the effect of the Deed in Lieu of Foreclosure was never at issue at trial. AOB 34. These procedural arguments are without merit. The court initially ruled the Deed in Lieu did not strip Nationstar of its interest in issuing summary judgment. JA 818-19. However, the Trust timely appealed the summary judgment order and this court reversed and remanded for further proceedings, which resulted in this court properly reversing its prior decision after a bench trial. JA 917-35, 1749-56. As such, all the aforementioned procedural arguments are without merit as the matter was properly appealed, reversed and remanded.

III. THE DISTRICT COURT PROPERLY EXCLUDED DOCUMENTS DISCLOSED LATE BY NATIONSTAR.

The District Court properly exercised its discretion in excluding Nationstar from introducing, at trial, late disclosed documents of Freddie Mac's alleged ownership. JA 1158. Rule 37(c)(1) provides if a party fails to disclose information as required by Rule 16.1, "the party is not allowed to use that information or witness to supply evidence…at trial, unless the failure was substantially justified or is harmless." NRCP 37(c)(1); *see also*, *FCH1, LLC v. Rodriquez*, 130 Nev. ___, 335 P.3d 183, 190 (2014) (finding it an abuse of discretion that lower court allowed expert to testify about documents not disclosed during discovery). This Court has upheld lower courts' decisions to exclude late disclosed or non-disclosed documents regarding alleged GSE ownership. *See Green Tree Servicing, LLC v. SFR Investments Pool 1, LLC*, No. 71248 (Nev. Feb. 17, 2019) (unpublished order of affirmance) ("[w]e are not persuaded that the District Court abused its discretion in declining to consider John Curcio's declaration and supporting documentation purporting to show that Fannie Mae owned the loan in question on the date of the foreclosure sale, as that information was not provided during discovery."); *JPMorgan Chase v. SFR Investments Pool 1, LLC*, No. 76952 (Mar. 2, 2020) (unpublished disposition) (affirming district court's exclusion of documents and printouts from Fannie Mae and JPMorgan Chase purportedly showing Fannie Mae ownership because documents were not disclosed timely). Here, the District Court

properly excluded the late discovery Nationstar sought to admit on the eve of trial and this court should affirm.

Contrary, to Nationstar's contention, the *Young* factors have no application here; the Court did not dismiss any of Nationstar's claims with prejudice. Instead, the District Court precluded Nationstar from using late disclosed documents at trial. Unlike here, the *Young* case dealt with a district court issuing a Rule 37 sanction by way of dismissal with prejudice. *Young v. Johnny Ribeiro Building*, 106 Nev. 88, 92-93, 787 P.2d 777, 780 (1990). Because this Court recognized dismissal with prejudice is a harsh sanction, it set forth various factors by which a court must analyze before imposing such a severe sanction. *Id.* at 780. But these factors do not apply for every sanction. Here, the late disclosure was neither substantially justified nor harmless.

A. There was no Substantial Justification for Nationstar's Late Disclosure

Despite claiming Freddie Mac has owned the loan in question since 2005, Nationstar never once pled 4617(j)(3) a/k/a the Federal Foreclosure Bar in this case or disclosed any documents to this effect prior to the close of discovery. After five years of litigation, which included an appeal to the Nevada Supreme Court, and then an additional four months of discovery, after remand, Nationstar never alleged Freddie Mac owned the loan in question nor did it produce any documents to this effect. Instead, two months after the close of discovery, Nationstar disclosed

documents purportedly proving Freddie Mac's ownership interest. The only justification Nationstar musters is this Court had not yet ruled on the effect of the Federal Foreclosure Bar on an Association foreclosure sale when this case was initiated in 2013. Certainly, this has no bearing on whether a party can bring a claim or produce evidence that may affect the sale. After all, Nationstar is the party who claims the Association sale did not extinguish the deed of trust, thus it was incumbent upon Nationstar to raise every challenge. It did not.

But even so, this excuse falls flat when the timeline of this case is considered. This Court issued its opinion in *Nationstar* (the case that established a servicer can raise 4617(j)(3)) and *Christine View* (the case that established 4617(j)(3) pre-empts NRS 116.3116(2)) in June 2017 and March 2018 respectively. *See Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 396 P.3d 754 (2017); *Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Association*, 417 P.3d 363 (Nev. 2018). In the present case, as late as October 15, 2018, after remand, the parties agreed to 120 more days of discovery, in which Nationstar failed to provide documents evidencing Freddie Mac's ownership of the loan. JA 1064. Then, on February 28, 2019, counsel for Nationstar indicated there was no discovery outstanding and everything was on track. JA 1076. There being no substantial justification, the District Court did not abuse its discretion.

B. The Late Disclosure Was Harmful

Of course, the late disclosure was harmful to The Trust rather than harmless. Because Nationstar never disclosed the documents during discovery, The Trust was deprived of conducting any discovery into the documents. Additionally, because the disclosure was made on the eve of trial, to allow Nationstar to use the documents would have required re-opening discovery and delaying trial. This case had already spanned over five years. To delay any longer because a party simply failed to comply with Rule 16.1 would be harmful, rather than harmless.

In fact, the District Court analyzed the harmfulness under a laches standard. The District Court recognized the failure to disclose was actually five years, not simply two months after the close of discovery. JA 1754. To determine whether a suit is barred by laches, a court must consider two criteria: the diligence of the party against whom the defense is asserted and the prejudice to the party asserting the defense. *Sierra Club v. U.S. Dept. of Transp.*, 245 F.Supp.2d 1109 (D. Nev. 2003). In this case, Nationstar waited over five years because it waited until after the second period of discovery closed to disclose document which should have been available to it since before this suit was initiated in 2013. Nationstar's attempt to completely change the landscape of this case on the eve of trial, if allowed, would have most certainly prejudiced The Trust.

Despite the Court's Order excluding Freddie Mac's ownership documents, Nationstar still attempted to admit certain Freddie Mac ownership documents at trial. JA 1275. During the trial the Court addressed this issue saying "I'm not letting in evidence about the actual owner of the loan because of the late disclosure and the poor conduct on behalf of someone who should have disclosed it many, many years ago." *Id*. Despite clear instructions by the Court, Nationstar continued to question BANA's 30(b)(6) witness, Matthew Labrie, about the ownership of the loan in question. JA 1278-1280.

The District Court properly exercised is discretion in excluding the extremely late-disclosed documents in denying Nationstar's motion in limine to preadmit these documents, and it properly excluded them from being admitted and considered at trial. Nothing in the record indicates the District Court abused its power in excluding these documents and this Court should affirm.

IV. THE DISTRICT COURT PROPERLY DISREGARDED NATIONSTAR'S EQUITY ANALYSIS ARGUMENT

Nationstar failed to establish the price paid by The Trust was grossly inadequate and that the price was brought about by fraud, oppression or unfairness. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 644-45 (Nev. 2017).

A. The Purchase Price Was Adequate

Nationstar argues the purchase price was "inadequate" because it was sold at an 88% discount, but bases this on a fair market comparison. AOB 49. There is no requirement in NRS 116.3116 through 116.31168 that a sale price be equal to fair market. In many similar cases, this Court has already rejected the notion that an HOA has a duty to obtain the highest price it could when conducting an HOA foreclosure sale. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 644-45 (Nev. 2017).

Nationstar's attempt to establish the purported "fair market value" of the property is entirely misplaced. In *BFP v. Resolution Trust Corp*., 512 U.S. 1247 (1994), the United States Supreme Court held that a non-forced sale "fair market value" had no place in the analysis of the reasonableness of a forced sale. The *BFP* Court held that, in a forced sale situation, "fair market value cannot – or at least cannot always – be the benchmark []" used to determine reasonably equivalent value. *Id.* at 537. "[A] reasonably equivalent value" for foreclosed real property is the price in fact received at foreclosure sale. Market value has no place in the consideration, this is so because "market value, as it is commonly understood. . .is the very antithesis of forced-sale value. . ." *Id*. at 537. Nationstar's fair market value argument is irrelevant to this forced-sale context. The Trust paid valuable

consideration, $7,800.00 for a forced sale situation, and Nationstar has not provided any evidence of inadequate forced-sale price.

B. There is No Evidence the Price Paid Was Caused by Any Fraud, Unfairness or Oppression.

But even if the price was inadequate, inadequacy of price alone is not enough to set aside a sale; instead, Nationstar must establish a causal connection between the price paid and the alleged fraud, unfairness, or oppression. *Shadow Canyon*, 405 P.3d at 644-45. As its alleged unfairness, Nationstar claims the alleged lack of mailing the NOD to BANA and alleged lack of mailing the NOS to Nationstar.

With respect to the lack of mailing to BANA, Nationstar does not have standing to raise this argument. *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976). Additionally, just like in *West Sunset*, Nationstar fails to establish how it "was affected–much less injured by defective notice to Bank of America." *See* West Sunset 2050 Trust v. Nationstar Mortgage, LLC, 420 P.3d 1032 (Nev. 2018). By the time Nationstar was assigned the Deed of Trust (March 20, 2013), the NOD had been recorded for nearly a year, thus Nationstar had notice of the NOD by virtue of its recordation. Nevertheless, Nationstar has not and did not establish how the lack of mailing to BANA affected the price paid by The Trust.

Equally unavailing is Nationstar's argument it was not mailed the notice of sale. The evidence at trial showed the notice of sale was indeed mailed to Nationstar, as well as BANA. JA 1237-40, 1253-43, JA 1752. Contrary to

Nationstar's contention, nothing under NRS 116 requires proof of mail receipt. The evidence at trial established the HOA and its agent, ULS, complied with the provisions of NRS §116.3116, *et seq.*, resulting in BANA and Nationstar receiving actual notice of both the notice of default and notice of sale. JA 1237-40, 1253-43, 1461, 1752. As such, BANA and Nationstar had notice of the foreclosure sale and there is no evidence of unfairness.

The next professed unfairness is an April 7, 2010 Red Rock letter that was neither addressed, nor sent to either BANA or Nationstar for this Property. JA 1718. Not surprisingly, the District Court gave no credence to this argument at trial. While the letter appears to be an explanation from Red Rock to Miles Bauer that is agrees with Miles Bauer that the HOA lien is junior to the deed of trust, there is no evidence this letter was ever sent to BANA or Nationstar or that either entity relied on the letter.

If that was not enough, the letter is dated April 7, 2010, but the subject foreclosure spanned between April 4, 2012 and June 22, 2013. One key event took place eight months after the notice of lien was recorded, but six months before the sale occurred. Specifically, on December 12, 2012, the Nevada Real Estate Division of the Department of Business and Industry (NRED), the entity charged with administering Chapter 116 and tasked with issuing "advisory opinions as to the applicability or interpretation of…[a]ny provision of this chapter," issued Advisory

Opinion No. 1301 wherein it opined NRS 116.3116(2) gave an association a true super-priority lien, the foreclosure of which would extinguish all deeds of trust. *See SFR*, 334 P.3d at 416-417.

Despite this, Nationstar did nothing to protect the deed of trust. Moreover, Nationstar presented no evidence it detrimentally relied on Red Rock's mistaken subjective belief about Nevada law, that was only apparently expressed to Miles Bauer. This Court has held, "the mistaken belief by the HOA's foreclosure agent regarding the effect of the foreclosure sale cannot alter the actual legal effect of the sale." *See SFR Investments Pool 1, LLC v. Nationstar Mortgage, LLC*, 451 P.3d 548 (Nev., 2019) (unpublished disposition) citing *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596-97 (2018) (recognizing that a party's subjective belief as to the effect of a foreclosure sale cannot alter the sale's actual effect).

Lastly, Nationstar makes an unfairness argument based on the Property being sold via a First 100 sale, relying on *U.S. Bank, N.A. v. Nevada Sandcastles, LLC.* No. 75341, 2019 WL 4447343, at *2 (Nev. Sept. 16, 2019) (unpublished) ("*Sandcastles*") and *Bank of N.Y. Mellon v. Christopher Cmtys. at S. Highlands Golf Club Homeowners Ass'n* (D. Nev. 2019) ("*Lahrs*"). But Nationstar's attempts to compare this case to the *Lahrs* and *Sandcastles*, are unfounded. In *Lahrs*, unlike here, First 100 was the only bidder at the foreclosure sale, purchasing the property

for $151. Here, there were multiple bidders, and the Trust bid $7,800. JA 1185-1200; JA 1351. Also, Nationstar's contention it was wrongful for ULS to conduct an HOA foreclosure sale on a Saturday, has no basis in law. Nothing under NRS Chapter 116 prohibits sales on Saturday. What is more, ULS's 30(b)(6) witness, Robert Atkinson ("Mr. Atkinson"), testified at trial, it was customary for ULS to conduct sales on Saturday. JA 1344-45. Lastly, although bidding opened at $99 in this case, contrary to Nationstar's argument and failed attempt to compare this case to *Lahrs*, nothing in Mr. Atkinson's testimony indicated this foreclosure sale had a capped bidding like in *Lahrs*. JA 1345-51. Mr. Atkinson even testified that he recorded this particular auction and reviewed the recording just prior to giving testimony, which he said there were at least two bidders and there could have been three. JA 1351.

V. THE TRUST IS A BONA FIDE PURCHASER

The District Court correctly found that the Trust was a bona fide purchaser. JA 1753. While there is no evidence, slight or otherwise, of fraud, unfairness or oppression which affected the sale, even if there were such evidence, this only makes the sale voidable as opposed to void. *Shadow Canyon*, 133 Nev. at 750. As a result, The Trust's bona fide purchaser status is relevant in weighing the equities.

As this Court noted,

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes

> considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood Homeowners Ass'n v. New York Community Bancorp, Inc., 366 P.3d 1105, 1114 (Nev. 2016) citing *Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

This Court further stated that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [the Bank] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." *Shadow Wood,* 366 P.3d at 1114 fn. 7 citing *Cf. Barkley's Appeal. Bentley's Estate*, 2 Monag. 274, 277 (Pa. 1888) ("in the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

In emphasizing "the legal remedies available to prevent the property from being sold to a third party," this Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. *See First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (Cal.Ct.App. 1998) If that party's inaction allows a purchaser to become a bona fide purchaser, then equity cannot be granted to the detriment of the innocent third party. Put another way, equitable relief cannot be granted at the expense of a bona fide purchaser.

Here, The Trust had no notice of the "inequities" Nationstar complains about, and Nationstar took no action to protect itself or avoid a bona fide purchaser from purchasing the Property. Also, Nationstar makes irrelevant unfairness arguments about the way the sale was conducted, which have already been addressed. In weighting the equities, this Court should consider the entirety of the circumstances, taking into consideration that Nationstar did not use legal remedies that were available to them and did nothing to protect the deed of trust, despite receiving the foreclosure notices. As such, this Court should affirm the District Court's judgment that the Trust is a bona fide purchaser.

VI. THIS COURT ALREADY REJECTED NATIONSTAR'S *EDELSTEIN* ANALOGY TO THE FIRST 100 FACTORING AGREEMENT

Nationstar asks this Court to ignore its prior published decision addressing Nationstar's *Edelstein*[2] analogy, but there is no reason for this Court to overturn *West Sunset*.[3] In *West Sunset*, this court concluded that a First 100 factoring agreement did not sever the HOAs superpriority lien from its right to receive payment on the homeowner's underlying debt comprised of past due assessments. *Id.* at 1037. In so doing, this court recognized that a factoring agreement does "not affect the relationship between debtor and lender," or "the HOAs right to foreclose on the property," as "the [p]roperty owner remain[s] indebted to the HOA." *Id.*

Here, the debt and the lien were never split. The HOA had the right to collect assessments, and also held a security interest in the Property to enforce collection. Although the HOA may have sold the right to proceeds from collection to First 100, the HOA did not sell its right to collect. In fact, like the factoring agreement in *West Sunset*, the factoring agreement here obligated the Association to continue collection efforts of the delinquent assessments. JA 1544-49. Additionally, just like in *West Sunset*, the factoring agreement in the present case merely purchases proceeds of receivables. JA 1351-52, 1548. In that regard, the Association retained

[2] *Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 286 P.3d 249 (2012).
[3] *West Sunset,* 420 P.3d 1032.

the right to collect assessments, delinquent or otherwise, and retained the right to foreclose. *Id*.

The holding in *West Sunset* equally applies here, and therefore the District Court's judgment should be affirmed in favor of the Trust.

VII. ANY CONSIDERATION UNDER THE FACTORING AGREEMENT DOES NOT EQUAL PAYMENT OF THE SUPER-PRIORITY PORTION

Nationstar, without any evidence, claims the consideration paid by First 100 for the factoring agreement equates to paying the superpriority portion. But this Court recently rejected this same argument by Nationstar in *SFR Investments Pool 1, LLC v. Nationstar Mortgage, LLC*, 451 P.3d 548 (Nev., 2019) (unpublished disposition).

The District Court correctly determined that the consideration under the Factoring Agreement to the Association did not constitute payment of the super-priority portion of the lien. JA 1742. The District Court found that in March of 2013, the HOA contracted its right to future payment on a number of liens, including the lien in this case, to First 100 pursuant to the Factoring Agreement. JA 1740, 1544-53. The District Court also found that First 100 paid the HOA $1,476 for these rights to future payments. *Id*. First 100 purchased an asset. Specifically, First 100 purchased the right to proceeds from collection on an accounts receivable. JA 1351-52, 1548. It was a factoring agreement, which is "the sale of accounts receivable of a firm to a factor at a discounted price." *In re*

Straightline Invs., Inc., 525 F.3d 870, 876 n.1 (9th Cir. 2008). A factoring agreement accords the seller "to immediate advantages: (1) immediate access to cash; and (2) the factor assumes the risk of loss." *Id.* In this case, payments were for the rights to receive any money that came in and there was never any discussion that the payments were intended to pay the superpriority lien. JA 1251-1352. The payment made for the purchase of the asset did not constitute satisfaction of any portion of the Association's lien, let alone the super-priority portion. To hold otherwise, means that in purchasing the asset, First 100 also satisfied a portion of the very asset it was acquiring, before acquiring it. This is absurd.

The Factoring Agreement itself defies this logic too. Section 2.02 of the Agreement defines First 100's purchase price i.e. consideration, but nowhere in that section does it contemplate or discuss that such payment will be applied to the delinquent assessment account. JA 1554-55. In fact, the only section that discusses application of monies received is the Schedule A attached to the Factoring Agreement, and these deal with monies received via collection efforts. JA 1558-59. Simply put, First 100's purchase price does not constitute a "collection effort." According to the testimony of Mr. Atkinson, the HOA delinquency was purchased as proceeds on past income, or "PPI"; and Mr. Atkinson vehemently disagrees that it is a lien being sold. JA 1334-35.

Additionally, there was no evidence any monies paid by First 100 were ever applied to the Property's delinquent assessment account. JA 1340-43, 1742. In fact, the foreclosure notices are consistent with a showing that no payments were made toward the Property's delinquent assessment account, showing a continually increasing delinquency amount. JA 1423-26, 1430-31. All told, there is no basis in law or fact for Nationstar to conclude that First 100's consideration paid a portion of the super-priority amount, such that the Trust took subject to the deed of trust. As such, this Court should affirm.

VIII NO PERSON OR ENTITY PAID THE SUPER-PRIORITY PORTION OF THE LIEN

Nationstar incorrectly contends the District Court erred in finding that no entity, including First 100, paid the superpriority portion of the HOA's lien. AOB 62, JA 1753. Assuming for the sake of argument, that anyone other than a holder of a first security interest can pay the super-priority portion (a point the Trust does not concede), the Nationstar's conclusion is fraught with error because: (1) the Association did not transfer its lien, let alone the super-priority portion to First 100; and (2) there was no evidence any monies paid by First 100 were applied to the superpriority amount. As such, Nationstar's contention that First 100 could have paid the superpriority amount in this case is flawed.

A. The Association Retained its Lien

The Association did not transfer its lien, let alone the super-priority portion of its lien to First 100. Rather, as part of the factoring agreement the Association retained the lien, the right to collect assessments, and authority to foreclose. JA 1348-53, 1544-46. As such, First 100's consideration cannot constitute a payment of the super-priority portion. This Court has already rejected the notion that by entering into a factoring agreement extinguishes the super-priority portion. *Nationstar Mortgage, LLC v. Kal-Mor-USA, LLC*, 422P.3d 707 (Nev. 2018) (unpublished disposition).

B. The Monies from First 100 Were Not Applied to the Super-Priority Amount

Nationstar wrongfully contends that First 100 paid the superpriority amount and the HOA applied that payment to the superpriority portion of the lien. AOB 63-64. There was no evidence any monies paid by First 100 were ever applied to the superpriority amount of the HOA's lien. JA 1233-36, 1254-55, 1348-53. At Trial, Julia Thompson testified as Red Rock Financial Services' 30(b)(6) witness and conceded that a payment was received from First 100 for collection fees and costs incurred, however she did testify that these monies were applied to the superpriority amount. 1233-36, 1254-55.

Further, First 100's consideration under the factoring agreement did not pay down the delinquent assessment account when no monies paid by First 100 were

credited to the account. Of course this makes complete sense because First 100 was not paying the Association to reduce the debt, but to purchase accounts receivable.

C. First 100's Payment is not analogous to Homeowner Tender

Nationstar makes an inaccurate comparison of First 100's payment in this case to payments made by homeowners, as established in *Golden Hill*, whereas it claims that when a homeowner tenders the superpriority portion of the HOA's lien, the purchase is 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. AOB 62. Nationstar misconstrues this comparison because First 100 only had a right to the proceeds from collection and not a right to collect the proceeds.

Even if Nationstar is permitted to rely upon the payment of First 100 in comparison to homeowner tender, this Court recently held a bank, like Nationstar here, must demonstrate that the payments were *actually applied* to the superpriority component. *Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. Adv. Op. 8, _____P.3d__(Mar. 5, 2020).

Here, even if Nationstar is allowed to use First 100's payment as valid tender, which it is not, Nationstar has not and cannot demonstrate that the HOA was either obligated to, or did in-fact, apply First 100's payments toward its superpriority lien.

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D. The Amount First 100 Paid is Irrelevant

Nationstar contends because First 100 paid $1,476 it somehow equates to paying the superpriority lien. AOB 63. As discussed above, pursuant to the factoring agreement the Association retained the lien, the right to collect assessments, and authority to foreclose. JA 1348-53, 1544-46. Even if the amount First 100 paid equates to the superpriority amount, there is no way the superpriority amount is paid off. Again, Nationstar wrongfully attempts to use *Goldenhill* in claiming First 100's payment paid off the superpriority lien. However, as discussed above, First 100 did not pay off the superpriority lien because it is not a homeowner; and even if it was, the Factoring Agreement did not allow First 100 to pay off the superpriority amount. Nationstar's reference to the HOA's 30(b)(6) witness, Kipp Greengrass' testimony that the HOA applied First 100's payment to the superpriority portion is misplaced. AOB 64. First, Mr. Greengrass testified that First 100's payment came from Red Rock. JA 1218. Second, it doesn't matter if First 100's payment was $1476 and if the HOA applied Red Rock's payment of $1476 to Tablante's balance because, as discussed above, First 100 purchased the delinquency as PPI and the HOA retained the lien, the right to collect assessments, and authority to foreclose. JA 1334-35, 1348-53, 1544-46. As such, the amount First 100 paid is irrelevant.

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E. The HOA and Its Agent Did Not Have a Policy of Rejecting Tender

Nationstar makes a last ditch effort in claiming 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, which they base on the recent Nevada Supreme Court decision *7510 Perla Del Mar Ave. Tr. v. Bank of Am*., 136 Nev. Adv. Op. 6 (Nev. Feb. 27, 2020). The futility of tender argument made by Nationstar was not made at any time during this litigation, so this Court should not consider Nationstar's futility of tender argument now. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

Even if this Court indulges Nationstar's argument, no evidence was ever submitted that indicates Nationstar or BANA submitted or attempted to submit payment. A tender of payment operates to discharge a lien. *Bank of Am., N.A. v. Ferrell St. Tr.*, 46 P.3d 208 (Nev.2018) (citing *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972) (Common-law and statutory liens continue in existence until they are satisfied or terminated by some manner recognized by law. A lien may be lost by …tender of the proper amount of the debt secured by the lien.)). Also, there is no evidence in this case that Red Rock had a policy of rejecting tender, nor is there evidence that Nationstar or BANA relied on the nonexistent policy. As such, Nationstar's futility of tender argument fails.

CONCLUSION

The District Court correctly determined the Deed of Trust was extinguished by the Deed in Lieu of Foreclosure under the Merger Doctrine. Even if this Court deems otherwise, the Deed of Trust was still extinguished by the legally and properly held HOA's non-judicial foreclosure sale. The District Court properly excluded Nationstar's documents that allegedly evidenced Freddie Mac's ownership of the loan because the disclosure of such documents was extremely untimely. There is no evidence of fraud, oppression or unfairness. Neither is there any other equity or policy reason to reverse the District Court's holding. Neither Nationstar nor BANA tendered or was excused from tendering the superpriority amount of the lien before the HOA sale. Thus, the foreclosure sale included the HOA's superpriority lien amount and extinguished all junior liens, including Nationstar's purported interest in the Deed of Trust. Therefore, the Trust purchased the Property and acquired its interest free and clear of Nationstar's alleged interest

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in the Deed of Trust. Accordingly, The District Court's Judgment in favor of the Trust and dismissal of the case should be affirmed.

DATED this 4th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

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

I FURTHER CERTIFY that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and 7487 words.

DATED this 4th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing RESPONDENT'S ANSWERING BRIEF with the Clerk of the Court for the Supreme Court for the State of Nevada by using the appellate CM/ECF system on the 4th day of May, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Coreene Drose
An Employee of Ayon Law, PLLC