IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE LLC,

Appellant,

v.

WEST SUNSET 2050 TRUST,

Respondent.

Electronically Filed
Sep 02 2020 06:33 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

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 REPLY BRIEF

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000

Attorneys for Appellant

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REPLY STATEMENT

Sunset concedes in its jurisdictional statement that Freddie Mac owns the deed of trust. The only evidence of ownership admitted at trial established Freddie Mac owned the deed of trust. The Federal Foreclosure Bar protected Freddie Mac's deed of trust from extinguishment. The district court abused its discretion in precluding the Federal Foreclosure Bar based on Nationstar's non-disclosure of *some* evidence of Freddie Mac's ownership, an error compounded by its failure to conduct a proper NRCP 37 analysis. The district court also erred in: determining Freddie Mac's deed of trust was reconveyed in a deed in lieu of foreclosure *before* the sale; not conducting an equity analysis; and disregarding how the HOA applied F100's payments to the superpriority lien. This court should reverse.

ARGUMENT

I. THE DEED IN LIEU WAS FRAUDULENTLY CONVEYED WITHOUT CONSENT

Years before the trial, the district court concluded on summary judgment that Ms. Tablante unilaterally recorded a false deed in lieu in favor of New Freedom Mortgage Corporation (**NFM**). Yet, the district court—in its post-trial, counsel-drafted order—found the deed in lieu reconveyed the deed of trust and that NFM (who was out of business and did not consent to reconveyance) owned the property at the time of sale. Sunset offered no evidence the deed in lieu was valid, nor did Sunset argue the deed in lieu extinguished the deed of trust. Without

notice, the district court reversed itself by simply signing off on the proposed order Sunset's counsel submitted after the trial.

A. The District Court Erred in Reversing Itself After Trial

Sunset offers no factual support for the district court's reversal. None exists. The court abandoned its prior factual determination ***without any*** evidence, and ***without any*** notice to Nationstar. Sunset itself did not even attempt to litigate the deed-in-lieu issue at trial. Had Sunset wished to relitigate the issue, it should have provided notice to Nationstar in its pretrial memorandum, JA 1141-44, or some other medium prior to trial. *See* EDCR 2.67(b)(8). Sunset waived reconsideration of this issue. *Southern Cal. Retail Clerks Union v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984). The district court's self-reversal on this issue after trial and without notice is an ambush in violation of EDCR 2.67. This court should reinstate the district court's original invalidity findings.[1]

B. Sunset Argued the Deed in Lieu Was Not Central to the Case

Not only did Sunset fail to give notice of its intent to submit the deed-in-lieu issue in its proposed post-trial order, it actually denied the issue's relevance. Sunset described the issue as "not central to this case," and told the district court it wasn't "going into that" issue. JA 1197, 1374. This court should reverse because

[1] Nationstar argued in its opening brief that the district court violated its right to due process by affording no notice it would reconsider the effect of the deed in lieu. AOB 35. Sunset failed to address this argument in its answering brief. This court should treat the failure as a confession of error.

Sunset presented the deed-in-lieu issue for the first time after remand in its post-trial proposed order, and now advances an argument in favor of the issue for the first time in its answering brief.[2]

Sunset did not elicit testimony from its manager to support reversal of the district court's original findings. The manager's testimony about the deed in lieu went to Sunset's purported *bona fide* purchaser status, not whether the deed in lieu was valid. JA 1186-90, 1197-98. The manager reviewed the deed in lieu before the sale, and did nothing to verify its validity. *Id.* The manager, a seasoned real estate investor, found the deed in lieu "unusual" because, as he correctly testified, "whoever originated the mortgage [in this case, NFM] was not typically the bank or servicer on the loan." JA 1198. The manager purchased the property with knowledge of the "unusual" deed in lieu and with knowledge litigation would ensue due to the deed of trust on title at the time of sale. JA 1181, 1190-91.

C. The Deed in Lieu Was Not a Valid Conveyance

The district court had ample evidence before it—both at the 2015 summary judgment stage and at the 2019 trial—establishing the deed in lieu was a fraud. ***First***, the district court recognized through the Secretary of State that NFM was out

[2] Sunset had options to overturn the summary judgment order: it could have sought reconsideration again after remand, and/or it could have cross-appealed since the *W-S* opinion declined to address the deed in lieu. *W-S*, 134 Nev. at 354 n.1, 420 P.3d at 1035 n.1. Sunset instead chose to improperly include new findings in the order it submitted to the district court, JA 1751, and now argues about those findings for the first time *post-remand* in its answering brief.

of business when Ms. Tablante's lawyer recorded the deed in lieu. 4 JA 818. ***Second***, the district court honed in on the fact NFM did not sign the deed in lieu. *Id.* ***Third***, there were no documents in the loan file about any financial institution accepting a deed in lieu from Ms. Tablante. JA 1282, 1307-10. ***And fourth***, it is common for lenders to sell loans after origination. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 515, 286 P.3d 249, 256 (2014).

Freddie Mac purchased the loan and deed of trust after NFM originated the loan. JA 1121. It is illogical to think Freddie Mac waived Ms. Tablante's loan obligation and gave the property to NFM free and clear of the deed of trust. *See RH Kids, LLC v. Nationstar Mortg., LLC*, No. 77760, 2020 WL 407053, at *1 n.2 (Nev. Jan. 23, 2020) (unpublished) ("MERS and BAC Home Loans lacked authority to transfer the promissory note [after it had been negotiated to Freddie Mac], and the language in the assignments purporting to do so had no effect").

Sunset failed to prove the validity of the deed in lieu during summary judgment proceedings, and it did not even try to prove it at trial. Sunset had the same burden Nationstar had, *Resources Group, LLC v. Nev. Ass'n Servs.*, 135 Nev. 48, 51, 437 P.3d 154, 158 (2019), and Sunset provided no evidence to support the deed in lieu's validity. Even on appeal, Sunset cannot point to anything besides the fraudulent deed in lieu to support that deed was valid.

Sunset highlights a letter from Nationstar's counsel to Ms. Tablante's counsel inquiring why Ms. Tablante unilaterally recorded the deed in lieu. JA 1639. This letter, which was admitted as evidence at trial, lends further support the deed of lieu was invalid. This letter also illustrates efforts Nationstar took to remove that deed from the record.

D. There is No Evidence Anyone Consented

Borrowers cannot unilaterally record deeds in lieu without consent of the loan owner or servicer. AOB 29-31. Sunset does not point to any evidence that anyone aside from Ms. Tablante consented to the deed in lieu. Nor does Sunset challenge all of the evidence proving lack of consent. The district court's post-trial findings were clearly erroneous because there is no evidence—let alone substantial evidence—that the deed of lieu was valid.

E. The Merger Doctrine is Not Applicable

Sunset fails to establish that the merger doctrine operates to extinguish Freddie Mac's deed of trust. "Whether a merger has occurred depends on the intent of the parties, especially the one in whom the interests unite." *Aladdin Heating Corp. v. Trustees of Central States*, 93 Nev. 257, 261, 563 P.2d 82, 85 (1977). "If the merger is not in the best interest of that party, no merger will be found." *Roy v. Luschar*, 108 Nev. 567, 571, 835 P.2d 807, 810 (1992); *see Jensen v. Miller*, 570 P.2d 375, 378 (Or. 1977) ("The doctrine of merger should operate only where it is

reasonable to assume that the parties contemplated the extinction of their contractual rights and duties upon the execution of the deed" (quotations omitted)).

NFM was out of business so it could not have intended to obtain title. Placing title into the name of a defunct entity is not in that entity's best interest, nor is it in the best interest of the property. There is no logical reason why Freddie Mac would give title to the defunct originating lender. Had Freddie Mac or its then-servicer consented, the property would have been titled in Freddie Mac's name, not a defunct entity like NFM. There was no intent for a merger to take place, and no intent can reasonably be implied from the deed in lieu itself.

Even if the merger doctrine applied, this court should apply the fraud exception because Ms. Tablante fraudulently recorded the deed in lieu purporting to extinguish a $176,760 loan without any consent. 26A C.J.S. Deeds § 224 (2020) ("The merger doctrine applies to deeds only in the absence of fraud, accident, or mistake"); *see GXG, Inc. v. Texacal Oil & Gas*, 977 S.W.2d 403, 416 (Tex. Ct. App. 1998) ("The doctrine of merger is inapplicable where there is an allegation of fraud, mistake, or accident, or an ambiguity in the contract.").[3]

[3] The merger doctrine is disfavored. *See, e.g., Abi-Najm v. Concord Condominium, LLC*, 699 S.E.2d 483, 487 (Va. 2010); *In Re Trustee's Sale of Real Property of Ball*, 319 P.3d 844, 847 (Wash. Ct. App. 2014); Restatement (Third) of Property: Mortgages § 8.5 cmt. a (1997) ("the central role of intent in the application of merger is incompatible with the recording acts. Courts normally will not apply merger to eliminate a recorded mortgage lien because intent cannot be determined from the property records.").

This court should decline to consider the merger doctrine because Sunset did not raise it at trial, or any time after the remand. The district court correctly concluded at summary judgment that Ms. Tablante unilaterally recorded the deed in lieu, and that the deed in lieu did not extinguish the deed of trust. The district court had no basis to reverse itself *sua sponte* after a trial that did not adjudicate the deed-in-lieu issue.

II. FREDDIE MAC OWNED THE LOAN AT THE TIME OF THE SALE AND CONTINUES TO OWN THE LOAN TODAY

The district court denied Nationstar's motion to admit late-disclosed documents evidencing Freddie Mac's ownership. At trial, the court expanded this evidentiary ruling into a broader sanction precluding Nationstar from raising the Federal Foreclosure Bar despite independent evidence establishing Freddie Mac's ownership. The court failed to conduct a proper NRCP 37 analysis and admitted it knew who owned the loan, much like Sunset does on appeal. The district court should have held the Federal Foreclosure Bar protected the deed of trust.

A. There is No Dispute Freddie Mac Owns the Loan

Sunset fails to address the substantial evidence and testimony in the record proving Freddie Mac's ownership, including the welcome letters, the deed of trust, and testimony from BANA and Nationstar. JA 1263, 1277-78, 1298, 1386, 1402, 1720-23, 1298. Nor does Sunset present contrary evidence.

B. The District Court Failed to Conduct a *Young* Analysis

The district court did not address the *Young* factors or conduct any analysis in precluding "everything Freddie Mac." These factors must be considered in determining whether discovery sanctions are warranted. *See Valley Health System, LLC v. Doe*, 134 Nev. 634, 641, 427 P.3d 1021, 1028 (2018).

Sunset fails to explain why the *Young* factors are irrelevant to the sanction in this case. The sanction was outcome-determinative because the district court went beyond precluding use of the undisclosed documents—it forbade Nationstar from raising the Federal Foreclosure Bar as a defense. JA 1754. This penalty was disproportionate to Nationstar's conduct: inadvertent untimely disclosure of *some* (but not all) of the probative evidence. By taking the entire defense out of play, the district court allowed Sunset to win a case it should have lost. This sanction violated "[t]he basic underlying policy to have each case decided upon its merits." *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

Even assuming the district court did not need to analyze the *Young* factors, it needed to provide some basis besides timeliness for preventing Nationstar from raising the Federal Foreclosure Bar. A two-and-a-half line rationale in a post-trial footnote, JA 1754, is not sufficient.[4]

[4] The district court did not issue a written order detailing the sanctions imposed before trial. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (recognizing oral orders are ineffective for any purpose).

C. The District Court Did Not Address Substantial Justification or Harmlessness

Under NRCP 37(c)(1), discovery sanctions are warranted for failure to comply with discovery obligations ***unless*** the delayed disclosures are substantially justified or harmless. There is no evidence in the record from which this court could confidently infer that the district court based its sanction pursuant to an NRCP 37 analysis. *See SFR Invs. Pool 1, LLC v. Nationstar Mortg., LLC,* No. 75890, 2019 WL 5490994, at *1 (Nev. Oct. 24, 2019) (unpublished). The order itself does not cite the rule, and the district court did not address substantial justification or harmlessness. JA 1754.

Rather than justify the district court's NRCP 37 analysis, Sunset provides its own take—for the first time on appeal. Sunset failed to address NRCP 37 in its opposition to Nationstar's motion *in limine* and even argued NRCP 37 was not applicable. JA 1150. This court should disregard Sunset's new NRCP 37 analysis.

To the extent this court considers substantial justification and harmlessness for the first time on appeal, Nationstar directs this court to pages 41 through 44 of its opening brief, and urges this court to apply the same rationale it applied in *Fort Apache Homes v. JPMorgan Chase Bank*, No. 72257, 2019 WL 4390833, at *1 (Nev. Sept. 12, 2019), and *SFR Invs. Pool 1 v. Green Tree Servicing*, No. 71176, 2018 WL 6829002, at *1 n.1 (Nev. Dec. 27, 2018) (both unpublished). As in those cases, Nationstar untimely disclosed evidence of Freddie Mac's ownership.

Although Nationstar did so by two months, Sunset had reasonable notice and an opportunity to respond. Sunset could have requested a brief trial continuance if it believed additional discovery would lead to evidence supporting the lack of ownership. A brief continuance would have given Sunset an opportunity to depose Freddie Mac or send written discovery tailored to enterprise ownership—discovery Sunset failed to conduct before and after the first appeal. A brief delay was well within the 3 years the parties had to bring the case to trial, *see* NRCP 41(e)(4)(B), and would have allowed an adjudication of the merits.

Any prejudice claimed by Sunset is illusory; being deprived of a fortuitous escape from the Federal Foreclosure Bar is not prejudice. Nor did Sunset establish especially strong circumstances to apply laches. AOB 44-46.

D. This Case Was Decided At Trial, Not Summary Judgment

This case was not decided on summary judgment. Rather, it was decided after a motion *in limine* and a trial with sufficient testimony and evidence of Freddie Mae's ownership. *Compare JPMorgan Chase Bank v. SFR Invs. Pool 1, LLC*, No. 76952, 2020 WL 1031256, at *1 (Nev. March 2, 2020) (unpublished). In *JPMorgan*, the HOA-sale investor took affirmative action—as opposed to Sunset here—by filing a motion to strike evidence of Fannie Mae's ownership, including printouts from Fannie Mae and JPMorgan's databases that were not disclosed during discovery. 2020 WL 1031256, at *1. The district court ultimately struck

this "pivotal and dispositive" evidence at the summary judgment phase, but not before conducting a NRCP 37 analysis. *Id.* This court affirmed in a 2-1 decision that is pending reconsideration. *Id.* at *1-2.

The evidence in *JPMorgan* is the same sort of evidence Nationstar sought to admit at trial through its motion *in limine*. JA 1122-23. But here, the district court failed to conduct a NRCP 37 analysis, which is reversible error given the evidence is "pivotal and dispositive" to the case's disposition. Even if this court were to assume the district court correctly suppressed certain Freddie Mac ownership documents, the district court allowed other evidence that was sufficient to demonstrate Freddie Mac's interest in the deed of trust. This court has concluded evidence similar to what the district court admitted was sufficient to establish Freddie Mac owned the subject loan. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 234-35, 445 P.3d 846, 850-51 (2019). The district court had sufficient evidence to rule in Nationstar's favor based on the Federal Foreclosure Bar. Given the absence of contrary evidence, this court should reverse with instruction to enter judgment in Nationstar's favor.

III. THE DISTRICT COURT FAILED TO CONDUCT AN EQUITY ANALYSIS

Sunset concedes the district court did not conduct an equity analysis. For this reason alone, this court should remand for further proceedings. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, No. 71332, 2017 WL 6543883, at * 1 (Nev.

Dec. 20, 2017) (unpublished) (vacating judgment because district court failed to address "entirety of the circumstances that bear upon the equities"). To the extent this court reaches the equities in the first instance, it should conclude the purchase price was inadequate and the sale was unfair just as it has in recent F100 cases.

A. The Purchase Price Was Not Adequate

The fair market value was $63,280, but Sunset paid $7,800—less than the amount allegedly owed to the HOA. JA 1433-35, 1753. This court has long used a property's fair market value to ascertain whether the inadequacy of the price is great. *Bank of Am., N.A. v. Resources Group, LLC*, 135 Nev. 199, 206, 444 P.3d 442, 449 (2019); *Golden v. Tomiyasu*, 79 Nev. 503, 511, 387 P.2d 989, 993 (1963).

Sunset ignores this authority and claims, citing *BFP v. Resolution Tr. Corp.*, 511 U.S. 531 (1994), that its purchase price was adequate. *BFP* does not displace the fair market value standard; it does not apply outside of federal bankruptcy:

> This case presents the question whether the consideration received from a noncollusive, real estate mortgage foreclosure sale ***conducted in conformance with applicable state law*** conclusively satisfies ***the Bankruptcy Code's requirement*** that transfers by insolvent debtors within one year prior to the filing of a bankruptcy petition be in exchange for a "reasonably equivalent value." 11 U.S.C. § 548(a)(2).

Id. at 533 (emphasis added). By its plain terms, the Supreme Court assumes a sale conducted in conformance with state law (which Nationstar disputes happened here) and then assesses whether such a sale satisfies a specific provision of the federal bankruptcy code. The Court further limited the precedential effect of *BFP*:

"We emphasize that our opinion today covers ***only mortgage*** foreclosures of real estate. The considerations bearing upon other foreclosures and forced sales (to satisfy tax liens, for example) may be different." *Id.* at 537 n.3 (emphasis added). *BFP* does not apply to other forced sales like HOA foreclosures.

B. There is More than Very Slight Evidence of Unfairness

The district court did not have the benefit of two recent F100 cases addressing the unfairness associated with the factoring agreement: *Lahrs Family Trust v. JPMorgan Chase Bank, N.A.*, No. 74059, 2019 WL 4054161, at *2 (Nev. Aug. 27, 2019), and *U.S. Bank N.A. v. Gifford W. Cochran Revocable Living Tr.*, No. 77642, 2020 WL 2521786, at *1-2 (Nev. May 15, 2020) (both unpublished); *see also Wells Fargo Bank, N.A. v. First 100, LLC*, 2019 WL 919585, at *3-4 (D. Nev. Feb. 25, 2019).

In *Lahrs*, this court concluded the association's sale was unfair because (1) the factoring agreement required ULS to set the opening bid at $99, (2) F100 capped bidding, and (3) Red Rock sent a pre-foreclosure letter to the bank stating the association's lien was junior to the deed of trust. 2019 WL 4054161, at *1-2. *Gifford* was nearly identical to *Lahrs*. In *Gifford*, this court concluded the association's sale was unfair because (1) the agreement required the HOA to use F100's preferred foreclosure agent, (2) the agreement capped bidding, (3) there were problems with the notice and the beneficiary did not have actual notice of the

sale, and (4) Red Rock sent a pre-foreclosure letter to the bank explaining the association's lien is junior to the deed of trust. 2020 WL 2521786, at *1.[5]

The same facts are present here. F100's preferred foreclosure agent, ULS, opened bidding at $99, as F100—a bidder, no less—required of it in the factoring agreement. JA 1185, 1191. F100 would stop bidding at the total amount owed and refused to bid higher. JA 1171, 1192-93. Red Rock did not mail the notice of default to BANA, when it was the beneficiary of record of the deed of trust, and there is no evidence Nationstar had actual notice of the sale as was testified by Nationstar at trial. JA 1239, 1303-07, 1314, 1689-90. Red Rock sent the same letter to BANA prior to the sale, giving the impression and lulling BANA into believing that a sale would deliver title subject to the first deed of trust. JA 1338-39, 1342, 1712-1718. These facts, just like the facts in *Lahrs* and *Gifford,* support a conclusion that the sale was unfair with chilled bidding.

1. Nationstar Has Standing to Raise Lack of Mailing to BANA

Sunset argues for the first the first time on appeal that Nationstar's assignee status precludes it from arguing BANA's lack of notice. Sunset waived this argument by not making it in the district court. The argument is also wrong. Assignees stand in the shoes of assignors. *Sweeney v. Hawthorne*, 6 Nev. 129, 131 (1870); *JPMorgan Chase Bank N.A. v. Saticoy Bay, LLC Series 1423 Orange*

[5] F100 ***was not*** the only bidder in *Gifford*. *See* RAB 12 (No. 77642).

Juice, No. 73087, 2019 WL 4390763, at *1 (Nev. Sept. 12, 2019) (unpublished) (citing 6A C.J.S. Assignments § 111 (2019)). Nationstar stepped into BANA's shoes when it was assigned the deed of trust, and has standing to argue the HOA's sale was unfair for failure to give notice to BANA.[6]

2. Red Rock Did Not Mail the Notice of Default to BANA

Sunset claims the HOA, through Red Rock, mailed the notice of default to BANA, but fails to cite any evidence to support the claim. None of the pages Sunset cites establishes Red Rock mailed the notice of default to BANA. Sunset ignores: Red Rock's testimony that it did not mail the notice of default to BANA, BANA's testimony that it did not receive the notice of default, and Nationstar's testimony that the notice of default was not in BANA's loan file. JA 1238-39, 1281, 1285, 1288-89, 1303-04. Sunset also fails to acknowledge there is no evidence in Red Rock's collection file, or anywhere in the record, showing Red Rock mailed the notice of default to BANA. JA 1665-1711.[7]

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[6] Sunset cites *Wiren v. Eide*, 542 F.2d 757, 762 (9th Cir. 1976), but does not explain how the case is even applicable. This case is inapposite since it involves standing to raise due process, a non-issue after this court held non-judicial foreclosures are not subject to due process requirement.

[7] Sunset praises ULS for mailing the notice of sale to BANA. But the deed of trust was assigned to Nationstar two months earlier in March 2013. JA 1428-29. Sunset cites no authority that a former beneficiary of a deed of trust must forward a new beneficiary statutorily-required notices. That is because no law exists. There is no such obligation, nor would there be one because the law presumes the current beneficiary of record will receive notice.

3. Nationstar Did Not Have Actual Notice of the Sale

Nationstar concedes it had constructive notice of the notice of default when BANA assigned the deed of trust to it. But even if Nationstar had constructive notice of the notice of default, this does not mean Nationstar was aware of the notice of sale or the sale itself.

The notice of sale is a separate document that outlines when the sale is to occur. *Compare* NRS 116.31163, *with* NRS 116.311635. Deed of trust beneficiaries like Nationstar are supposed to receive a notice of sale before a sale, which did not happen here. *See SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, 134 Nev. 483, 484, 422 P.3d 1248, 1249 (2018). Even if a notice of default was recorded, this does not mean a sale is imminent. Notices of default are often rescinded and are meaningless without a subsequent notice of sale.

Even if this court were to assume the notice of sale was mailed to Nationstar, there is no evidence Nationstar received that notice from any source. Nationstar had no actual notice of the sale. JA 1304-05. Nationstar testified at trial that it was unaware of the sale until after it occurred. JA 1303-05, 1317. 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). Sunset does not address these issues either, conceding them.

There is no substantial evidence ULS mailed the notice of sale to Nationstar, and even if there was, the fact Nationstar did not receive the notice, together with the lack of notice to BANA, is evidence of unfairness.

4. Red Rock Sent Its Stock Comfort Letter to BANA

Sunset concedes the district court did not consider the Red Rock comfort letter. This court on numerous occasions has recognized the Red Rock letter as a factor of unfairness. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 749 n.11, 405 P.3d 641, 648 n.11 (2017); *San Florentine Ave. Tr. v. JP Morgan Mortg. Acquisition Corp.*, No. 73684, 2018 WL 4697260, at *1 (Nev. Sept. 28, 2018) (unpublished). The letter was at issue in *Lahrs* and *Gifford*, and the result was the same. 2019 WL 4054161, at *2; 2020 WL 2521786, at *1.

The Red Rock letter is present in this case too. JA 1718. Red Rock mailed the letter to Miles Bauer, who served as counsel for BANA. JA 1248. The letter was accompanied by a declaration from Red Rock's corporate representative who explained, between 2010 and 2012, that it mailed a number of form letters to Miles Bauer, whom it knew represented BANA, explaining its position: that the HOA's superpriority lien is junior to the deed of trust. JA 1713-18, *see* JA 1242-46. To say Red Rock did not mail the letter is incorrect and contradicts the record.

For the first time on appeal, Sunset argues the Red Rock letter is inconsequential because of the NRED advisory opinion. This court should not consider this argument, but in the event it does, Sunset does not show Red Rock changed its mind about the legal effect of superpriority liens even after the NRED advisory opinion. There is no evidence Red Rock informed BANA about any change. After the advisory opinion, Red Rock continued with sales—subsequent to rejecting BANA's superpriority tenders—proving the opinion did not change its mind. *See Wells Fargo Bank, N.A. v. SFR Invs. Pool 1, LLC,* 2019 WL 2453646, 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).

5. Saturday Sales are Inherently Unfair

Conducting real property sales on Saturdays, without advertising them, is a means to intentionally chill bidding. AOB 56-57. Although Saturday sales are not statutorily prohibited, this does not mean the sale date is not a factor in the equitable analysis. *See Ayres v. Chicago & N.W.R. Co.*, 43 N.W. 1122, 1122 (Wisc. 1889) (expressing why sales on Saturdays are unfair: "it is ordinarily not a good market day"). This is especially true where only two people were bidding at F100's sale—F100 itself and Sunset.[8] One non-collusive bidder at a sale fetching just $7,800 cannot constitute competitive bidding—especially where the other

[8] Sunset did not address the fact F100 bid on the property at its very own sale. Nor can it reasonably argue this fact does not promote unfairness.

bidder purports to own the debt and instructed ULS to open bidding at $99.

Bidding was capped at F100's sales because F100 refused to bid any higher than the amount owed. JA 1171, 1192-93. Sunset's winning bid was $7,800 and the total owed was $7,806. JA 1431, 1433-35. Making matters worse, Sunset was aware that F100 capped its bidding at Saturday sales. JA 1184. The lack of competitive bidding at an artificially capped sale, coupled with an inadequate sale price that financially benefits Sunset, suggests the unfairness chilled bidding on the property. *See U.S. Bank N.A. v. Nev. Sandcastles, LLC,* No. 75341, 2019 WL 4447343, at *2 (Nev. Sept. 16, 2019) (unpublished) (potential irregularities rising to unfairness include: "selling property in a manner that prevents it from selling for full value", "preventing bidders from attending the auction", and "collusive conduct benefitting the purchaser").

C. The District Court Did Not Conduct a BFP Analysis

Sunset concedes the district court found it was a BFP without any legal analysis or factual support. Sunset fails to address the circumstances presented in Nationstar's opening brief establishing Sunset is not a BFP. AOB 57-60. Citing case authority from other jurisdictions is not enough for Sunset to meet its BFP burden. *See Berge v. Fredericks,* 95 Nev. 183, 187, 591 P.2d 246, 248 (1979).

Under Nevada's recording statute, purchasers "with notice, actual or constructive, of an interest in the land superior to that which he is purchasing is not

a purchaser in good faith." *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 499, 471 P.2d 666, 669 (1970). Sunset was on constructive notice of the deed of trust, as well as the fraudulent deed in lieu, and obtained a warrantless foreclosure deed at an 88% discount. JA 1186-87, 1198. It knew it was also purchasing a quiet title lawsuit. JA 1431. Sunset is not an ill-informed investor, nor is it an innocent third-party purchaser. This court should conclude Sunset did not occupy BFP status or alternatively vacate the district court's conclusory finding.

IV. F100 PAID THE SUPERPRIORITY AMOUNT BEFORE THE SALE

This court recently confirmed that NRS 116 does not limit who can satisfy the default on the superpriority portion of a lien. *9352 Cranesbill Tr. v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020). Whether an entity's payments satisfy a superpriority default depends upon the actions and intent of that entity and the HOA and, if those cannot be determined, upon the district court's assessment of justice and equity. *Id.* at 80, 459 P.3d at 231-32.

This court should conclude F100 satisfied the default on the HOA's superpriority lien based on the HOA's trial testimony. *See Am. River Lane Tr. v. CitiMortgage, Inc.*, No. 79100, 2020 WL 3469176 (Nev. June 24, 2020);*7813 Milkweed Ct. Tr. v. Wells Fargo Bank, N.A.*, No. 79270, 2020 WL 2521794 (Nev. May 15, 2020); *River Glider Ave. Tr. v. Nationstar Mortg., LLC*, No. 76683, 2020 WL 2527426 (Nev. May 15, 2020) (all unpublished).

A. This Case Mirrors *Post-Cranesbill* Decisions

This court in *Milkweed* concluded, based on testimony from an association, that the association applied the payments in a manner that cured the superpriority default. 2020 WL 2521794, at *1. The court concluded the same in *American River* and *River Glider* having reviewed testimony of the association's collection agent. 2020 WL 3469176, at *1, 2020 WL 2527426, at *1. Here, the HOA testified that "F100 came around to [the HOA], explained that they will buy the debt from us, *pay the super lien, which is nine months* . . . ." 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, 1226-27. This testimony leaves no question the HOA intended F100's payment to satisfy the superpriority debt. And to the extent a question lingers, this court should remand for the district court to address *Cranesbill*'s equity factor.

B. There is No Evidence Refuting the HOA's Testimony

The notice of sale does not conflict with the HOA's testimony. It contains a snapshot of how much was owed at that time (May 29, 2013), not how much was owed on the sale date (June 22, 2013). JA 1431. This left approximately three weeks for the HOA to close the account prior to the foreclosure. Sunset cites no evidence to contradict the HOA because there is none. Sunset misstates the HOA's

testimony by claiming the pre-sale superpriority payment came from Red Rock. The HOA clarified earlier testimony by stating "that after [the HOA] received the payment from First 100 for the nine months at that point the association wrote off the rest and basically closed the account, starting with zero." JA 1226-27.

C. The HOA Applied F100's Payment and Nobody Objected

Even if F100 had no intention of paying the HOA's superpriority lien before the June 2013 sale, that is how the HOA through its board applied the payment and, as conceded by Sunset, there is no evidence F100 communicated any intent to the HOA. JA 1153. F100's communication to the HOA was quite the opposite. AOB 63-64 (F100's marketing pitch), JA 1548 (F100's offer to pay nine-months of assessments). This court nor the district court can retroactively change the application of the HOA's payment at the request of a third-party like Sunset, especially where no entity involved in the payment objected at that time.

Courts have long recognized that a party must object at the time of the tender or the objections are waived. *See Hossom v. City of Long Beach*, 189 P.2d 787, 791 (Cal. App. 1948) ("the creditor is required to specify his objections to a tender and if he fails to do so he is precluded from objecting afterwards") (internal punctuation omitted). Neither Sunset nor any other entity objected prior to the June 2013 sale, meaning any argument made years later is waived.

D. Nationstar Made a Different F100 Tender Argument in *Kal-Mor*

Nationstar previously contended the factoring agreement itself extinguished the superpriority lien—a much different argument than Nationstar makes here. *SFR Invs. Pool 1, LLC v. Nationstar Mortg., LLC,* No. 75116, 2019 WL 4740103, at *1 (Nev. Sept. 26, 2019) (unpublished). Nationstar does not argue F100's payments to HOAs under the factoring agreement are automatically superpriority tenders. F100 tendered *in this case* because the HOA applied F100's payment in a manner that cured the superpriority component, and wrote off the rest.

E. Sunset Extinguished its Lien and Conducted a Subpriority Sale

Sunset emphasizes the HOA—not F100—retained the superpriority lien. Because the HOA controlled the superpriority lien and had authority to foreclose, it chose how to apply the F100's payments to its own lien prior to the sale regardless of what the factoring agreement said (or did not say). The HOA applied F100's payments to the superpriority portion of the HOA's lien, causing Sunset to purchase the property subject to Freddie Mac's deed of trust.

Even if this court concludes F100's payment is different than those from financial institutions and homeowners, or that the factoring agreement somehow prohibited the tender, the foreclosed lien here had no superpriority component because the HOA accepted payment for it, writing off the balance and closing the

account before the sale. JA 1218-19, 1226-27.[9] Sunset failed to address Nationstar's subpriority argument in its answering brief, *see* AOB 65, and has waived any argument the sale was anything but a subpriority sale.

F. F100 Did Not Foreclosure on the Superpriority Lien

The HOA's sale was a subpriority sale, not because of the factoring agreement, but because of the way the HOA applied F100's payment. The superpriority portion was satisfied prior to the foreclosure and Ms. Tablante was no longer indebted to the HOA. Because of the allocation of F100's payment and the HOA's write-off of the balance, the parties severed the superpriority lien from the debt. These accounting measures affected the relationship between Ms. Tablante and the HOA, and precluded F100's ability to foreclose until the two become unified. *See* AOB 60-62 (citing *Edelstein*).

Nationstar does not ask this court to vacate its *Edelstein* conclusion in *W-S*. Rather, it asks this court to reexamine the *Edelstein* argument with a full trial

[9] Sunset cites no provision in the factoring agreement that would prohibit the HOA's application of payments on a homeowner's account. None of the HOA's pre-sale duties prohibits as much. JA 1528-29. Even if such a provision existed, then F100 assumed the risk of the HOA breaching the agreement—between it, F100, and ULS—by extinguishing the superpriority lien before the sale. Sunset has no standing to challenge the breach or the HOA's application of payments. *See Morelli v. Morelli*, 102 Nev. 326, 328, 720 P.2d 704, 705-06 (1986) (a nonparty to a contract has standing to enforce the contract only when the nonparty is an intended third-party beneficiary); *see also Boesiger v. Desert Appraisals, LLC*, 135 Nev. 192, 197, 444 P.3d 436, 441 (2019) (setting forth the elements to establish third-party beneficiary status).

record and understanding Ms. Tablante did not remain indebted to the HOA because the HOA wrote off the remaining debt before the sale. JA 1218-21. The HOA's testimony was not before the court on summary judgment, meaning it was not considered in this court's *W-S* opinion.

V. IT WOULD HAVE BEEN FUTILE FOR BANA TO TENDER

Red Rock did not mail the notice of default to BANA. As a result, BANA did not follow its regular custom and practice of tendering payment. JA 1281-83. Red Rock would have rejected BANA's tender had BANA received the notice of default. JA 1281. There is ample support in the record establishing Red Rock's rejection policy, including testimony and correspondence from Red Rock.

Red Rock testified it would have rejected BANA's tender. JA 298, 1715. Red Rock responded to tender attempts with letters "explaining" deeds of trust are fully senior to HOA liens and the superpriority component arises *after* a first deed of trust foreclosure. JA 1242-48, 1255-56, 1713-18. The necessary implication of these statements is that Red Rock would not accept a superpriority tender before the first deed of trust was foreclosed. *See U.S. Bank N.A. v. SFR Invs. Pool 1, LLC*, No. 78003, 2020 WL 3003017, at *1 (Nev. June 4, 2020) (unpublished).

The evidence from Red Rock demonstrates Red Rock had a known rejection policy. And if the evidence and testimony were not enough, the overwhelming case authority establishes Red Rock's rejection policy. AOB 67 (citing cases); *see*

Tyrone & In-Ching, LLC v. Deutsche Bank Nat'l Tr. Co., No. 77875, 2020 WL 2529028, at *1 (Nev. May 15, 2020) (unpublished).

The close relationship between this case and other Red Rock cases—all involving HOA foreclosure sales, BANA's tenders, and Red Rock's tender rejections—justifies this court taking judicial notice of Red Rock's scheme to reject superpriority payments. *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1982) (allowing judicial notice of a prior proceeding where the cases are closely related); NRS 47.150.

At the time of trial in summer 2019, neither Nationstar nor the district court had the benefit of *7510 Perla Del Mar Ave Trust. v. Bank of America, N.A.*, 136 Nev. 62, 458 P.3d 348 (2020). And the legal doctrine set forth in *Perla* had previously been argued and rejected. *See, e.g., Nationstar Mortg., LLC v. Melvin Group, LLC*, No. 71028, 2018 WL 3544972 (Nev. July 20, 2018); *Bank of N.Y. Mellon v. SFR Invs. Pool 1, LLC*, No. 68165, 2018 WL 3025963 (Nev. June 15, 2018). Although Nationstar did not previously argue that the obligation to tender was excused, it had no reason to address the issue at trial. Issues surrounding Red Rock's rejection policies were however addressed below.

In the event the record does not establish Red Rock's rejection policy, this court should remand for the district court to analyze futility based on Red Rock's testimony, Red Rock's correspondence, and other evidence supporting Red Rock's

rejection policy.[10] Even if this court does not consider Red Rock's rejection policy as part of a futility analysis, Red Rock's rejection policy combined with BANA's tender practices when it receives notice should be considered as a matter of equity.

VI. SUNSET FAILED TO ADDRESS THE PREJUDICE TO NATIONSTAR

Nationstar argued in its opening brief that it was prejudiced because BANA would have tendered the superpriority amount had Red Rock provided BANA with statutorily-required notice. AOB 65-67. Sunset failed to address this argument in its answering brief, and concedes its validity. This court should conclude Nationstar was prejudiced as part of its notice analysis, not only because BANA would have tendered, but because Nationstar never had actual notice of the sale. AOB 19-20. At the very least, the dual lack of notice should be considered in an equity analysis, along with the myriad of issues associated with F100's sale.

[10] Other evidence would include Red Rock's position in the same arbitration at issue in *U.S. Bank v. SFR*, 2020 WL 3003017, at *1. Leach Johnson wrote on behalf of Red Rock in that arbitration, who like NAS, believed the superpriority component of an HOA's lien came into existence until after the first deed of trust was foreclosed. *See BAC Home Loans Servicing, LP v. Stonefield II Homeowners Ass'n*, No. 2:11-cv-00167-JCM-RJJ, ECF No. 71 (D. Nev. March 23, 2011). Red Rock's belief is illustrated in its stock comfort letter too. JA 1178.

CONCLUSION

This court should reverse or alternatively remand.

DATED this 2nd day of September, 2020.

AKERMAN LLP

/s/ Scott R. Lachman
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Appellant

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 exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 6,921 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 2nd day of September, 2020.

AKERMAN LLP

/s/ Scott R.Lachman
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that I electronically filed on September 2, 2020, the foregoing **APPELLANT'S REPLY 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