IN THE SUPREME COURT OF THE STATE OF NEVADA

LEO KRAMER; AND AUDREY KRAMER, Appellants, v. NATIONAL DEFAULT SERVICING CORPORATION; ALYSSA MCDERMOTT; AND BRECKENRIDGE PROPERTY FUND 2016, LLC, Respondents.	)	Supreme Court No. 82379

BRECKENRIDGE PROPERTY FUND 2016, LLC'S ANSWERING BRIEF

HUTCHISON & STEFFEN, PLLC

Daniel H. Stewart (11287)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorney for Respondent Breckenridge Property Fund 2016, LLC

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(1), and must be disclosed:

The parent company of respondent Breckenridge Property Fund 2016, LLC is Neighborhood Stabilization Holdings I, LLC. There is no publically held corporation that owns a 10% or greater stock interest in this company.

The attorneys who have appeared on behalf of respondent in this Court and in district court are:

Casey J. Nelson (12259)
Wedgewood, LLC
Office of the General Counsel
2320 Potosi Street, Suite 130
Las Vegas, NV 89146
Attorney for Defendant in Intervention
Breckenridge Property Fund 2016, LLC

Daniel H. Stewart (11287)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorneys for Respondent
Breckenridge Property Fund 2016, LLC

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These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 15th day of September, 2021.

HUTCHISON & STEFFEN, PLLC

/s/ Daniel H. Stewart

Daniel H. Stewart (11287)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Respondent Breckenridge Property Fund 2016, LLC

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I. JURISDICTIONAL STATEMENT

This is an appeal from a final judgment granting summary judgment entered January 5, 2021. ROA 5021. It is appealable as under NRAP 3A(b)(1). *Id*. Appellants Leo and Audrey Kramer (the "Kramers") timely filed a notice of appeal on January 14, 2021, pursuant to NRAP 4(a).

II. ROUTING STATEMENT

No section of NRAP 17(a) or (b) applies directly to this appeal.

Breckenridge Property Fund 2016, LLC ("Breckenridge") does not feel the matter need be retained by the Supreme Court as this Court has already addressed the issue of substantial compliance with NRS 107.080 and other notice statutes in published opinions. Further, the legal and factual issues related to the assignment of the deed were resolved in a judgment issued by the United States District Court for the District of Nevada in case number 18-cv-0001, which this Court should entitle full faith and credit recognition. The remaining issues presented in the Opening Brief are primarily procedural and do satisfy any of the requirements under NRAP 17 (a) or (b).

III. STATEMENT OF THE CASE

This appeal arises from the non-judicial foreclosure sale of 1740 Autumn Glen Street in Fenley, Nevada (the "Property") to secure payment on a debt. The Kramers were the grantors on the relevant deed of trust. JP Morgan Chase Bank,

N.A. (“JP Morgan”), the beneficiary of the deed of trust through assignment, appointed Respondent, National Default Servicing Corporation (“NDSC”), as the Trustee. The Trustee sold the Property to Breckenridge at a May 18, 2018 non-judicial foreclosure sale.

The Kramers filed a Complaint in the Third Judicial District Court, Lyon County, on June 8, 2018 with case number 18-CV-00663 the (“State Action”). The case was assigned to Department I, the Honorable John P. Schlegelmilch (the “Lower Court”).

The Kramers filed a First Amended Complaint on October 25, 2018. On May 24, 2019 the district court dismissed all causes of action in the First Amended Complaint except those for Unlawful Foreclosure and Declaratory Relief.

On August 8, 2019 the district court set October 1, 2019 as the deadline to file Motions to Amend the Pleadings. ROA 2352. The Kramers filed a motion for leave to amend their complaint on January 9, 2020. ROA 3353.

The District Court granted summary judgment against the Kramers and in favor of NSDC and Breckenridge on all remaining claims in the First Amended Complaint. The Notice of Entry of Order granting summary judgment was filed on January 5, 2021.

This appeal followed.

IV. INTRODUCTION AND SUMMARY OF ARGUMENT

The statute which is the focus of this appeal, NRS 107.080, gives a trustee the power to sell real property to secure the payment of a debt. The statute also imposes requirements which must be met before the trustee may exercise this power of sale through foreclosure. These requirements focus on providing notice to interested parties.

Notice under statute is given in many ways and for several purposes. Notice is given to grantors so they can either cure the default or challenge the action of the trustee. Notice is given to junior lien holders, if any exist, so they may protect their interests. Notice is given to public at large to allow potential bidders the opportunity to research title and authority before the sale, and to assist in obtaining a higher price at the foreclosure sale.

Notice was given to the Kramers and they were not prejudiced. They were given actual notice of the default and election to sell, and they acted upon that notice. But rather than cure the default, the Kramers elected to challenge the foreclosure in federal court by arguing Chase did not properly possess the loan or a lien against the Property. The Kramers' arguments were rejected by the federal court. The federal judgment is a conclusive determination on the issues and is entitled to full faith and credit in state courts.

The recording of the assignment by NSDS in April 2018 provided potential

buyers with notice of the owner of the note and sufficient time to research title to the Property. The Kramers' already knew the note secured by a deed of trust was assigned to Chase since Leo Kramer's bankruptcy filings list Chase as a creditor on the note. Given the actual notice, the prerequisites to the trustee exercising the power of sale regarding the Property were met prior to the foreclosure sale.

Aside from actual notice being given, and therefore warranting this Court affirming the District Court, the Kramers never challenged Breckenridge's status as a bona fide purchaser. If the Kramers prevail on mandating strict compliance with the statute, then the Kramers failed to strictly comply with the statute by timely filing a lis pendens. Because actual knowledge and lack of prejudice evidence substantial compliance, the Kramers cannot void the sale.

V. STATEMENT OF THE ISSUES

1. Whether the district court properly gave full faith and credit and preclusive effect to a judgment entered by the United States District Court District of Nevada?
2. Whether the district court abused its discretion in finding NSDC substantially complied with NRS 107.080?
3. Whether the district court abused its discretion in denying the Kramers leave to amend their complaint a second time?
4. Whether Breckenridge is a bona fide purchaser?

VI. STATEMENT OF FACTS

In April 2008, the Kramers used the Property as collateral to obtain a $176,000 revolving line of credit (the "Loan") from Washington Mutual Bank, F.A. ("WaMu"). ROA 172.

The deed of trust on the Property securing the WaMu Loan was publicly recorded on May 1, 2008 (the "DOT"). ROA 172.

In September 2008, the Federal Deposit Insurance Corporation ("FDIC") assumed receivership of WaMu. ROA 172. Also in September 2008, certain WaMu's assets and liabilities were acquired to or assumed by Chase pursuant to a Purchase and Assumption Agreement (the "PAA"). *Id.*

The PAA details that as part of Chase's acquisition, Chase obtained the rights and liabilities of WaMu, as lender and beneficiary, arising under all of the loan assets of WaMu, which would include the DOT. ROA 173.

In November 2013, Chase substituted NDSC as trustee under the DOT. ROA 173.

Leo Kramer filed three bankruptcy petitions: Case No 10-43951, filed as a Chapter 11 petition in April 2010, but converted to a Chapter 7 filing; Case No 11-49493 filed as a Chapter 13 petition in September 2011; and Case No 14-42866, filed as a Chapter 13 petition in July 2014. In schedules filed in Case Nos. 10-

43951 and 14-42866, Kramer acknowledged the Loan was secured and that Chase held a security interest in the Property. ROA 173.

Chase filed a proof of claim regarding the Loan in both Case No. 14-42866 and Case No. 11-49493, before the latter's dismissal. To the proof of claims Chase attached a copy of the WaMu Mortgage Plus Agreement and Disclosure relating to the Loan and the DOT. In Case No. 14-42866, Leo Kramer proposed a Chapter 13 plan wherein Chase was recognized as a Class 3 creditor, and Leo Kramer was to surrender his interest in the Collateral Property upon plan confirmation. Leo Kramer received discharges in both Case No. 10-43951 and Case No. 14-42866, on June 16, 2011, and January 9, 2017, respectively. At no point in the bankruptcy proceedings did Leo Kramer assert claims against Chase or WaMu.[1] Nor did Kramer seek to have the lien evidenced in the DOT stripped from the Property to render the Loan "unsecured." ROA 173-174.

On October 6, 2017, a non-judicial foreclosure of the Property owing to the DOT was initiated by the recording of a Notice of Default ("NOD" or "Notice of Default") in the Official Records of the Lyon County, Nevada Recorder. ROA 4169-4175.

On or about October 16, 2017, the Notice of Default was mailed via Certified Mail to the Plaintiffs at:

[1] Or the other defendants in the federal action.

- 1740 Autumn Glen St., Fernley; Nevada 89408
- 1229 Ballena Blvd., Alameda, California 94501

and via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. ROA 4142-4153.

These were the only addresses in NDSC's possession. ROA 4053-4056.

A Copy of the Notice of Default, along with a Danger Notice was also posted on the Property on or about October 12, 2017. ROA 4155-4158.

The Notice of Default was received by the tenant at the time, Daniel Starling ("Starling"). ROA 4165-4168, Para #7, 4177-4179, 4187.

At the time the Property was managed by Chaffin Real Estate Services ("Chaffin") on behalf of the Kramers. ROA 4165-4168,

On or about October 16, 2017, Deborah Taylor of Chaffin was notified by Starling that the Notice of Default had been posted and provided a copy of the same to Chaffin. ROA 4165-4168.

Chaffin advised the Plaintiffs on October 16, 2017, that the Notice of Default had been posted on the Property and provided a copy of the same to the Plaintiffs. ROA 4165-4168, 4177-4179, 4187.

On January 2, 2018 the Kramers filed an action in the United States District Court of Nevada with case number 18-cv-0001 against JPMorgan, Mortgage Electronic registration System, NSDC, and WaMu asserting several causes of

action including Quiet Title and Declaratory Relief (the "Federal Action"). ROA 1007-1055.

On or about January 27, 2018, Home Means Nevada, Inc. issued a State of Nevada Foreclosure Mediation Program Certificate which was recorded thereafter on or about March 22, 2018. ROA 4241-4242.

An Assignment of the DOT from WaMu to Chase was recorded in the Official Records of the Lyon County, Nevada Recorder on, or about April 10, 2018. ROA 4244.

On or about April 19, 2018, a Notice of Trustee's Sale was recorded in the Official Records of the Lyon County, Nevada Recorder, advising that foreclosure sale would occur on May 18, 2018. ROA 4246-4248.

On or about April 19, 2018, the Notice of Sale was mailed via Certified Mail to the Plaintiffs at:

i. 1740 Autumn Glen St., Fernley, Nevada 89408

ii. 1229 Ballena Blvd., Alameda, California 94501

iii. 2364 Redwood Road, Hercules, California 94547

and via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. ROA 4250-4266.

Plaintiffs acknowledge receipt of the Notice of Sale. ROA 4216

The Notice of Sale was also posted on the Property on April 19, 2018, and again on April 20, 2018. ROA 4268-4270.

The Notice of the Sale was also published in the Reno Gazette-Journal, and Mason Valley News/Leader Courier on April 25, 2018, May 2, 2018, and May 9, 2018. ROA 4272.

Starling also provided a copy of the Notice of Sale to Chaffin, who in turn provided the Notice of Sale to the Plaintiffs. ROA 4187-4188.

On May 17, 2018 United States District Court Judge Miranda M. Du dismissed the Kramers' Complaint (the "Federal Judgment") finding the Kramers were judicially estopped from asserting claims against Chase, WaMu, and NSDC owing to the filings made in the bankruptcy cases filed by Kramer. ROA 131-141.

On May 18, 2018 the foreclosure sale of the Property occurred and the Breckenridge Property Fund 2016, LLC provided the highest bid in the amount of $211,000. ROA 4275-4276.

On or about June 1, 2018, a Trustee's Deed Upon Sale granting title of the Property to Breckenridge Property Fund 2016, LLC was recorded in the Official Records of the Lyon County, Nevada Recorder. ROA 4274-4277.

The Kramers filed their Complaint in this action on June 8, 2018, naming NDSC and Breckenridge among other parties (the "State Action"). ROA 1-115.

On or about June 11, 2018 the Summon and Complaint was served upon Breckenridge. ROA 120.

There is no evidence in the record on appeal that a lis pendens was recorded against the Property in the Lyon County by the Kramers within the timeframe mandated by statute.

On October 24, 2018, the Lower Court entered an Order Granting Motion to Dismiss the Kramers' Complaint which dismissed the entirety of the Complaint without prejudice but allowed the Kramers time to file an amended complaint. ROA 571-574.

The Kramers filed their First Amended Complaint on October 29, 2018. ROA 575-765.

On May 24, 2019, the Lower Court dismissed all causes of action in the First Amended Complaint except those for Unlawful Foreclosure and Declaratory Relief. ROA 1201-1205.

The Case Management Order set October 1, 2019 as the deadline for Motions to Amend the Pleadings. ROA 2352.

The Order denying the Kramers' Motion for Leave to Amend Complaint was filed on December 16, 2020. ROA 5015-5016.

The Notice of Entry of Order granting summary judgment against the Kramers and in favor of NSDC and Breckenridge on all remaining claims in the First Amended Complaint was filed on January 5, 2021. ROA 5021.

VII. ARGUMENT

A. Standard of Appellate Review

Summary judgment was appropriate if, after a review of the record viewed in a light most favorable to the nonmoving party, there remained no genuine issues of material fact and, therefore, the moving party was entitled to judgment as a matter of law. NRCP 56; *see Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Anderson v. Baltrusaitis*, 113 Nev. 963, 964, 944 P.2d 797, 798 (1997). There are two relevant standards of review for this Court on appeal. First, a district court's conclusions of law, including whether claim or issue preclusion applies, is reviewed de novo. *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014). A court's decision to give full faith and credit to court's judgment is reviewed de novo. *See Sanders v. City of Brady (In re Brady, Texas Mun. Gas Corp.),* 936 F.2d 212, 217 (5th Cir.), cert. denied, 502 U.S. 1013, 112 S.Ct. 657, 116 L.Ed.2d 748 (1991) (discussing a granting a state court's judgment full faith and credit in a federal court).[2]

[2] Under 28 U.S.C.A. § 1738 state courts must give full faith and credit to federal judgments.

Second, this Court reviews substantial-compliance determinations for an abuse of discretion. *Schleining v. Cap One, Inc.,* 130 Nev. 323, 330, 326 P.3d 4, 8 (2014). This includes when reviewing an appeal from an order granting summary judgment. *Las Vegas Plywood & Lumber, Inc. v. D & D Enterprises*, 98 Nev. 378, 379, 649 P.2d 1367, 1367 (1982).

B. The district court properly gave full faith and credit and preclusive effect to the Federal Judgment.

A judgment from another court in the United States is entitled to full faith and credit unless the party attacking the judgment establishes lack of personal or subject-matter jurisdiction of the rendering court, fraud in the procurement of the judgment, lack of due process, satisfaction, or other grounds that make the judgment invalid or unenforceable. *City of Oakland v. Desert Outdoor Advert., Inc*., 127 Nev. 533, 537, 267 P.3d 48, 51 (2011).

Here, the Kramers brought the Federal Action and asserted claims, including quiet title, against federal lending institutions involving the Property which is located within the State of Nevada. The federal court had subject matter over the premise or personal jurisdiction over the parties.

The Federal Judgment, and the two bankruptcy actions which provided the basis of that decision, resolved the ownership issues associated with the Property which was the res before the federal court. The facts regarding liens

against the Property were, therefore, decided by the "Federal Judgment." Actions to quiet title are in rem or quasi in rem. *Chapman v. Deutsche Bank Nat'l Trust Co*., 302 P.3d 1103, 1106 (Nev. 2013); *Weeping Hollow Ave. Tr. v. Spencer*, 831 F.3d 1110, 1113 (9th Cir. 2016). A proceeding in rem is one taken directly against property and has for its object the disposition of the property, without reference to the title of individual claimants. In other words, when an action is in rem, the resulting judgment applies against the whole world. *Chapman, supra*., 129 Nev. at 318, 302 P.3d at 1106.

As such, the 3rd Judicial District of the State of Nevada was bound by the decision as related to the *res* which had been in the exclusive jurisdiction of the federal court until the Federal Judgment was issued. *Chapman, supra*, 129 Nev. at 317, 302 P.3d at 1105.

Dismissals under Rule 12(b)(6) are judgments on the merits. *Hampton v. Pac. Inv. Mgmt. Co. LLC*, 869 F.3d 844, 846 (9th Cir. 2017) *citing Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981). Such dismissals, unless the court provides otherwise, will preclude future assertion of claims "aris[ing] out of the same transactional nucleus of facts." *See id. citing Garity v. APWU Nat'l Labor Org.*, 828 F.3d 848, 855 (9th Cir. 2016) (citation omitted).

Given this, the questions of whether a Chase is the beneficiary of the DOT

and whether a lien in favor of Chase existed against the Property were conclusively resolved by the Federal Judgment. Thus, Chase is the beneficiary of the DOT and NDSC was the Trustee.

In their Opening Brief the Kramers continue to litigate the issues decided by the Federal Judgment. The Kramers assert various individuals defrauded the court by recording an assignment of the DOT regarding the Property from WaMu to Chase in May 2018. This is not a proper collateral attack on the Federal Judgment, but the concept will be discussed briefly.

First, the Federal Judgment is correct under recent Nevada law. The year after the Federal Judgment this Court reaffirmed recording is not necessary to complete the assignment of a beneficial interest. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 234, 445 P.3d 846, 849 (2019)(holding Nevada's recording statutes do not require a beneficiary to publicly record its ownership interest as a prerequisite for establishing that interest). Thus, the in rem determinations made in the Federal Judgment were correct, and the Kramers' assertions regarding the recorded assignment are irrelevant.

Even if the Federal Judgment were incorrect, however, the Kramers have not properly collaterally attacked the judgment. Such judgments withstand collateral attack unless subject matter jurisdiction or personal jurisdiction is lacking, or in cases involving *extrinsic* fraud. There is no doubt the federal court has subject

matter and personal jurisdiction over the Kramers.

The Kramers claim—to the extent it argues extrinsic fraud—fails as well. Extrinsic fraud exists when a claim is fraudulently advanced and that fraud is so successful that the other party is not aware that he has a particular claim or defense. *Love v. Love*, 114 Nev. 572, 576, 959 P.2d 523, 526 (1998). That which keeps one party away from court by conduct preventing a real trial on the issues is extrinsic fraud and forms a sufficient basis for equitable relief from the judgment. *Love v. Love*, 114 Nev. 572, 576, 959 P.2d 523, 526 (1998) *citing Villalon v. Bowen*, 70 Nev. 456, 471, 273 P.2d 409, 416 (1954).

There is plainly no extrinsic fraud here. The Kramers have always alleged Chase did not own the Note or DOT. This began on the very day they received notice of the NOD. The recording of the assignment in May 2018 in no way prevented the Kramers from asserting this argument. Thus, extrinsic fraud does not exist, so the Federal Judgment may not be attacked collaterally.

C. The district court did not abuse its discretion in finding NSDC substantially (or completely) complied with NRS 107.080.

1. The service of the NOD at least substantially complied with NRS 107.080.

The Kramers argue they did not receive proper notice of the Notice of Default ("NOD"). Opening brief of Appealants, p. 21. This is inaccurate because:

1) the Kramers, admittedly, had actual notice of the NOD, and 2) NDSC complied or substantially complied with the notice provisions of the statute.

Per NRS 107.080(3) NDSC is required to send the NOD via certified mail to the Kramers.[3] The record establishes the NOD was properly sent to the addresses NDSC had on file for the Kramers. ROA 4142-4153. Further, NDSC sent a copy of the NOD to the Property address, id., and posted the NOD on the Property. ROA 4155-4158. The tenant in the Property, Daniel Starling, provided a copy of the NOD to the Kramers' property manager Chaffin. ROA 4165-4167, 4177-4179, 4187. The property manager, acting as the Kramers' agent, promptly provided notice to the Kramers on or about October 16, 2018. *Id.* The Kramers provide no evidence contrary to these facts.

The certified mail, regular mail, and posting of the NOD achieved the desired effect: the Kramers received timely notice by receiving a copy of the NOD within ten (10) days of the NOD being recorded. The Kramers received actual notice of the NOD. Given this actual notice, the Kramers sought to protect their rights by filing the Federal Action on January 2, 2018. Thus, the Kramers cannot establish any prejudice resulting from any failure of NDSC to follow the statute perfectly.

Failure to establish prejudice resulting from defective notice dooms any

[3] The Kramers are listed as the "Grantor" on the Deed of Trust.

claim that the defective notice invalidates the foreclosure sale. *See W. Sunset 2050 Tr. v. Nationstar Mortg., LLC*, 134 Nev. 352, 354–55, 420 P.3d 1032, 1035 (2018)(discussing HOA foreclosure sale). In considering notice requirements, it was held substantial compliance is sufficient where actual notice occurs and there is no prejudice to the party entitled to notice. *See Schleining v. Cap One, Inc*., 130 Nev. 323, 330, 326 P.3d 4, 8 (2014) *citing Las Vegas Plywood & Lumber, Inc. v. D & D Enters.*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982) (discussing notice of mechanic's liens).

2. The service of the NOD complied with NRS 107.080.

The Kramers received the notice to which they were due under statute. *See* ROA 4142-4153; ROA 4250-4266. Mailing of the notices is all that the statute requires. *Hankins v. Adm'r of Veterans Affs.*, 92 Nev. 578, 580, 555 P.2d 483, 484 (1976). Because Respondents established the fact that they mailed the notice, that is all that is required. *Id*. ("Actual notice is not necessary as long as the statutory requirements are met.").

But even if that were not the case, the intent of the notice provision was achieved because the Kramers received actual notice because the notice of sale was posted on the property. ROA 4155-4158. NRS 107.080(4) states the Notice of Sale must be filed in the property records before the sale. It is undisputed on this record that the Notice of Sale was filed on the property.

3. The recorded assignment was proper and timely recorded.

The Kramers also discuss the assignment recorded on April 10, 2018. The assignment was recorded several months after the NOD was recorded by the NDSC but a month before the power of sale was exercised by way of the foreclosure sale.[4] NRS 106.210, referenced in NRS 107.080(1), only provides the power of sale may not be exercised "unless and until the assignment is recorded." The assignment was recorded well before the foreclosure sale.

The recording was not necessary to complete the assignment of the Note or the DOT which was accomplished in September 2008 by way of the PAA. Thus, the beneficiary could, and did, change the trustee. The change of trustee just happened to be recorded before the assignment was recorded. Nevertheless, the Substitution of Trustee on December 5, 2013 provides constructive notice the beneficiary of the Note is now JPMorgan since it was signed on behalf of JPMorgan.

The Kramers next argue it was impossible for WaMu to sign the May 2018 notice of assignment since WaMu went into receivership in 2008.

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[4] The power of sale is exercised at the time of the foreclosure sale. *See In re Mortg. Elec. Registration Sys. (MERS) Litig.*, 744 F. Supp. 2d 1018, 1025 (D. Ariz. 2010) (explaining a plaintiff in a wrongful foreclosure action must establish that they were not "in default when the power of sale was exercised" and "a claim for wrongful foreclosure does not arise until the power of sale is exercised" and *citing to Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 662 P.2d 610, 623 (1983).

This ignores the provisions in the PAA for the continuing cooperation between the FDIC and Chase. Article 9 provides for execution of documents necessary to accomplish the PAA and vest Chase with rights necessary to do so. ROA 3904. Chase is responsible preparing the documents in a form satisfactory to the FDIC and recording the documents at Chase's expense. Art. 9.2. ROA 3904.

Further, the Kramers were not harmed by the May 2018 assignment. The purpose of recording statutes is to impart notice to a subsequent purchaser. *SFR Invs. Pool 1, LLC v. First Horizon Home Loans, a Div. of First Tennessee Bank, N.A.*, 134 Nev. 19, 22, 409 P.3d 891, 893 (2018). The purpose of the recording statutes is to give notice to prospective purchasers or mortgagees of land of all existing and outstanding estates, titles or interest, whether valid or invalid, that may affect their rights as bona fide purchasers. *Haynes v. EMC Mortg. Corp.*, 205 Cal. App. 4th 329, 336, 140 Cal. Rptr. 3d 32, 37 (2012) (discussing a similar statute in California).

The Kramers were not harmed by the recording of the assignment in May 2018 since the Kramers notice of the assignment since the bankruptcy filings. Potential purchasers of the Property such as Breckenridge were the only parties potentially harmed by the May 2018 filing because it could impact their status as a bona fide purchaser if insufficient time to research ownership was available. Thus, it is improper for the Kramers to argue a statute was not followed when they are

not the intended beneficiaries of the notice.[5]

D. The district court did not abuse its discretion in denying the Kramers leave to amend their complaint a second time.

The deadline for filing a Motion for Leave to Amend the Pleadings was October 1, 2019. ROA 2352. Plaintiffs' Motion for Leave to Amend Complaint was filed on January 9, 2020. ROA 3353.

When a motion seeking leave to amend a pleading is filed after the expiration of the deadline for filing such motions, the district court must first determine whether "good cause" exists for missing the deadline under NRCP 16(b) before the court can consider the merits of the motion under the standards of NRCP 15(a). *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 281, 357 P.3d 966, 968 (Nev. App. 2015).

Courts have identified four factors that may aid in assessing whether a party exercised diligence in attempting, but failing, to meet the deadline: (1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the

[5] A party generally has standing to assert only its own rights and cannot raise the claims of a third party. *See Deal v. 999 Lakeshore Association*, 94 Nev. 301, 579 P.2d 775 (1978); *see also Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

availability of a continuance to cure such prejudice. Id. However, the four factors are nonexclusive and need not be considered in every case because, ultimately, if the moving party was not diligent in at least attempting to comply with the deadline, "the inquiry should end." Id. Thus, of the four factors, the first (the movant's explanation for missing the deadline) is by far the most important and may in many cases be decisive by itself. Id.

Lack of diligence has been found when a party was aware of the information behind its amendment before the deadline yet failed to seek amendment before it expired. *See Perfect Pearl Co. v. Majestic Pearl & Stone, Inc.*, 889 F.Supp.2d 453, 457 (S.D.N.Y.2012) ("A party fails to show good cause when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline." (internal quotation marks omitted)).

In their motion the Kramers do not provide any discussion regarding good cause. The basis for the request was alleged fraud discovered by their expert, Mr. William Paatalo.[6] The expert report allegedly describing this fraud was signed on June 8, 2019, ROA 3411, almost four months before the deadline. The only new information provided was a newspaper opinion piece written by Mr. William Paatalo.

[6] Mr. Paatalo was subsequently disqualified as an expert by the Lower Court. ROA 5003. Thus, the report is not properly used as a basis to amend.

Regardless, there is no allegation of extrinsic fraud, so the report is completely irrelevant since the Federal Judgment was res judicata on the issue of ownership.

E. Breckenridge is a bona fide purchaser.

The district court also found Breckenridge is a bona fide purchaser. While this finding is not directly challenged by the Kramers in their Opening Brief, the issue exposes the fatal flaw in the Kramers' arguments.

It is undisputed the Kramers failed to record a lis pendens within 5 days of filing the State Action in Lyon County. The Kramers did serve JPMorgan with the Complaint within 5 days of filing, however. Thus, JPMorgan had actual knowledge of the lawsuit within the timeframe required by statute.

Despite this actual knowledge, before a court may declare a non-judicial foreclosure sale void under NRS 107.080(5), the statute specifically provides:

> (c) A notice of lis pendens providing notice of the pendency of the action is recorded in the office of the county recorder of the county where the sale took place within 5 days after commencement of the action.

There is no indication this was performed by the Kramers.

If strict construction of NRS 107.080 is required and applied equally, any failure by NSDC to strictly follow the statute could provide a *prima facie* case for

the sale being voided.[7] Yet the Kramers' own failure to strictly follow NRS 107.080 would be fatal to the Kramers' attempt to void the sale.

On the other hand, if substantial compliance is all that is required and equally applied, the Kramers' failure to follow NRS 107.080 could be forgiven since Breckenridge had actual knowledge of the State Action owing to it being served.[8] Yet NDSC's substantial compliance with NRS 107.080 would then be equally fatal to the Kramers' attempt to void the sale.

In short, the Kramers cannot void the sale because they cannot have NRS 107.080 read strictly only when it benefits them.

If NRS 107.080 requires substantial compliance, then NSDC properly followed the statute and Breckenridge is a bona fide purchaser. If NRS 107.080 requires strict compliance, then the Kramers failed to follow NRS 1087.070(5)(c) and the sale cannot be voided which also makes Breckenridge a bona fide purchaser.

VIII. CONCLUSION

The principal issue argued by the Kramers is the ownership of the Note and Deed of Trust which was decided by the Federal Judgment. The Lower Court properly gave that decision full faith and credit and considered those issues barred

[7] NSDC *did* strictly follow the statute, however.
[8] And there being no subsequent purchasers.

by *res judicata.*

The Kramers also argue the foreclosure sale was not conducted by NDSC with strict adherence to the statutes. While it is quite likely the statutes were strictly followed, that is not the standard. The Kramers had actual knowledge of the NOD and acted on that notice quickly. Giving time for action is the reason for the NOD, so the Kramers were not prejudiced *if* NDSC did not follow the notice statute precisely. This dooms any claim that the defective notice invalidates the foreclosure sale. The assignment was recorded under the powers granted by the FDIC in the PAA before the foreclosure sale and gave potential purchasers time to investigate the Property. No other acts related to the foreclosure sale are at issue. Thus, the Lower Court properly exercised its discretion when it found NDSC either substantially or fully complied with the relevant statutes.

Given the Kramers did not provide a good faith basis for missing the deadline for amending their complaint, the Lower Court properly exercised its discretion and denied the Kramers' Motion to Amend their complaint.

Finally, if strict compliance with the statutes is mandated and equally applied, then Breckenridge is necessarily a bona fide purchaser because the Kramers failed to strictly follow the statute for challenging foreclosure sales.

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Breckenridge therefore requests this Court uphold the final judgment granting summary judgment which was entered on January 5, 2021 in its entirety.

DATED this 15th day of September, 2021.

HUTCHISON & STEFFEN, PLLC

/s/ *Daniel H. Stewart*

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Daniel H. Stewart (11287)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Respondent Breckenridge Property Fund 2016, LLC

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ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 5,430 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular 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 that I may be subject to sanctions in the event the

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accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 15th day of September, 2021.

HUTCHISON & STEFFEN, PLLC

/s/ Daniel H. Stewart

Daniel H. Stewart (11287)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Respondent Breckenridge Property Fund 2016, LLC

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CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **BRECKENRIDGE PROPERTY FUND 2016, LLC'S ANSWERING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Tiffany & Bosco, P.A.
Ace C. Van Patten
Kevin S. Soderstrom
10100 W. Charleston Blvd, Suite 220
Las Vegas, NV 89135

And Via U.S. Mail

Leo Kramer
Audrey Kramer
2364 Redwood Road
Hercules, CA 94547

DATED this 15th day of September, 2021.

/s/ Kaylee Conradi

An employee of Hutchison & Steffen, PLLC