IN THE SUPREME COURT OF THE STATE OF NEVADA

OCWEN LOAN SERVICING, LLC, A FOREIGN LIMITED LIABILITY COMPANY, Appellant, vs. CHERSUS HOLDINGS, LLC, A DOMESTIC LIMITED LIABILITY COMPANY; and SOUTHERN TERRACE HOMEOWNERS ASSOCIATION, A DOMESTIC NON-PROFIT CORPORATION, Respondents.	**Appeal Case No. 82680** District Court Case No. A696357

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APPELLANT'S OPENING BRIEF

WRIGHT, FINLAY & ZAK, LLP
Christina V. Miller, Esq.
Nevada Bar No. 12448
7785 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
(702) 475-7964; Fax: (702) 946-1345
cmiller@wrightlegal.net

Attorneys for Appellant, Ocwen Loan Servicing, LLC

Docket 82680 Document 2022-02354

RULE 26.1 DISCLOSURE

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 that the judges of this court may evaluate possible disqualification or recusal.

Through and including May 31, 2019, Ocwen Loan Servicing, LLC, a Delaware limited liability company, was 100% directly owned by Ocwen Mortgage Servicing, Inc., a United States Virgin Islands corporation. Ocwen Mortgage Servicing, Inc. is 100% directly owned by Ocwen Financial Corporation, a publicly-traded Florida corporation. On June 1, 2019, Ocwen Loan Servicing, LLC merged with and into PHH Mortgage Corporation, a New Jersey corporation, with PHH Mortgage Corporation surviving the merger. PHH Mortgage Corporation is 100% directly owned by PHH Corporation, a Maryland Corporation. PHH Corporation is 100% directly owned by Ocwen Financial Corporation.

The following attorneys appeared on behalf of Appellant Ocwen Loan Servicing, LLC ("Ocwen") before the district court or in this Court on this matter: Attorneys presently at Wright Finlay & Zak, LLP, including Christina V. Miller, Esq. and Robert Riether, Esq.; and attorneys formerly at Wright Finlay & Zak, LLP include Dana Jonathon Nitz, Esq., Paterno C. Jurani, Esq., Natalie C.

Lehman, Esq., and Aaron Lancaster, Esq. The Cooper Castle Law Firm, LLP (Jason Peck, Esq.) also previously represented Ocwen before the district court.

DATED this 21st day of January, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Christina V. Miller
Christina V. Miller, Esq.
Nevada Bar No. 12448
7785 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Appellant, Ocwen Loan Servicing, LLC

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I. JURISDICTIONAL STATEMENT

This case is properly before the Nevada Supreme Court based on the district court's March 22, 2021, Order Granting Judgment in Favor of Counterclaimant Chersus Holdings, LLC, which resolved all remaining claims, rendering this matter as final and appealable. [XVIII:AA3478-85.][1] Notice of entry of that order was filed and served on March 22, 2021. [XVIII:AA3486-97.]

Ocwen served and filed its initial notice of appeal on March 6, 2020. [XVIII:AA3459-60.] The initial notice of appeal was deemed premature, and the operative notice of appeal was filed on March 23, 2021. [XVIII:AA3498-99.] The operative notice of appeal was timely as required by NRAP 4(a)(1).

II. ROUTING STATEMENT

Ocwen requests that this appeal remain assigned to the Nevada Supreme Court for decision pursuant to NRAP 17(a)(12). This matter involves as a principal issue a question of statewide public importance regarding foreclosure of a homeowner's association lien for unpaid assessments.

[1] Appellant's Appendix is designated "AA". On January 7, 2022, counsel for Ocwen contacted counsel for Chersus and the HOA and provided the proposed documents to include in a Joint Appendix, as required by NRAP 30(a). No response to the proposed Joint Appendix was received by the date of filing this Opening Brief. Accordingly, Ocwen will concurrently file the Appendix designated as Appellant's Appendix, which includes all portions of the record essential to determination of issues raised in this appeal. NRAP 30(b)(3).

III. <u>ISSUES PRESENTED</u>

1. Whether the district court erred in granting summary judgment in favor of Chersus Holdings, LLC ("Chersus") based on *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 134 Nev. 352, 420 P.3d 1032 (2018), which did not address whether a homeowners association's foreclosure sale is affected by fraud, oppression or unfairness as a result of the homeowners association pre-foreclosure factoring agreement with United Legal Services, Inc. ("ULS") and First 100, LLC ("First 100").

2. Whether the district court erred in not evaluating whether the HOA Sale price was grossly inadequate where the sale price was less than 2.4% of the fair market value of the Property at the time of the HOA Sale.

3. Whether the district court erred in finding that the Factoring Agreement was not evidence of fraud, oppression or unfairness which brought about the low sale price where there was more than *slight evidence* in the undisputed record that (1) the Factoring Agreement mandated an opening bid amount of only $99 and that the HOA could not bid at the HOA Sale; (2) the Factoring Agreement mandated the HOA must use ULS as the foreclosure trustee and that ULS would be paid by First 100; (3) ULS conducted the HOA Sale outside of regular business hours; and (4) First 100 did not actually pay any amount to acquire the Property at the HOA Sale because, per the Factoring

Agreement, First 100 was entitled to receive all proceeds of the HOA Sale which were due to the HOA, thereby resulting in a full refund of First 100's winning bid.

4. Whether the district erred in concluding that bona fide purchaser analysis as to First 100 and Chersus was irrelevant, and the undisputed evidentiary record confirms that neither entity paid any valuable consideration for their interests and both knew that they would not receive clear title to the Property and could acquire their interests subject to the Deed of Trust.

5. Whether the district court erred in entering summary judgment against Ocwen on Chersus' counterclaim for wrongful foreclosure where the undisputed evidentiary record confirms that the HOA Sale was voidable as to the Deed of Trust as the result of a commercially unreasonable HOA Sale and GMAC Mortgage, LLC ("GMAC") properly proceeded to foreclose under the Deed of Trust and sold the Property to Ocwen.

6. Whether the district erred in entering summary judgment against Ocwen on Chersus' counterclaim for trespass where the HOA Sale did not extinguish the Deed of Trust and no argument or evidence of "forcible entry" or "lockout" was presented by Chersus to the district court.

7. Whether the district court erred in entering summary judgment against Ocwen on Chersus' counterclaim for unjust enrichment where no argument or evidence was presented by Chersus to the district court that Chersus had conferred

any benefit upon Ocwen or that Ocwen had gained any profit that should have been paid to Chersus.

8. Whether the district court abused its discretion in awarding rental income as damages to Chersus where Chersus based its hypothetical lost rental income on an undisclosed expert witness, the undisclosed expert witness' report failed to comply with the requirements of NRCP 16.1(a)(2)(B), and the district court found that the witness was qualified as an expert without conducting any analysis of his qualifications and methodology.

9. Whether the district court abused its discretion in awarding costs to Chersus where Chersus filed an untimely memorandum of costs and failed to submit sufficient evidence to support its alleged costs.

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IV. STATEMENT OF THE CASE

This is an action for quiet title to real property after a homeowner's association lien foreclosure sale. Chersus claims to have a superior claim to title as the successor to the buyer at the homeowners' association foreclosure sale. Ocwen, is the record owner of the subject real property after a subsequent deed of trust foreclosure sale.

On February 19, 2014, Ocwen filed a Complaint for quiet title and declaratory relief against Chersus and the Southern Terrace Homeowners Association (the "HOA").[2] [I:AA0001-4.] The Complaint was subsequently amended on June 24, 2016, and January 23, 2018, as a result of the changing legal environment concerning similar facts and decisions of state and federal courts on point. [I:AA0021-155; II:AA0201-334, respectively.] On March 9, 2018, Chersus filed its Answer to the Second Amended Complaint and asserted counterclaims for Quiet Title, Declaratory Relief, Wrongful Foreclosure, Trespass, Conversion and Unjust Enrichment against Ocwen. [III:AA0338-49.]

After discovery closed, the parties filed competing Motions for Summary Judgment. [III:AA0363-IV:AA0501-715, V:AA0716-858 (Ocwen's Motion for Summary Judgment and Request for Judicial Notice); V:AA0859-887 –

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[2] Ocwen also filed claims against Red Rock Financial Services and ULS, but subsequently dismissed those claims. [III:AA0360-62 and III:AA0335-37, respectively.]

XII:AA2303 (Chersus' Motion for Summary Judgment and Errata to Exhibits); XII:AA2317-2337 (HOA's Motion for Summary Judgment).] The district court held a hearing on January 22, 2019 [XIV:AA2677-739] and subsequently granted summary judgment in favor of Chersus and the HOA and against Ocwen. *Id*. The district court's written Findings of Fact, Conclusions of Law and Order ("FOFCOL") was entered on May 6, 2019. [XIV:AA2740-80.]

Ocwen moved the district court for reconsideration [XIV:AA2826-37], which was initially denied. [XVII:AA3419-21.] Ocwen renewed its Motion for Reconsideration on November 18, 2019 [XVIII:AA3432-39], which the district court granted. [XVIII:AA3444-46.] However, the district court then reached the same conclusion, entering judgment in favor of Chersus and against Ocwen. [XVIII:AA3457-58.]

Ocwen filed a notice of appeal [XVIII:AA3459-60]; however, due to the outstanding issue of Chersus' alleged damages, the appeal did not proceed. In order to prove-up its alleged damages, Chersus filed a Motion for: (1) Judgment or Prove-Up Hearing for Compensatory Statutory, or Punitive Damages; (2) Order Awarding Attorney's Fees to Chersus; and Orders for Specific Performance ("Motion for Prove-Up Hearing"). [XV:AA3053-152.] Chersus concurrently filed a Memorandum of Costs. [XV:AA3040-52.] Ocwen opposed the Motion for Prove-Up Hearing and filed a Motion to Retax Chersus' alleged litigation costs.

[XVII:AA3360-418 and XVII:AA3352-59, respectively.] Thereafter, on March 4, 2021, the district court held a hearing for Chersus to prove-up its alleged damages ("Prove-Up Hearing"). [XVIII:AA3500-65.] The district court denied Chersus' request for attorney's fees and punitive damages against Ocwen but granted Chersus' claim for lost rental income for the period November 2016 through March 2021, in the amount of $76,650, and awarded Chersus its claimed litigation costs, in the amount of $2,522.17. [XVIII:AA3478-85.]

On March 23, 2021, Ocwen timely filed a new Notice of Appeal. [XVIII:AA3498-99.]

V. STATEMENT OF FACTS

A. The Subject Loan

In March 2008, Joseph F. Harrison and Bonnie L. Harrison ("Borrowers") purchased the real property located at 5946 Lingering Breeze Street, Las Vegas, Nevada 89148, APN 163-31-611-022 (the "Property"). The Borrowers subsequently obtained a mortgage as evidenced by a deed of trust, identifying Direct Equity Mortgage, LLC as the Lender and Mortgage Electronic Registration Systems, Inc. (hereinafter "MERS") as nominee for Lender and Lender's successors and assigns, and secured a loan in the amount of $234,739.00 ("Deed of Trust"). [II:AA0222-30.] The Deed of Trust and promissory note secured thereby are collectively referred to herein as the "Loan".

On December 20, 2013, after the Borrowers defaulted on their repayment obligations under the Loan, and after the HOA Sale, defined in section V.B. below, GMAC Mortgage LLC ("GMAC") the record beneficiary of the Deed of Trust and holder of the promissory note, through its trustee, the Cooper Castle Law Firm, LLP, proceeded with a non-judicial foreclosure under the Deed of Trust ("Loan Foreclosure"). [V:AA0851-54.] Ocwen was the grantee at the Loan Foreclosure and became the record owner of the Property ("Loan Foreclosure"). [*Id*.]

B. The Factoring Agreement Between the HOA and First 100.

The Property is located within the HOA. After the Borrowers became delinquent in payment of their monthly assessments to the HOA, the HOA—through its agent, Red Rock Financial Services ("Red Rock")—began the process of foreclosing on the Property under a lien for delinquent assessments ("HOA Lien"). [II:AA0237.]

On April 23, 2013, the HOA entered into a Purchase and Sale Agreement with First 100, LLC ("First 100") and United Legal Services, Inc. ("ULS) (the "Factoring Agreement"). [III:AA0396-412.] Pursuant to the terms of the Factoring Agreement, in pertinent part, the HOA sold its interest in both the delinquent assessments and its right to collect future delinquent assessments. *Id*. at ¶¶ 2.01 and 4.02(h). The Factoring Agreement prohibited the HOA from continuing to use its preferred foreclosure agent, Red Rock, and required ULS to be used as the

foreclosure agent. *Id*. at ¶ 3.02(a). Any amounts collected by ULS or the HOA, including the HOA's foreclosure sale proceeds due to the HOA, were required to be turned over to First 100. *Id*. at 3.02(b), 3.04(i) and 4.02(a). The Factoring Agreement required ULS to pre-set the opening bid at the reduced amount of $99, instead of the actual amount of the HOA's lien at the time of the foreclosure sale, and forbid the HOA from bidding any higher or sending a person or agent to the foreclosure sale to credit bid or bid any amount higher than the pre-set $99 opening bid. *Id*. at ¶ 3.02(l) and ¶ 4.02(i).

C. The HOA Sale Resulting in First 100's Acquisition of the Property.

Pursuant to the HOA Lien, the HOA proceeded to foreclose against the Property on May 25, 2013 ("HOA Sale"), through ULS and the Property was sold to First 100 for an alleged amount of $3,500. [II:AA0243-45.] At the time of the HOA Sale, the fair market value of the Property was $148,000. [IV:AA0681-708.] First 100 then gave the Property to Respondent Chersus Holdings, LLC ("Chersus") for free. [II:AA0247-49; IV:AA0625 at line 9 - AA0629, line 25.] According to Chersus' deposition testimony, Chersus and First 100 had earlier agreement for a real estate deal involving four or five properties, but that deal feel through. [IV:AA0625 at line 9 - AA0629, line 25.] As a result, First 100 simply gave Chersus whatever interest First 100 had in the Property for free to make up for any loss in the unsuccessful deal. *Id.* It appears that Chersus simply paid First

100 a $2,500 fee to represent it in obtaining quiet title. *Id*.

The written Purchase and Sale Agreement ("Sale Agreement") between First 100 and Chersus confirms the foregoing information, as well as that both entities knew that the Deed of Trust was an encumbrance on title and a quiet title lawsuit would be required to clear title, if at all. [XVII:AA3386-90.] The Sale Agreement provides:

- First 100 sold the Property to Chersus "without recourse or warranty". [*Id*. at §§1.1, 2.1, 2.2.]
- The purchase price for the Property was $0.00. [*Id*. at §1.2.]
- Chersus would pay a fee of $2,500 to pursue quiet title. [*Id*.]

The Sale Agreement also includes an entire section entitled "Quiet Title", which provides in pertinent part:

> **1.5 Quiet Title.** Buyer understands and acknowledges that: (i) A quiet title action is a lawsuit that must be brought in the deed owner's name, as plaintiff[.]

[*Id*. at §1.5.]

Additionally, because First 100 knew that it was possible that quiet title free and clear of the Deed of Trust may not attainable, the Sale Agreement included a provision permitting Chersus to return the Property to First 100:

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> **1.6 Property Swap/Substitution.** If a quiet title action on the Property is unsuccessful, then: (i) F100 will (pending availability) substitute a different property to Buyer…and (ii) F100 will convey the substituted property to [Chersus]…The parties agree to work together to make all such transitions as smooth as possible. For all substitutions, Buyer will be required to remit the recordation costs for the transfers, a new quiet title placement fee, and, if applicable, remediation costs.

[*Id*. at §1.6.]

VI. SUMMARY OF THE ARGUMENT

This case is one that this Court has become all too familiar with in the last decade: a professional property purchaser acquired a property at a homeowner's association lien foreclosure sale and then challenged the first position deed of trust's continued validity as a result in order to obtain a financial windfall after paying pennies to obtain its interest. Specific to this matter, the Deed of Trust was foreclosed upon after the HOA Sale but before the HOA Sale buyer, First 100, then transferred its interest to a subsequent entity, Chersus. As a result, in addition to the parties competing claims to quiet title and for declaratory relief, Chersus also asserted counterclaims for wrongful foreclosure, trespass, conversion and unjust enrichment against Ocwen.

After the parties proceeded through discovery and filed competing motions for summary judgment, the district court entered summary judgment in favor of Chersus and against Ocwen on all of its counterclaims, concluding that the HOA Sale extinguished the Deed of Trust, the subsequent Foreclosure Sale under the

Deed of Trust was wrongful, that Ocwen was liable for trespass to Chersus and Ocwen was unjustly enriched. The district court then entered an award of damages in favor of Chersus for lost rental income and awarded Chersus its litigation costs.

Ocwen now appeals and seeks reversal on the following grounds:

First, the district court erred by relying on *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 134 Nev. 352, 420 P.3d 1032 (2018) ("*West Sunset*") (holding that a homeowners association did not lack standing to foreclose after entering into a substantially similar factoring agreement), to conclude that the HOA Sale was valid. But the issue of whether a foreclosure sale was commercially unreasonable was not before the *West Sunset* court. The district court simply concluded that the Factoring Agreement was not evidence of collusion but did not analyze whether the HOA Sale price was grossly inadequate. This was erroneous and requires reversal because the undisputed evidentiary record confirms that the HOA Sale price was less than 2.4 % of the value of the Property such that it was grossly inadequate. The undisputed evidentiary record also confirms that the requisite *slight evidence* of fraud, oppression or unfairness was present to render the HOA Sale commercially unreasonable and, therefore, voidable as to its effect on the Deed of Trust.

Second, the district court erred in concluding that First 100 and Chersus' bona fide purchaser status was irrelevant. Applicable Nevada law confirms that the

district court was required to inquire and analyze whether First 100 and Chersus were bona fide purchasers when it weighed the equities to determine whether the HOA Sale was voidable. The undisputed evidentiary record confirms that neither First 100 nor Chersus paid valuable consideration for their interests in the Property and both had actual knowledge that title to the Property may continue to be encumbered by the Deed of Trust.

Third, because the district court reached an erroneous conclusion as to the validity of the HOA Sale, it subsequently erred in entering summary judgment on Chersus' counterclaim for Wrongful Foreclosure against Ocwen. The district court further erred by concluding that Chersus had sufficiently proven that it was not in breach or default under the terms of the Deed of Trust so it was wrongful for foreclosure to proceed thereunder. These conclusions were erroneous because Chersus is not a party to the Deed of Trust and Nevada law confirms that it is the Borrowers (as the grantors/trustors) breach and default which is the relevant inquiry. Here, it is undisputed that the Borrowers were in default of their repayment obligations and the express terms of the Deed of Trust permitted foreclosure as a remedy. The HOA Sale was commercially unreasonable and did not extinguish the Deed of Trust. Consequently, GMAC lawfully proceeded with the Loan Foreclosure.

Fourth, the district court erred in granting summary judgment to Chersus on

its counterclaim for Trespass because Chersus failed to present any argument or supporting evidence to the district court that Ocwen had entered the Property, conducted a "lockout" or otherwise "forcibly entered" the Property causing Chersus' damages.

Fifth, the district court erred in granting summary judgment to Chersus on its counterclaim for Unjust Enrichment because Chersus failed to present any argument or supporting evidence to the district court that it had conferred any benefit upon Ocwen and that Ocwen accepted and retained any benefit without payment of the value thereof to Chersus. Moreover, because the undisputed evidentiary record confirms that the HOA Sale was commercially unreasonable and did not extinguish the Deed of Trust, any rental income received and retained by Chersus should have been paid to Ocwen post-Loan Foreclosure and Chersus has been unjustly enriched by its receipt of those amounts at a time when it did not own the Property.

Sixth, in the alternative, should this Court affirm summary judgment in favor of Chersus, the award of monetary damages for lost income and litigation costs to Chersus must be overturned. The district court abused its discretion in considering the testimony and report of an undisclosed expert witness whose expert report failed to comply with the requirements of NRCP 16.1(a)(2)(B). The district court further abused its discretion by concluding that the witness was qualified as an

expert where no such supporting documentation was attached to the report and no analysis of the witness' qualifications and methodology was conducted. Lastly, the district court abused its discretion in awarding Chersus its litigation costs because Chersus failed to timely file its Memorandum of Costs and certain deposition costs lacked sufficient justifying documentation.

For these reasons, Ocwen respectfully submits that summary judgment in favor of Chersus and against Ocwen must be reversed and this matter remanded with instruction to the district court to enter summary judgment in Ocwen's favor.

VII. STANDARD OF REVIEW

While a district court's findings of fact are reviewed for abuse of discretion, a district court's conclusions of law are reviewed de novo. *White v. Cont'l Ins. Co.,* 119 Nev. 114, 116, 65 P.3d 1090, 1091 (2003); *Collins v. Burns*, 103 Nev. 394, 399, 741 P.2d 819, 822 (1987), distinguished on other grounds by *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 177, 101 P.3d 792 (2004). A district court's application of law to facts is also reviewed de novo along with all questions of law. *24/7 Ltd v. Schoen*, 133 Nev. 975, 399 P.3d 916 (2017) (citing *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579, 97 P.3d 1132, 1135 (2004); *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)); *Franchise Tax Bd. of State of California v. Hyatt*, 133 Nev. 826, 407 P.3d 717, 733 (2017), cert. granted sub nom. *Franchise Tax Bd. of*

California v. Hyatt, No. 17-1299, 2018 WL 1335506 (U.S. June 28, 2018); *In re L.J.A.*, 2017 LEXIS 764, 401 P.3d 1146 (Nev. 2017) (unpublished disposition). A district court's order denying declaratory relief is also reviewed de novo. *Johnson v. Wells Fargo Bank Nat'l Ass'n*, 132 Nev. 704, 382 P.3d 914, 916 (2016) (citing *Nevadans for Nev. v. Beers*, 122 Nev. 930, 942, 142 P.3d 339, 347 (2006)).

A district court's evidentiary rulings are generally reviewed for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009); *Mclellan v. State*, 124 Nev. 263, 182 P.3d 106, 109 (2008). But, "to the extent an evidentiary ruling rests on a legal interpretation of the evidence code, de novo review" is appropriate. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012); *Stephans v. State*, 127 Nev. 712, 716, 262 P.3d 727, 730 (2011).

A district court's decision to accept an untimely memorandum of costs pursuant to NRS 18.110 is reviewed for an abuse of discretion. *Valladares v. DMJ, Inc.*, 110 Nev. 1291, 1293, 885 P.2d 580, 582 (1994).

"An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks omitted). A district court abuses its discretion when it "bases its decision on a clearly erroneous factual determination or it disregards controlling law," *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 367 P.3d 1286, 1292 (2016).

"This Court reviews a district court's decision to allow expert testimony for abuse of discretion." *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (citing *Brown v. Capanna*, 105 Nev. 665, 671, 782 P.2d 1299, 1303 (1989)). A district court does not abuse its discretion in determining whether a witness qualifies as an expert under NRS 50.275 it its finding is supported by "substantial evidence." *Id*., 124 Nev. at 499, 189 P.3d at 651.

VIII. <u>ARGUMENT</u>

A. THE DISTRICT COURT ERRED IN GRANTING QUIET TITLE TO CHERSUS AND AGAINST OCWEN.

This Court has confirmed that weighing the equities is a relevant consideration stating that even if the HOA Sale was not void, it is nonetheless "voidable[] because the low sale price…and other irregularities establish that "the sale was affected by some element of fraud, unfairness, or oppression."" *U.S. Bank National Association v. Resources Group, LLC,* 135 Nev. Adv. Op. 26, 444 P.3d 442 (2019) (quoting *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017) ("*Shadow Canyon*"); *see also Shadow Wood Homeowners Association, Inc. et al. v. New York Community Bancorp, Inc.*, 132 Nev. 49, 56, 366 P.3d 1105, 1110 (2016) ("*Shadow Wood*"); *Golden v. Tomiyasu*, 79 Nev. 503, 387 P.2d 989 (1963)). In summarizing these cases, this Court has clarified that the "relationship is hydraulic: "where the inadequacy [of price] is palpable and great, **very slight additional**

evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought." *Id*. (emphasis added) (citing *Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646; quoting *Golden*, 79 Nev. at 515, 387 P.2d at 995).

i. The district court erred by not finding that the HOA Sale price was grossly inadequate.

The district court concluded that the issue of "whether the price paid at the HOA Sale was grossly inadequate need not be resolved because [Ocwen] has failed to show that fraud, unfairness or oppression affected the sale." [XIV:AA2758 at ¶91.] This was an error by the district court requiring reversal because a determination of whether the sale price was grossly inadequate and the extent of inadequacy was necessary to determine first in order for the district court to then know the amount of evidence necessary to prove fraud, oppression or unfairness in the HOA Sale sufficient to set aside the HOA Sale. *Shadow Wood*, 132 Nev. at 56, 366 P.3d at 1110; *Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646; *Golden*, 79 Nev. at 515, 387 P.2d at 995. The "relationship is hydraulic: "where the inadequacy [of price] is palpable and great, **very slight additional evidence of unfairness or irregularity is sufficient** to authorize the granting of the relief sought." *Resources Group*, 135 Nev. Adv. Op. 26, 444 P.3d at 448.

The fair market value of the Property at the time of the HOA Sale was $148,000. [IV:AA0681-708]; *see also* [XIV:AA2757-58.] The alleged HOA Sale price paid by First 100 was $3,500, which amounts to a mere 2.4% of the fair

market value of the Property. Chersus did not present a competing expert report regarding the fair market value of the Property and simply argued that "First 100 and Chersus paid far more than $3,500 to acquire the Property." [XIV:AA2758 at ¶90]. However, this statement is false and directly contradicted by Chersus' deposition testimony: Chersus and First 100 had an earlier agreement for a real estate deal involving four or five properties, but that deal fell through. [IV:AA0625 at line 9 - AA0629, line 25.] As a result, First 100 simply gave Chersus whatever interest First 100 had in the Property for free to make up for any loss in the unsuccessful deal. *Id.* Moreover, even if Chersus had paid some monetary amount to purchase the Property, which it did not, "the relevant price is not…the [amount Chersus] paid to buy the property from the entity that purchased it at the HOA foreclosure sale." *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.*, 2019 WL 4054161, 446 P.3d 1157, *2 (Aug. 27, 2019) (unpub. disposition) ("*Lahrs Trust*"). The *Lahrs Trust* court affirmed that "we must look to the [amount] [Chersus'] predecessor-in-interest, First 100, LLC, paid to purchase the property at the foreclosure sale." *Id*. Comparing First 100's winning bid of $100 in *Lahrs Trust* with the value of the Property, $374,000, this Court confirmed "the inadequacy of price was palpable and great." *Id*. (citing *Shadow Canyon*, 133 Nev. at 747-50, 405 P.3d at 647-49 (discussing how a district court evaluates price inadequacy in the foreclosure sale context)).

Here, based on the fair market value of the Property at the time of the HOA Sale, the purchase price at the HOA Sale was less than 2.4% of the fair market value, an amount substantially below the 20% threshold the *Shadow Wood* court recognized as "grossly inadequate as a matter of law." 132 Nev. at 60, 366 P.3d at 1112-13. Accordingly, because the HOA Sale price was more than grossly inadequate, Ocwen was only required to present *very slight evidence* of fraud, unfairness or oppression to set aside the HOA Sale as voidable. *Lahrs Trust*, 446 P.3d 1157 at *5; *Golden*, 79 Nev. at 515, 387 P.2d at 995.

ii. The district court erred in relying upon *West Sunset* to conclude that the HOA Sale was not affected by fraud, oppression or unfairness.

The district court incorrectly concluded that the HOA Sale was not affected by fraud, oppression or unfairness because the Factoring Agreement was not evidence of collusion and served the valid purpose of providing HOA's with immediate access to cash and help them meet their perpetual upkeep obligations. [XIV:AA2758-59.] The district court relied upon *West Sunset* in reaching this conclusion to confirm that the Factoring Agreement was valid. But the issue of collusion was not before this Court in *West Sunset*, only the issue of whether the HOA had standing to foreclose after entering into a "factoring agreement." 134 Nev. at 355-57, 420 P.3d at 1035-37. Here, the district court erred in not actually considering that the Factoring Agreement, designed to artificially depress the

bidding amount at the HOA Sale and to benefit the purchaser, First 100, is sufficient *slight evidence* of fraud, oppression or unfairness sufficient to grant equitable relief to Ocwen. The district court's ruling must be reversed on appeal consistent with subsequent decisions of this Court which reject *West Sunset* and find that identical Factoring Agreements between ULS, First 100 and foreclosing homeowner's associations presents sufficient *slight evidence* of collusion.

In *Lahrs Trust*, this Court confirmed that a homeowner's association's decision to enter into a factoring agreement with First 100 does not itself cast doubt on the legitimacy of a foreclosure sale. 446 P.3d 1157 at *3 (citing *West Sunset*, 134 Nev. at 355-57, 420 P.3d at 1035-37). However, this Court went on to note that the problem with such factoring agreements "is that the agreement required the collection agent to set the opening bid at $99, and that the homeowners association agreed "not to bid any higher." *Id*. This Court concluded that "these facts suggest that there was some unfairness in the foreclosure process that affected the sale." *Id*. at *3-4 (citing *Las Vegas Dev. Grp., LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1058 (D. Nev. 2016) (noting that collusion between the winning bidder and the entity selling the property may constitute fraud, oppression, or unfairness).

In *United States Bank Nat'l Ass'n v. Gifford W. Cochran*, this Court reversed a post-trial judgment in favor of Cochran because the district court abused its

discretion in denying equitable relief to U.S. Bank. 2020 WL 2521786, 462 P.3d 1228 (May 15, 2020) (unpub. disposition). This Court confirmed that Cochran's reliance on *West Sunset* was misplaced and did not address the issue of whether the contractual relationship under the factoring agreement caused any fraud, oppression, or unfairness in the foreclosure process. *Id*. at *2, fn 2. This Court also confirmed that the factoring agreement between ULS, First 100 and the foreclosing homeowner's association "required the HOA to use First 100's preferred foreclosure agent and prevented the HOA from bidding any higher than the agreed-upon starting bid of $99[.]" *Id.* at *2. This undisputed fact, along with the undisputed fact that First 100 purchased the property at the foreclosure sale, "support a conclusion that bidding was chilled." *Id*. (citing *Yfantis,* 173 F.supp. 3d at 1058 (noting that collusion between the winning bidder and the entity selling the property may constitute fraud, oppression, or unfairness); *Country Exp. Stores, Inc. v. Sims*, 87 Wn. Ap.. 741, 943 P.2d 374, 379 (Wash. Ct. App. 1997) (noting that one type of chilled bidding "is intentional, occurring where there is collusion for the purpose of holding down the bids.")).

At least one federal court considering similar facts and arguments have also found that a homeowner's association foreclosure sale is affected by *slight evidence* of fraud, oppression or unfairness as a result of an identical factoring agreement between ULS, First 100 and the foreclosing homeowner's association.

See Wells Fargo Bank, N.A. v. First 100, LLC, 2019 WL 919585, Case No.: 3:17-cv-00062-MMD-WGC (D. Nev. Feb. 25, 2019) (rejecting *West Sunset* because it does not address the factoring agreement in the context of a lender seeking equitable relief to set aside a homeowner's association sale using the factoring agreement as evidence of collusion, and finding the factoring agreement terms suggest collusion between First 100 and the foreclosing homeowner's association because the agreement allows First 100 to purchase the property for an unreasonably low price, the homeowner's association agreed to set an opening bid price of $99 and then never bid higher and the sale occurred outside of regular business hours)).

Here, the Factoring Agreement terms present the requisite *very slight* evidence of fraud, oppression or unfairness and the district court's conclusions to the contrary were erroneous and grounds for reversal. [XIV:AA2759.] Specifically, the district court relied upon the biased, self-serving testimony of Robert Atkinson, NRCP 30(b)(6) witness for ULS, discussing, in general terms without any actual evidence related to the subject HOA Sale, that the opening bid price of $99 was set to encourage bidding, auctions were generally well-attended by "NRS 116 type buyers" and "HOAs did not want to acquire a property via a credit bid". *Id*. But no evidence was presented to the district court to confirm these statements were in any way true or applicable to the HOA Sale here. But regardless, the terms of the

Factoring Agreement resulted in a sale that was conducted in a manner intended to benefit First 100 exclusively. By setting the opening bid at $99, if no other bidders appeared, First 100 could enter an unchallenged bid for $99, guaranteeing itself as the winning bidder for a miniscule fraction of the value of the Property. Alternatively, by setting the opening bid for $99, instead of the value of the HOA's lien for unpaid assessments in an amount greater than $1,300, [III:AA0408] even if other bidders appeared and competitively bid on the Property, the ultimate winning bid would be lower (because it started lower) than if ULS opened bidding for the actual amount of the HOA's lien.

Further, even if there was competitive bidding, which there is no evidence of in the record here, First 100 could bid any amount because the final winning amount would be nothing more than a number on paper. There is no evidence in the record to confirm that any actual exchange of funds occurred here. And again, even if it did, First 100's right to receive the HOA Sale proceeds essentially nullified any price it paid at the HOA Sale because it received a full refund thereof and, therefore, paid $0.00 at the HOA Sale. Specifically, the Factoring Agreement guaranteed that any amounts collected by ULS at the HOA Sale would be paid to First 100. [III:AA0401 at 4.02(a).] So whatever amount First 100 bid and allegedly paid at the HOA Sale would be immediately returned to First 100 per the Factoring Agreement terms – meaning First 100 effectively paid nothing for the Property at

the HOA Sale. The evidentiary record here confirms this: the HOA's ledger reflects that First 100 simply wrote off the remaining amount of the HOA's lien as "bad debt" instead of actually paying the HOA for the remaining portion of its lien. [IV:AA0596.] This is further evidence of fraud, unfairness and oppression; First 100 would outbid any other bidder to guarantee that it was the winning bidder because it knew it would obtain ownership of the Property *without actually paying any money* at the HOA Sale.

Further *very slight evidence* of fraud, oppression or unfairness is present by the fact that (1) the HOA was required to use ULS as its foreclosure agent [III:AA0398 at §3.02], (2) ULS was hand-picked **and paid by First 100**, and (3) ULS intentionally held the HOA Sale outside of regular business hours. The district court erroneously concluded that it was proper for ULS to conduct the HOA Sale outside of regular business hours because Mr. Atkinson testified that he did not want potential bidders walking around his office. [XIV:AA2758 at ¶ 94.] Again, this self-serving statement was insufficient to explain why ULS could not have conducted the HOA Sale during regular business hours at the front entrance to its office or in a traditional auction location, such at the courthouse steps. Rather, ULS' choice to hold the HOA Sale outside of regular business hours and inside its office, is further evidence that ULS set up a foreclosure sale designed to reduce the number of bidders and/or depress bidding.

The above facts, together with the fact that First 100 was the purchaser at the HOA Sale, purportedly purchased the Property for $3,500 and then received the proceeds (the $3,500) from the foreclosure sale – meaning it effectively paid $0.00 for the Property at the HOA Sale – presents more than the required *very slight evidence* of fraud, oppression and unfairness sufficient for the district court to have found that the HOA Sale was commercially unreasonable. Accordingly, Ocwen respectfully requests that this Court reverse the ruling of the district court and remand with direction for the district court to enter judgment in Ocwen's favor on its claim for quiet title because the HOA Sale was commercially unreasonable.

iii. The district court erred in concluding that bona fide purchaser analysis is irrelevant.

The district court concluded that "the Nevada Supreme Court recently held in [*West Sunset*] that since the underlying HOA sale was valid, the Court did not need to resolve a dispute as to whether First 100 and Chersus were bona fide purchasers" and concluded that bona fide purchaser status was "irrelevant." [XIV:AA2761 at ¶¶106-107.] The district court erred in reaching this conclusion because bona fide purchaser status is a necessary inquiry when weighing the equities. *See Shadow Wood*, 132 Nev. at 63, 366 P.3d at 1114 ("When sitting in equity…courts must consider the entirety of the circumstances that bear upon the equities."). Therefore, judgment in Chersus' favor must be reversed and remanded with instruction to the district court to enter judgment against Chersus because it

was not a bona fide purchaser, as discussed at length below.

iv. Neither First 100 nor Chersus are bona fide purchasers for value.

The evidentiary record is void of any evidence that First 100 and Chersus are entitled to bona fide purchaser status such that judgment of quiet title in Chersus' favor can be affirmed. Rather, the record reflects that neither First 100 nor Chersus paid any amount, i.e. no "valuable consideration", to obtain their interests and both had actual knowledge that their interests may transfer subject to the Deed of Trust.

Bona fide purchaser status was a necessary line of inquiry in considering whether the HOA Sale was voidable as commercially unreasonable. *See Shadow Wood*, 132 Nev. at 63, 366 P.3d at 1114 ("When sitting in equity…courts must consider the entirety of the circumstances that bear upon the equities."). A bona fide purchaser is one who takes property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Id.*, 132 Nev. at 64, 366 P.3d at 1115. However, mere lack of actual notice of a defect in the foreclosure is not enough to find that a third-party purchaser is a bona fide purchaser. Instead, the third-party's diligent inquiry and sophistication are factors to be considered. *Resources Group*, 135 Nev. at 206, 444 P.3d at 449 (citing *Albice v. Premier Mortg. Servs. of Wash., Inc.*, 157 Wash.App. 912, 239 P.3d 1148 1157 (2010) (holding that "[a] purchaser is on notice if he has

knowledge of facts sufficient to put an ordinarily prudent man on inquiry and a reasonably diligent inquiry would lead to the discovery of title or sale defects" and deeming it appropriate to "give substantial weight to a purchaser's real estate investment experience when determining whether a purchaser had inquiry notice")).

Moreover, **the party asserting bone fide purchaser status bears the burden of establishing that status**. *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246 (1979) (emphasis added). Specifically, where circumstances would lead a reasonable person in a buyer's position to investigate the existence of prior unrecorded rights, the buyer had a duty of inquiry to qualify as a bona fide purchaser. *Id*. 95 Nev. at 188-89, 591 P.2d at 249. "[A] putative BFP must introduce some evidence to support its BFP status beyond simply claiming that status." *RLP-Ampus Place, LLC v. U.S. Bank, N.A.*, 408 P.3d 557, 2017 WL 6597148 (Nev. 2017) (citing *Berge*, 95 Nev. at 187, 591 P.2d at 248 (recognizing that the party asserting BFP status has the burden of establishing that status)). In *RLP-Ampus*, this Court found that the third-party buyer was not entitled to bona fide purchaser status because it "failed to produce even an affidavit supporting its putative BFP status, meaning that there was no admissible evidence as to this issue." *Id*. at *1 (citing *Wood v. Safeway, Inc.*, 121 Nev. at 732, 121 P.3d at 1031).

Similarly, here, the record before the district court confirms that neither First 100 nor Chersus are bona fide purchasers.

First, neither First 100 nor Chersus paid "valuable consideration" to acquire their interests in the Property. *Shadow Wood*, 132 Nev. at 64, 366 P.3d at 1115. As discussed in section VIII(A)(iii) above, First 100's alleged purchase price at the HOA Sale was nothing more than a number written on paper and no exchange of funds or payment to the HOA actually occurred. Per the terms of the Factoring Agreement, any amount obtained at the HOA Sale to satisfy the HOA's lien (in an amount in excess of $4,100 per the Notice of Sale [XI:AA2224] was to be paid to First 100. [III:AA0401 at §3.04(i).] In other words, whether First 100 paid the opening bid of $99 or $3,500, it effectively paid $0.00 to obtain its interest once it was repaid the sale proceeds in accordance with the terms of the Factoring Agreement. *Id*. Accordingly, First 100 did not pay any consideration, let alone "valuable consideration", to acquire the Property at the HOA Sale.

Similarly, Chersus admitted during deposition that it did not pay anything to acquire its interest in the Property from First 100. According to Chersus' deposition testimony, Chersus and First 100 had an earlier agreement for a real estate deal involving four or five properties, but that deal fell through. [IV:AA0625 at line 9, AA0629, line 25.] As a result, First 100 simply gave Chersus whatever interest First 100 had in the Property for free to make up for any loss in the

unsuccessful deal concerning separate and unrelated properties. *Id.*

Second, both First 100 and Chersus had notice of Ocwen's competing interest in the Property. The Sale Agreement between First 100 and Chersus confirms that First 100 knew that it had not obtained clear title to the Property at the HOA Sale. First 100 required Chersus to acknowledge that it would acquire the Property from First 100 without warranty or guarantee and with the requirement that a quiet title lawsuit would still be required. [XVII:AA3386-90.] The Sale Agreement expressly provides:

- First 100 sold the Property to Chersus "without recourse or warranty". *Id.* at §§1.1, 2.1, 2.2.
- The purchase price for the Property was $0.00. *Id*. at §1.2.
- Chersus would pay a fee of $2,500 to pursue quiet title. *Id*.

The Sale Agreement also includes an entire section entitled "Quiet Title", which provides in pertinent part:

> **1.5 Quiet Title.** Buyer understands and acknowledges that: (i) A quiet title action is a lawsuit that must be brought in the deed owner's name, as plaintiff[.]

Id. at §1.5.

Additionally, because First 100 knew that it was possible that quiet title free and clear of the Deed of Trust may not be attainable, the Sale Agreement included a provision permitting Chersus to return the Property to First 100:

> **1.6 Property Swap/Substitution.** If a quiet title action on the Property is unsuccessful, then: (i) F100 will (pending availability) substitute a different property to Buyer…and (ii) F100 will convey the substituted property to [Chersus]…The parties agree to work together to make all such transitions as smooth as possible. For all substitutions, Buyer will be required to remit the recordation costs for the transfers, a new quiet title placement fee, and, if applicable, remediation costs.

Id. at §1.6.

Accordingly, the evidentiary record confirms that First 100 was not a bona fide purchaser because it acquired the Property at the HOA Sale with knowledge that title was not clear and the Deed of Trust may remain a valid encumbrance on title.

As to Chersus, in addition to the terms of the Sale Agreement, described above, the publicly available title records for the Property reflect that not only was there the Deed of Trust upon title, but also that foreclosure thereunder had proceeded and a Trustee's Deed Upon Sale was recorded against title before Chersus obtained its interest from First 100. [V:AA0851.] Accordingly, Chersus was on notice that there was a competing claim to title and it would not obtain clear title from First 100.

The deposition testimony of Jagdesh Mehta, NRCP 30(b)(6) witness for Chersus, confirms that Chersus knew it was not a bona fide purchaser, as reflected in the Sale Agreement with First 100. Mr. Mehta testified that Chersus is a professional property purchaser having acquired at least four properties from First

100. [IV:AA0620-21.] Mr. Mehta admitted during deposition that Chersus paid a $2,500 fee when it acquired the Property in order to quiet title to the Property. [IV:AA0629; AA0632 ("Q. Is it fair to say that you knew you would have to engage in a lawsuit to get title to this property, clear title? A. Yes. Q. What is the significant (sic) of this provision to you? A. To me, it just means that it will take time and effort on attorneys part to get the quiet title.").] In fact, Mr. Mehta admitted that all four of the properties he acquired from First 100 were subject to quiet title litigation. [IV:AA0634-35.] Accordingly, at the time Chersus acquired its interest in the Property, it knew that it would not obtain clear title to the Property and paid a fee to retain an attorney to pursue quiet title in its name. *Id*.

Moreover, Mr. Mehta admitted during deposition that he did not conduct any inquiry into the quality of title that would pass to Chersus upon acquiring the Property from First 100:

> Q. With regard to this property, did you conduct any due diligence before buying it before obtaining it?
> A. No.
> Q. Did you obtain any kind of title searches?
> A. No.
> Q. Did you review any documents prior to obtaining this property?
> A. No.
> Q. Did you look on any kind of web pages like Assessor's website or Recorder's website or anything like that?
> A. No.
> Q. Did you contact any title companies or escrow companies?
> A. No.
> Q. Did you determine if there were any kind of liens on the property?
> A. No.

> Q. Did you obtain any kind of appraisals or do you know what a BPO is?
> A. No.
> Q. Did you attempt to obtain any kind of evaluation on the property?
> A. Yes.
> Q. And how did you do that?
> A. Going to zillow.
> Q. Zillow.com?
> A. Yes.
> Q. Did you actually go to the property and inspect it itself?
> A. No.
> Q. What did you do, did you just look on zillow?
> A. Yes.
> …
> Q. Before you acquired this property that we are here for today, did you inquire of anybody whether or not the super priority lien had been paid?
> A. No.

[IV:AA0636-38, AA0646.]

The evidentiary record reflects that Chersus is a sophisticated property purchaser, executed the Sale Agreement with First 100 acknowledging a lack of clear title and that the Property may be subject to the Deed of Trust, and failed to conduct any inquiry into the quality of title it would acquire prior to obtaining the Property from First 100. Accordingly, Chersus is a not a bona fide purchaser and the district court erred in finding that inquiry was irrelevant. The equities weigh in Ocwen's favor and judgment in favor of Chersus must be reversed.

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B. JUDGMENT AND AN AWARD OF MONETARY DAMAGES IN FAVOR OF CHERSUS ON ITS REMAINING COUNTERCLAIMS MUST BE REVERSED.

The district court erred in concluding that Chersus was entitled to quiet title and a declaratory judgment that First 100 and, subsequently, Chersus acquired title to the Property free and clear of the Deed of Trust and Ocwen's interest. Based on this erroneous ruling, the district court then concluded that Chersus prevailed on its counterclaims for wrongful foreclosure, trespass and conversion, and unjust enrichment against Ocwen and erroneously awarded Chersus damages in the amount of lost rental income and litigation costs. [XVIII:AA3478-85.] But because the HOA Sale was commercially unreasonable, judgment in Chersus' favor must be reversed, including the derivative counterclaims and monetary judgment.

i. The Deed of Trust survived the HOA Sale and foreclosure thereunder was not wrongful.

The district court erroneously concluded that "Chersus is entitled to summary judgment on its wrongful foreclosure claim as a matter of law" after reaching the following conclusions:

> 109. In support of its claim for wrongful foreclosure, Chersus established that at the time GMAC Mortgage, LLC exercised the power of sale and foreclosed, that no breach of condition or failure of performance existed on Chersus' part which would have authorized the foreclosure or power of sale. There is no dispute that when GMAC Mortgage, LLC exercised the power of sale and foreclosed, its Deed of Trust had been extinguished by the foreclosure sale. There is no dispute that GMAC Mortgage, LLC and Plaintiff knew that after the

> HOA Sale: (1) GMAC Mortgage, LLC had no interest in the Property; (2) GMAC Mortgage, LLC had no authority whatsoever to authorize the foreclosure or exercise the power of sale that had been extinguished by the HOA Foreclosure Sale; (3) GMAC Mortgage, LLC had no authority to convey the Property to Plaintiff; and (4) Plaintiff had no right or authority take possession of the Property.

[XIV:AA2761-62 at ¶109.]

"An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale." *Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983).

The district court reached an erroneous conclusion here which must be reversed on appeal for two separate reasons. *First*, whether or not Chersus was in breach of any condition or failed to perform under the Deed of Trust is irrelevant. Chersus is not and has never been a party to the Deed of Trust, let alone the "trustor" or "mortgagor". The correct inquiry was whether the Borrowers, as the mortgagors/trustors under the Deed of Trust [V:AA0725.], were in breach of the terms of the Deed of Trust such that GMAC was authorized to pursue its right to foreclose thereunder. It was undisputed that the Borrowers defaulted on their Loan repayment obligations. [V:AA835.] It was also undisputed that the Deed of Trust authorized the beneficiary to pursue foreclosure as its remedy upon the Borrowers'

breach. [V:AA0725-33 at ¶9 ("Lender may…in the case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument if: (i) Borrower defaults by failing to pay in full any monthly payment…or (ii) Borrower defaults by failing…to perform any other obligations contained in this Security Instrument.") and ¶18 ("If Lender requires immediate payment in full under paragraph 9, Lender may invoke the power of sale and any other remedies permitted by applicable law.")]. Accordingly, the district court erred in concluding that the Loan Foreclosure was wrongful simply because Chersus, a non-party to the Loan, was not in breach of the Deed of Trust terms.

Second, as discussed at length in section VIII(A) above, the HOA Sale was commercially unreasonable and, therefore, voidable as to its effect on the Deed of Trust resulting in a foreclosure sale subject to the Deed of Trust. Because the Deed of Trust remained a valid encumbrance upon title to the Property after the HOA Sale, GMAC had a continuing lien interest in the Property, authority to authorize the foreclosure and exercise the power of sale under the valid Deed of Trust, authority to convey the Property to Ocwen and Ocwen, as the grantee at the Loan Foreclosure, had the right to take possession of the Property.

The district court committed reversible error and Ocwen respectfully requests that this Court reverse the judgment of wrongful foreclosure against

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Ocwen and concurrently reverse the resulting award of monetary damages against Ocwen.

ii. Chersus' claim for Trespass fails because Ocwen is the rightful owner of the Property.

The district court concluded that "Plaintiff wrongfully deprived Chersus of its right to own and possess the Property…[and] Chersus' damages include loss of rental income; which would be based on a claim for Trespass." [XIV:AA2763-64 at ¶¶124 and 128, respectively]. After the Prove-Up Hearing, the district court then awarded Chersus $76,650.00 in "lost rental damages." [XVIII:AA3479.] The district court erred in entering judgment for Trespass in favor of Chersus and against Ocwen because the Loan Foreclosure was not wrongful (*see* discussion in sections VIII(A) and VIII(B)(i), above) and title properly passed to Ocwen as a result of the Loan Foreclosure.

Pursuant to NRS 40.220 "[n]o entry shall be made upon or into any real property or other possessions but in cases where entry is given by law; and in such cases, only in a peaceable manner, not with strong hand nor with multitude of people." "Forcible entry" is defined as:

> 1. Every person is guilty of a forcible entry who unlawfully enters any real property:
>
> (a) By means of physical force resulting in damage to a structure on the real property;
> (b) By any kind of violence or circumstance of terror; or
> (c) Peaceably or otherwise and:

> (1) Thereafter prevents the owner of the real property from access or occupancy of the property by changing a lock; or
>
> (2) Turns out by force, threats of violence or menacing conduct, the owner of the real property or an occupant who is authorized by the owner to be in possession of the real property.

NRS 40.230(1).

The district court erred in concluding that Ocwen committed a trespass to the Property by wrongfully depriving Chersus of its right to own and possess the Property. [XIV:AA2763 at ¶124.] First, a cause of action for Trespass required Chersus to present facts supported by admissible evidence that Ocwen "forcibly entered" the Property resulting in damages to the "structure on the real property", by committing "any kind of violence or circumstance of terror" or by "changing a lock" or by "turning out" Chersus or a tenant by "force, threat of violence or menacing conduct." NRS 40.230(1)(a)-(c). But no such allegations were made by Chersus nor did Chersus present any admissible evidence to support a finding that Ocwen forcibly entered the Property in any manner defined by NRS 40.230. Indeed, no such finding was even made by the district court. The district court simply concluded that that Ocwen deprived Chersus of the right to own and possess the Property. But again, no argument or evidence of how Ocwen deprived Chersus of the ownership and possession was ever presented to the district court. Consequently, the district court erred in entering judgment against Ocwen on the Trespass counterclaim.

In addition, because the district court granted summary judgment to Chersus on its Trespass counterclaim solely on the erroneous ruling that the HOA Sale extinguished the Deed of Trust from title, the Trespass judgment was erroneous and must be reversed on appeal. *See* section VIII(A) above.

iii. Ocwen was not unjustly enriched by any benefit received from Chersus.

The district court did not award Chersus any damages for improvements that Chersus allegedly made to the Property. *See* 3/21/2021 order. However, the district court erred in imposing a "quasi-contract upon Plaintiff and [compelling] Plaintiff to pay Defendant Chersus the reasonable rental value of the property as established by Plaintiff's expert's appraisal." [XIV:AA2765 at ¶134.] This was an error of law by the district court which requires reversal because Chersus did not confer a benefit on Ocwen which Ocwen then retained without payment of the value thereof to Chersus.

"Unjust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot. Inc. v. Precision Constr. Inc.*¸128 Nev. 371, 380-81, 283 P.3d 250, 256-57 (2012) (quoting *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981) (quoting *Dass v. Epplen*, 162 Colo. 60, 424 P.2d 779,

780 (Colo. 1967)). The *Precision* court, in rejecting Certified's argument, confirmed that a pleading of quantum meruit for unjust enrichment does not discharge the plaintiff's obligation to demonstrate that the defendant received a benefit from services provided. *Id*. (citing Restatement (Third) of Restitution and Unjust Enrichment § 31 cmt. e (2011); 1 Dan B. Dobbs, Dobbs Law of Remedies § 4.2(3) (2d ed. 1993) (plaintiff pursuing quantum meruit under unjust enrichment theory must show benefit to defendant); 26 Richard A. Lord, Williston on Contracts § 68:1, at 24 (4th ed. 2003) (quantum meruit to avoid unjust enrichment applies "when a party confers a benefit with a reasonable expectation of payment"); *EPIC v. Salt Lake County*, 2007 UT 72, 167 P.3d 1080, 1086 (Utah 2007) (first element of quantum meruit is showing a benefit has been conferred)).

"'[B]enefit' in the unjust enrichment context can include "services beneficial to or at the request of the other," "denotes any form of advantage," and is not confined to retention of money or property. *Precision*, 128 Nev. at 382, 283 P.3d at 258 (citing Restatement of Restitution § 1 cmt. b (1937); *Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (citing § 1, cmt. b and noting that postponing foreclosure on a property benefits owner by providing additional time to negotiate a sale and reducing overall debt). "But while '[r]estitution may strip a wrongdoer of all profits gained in a transaction with [a] claimant . . . principles of unjust enrichment will not support the imposition of a liability that

leaves an innocent recipient worse off . . . than if the transaction with the claimant had never taken place.'" *Id*. (citing Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d (2011); cf. *Heartland Health Systems v. Chamberlin*, 871 S.W.2d 8, 11 (Mo. Ct. App. 1993) (quantum meruit available for provision of emergency medical services)).

Here, Chersus did not argue and did not present any admissible evidence to the district court that Chersus had conferred a benefit upon Ocwen. Therefore, the district court erred in entering judgment in favor of Chersus and against Ocwen on the unjust enrichment counterclaim. It was further error of the district court to compel Ocwen to pay damages to Chersus for rental income in the amount of $76,650.00. [XVIII:AA3478-85.] Chersus did not argue and did not present any admissible evidence that Ocwen rented out the Property during the 2016 through 2021 time period and retained any rental income. As discussed in *Precision*, the purpose of restitution under an unjust enrichment theory is to "strip a wrongdoer of all profits gained in a transaction with claimant." 128 Nev. at 382, 283 P.3d at 258. But it is not intended to "leave[] an innocent recipient worse off[.]" *Id*. By imposing an award of damages in an amount of hypothetical stream of rental income, the district court disregarded that Ocwen had not received rental income during the relevant time period and, therefore, did not gain any profit. Consequently, by imposing a damages award for the amount of rental income

against Ocwen, the district court left Ocwen in a worse position to the benefit of Chersus, despite Chersus never conferring any compensable benefit upon Ocwen in the first place.

In addition, as explained at length in section VIII(A) above, because the HOA Sale was commercially unreasonable and, therefore, voidable as to its effect on the Deed of Trust, the Deed of Trust remained a valid encumbrance against title to the Property after the HOA Sale and GMAC properly proceeded to foreclose thereunder. Ocwen is the rightful owner of the Property and has been since the Loan Foreclosure. Accordingly, it is Chersus which has retained the benefit of rental income (under its false claim to ownership of the Property) to the detriment of Ocwen. As such, Ocwen respectfully requests that the Court reverse the judgment of Unjust Enrichment and monetary damages in the amount of $76,650 against Ocwen and remand this matter to the district court with instruction to enter an award of damages in favor of Ocwen and against Chersus for all rental income actually received and retained by Chersus from the time of the Loan Foreclosure onwards.

iv. In the alternative, the district court improperly awarded lost rental income and costs to Chersus.

In the alternative, should this Court determine that the district court did not err in entering judgment in Chersus' favor, the district court nonetheless abused its discretion when it awarded lost rental income and costs to Chersus based on an

untimely disclosed expert witness and an untimely filed Memorandum of Costs.

a. The district court abused its discretion by permitting Chersus to rely on an undisclosed expert witness to prove Chersus' alleged lost rental income.

The district court abused its direction in awarding monetary damages against Ocwen in the amount of hypothetical rental income that Chersus would have received for the period of November 2016 through March 2021 based on an affidavit and "report" of an undisclosed witness, John Zimmer. [XVIII:AA3479.] The district court further abused its direction by "finding that Mr. Zimmer is a qualified expert in the area of rental income in the greater Las Vegas area." [XVIII:AA3547 at lines 23-25.]

Pursuant to NRCP 16.1(a)(2)(A), "[i]n addition to the disclosures required by Rule 16.1(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under 50.275, 50.285 and 50.305." NRCP 16.1(a)(2)(B) further requires that "this disclosure must be accompanied by a written report…if the witness is one retained or specially employed to provide expert testimony in the case[.]" The report is required to contain the following information:

> (i) a complete statement of all opinions the witness will express, and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

> (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

Id.

During discovery, Chersus did not disclose any evidence of hypothetical future rental income from November 2016 onwards. Nor did Chersus disclose an expert witness to testify concerning future rental value for the period of November 2016 onwards. Instead, on October 12, 2019, over five months after the FOFCOL was filed and **fifteen months after discovery closed** in July 2018, Chersus attached the "report" of John Zimmer to its Motion for Judgment in advance of the Prove-Up Hearing. [XV:AA3073-78.] Chersus did not provide the district court with any explanation for its failure to comply with the requirement of disclosing an expert witness during discovery and flippantly stated during the Prove-Up Hearing "[d]iscovery had closed in the main case. The prove up of our damages, that was a different matter." [XVIII:AA3523 at lines 22-23.]

To the extent that Chersus appears to argue that it was not required to disclose Mr. Zimmer and his opinion on damages during discovery because damages is "a different matter", such argument is nonsensical and unsupported by any Rule of Civil Procedure. There was no bifurcation of the elements of liability from damages in the underlying matter, nor did Chersus seek leave of the district court to disclose the untimely expert witness or to reopen discovery to disclose this

witness. Chersus' counsel provided simply no explanation for the significantly dilatory disclosure of Mr. Zimmer. Because Chersus violated NRCP 16.1, Ocwen was deprived of an opportunity to investigate Mr. Zimmer and his report during discovery and deprived of an opportunity to timely disclose a rebuttal expert. The district court adopted Mr. Zimmer's opinion of rental value for the Property during the years 2016 through 2021. This was an abuse of its discretion based on the foregoing failure by Chersus to comply with its disclosure requirements without any alleged or apparent good faith reason for the delay. The district court should have sanctioned Chersus by prohibiting the use of Mr. Zimmer's testimony and report to prove-up Chersus' damages, at a minimum. NRCP 16.1(e)(3)(B).

The district court further abused its discretion by "finding that Mr. Zimmer [wa]s a qualified expert in the area of rental income in the greater Las Vegas area" [XVIII:AA3547] because it failed to conduct any analysis of his qualifications or his methodology. In order to testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: 1) he or she must be qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of his or her specialized knowledge (the limited scope

requirement). *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). "Before a person may testify as an expert under NRS 50.275, the district court must first determine whether he or she is qualified in an area of scientific, technical, or other specialized knowledge. In determining whether a person is properly qualified, a district court should consider the following factors: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Id*. A district court does not abuse its discretion in determining whether a witness qualifies as an expert under NRS 50.275 if its finding is supported by substantial evidence." *Id*., 124 Nev. at 499, 189 P.3d at 651.

Because the district court did not conduct any analysis of Mr. Zimmer's qualifications and, as discussed below, his report was deficient and did not comply with NRCP 16.1(a)(2)(B) – which requires a list of his qualifications and publications – the district court's conclusion that Mr. Zimmer was a qualified expert was arbitrary, capricious and not based on any substantial evidence in the record to support its finding. This was an abuse of the district court's discretion and its reliance on Mr. Zimmer's report of rental income comparables to enter an award of rental income damages against Ocwen must be set aside.

The district court further abused its discretion in allowing Chersus to present the testimony and the report of Mr. Zimmer and then relying on Mr. Zimmer's

opinion of hypothetical rental value of the Property to prove-up damages against Ocwen because Mr. Zimmer's report failed to comply with any of the requirements of NRCP 16.1(a)(2)(B). The "report" presented was simply a Multiple Listing Service print out of comparable rental values during the time period of 2014 through 2019. [XV:AA3073-78.] The report did not contain any statement of Mr. Zimmer's opinions to be expressed during the Prove-Up Hearing and the basis and reasons for those opinions, did not recite the facts and data to be considered by Mr. Zimmer in forming his opinions, did not set forth Mr. Zimmer's qualifications, including a list of all publications authored in the previous ten years, did not include a list of all other cases in which, during the previous four years, Mr. Zimmer had testified as an expert at trial or by deposition, and did not include a statement of the compensation to be paid for his report and testimony in the case. All of this information was required to be included in his report pursuant to NRCP 16.1(a)(2)(B). But the report clearly failed to meet those requirements, again prejudicing Ocwen's ability to adequately evaluate Mr. Zimmer's qualifications and testimony as an expert witness and whether it needed to retain and disclose a rebuttal expert. Further, this lack of information affected the district court's ability to adequately assess whether Mr. Zimmer was qualified as an expert witness and it abused its discretion in concluding that Mr. Zimmer was so qualified. For these additional reasons, the district court abused its discretion in permitting Mr. Zimmer

to testify at the Prove-Up Hearing concerning rental value of the Property in 2016 through 2021 and relying on that testimony to enter an award of damages against Ocwen. The award of damages must be reversed.

b. The district court abused its discretion by awarding Chersus its litigation costs based on an untimely filed Memorandum of Costs.

Because the quiet title judgment in favor of Chersus should be reversed and remanded with instruction to enter judgment in Ocwen's favor, Chersus is not a prevailing party and is not entitled to an award of costs. NRS 18.020, 18.110. But even if Chersus was entitled to an award of costs, Chersus failed to file its Memorandum of Costs within the time set by statute.

NRS 18.110 requires that,

> The party in whose favor judgment is rendered, and who claims costs, must file with the clerk, and serve a copy upon the adverse party, **within 5 days after the entry of judgment**, or such further time as the court or judge may grant, a memorandum of the items of the costs in the action or proceeding, which memorandum must be verified by the oath of the party, or the party's attorney or agent…stating that to the best of his or her knowledge and belief the items are correct, and that the costs have been necessarily incurred in the action or proceeding.

In awarding costs, "the trial court should exercise restraint because "**statutes permitting recovery of costs**, being in derogation of the common law, **must be strictly construed**."" *Bergmann v. Boyce*, 109 Nev. 670, 679, 856 P.2d 560, 565-66 (1993) (citations omitted) (emphasis added).

The record here reflects that the Court entered its Order granting summary judgment to Chersus on May 6, 2019, notice of entry of which was filed on May 7, 2019. [XIV:AA2771.] However, Chersus did not file its Memorandum of Costs until October 12, 2019, over five months after it was originally due. [XV:AA3040.] Chersus did not provide the Court or Ocwen with any valid explanation for its delay or any good faith reason for its failure to comply with the filing deadline set forth in NRS 18.110. Chersus simply represented to the district court during the prove-up hearing that the prior judge had provided that the prove-up hearing would address damages, including costs. [XVIII:AA3504.] While it is true that Chersus' claimed costs were to be addressed at the prove-up hearing, it is a false representation by Chersus' counsel to the newly-assigned district court judge that the prior judge somehow authorized him to file a Memorandum of Costs more than five months later. In fact, the express terms of the Order granting summary judgment to Chersus, entered on May 6, 2019, state that **"[w]ithin 45 days of the Notice of Entry of this Order, Chersus shall file its Memorandum of Costs**[.]" [XIV:AA2771 at ¶E (emphasis added).] In other words, Chersus had 45 days from May 6, 2019 to file its Memorandum of Costs, which would have been June 20, 2019. Chersus did not file its Memorandum of Costs until October 12, 2019. [XV:AA3040.] Accordingly, the district court abused its discretion by disregarding Chersus' failure to timely seek costs and the award of costs in favor

of Chersus must be reversed.

Further, even if costs were appropriately considered, Chersus failed to provide sufficient evidence to support the alleged costs incurred for five depositions as the supporting exhibits lack any identifying information to identify which witness was deposed, the date of the deposition or whether Chersus actually and necessarily incurred the deposition cost. *See* [XV:AA3040-52.]

"A district court is not permitted to award attorney fees or costs unless authorized by statute, rule or contract." *U.S. Design & Constr. Corp. v. Int'l Bhd. Of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (Nev. 2002). Through its Memorandum, Chersus appears to invoke the cost-shifting provisions found in NRS 18.005 and NRS 18.020. This Court has authoritatively construed these same cost-shifting statutes to require submission of documentation providing evidentiary support for costs claimed through a memorandum of costs. *Jacksonville Police & Fire Pension Fund v. Brokaw* (*In re Dish Network Derivative Litig.*), 133 Nev. 438, 401 P.3d 1081, 1093 (Nev. 2017) (stating, "[t]o support an award of costs, justifying documentation must be provided to the district court to "demonstrate how such [claimed costs] were necessary to and incurred in the present action."). This Court further clarified this requirement by expressly reiterating, "Justifying documentation means 'something more than a memorandum of costs.'" *Id.* (emphasis added).

Indeed, this Court has construed the cost-shifting statutes under which Chersus sought relief strictly to require proof of actual costs incurred by the movant in recognition of the fact that NRS 18.005 and NRS 18.020 operate in derogation of the common law. *See, e.g., Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1352, 971 P.2d 383, 385 (Nev. 1998) (citing *Gibellini v. Klindt*, 110 Nev. 1201, 1205, 885 P.2d 540, 543 (Nev. 1994) for the same proposition). The supporting documentation, in turn, must demonstrate how the movant's claimed costs are reasonable, necessary, and were actually incurred. *See, e.g., The Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 345 P.3d 1049, 1054 (2015) (stating, "[t]hus, costs must be reasonable, necessary, and actually incurred. We will reverse a district court decision awarding costs if the district court has abused its discretion in so determining.").

Although the Court has wide discretion in adjudicating a memorandum of costs, that discretion is not unlimited. *Id*. at 1054 (recognizing that NRS 18.020 "give[s] district courts wide, but not unlimited, discretion to award costs to prevailing parties. Costs awarded must be reasonable…."). An award of costs in the complete absence of supporting documentation has been held to constitute an abuse of discretion and reversible error by this Court. *See, e.g., Bobby Berosini, Ltd*., 114 Nev. At 1353, 971 P.2d at 386 (stating, "[b]ased on our review of the record on appeal, we note that PAWS' memorandum of costs is completely void of

any specific itemization. Because of the lack of sufficient supporting documentation, we conclude that the district court abused its discretion in awarding costs to PAWS."). In *In re Dish Network Derivative Litigation*, this Court spoke clearly and unequivocally: "[t]o support an award of costs, justifying documentation must be provided to the district court…Justifying documentation means 'something more than a memorandum of costs.'" 401 P.3d 1081, 1093, 401 P.3d 1081 (2017) (quoting *The Cadle Co. v. Woods & Erickson, LLP*, 131 Nev. 114, 121, 345 P.3d 1049, 1054 (2015)).

Because the invoices identifying deposition charges were devoid of pertinent justifying documentation to confirm which witness was deposed, when the deposition occurred and if Chersus even paid the deposition invoice, there is no evidence that the depositions were actually and necessarily incurred by Chersus. Accordingly, the district court abused its discretion in awarding deposition costs in the total amount of $2,343.15 to Chersus.

IX. CONCLUSION

Ocwen requests the Court reverse and remand summary judgment and award of monetary damages in favor of Chersus on all of its counterclaims with direction to the district court to enter a judgment of quiet title in Ocwen's favor based on applicable Nevada law. In the alternative, should this Court affirm summary judgment against Ocwen, Ocwen requests that this Court reverse the award of

monetary damages in favor of Chersus and against Ocwen in its entirety.

DATED this 21st day of January, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Christina V. Miller

Christina V. Miller, Esq.
Nevada Bar No. 12448
7785 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Appellant, Ocwen Loan Servicing, LLC

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 2010 in 14 point, Times New Roman style. 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 proportionately spaced, has a typeface of 14 points or more, and contains 11,725 words. Finally, I hereby 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 and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 21st day of January, 2022.

WRIGHT, FINLAY & ZAK, LLP

/s/ Christina V. Miller
Christina V. Miller, Esq.
Nevada Bar No. 12448
7785 West Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Attorneys for Appellant, Ocwen Loan Servicing, LLC

CERTIFICATE OF SERVICE

I certify that I electronically filed on the 21st day of January, 2022, the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[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.

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Michelle Adams	michellea@nelsonlawfirmlv.com
Legal Assistant	legalassistant@nelsonlawfirmlv.com
Master Calendering	mail@nelsonlawfirmlv.com
Vernon A. Nelson	vnelson@nelsonlawfirmlv.com
Ashlie Surur	ashlie@sururlaw.com

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

/s/ Tonya Sessions
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