IN THE SUPREME COURT OF THE STATE OF NEVADA

OCWEN LOAN SERVICING, LLC, A FOREIGN LIMITED LIABILITY COMPANY, Appellant/Petitioner (Appellant) vs. CHERSUS HOLDINGS, LLC, A DOMESTIC LIMITED LIABILITY COMPANY; and SOUTHERN TERRACE HOMEOWNERS ASSOCIATION, A DOMESTIC NONPROFIT CORPORATION, Respondents/Respondents (Defendants)	Case No. 82680 District Court Case No. A696357

APPELLEE/RESPONDENT CHERSUS HOLDINGS, LLC

AMENDED ANSWERING BRIEF

(previous filing was of a prior draft-this is correct draft)

VERNON A. NELSON, JR., ESQ.
Nevada Bar No. 6434
LAW OFFICE OF VERNON NELSON
9550 S. Eastern Ave., Suite 253
Las Vegas, Nevada 89123
Telephone Number 702-525-7884
vnelson@nelsonlawfirmlv.com
Attorney for Respondent
CHERSUS HOLDINGS, LLC

NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record for Chersus Holdings, LLC certifies the following are persons and entities as described in NRAP 26.l(a), and must be disclosed:

1. Parent Corporations	None
2. Publicly Held Company	None
3. Respondent's Counsel of Record	Law Office of Vernon Nelson, PLLC

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ISSUES PRESENTED

In its Docketing Statement, Appellant listed five issues on appeal:

1. Whether the district court erred in granting Chersus's MSJ despite issues of whether the HOA Sale was commercially reasonable or conducted in good faith

2. Whether the district court erred in granting Chersus's MSJ Because Ocwen failed to tender the superpriority amount, when Red Rock rejected such tenders.

3. Whether the district court erred in denying Ocwen's Motion to Alter or Amend Judgment based upon manifest errors of law or fact in the FOFCOL.

4. Whether the district court erred in calculating Chersus's damages.

5. Whether the district court erred in allowing an undisclosed expert to testify at the prove-up.

However, in the "Issues Presented" section of its Opening Brief, Appellant uses three pages to state nine issues on appeal, including issues not raised in the district court. The Legal Argument also fails to address multiple "Issues Presented."

In the Summary of the Argument, Appellant offers these issues/arguments:

1. The District Court erred by relying on W. Sunset 2050 Trust v. Nationstar Mortg., LLC, 134 Nev. 352 (2018)

2. The District Court erred by not analyzing if First 100 or Chersus were BFPs.

3. The District Court erred in granting judgment for wrongful foreclosure.

4. The District Court erred in granting summary judgment for Trespass.

5. The District Court erred in awarding Chersus unjust enrichment.

6. The District Court erred in awarding amounts for lost income/court costs.

STATEMENT OF THE CASE

Appellant commenced this action to quiet title to the real property commonly known as 5946 Lingering Breeze Street, Las Vegas, 89148 (the "Property"). Prior this action: (1) First 100, LLC ("First 100") acquired the Property at a homeowner's association lien foreclosure sale ("HOA Sale"); (2) Respondent Chersus Holdings, LLC ("Chersus") acquired all of First 100's interest in the property via a quitclaim deed, and (3) Appellant knowingly/wrongfully participated in a foreclosure sale that arose out of the first deed of trust ("DOT") that was extinguished at the HOA Sale.

The procedural history is lengthy because several decisions impacted the Nevada Supreme Court's holding in *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A. (SFR I)*, 130 Nev. 742, 758, (2014). In short, the relevant operative pleadings begin with the Second Amended Complaint ("SAC") where Appellant sought a judgment quieting title to the Property and which determined Chersus' interest in the Property was subject to the DOT. *II:AA0201-334.* Appellant asserted allegations related to: (1) the priority of the DOT, (2) defective notice of the HOA Sale, (3) NRS Chapter 116, (4) the commercially unreasonable HOA Sale, (4) the duties of the HOA, (5) Chersus's status as a bona fide purchaser, and (6) its purported damages. *Id.* Chersus's denied Appellant's claims and made a counterclaim asserting causes of action for (1) wrongful foreclosure, (2) quiet title, (3) declaratory relief, and (4) trespass/conversion. *III:AA0338-49*.

In late 2018, Appellant and Chersus filed separate motions for summary judgment. *See Ocwen's MSJ at III:AA0363-IV:AA0501-715,V:AA0716-858; Chersus MSJ at V:AA0859-887 –XII:AA2303*. The district court heard the motions on January 22, 2019 and granted Chersus's MSJ and denied Appellant's MSJ. The district court entered its written Findings of Fact, Conclusions of Law and Order ("FOFCOL") on May 6, 2019. *XIV:AA2740-80*. The FOFCOL stated the Court would set evidentiary hearing to determine the amount of Chersus's damages. *Id*.

On June 11, 2019, Appellant filed a Motion for Reconsideration. After delays, the Court denied the motion on February 20, 2020. *XVIII:AA3457-58*. On October 12, 2019, Chersus filed a Motion for: (1) Judgment or Prove-Up Hearing for Compensatory, Statutory, and Punitive Damages: (2) Order Awarding Attorney's Fees; and (3) Orders for Specific Performance and Costs. *XV:AA3053-152;*

On March 6, 2020, after denial of its Motion for Reconsideration, Appellant filed a notice of appeal. The appeal was dismissed because the district court had not entered a final judgment including Chersus's damages. *XVIII:AA3459-60*. On March 4, 2021, the district court conducted an evidentiary hearing where Chersus proved-up its damages ("Prove-Up Hearing"). *XVIII:AA3500-65*. The district court awarded Chersus damages of $76,650.00 and costs of $2,522.17. *XVIII:AA3478-85*. Appellant filed a Notice of Appeal on March 23, 2021. *XVIII:AA3498-99*.

STATEMENT OF FACTS AND RELEVANT PROCEDURAL HISTORY

A. The District Court's Findings of Fact of May 6, 2019 Are Not In Dispute.

The district court entered its FOFCOL on May 6, 2019. *XIV:AA2740-80*. The issues raised on appeal do not dispute these factual findings.

1. Prior to Litigation

a. Harrison Loan Documents.

On March 13, 2008, Joseph F. Harrison and Bonnie L. Harrison (the "Harrisons") purchased the Property and executed the DOT identifying Direct Equity Mortgage, LLC as the Lender, MERS as beneficiary acting solely as a nominee for Lender/its successors and assigns, Nevada Title Company as Trustee. *Id. at* ¶¶ *1- 2*. The DOT secured a loan of $234,739.00 (the "Harrison Loan"). *Id.* On July 23, 2012, an Assignment of Deed of Trust was recorded, reflecting that MERS assigned the Deed of Trust to GMAC Mortgage, LLC ("GMAC"). *Id. at* ¶ *3*.

b. HOA Lien Documents.

The Property is subject to the Master Declaration of Covenants, Conditions and Restrictions and Reservation of Easements for Southern Terrace (the "CC&Rs"), which were recorded on August 9, 2001. *Id. at* ¶ *4*. On December 8, 2011, a Lien for Delinquent Assessments (the "HOA Lien") was recorded against the Property by Red Rock Financial Services ("Red Rock") on behalf of the HOA as Instrument Number 201112080002960. *Id at* ¶ *5*. It states Red Rock was assigned as agent by

the HOA, in accordance with NRS 116, as outlined in the HOA's CC&Rs, and Red Rock notified the Harrisons the HOA imposed the HOA Lien on the Property. *Id.*

On February 2, 2012, a Notice of Default and Election to Sell Pursuant to the HOA Lien was recorded by Red Rock as Instrument Number 201202020000465. *Id. at ¶ 6*. The Notice of Default and Election to Sell shows Red Rock notified the Harrisons it had recorded a Notice that made it known they breached their obligation under the CC&Rs; and therefore, the HOA was declaring all amounts secured, due and payable, and electing to sell the Property to satisfy the HOA Lien. *Id.*

On May 2, 2013, a Notice of Foreclosure Sale was recorded against the Property by a new Trustee, United Legal Services, Inc. ("ULS"), as Instrument Number 01305020000105. *Id. at ¶ 7*. The Notice shows the Harrisons were notified and warned: (a) the sale of their property was imminent; (b) they had to pay the specified amount or risk losing their home; (c) if they continued to be in Default their home could be sold at auction, and (d) the auction was scheduled for May 25, 2013 at 9:00AM at 8965 S. Eastern Ave, Suite 350, Las Vegas, NV 89123. *Id.*

On or around May 28, 2013, a Foreclosure Deed upon Sale (the "First 100 Foreclosure Deed") was executed conveying Property to First 100 pursuant to the HOA Sale. *Id. at ¶ 8*. First 100 subsequently recorded the First 100 Foreclosure Deed on May 29, 2013 as Instrument number 201305290002514. *Id.* The first page of the First 100 Foreclosure Deed includes the following recitals:

This conveyance is made pursuant to the powers conferred upon Agent by NRS Chapt. 116, the foreclosing Association's governing documents (CC&R's), and the notice of the Lien for Delinquent Assessments, recorded on December 8, 2011as instrument 201112080002960 in the Official Records of the Recorder of Clark County, Nevada. Default occurred as set forth in the Notice of Default and Election to Sell, recorded on February 2, 2012 as instrument 201202020000465 in Official Records of the Recorder of Clark County, Nevada. All requirements of law have been complied with, including, but not limited to, the elapsing of the 90 days, the mailing of copies of the notice of Lien of Delinquent Assessment, and Notice of Default, and the mailing, posting, and publication of Notice of Foreclosure Sale. Agent, in compliance with Notice of Foreclosure Sale and in exercise of its power under NRS§116.31164, sold the property at public auction on May 25, 2013.

c. Subsequent Transfers of the Property.

On August 24, 2012, a Substitution of Trustee was recorded, reflecting that Cooper Castle Law Firm ("Cooper Castle") was substituted as Trustee under the Deed of Trust. *Id. at ¶ 10*. On March 6, 2013, Cooper Castle recorded a Notice of Breach and Default and of Election to Cause Sale of Real Property Under Deed of Trust. *Id.* On October 23, 2013, First 100 sold the Property to Chersus which recorded its deed on January 13, 2014 On December 20, 2013, GMAC purported to foreclose on the Property pursuant to the DOT. *Id. at ¶ 13*. Appellant purchased the Property at the resulting foreclosure sale ("Trustee Sale"). *Id.* Appellant recorded its Trustee's Deed Upon Sale on January 7, 2014 (the "Ocwen Deed") *Id. at ¶ 14*.

2. The Litigation

a. Litigation Related to Ocwen's Initial Complaint

Appellant filed its initial Complaint on February 19, 2014. *Id. at ¶ 15*. Chersus

was the sole Defendant. Appellant alleged it obtained its ownership interest in the Property via the Trustee Sale. *Id.* Appellant alleged any interest First 100 may have obtained in the Property was subject to the DOT and the Trustee Sale extinguished First 100's interest in the Property and any interest Chersus acquired from First 100. *Id.* Appellant asserted claims for quiet title, and declaratory relief. *Id.* Chersus filed its Answer and Counterclaim on March 28, 2014 and denied the material allegations in the Complaint. In its Counterclaim, Chersus alleged on November 13, 2014, First 100 put GMAC and Appellant on actual notice the HOA Lien had been foreclosed upon and the Deed of Trust had been extinguished. *Id. at ¶ 16*. Chersus alleged Appellant had constructive and actual notice of the HOA Foreclosure; but despite such notice it wrongfully proceeded to acquire the Property via the Trustee Sale. *Id.* Chersus asserted claims for wrongful foreclosure, quiet title, declaratory relief, and conversion. Appellant filed a Motion for Summary Judgment in April 2014. *Id. at ¶ 17*. Defendant filed its Opposition and a Countermotion for Summary Judgment. *Id.*

b. The SFR Decision.

During the pendency of the parties MSJ Motions, the Nevada Supreme Court decided *SFR Investments Pool 1, LLC* v. *U.S. Bank, NA.*, 130 Nev. 742 (2014) (the "SFR I Decision"). *Id. at ¶ 18*.

c. Appellant Files Amended Complaint.

Given the SFR Decision, Appellant moved to amend complaint. *Id. at ¶ 19*.

In its Amended Complaint, Appellant restated its allegations against First 100 and Chersus; and added defendants including, HOA, Red Rock and ULS. *Id. at ¶ 20*.

d. Allegations In First Amended Complaint Against Chersus

(1) The Deed of Trust Priority Allegations.

Appellant alleged: (a) any interest First 100 obtained in the Property was subject to the DOTt; (b) the DOT Foreclosure extinguished any interest that First 100 or Chersus had in the Property; and (c) the HOA sale was invalid if it extinguished the Deed of Trust ("Deed of Trust Priority Allegations"). *Id. at ¶ 21*.

(2) The Defective Notice Allegations

Appellant also alleged: (a) an HOA sale conducted pursuant to chapter NRS 116 must comply with NRS 116.31162 through NRS 116.31168; (b) a lender/holder of a beneficial interest in a senior deed of trust has aright to cure a delinquent HOA Lien to protect its interest; (c) Red Rock and ULS did not comply with all mailing and noticing requirements of NRS 116.31162-NRS 116.31168; (d) a recorded notice of default must describe the deficiency in payment; (e) the HOA Sale occurred without adequate notice to Appellant; (f) the HOA Sale occurred without notice to Appellant as to what portion of the HOA Lien, if any, the HOA and HOA trustee claimed constituted a superpriority lien; (g) the HOA Sale occurred without notice to Appellant whether the HOA was foreclosing on the superpriority portion of the lien, if any, or under the "non-superpriority" portion of the HOA Lien; (h) the HOA

Sale occurred without notice to Appellant of the right to cure the delinquent assessment and the superpriority lien, if any; (i) the HOA Sale was an invalid sale and did not extinguish Appellant's secured interest because of the defective notices; and (j) the HOA foreclosure notices included improper fees and costs in cure amount and invalidated the HOA Lien (the "Defective Notice Allegations"). *Id. at ¶ 22*.

(3) The Statutory Allegations

Appellant alleged: (a) per NRS Chapter 116, a lien under NRS 116.3116 (1) can only include costs and fees that are specifically enumerated in the statute; (b) a HOA may only collect as part of the superpriority lien nuisance abatement charges and nine months of common assessments (unless Fannie Mae and Freddie Mac regulations require a shorter period of not less than six months); (c) the attorney's fees and costs of collecting an HOA Lien cannot be included in the lien or superpriority lien; (d) upon information and belief the HOA Lien is unlawful and void under NRS 116.3102 et seq. (the "Statutory Allegations"). *Id. at ¶ 23*.[1]

(4) The CC&R Allegations

Appellant alleged: (a) the CC&Rs provided the HOA Lien was subordinate to the DOT; (b) the CC&Rs had a mortgagee protection clause; (c) given the mortgagee protection clause, and lack of notice, Appellant did not know it had to attend the

[1] Appellant made "Constitutional Allegations" it abandoned in the SAC. *Id. at ¶ 24*.

HOA Sale to protect its Deed of Trust (the "CC&R Allegations"). *Id. at ¶ 25*.

(5) The Commercially Unreasonable Allegations

Appellant alleged the HOA Sale was not conducted in a commercially reasonable manner and sale was invalid. *Id. at ¶ 26*. Appellant claimed the HOA Sale was not commercially reasonable because: (a) the fair market value of the Property, at the time of the sale, greatly exceeded the purchase price; and (b) notice of the correct superpriority amount was not provided. *Id.* Appellant also alleged potential bidders were aware of the mortgagee protection clause. *Id.* Based on this alleged knowledge of potential bidders, Appellant claimed the sale was commercially unreasonable because proper notice the HOA intended to foreclose on the superpriority portion of the dues owing was not given; which caused prospective bidders to not appear for the HOA Sale. *Id. at ¶ 27*. Appellant claimed Defendants knew it would rely on the mortgagee protection clause and it would not know the HOA was foreclosing on superpriority amounts, due to the lack of notice. *Id.* The lack of notice resulted in Appellant being absent; thereby allowing First 100 to acquire the property for a fraction of market value. Appellant claimed Defendants knew: (I) prospective bidders would be less likely to attend the HOA Sale due to the mortgagee protection clause, and (II) there would be an absence of prospective bidders (the "Commercially Unreasonable Allegations"). *Id.*

(6) The HOA 's Duties Allegations

Appellant alleged the methods of the HOA Sale breached the HOA's and the HOA Trustee's obligations of good faith under NRS 116.1113; and their duty to act in a commercially reasonable manner (the "HOA's Duties Allegations"). *Id. at ¶ 28*.

(7) The BFP Allegations

Appellant alleged: (a) First 100 and Chersus are "professional foreclosure sale purchasers;" (b) First 100 and Chersus had actual, constructive or inquiry notice of the DOT; and (c) because of their "notice" of the DOT, and their status as "professional foreclosure sale purchasers," First 100 nor Chersus could be deemed bona fide purchasers for value (the "BFP Allegations"). *Id. at ¶ 29*.

(8) Appellant's Damages Allegations

Appellant alleged if the DOT was not reaffirmed or restored, the HOA was liable for damages in the amount of the fair market value of the Property, or the unpaid balance of the DOT/Note ("Appellant's Damages Allegations"). *Id. at ¶ 30*.

Based on these allegations, Appellant asserted claims for (a) Quiet Title and Declaratory relief; (b) Preliminary and permanent injunctions; (c) Wrongful foreclosure against the HOA, Red Rock, and ULS; (d) Negligence versus the HOA, Red Rock and ULS; (e) Negligence per se versus the HOA, Red Rock, and ULS; (f) Breach of contract versus the HOA, Red Rock and ULS; (g) Misrepresentation versus the HOA; (h) Unjust enrichment versus the HOA; and (i) Tortious

interference with contract. *Id. at ¶ 31*.

e. Chersus's Answer to Amended Complaint and Counterclaims

On July 29, 2016, Chersus filed its Answer to the Amended Complaint and asserted counterclaims. *Id. at ¶ 32*. Chersus denied the material allegations of the Amended Complaint and asserted Counterclaims against Appellant as follows.

(1) The Chersus Title Allegations

Chersus alleged: (a) the First 100 Foreclosure Deed conveyed the Property to First 100; (b) the HOA Sale was held per NRS Chapter 116 and the HOA Sale foreclosed the HOA Lien; (c) on October 23, 2013, First 100, LLC sold the Property to Chersus and the Chersus Deed was recorded on January 13, 2014 (the "Chersus Title Allegations"). *Id. at ¶ 33*.

(2) The Ocwen Foreclosure Allegations

Chersus alleged: (a) on November 13, 2014, First 100 put Appellant and its agents on actual notice the HOA Lien had been foreclosed on and the DOT was extinguished; (b) despite being its notice of the HOA Sale, Ocwen proceeded to try to acquire the Property at the Trustee's Sale in December 2014; and (c) it wrongfully recorded the Ocwen Deed on January 7, 2014 (the "Ocwen Foreclosure Allegations"). *Id. at ¶ 34*. Based on these allegations, Chersus asserted claims for (1) Wrongful foreclosure; (2) Quiet title; (3) Declaratory relief; and (4) Conversion.

f. The SAC Complaint and Dismissal of ULS & Red Rock.

After Red Rock filed a Motion to Dismiss the Amended Complaint, Appellant filed the SAC on January 23, 2018. *Id. at ¶ 37*. As to Chersus, the allegations and claims asserted in the SAC are essentially the same as those asserted in the Amended Complaint, except for the removal of certain "Constitutional Claims." *Id. at ¶ 38*. Chersus answered the SAC on March 19, 2018, denied all the material allegations in the SAC, reasserted its original Counterclaims and added claims for Unjust Enrichment and Slander of Title. *Id. at ¶ 39*. On April 10, 2018, a Notice of Stipulation and Order was entered dismissing ULS without prejudice. *Id. at ¶ 41*.

g. Material Facts Revealed During Discovery

(1) Deposition of Red Rock's NRCP 30(b)(6) witness, Sara Trevino

Red Rock's 30(b)(6) witness, Sara Trevino testified about the notices Red Rock mailed in this case and her testimony: (1) authenticated mailing affidavits signed by Red Rock employees that state how many notices were signed and how many were mailed; (2) identified which notices are sent by certified mail and first-class mail, which notices are sent by first-class mail only, (3) when specific notices are sent; (4) how skip-traces and title reports are used to identify addresses for the homeowners and others holding vested interests in the Property, (5) how Red Rock maintains "return receipts" it receives from certified mail; (6) how Red Rock maintains checklists for each type of notice that its employees are to follow when

mailing notices and how this information is included in the employees' mailing affidavits; (7) how Red Rock uses a third-party vendor Walz to mail many of the notices; (8) how she knows that Walz maintains records proving it sent notices and (9) how she is able to access Walz' s system and obtain proof that notices were mailed. *Id. at ¶ 42*. Based Ms. Trevino's testimony, the Court found Red Rock sent the Lien for Delinquent Assessment Notices and the Notice of Default and Election to Sell in accordance with NRS Chapter 116. *Id.*

Ms. Trevino also testified: (a) about payoff demands made by Cooper Castle on behalf of GMAC, (b) that Red Rock provided Cooper Castle with an Accounting Ledger in response to its payoff demands; (c) Cooper Castle could have calculated the amount of the superpriority lien by using the Accounting Ledger; (d) Red Rock did not receive any communications from Cooper Castle after it sent them the Accounting Ledger; and (e) Red Rock never received payment of the HOA Lien or a partial payment of the HOA Lien. *Id. at ¶ 43*. Based on Ms. Trevino's testimony, the Court found GMAC and Ocwen had notice of the HOA Sale, they were provided with an Accounting Ledger, and they could have calculated the amount of the superpriority lien. *Id. at ¶ 44*. The district court also found GMAC and Ocwen could have paid the calculated superpriority lien, the full HOA Lien, or any amount in between those two amounts. *Id.* However, neither GMAC nor Ocwen paid any portion of the HOA Lien. *Id.*

(2) Deposition of ULS's NRCP 30(b)(6) witness, Robert Atkinson

(a) Notice Issues

ULS's NRCP 30(b)(6) witness, Robert Atkinson, testified about the notices ULS mailed out in this case and he: (a) authenticated the Notice of Foreclosure Sale and explained how it was mailed; (b) described how ULS conducts its own thorough investigation of the "land records;" including the Assessor's Records to ensure they have the best addresses for the property-owners and other parties holding vested interests in the Property; (c) authenticated the "bulk form certificate of mail," known as Postal Service Form 3877; which evidences the notices were delivered to the post-office and handed to a post-office clerk; (d) explained how ULS completed the form by filling in the addresses for the Notices and by putting slashes on any unused lines; (e) explained how the Post-Office Clerk confirms and matches the addresses on the notices to the addresses on the bulk form; and (f) explained how the Post-Office Clerk verifies the actual mailing with a stamp and gives the original back to ULS. *Id. at ¶ 45*. The bulk form shows the Notices of Foreclosure Sale were sent to GMAC and Cooper Castle Law Firm, LLP. *Id.* The Court found ULS sent the Notices of Foreclosure in compliance with NRS 116.31162 to 116.31168. *Id.*

(b) No Payments Received

Based on Mr. Atkinson's testimony he did not receive any payments, the district court found ULS did not receive payment prior to the HOA Sale. *Id. at ¶ 46*.

(c) Conducting the Sale on Saturday Was Commercially Reasonable and In Good Faith.

Mr. Atkinson also testified the HOA Sale occurred on a Saturday at his office. *Id. at ¶ 47*. Mr. Atkinson testified he conducted HOA Sales on Saturday mornings because his office did not have a conference room with closed doors and he did not want "a bunch of randoms" wandering around his law office. *Id. at ¶ 48*. Mr. Atkinson testified: (a) he conducted the auction; (b) he recalled the auction was well attended; (c) it was reasonable to infer there was active bidding based on the $3,500 sales price; (d) a "core number of NRS 116 type buyers" usually always showed up for HOA Sales conducted in his office; and (e) many buyers attended foreclosure sales he conducted for the HOA and purchased homes at the foreclosure sales he conducted for the HOA. *Id.* Based on Mr. Atkinson's testimony, the district court determined Mr. Atkinson's decision to conduct the sale at his office on a Saturday morning was commercially reasonable and multiple bidders attended the HOA Sale. *Id*. The district court determined that conducting the sale on Saturday was not intended to dissuade or prevent potential purchasers from attending the sale; and it did not actually dissuade or prevent potential purchasers from attending. *Id.*

(d) The Purchase and Sale Agreement Was a Tripartite Agreement, Negotiated in An Arms Length Agreement, In Exchange for Valuable Consideration of Each of the Parties

Mr. Atkinson testified about the Purchase and Sale Agreement ("PSA") made

between the HOA and First 100. *Id. at ¶ 49.* Pursuant to the PSA, First 100 purchased "Past Proceeds of Income" ("PPI") for delinquent properties from the HOA. *Id.* The PSA was negotiated in an "arms-length" tri-partite agreement between First 100, the HOA, and ULS. *Id.* Thus, the PSA did not affect the relationship between the HOA and the Harrisons. *Id.* Mr. Atkinson testified how ULS worked with HOAs on the drafting of PSAs like the PSA in this case. *Id. at ¶ 52*.

Mr. Atkinson explained when First 100 purchased the PPI, it did not purchase the HOA Lien and the HOA still owned the HOA Lien including the superpriority portion, and the right to future dues. *Id. at ¶ 53*. Nothing in the PSA changed the fact that the HOA Lien belonged to the HOA. *Id.* Atkinson testified that purchasing PPI from an HOA is akin to a factoring agreement. *Id.* Pursuant to the PSA, First 100 purchased the right to receive all future monetization events related to the PPI. *Id.*

The parties determined the amount of PPI attributable to the Property was $1,208.28. *Id. at ¶ 50*. This amount was based on a calculation that First 100 made in connection with evaluating the value of the PPI related to the Property as part of the overall transaction and was agreed to the HOA in the PSA. *Id.* First 100 paid the HOA the total amount of the PPI provided for in the PSA. *Id. at ¶ 51*. Pursuant to the PSA, First 100 also paid ULS's fees of $1,200.00 and certain fees owed to Red Rock. *Id.* First 100 paid $3,500.00 at the HOA Sale as the winning bidder.

In this regard, Atkinson testified the PSA required the HOA to retain ULS for

collection efforts, including any efforts related to the foreclosure of the HOA Lien. *Id. at ¶ 54*. Atkinson explained the PSA allowed for a minimum bid of $99.00 as a means of starting the bidding and to make it clear that potential purchasers could bid less than the HOA Lien amount. *Id.* Atkinson also noted the PSA did not allow the HOA to credit bid; however, he pointed out HOAs did not want to acquire properties at foreclosure sales. *Id. at ¶ 56.* Atkinson testified that in his experience, HOAs did not want to be responsible for paying assessments, cleaning up the property, being subject to self-compliance fines, or being responsible for kicking out squatters. *Id.*

(3) Deposition of Chersus's NRCP 30(b)(6) witness, Jag Mehta.

Mr. Mehta, the Managing Member of Chersus testified Chersus spent about $40,000 for repairs on the Property before the wrongful foreclosure. *Id. at ¶ 57.*

Based on these Findings of Fact, the district court concluded:

1. NRS 116.3116 granted to the HOA a Superpriority Lien that had priority over the DOT and the DOT was extinguished at the HOA Sale.

2. The HOA complied with the notice requirements of NRS Chapter 116.

3. First 100's payment to the HOA pursuant to the PSA was not related to the HOA Lien and, therefore, it did not discharge the Superpriority Lien.

4. Appellant's contention that the HOA Sale was commercially unreasonable is without merit because the HOA Sale was valid and defendant failed to produce any evidence that fraud, unfairness, or oppression affected the sale.

5. Appellant's contentions that neither First 100 nor Chersus were bona fide purchasers are irrelevant.

6. Chersus is entitled to judgment on its counterclaims for wrongful foreclosure, quiet title, declaratory relief, and trespass/conversion, and unjust enrichment as a matter of law. XIV:AA2740-80 at ¶¶ 83-103.

h. Appellant's Motion for Reconsideration

On June 11, 2019, Appellant filed a Motion for Reconsideration. After multiple delays, the Court denied the motion on February 20, 2020. *XVIII:AA3457-58.* On October 12, 2019, Chersus filed its Motion for: (1) Judgment or Prove-Up Hearing for Compensatory, Statutory, and Punitive Damages: (2) Order Awarding Attorney's Fees…; and (3) Orders for Specific Performance. *XV:AA3053-152*. Chersus also filed a Memorandum of Costs *XV:AA3040-52*. On March 6, 2020, after denial of its Motion for Reconsideration, Appellant filed a notice of appeal. However, the appeal was dismissed as premature as the Court had not entered a final judgment that included the amount of Chersus's damages. *XVIII:AA3459-60*

On March 4, 2021, a hearing was held to give Chersus the opportunity to prove-up its damages ("Prove-Up Hearing") *XVIII:AA3500-65.* Chersus was awarded damages of $76,650.00 and costs of $2,522.17. *XVIII:AA3478-85*. Appellant filed its Notice of Appeal on March 23, 2021. *XVIII:AA3498-99*.

ARGUMENT

A. STANDARD OF REVIEW

1. Summary Judgment Standard

The Nevada Supreme Court reviews a district court order granting summary judgment de novo. *Myers v. Reno Cab Co*., 492 P.3d 545 (Nev. 2021)(citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should be granted if the admissible evidence, viewed in the light most favorable to the opposing party, shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id*. To discern whether a genuine issue of material fact exists, the Court must determine if a reasonable jury, based on admissible evidence, could return a verdict for the non-movant. *Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007).

NRCP Rule 56 provides summary judgment shall be granted if the admissible evidence on file shows there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. The Court will accept as true only properly supported factual allegations. *Wayment v. Holmes*, 112 Nev. 232, 237 (1996). Conclusory allegations and general statements that are unsupported by evidence will not be accepted as true and they do not create an issue of fact. *Id*.

2. Admissibility of Expert Testimony

The admissibility of expert testimony and whether an expert witness is

qualified is within the district court's discretion. The Court reviews such decisions for a clear abuse of discretion. *Mulder v. State* , 116 Nev. 1, 12-13, (2000). An expert witness must satisfy three requirements: (1) the expert must be qualified in an area of scientific, technical or other specialized knowledge, (2) the expert's specialized knowledge must assist the trier of fact to understand the evidence, and (3) the expert's testimony must be limited to the scope of his/her specialized knowledge. *Hallmark v. Eldridge* , 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). Per NRCP 16.1 and NRCP 37(b), the Court may exclude the use of a witness who was not disclosed, unless the failure to disclose was harmless.

3. Award of Costs

An award of costs is reviewed for an abuse of discretion. *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462 (2002)

B. THE DISTRICT COURT'S ORDER GRANTING QUIET TITLE TO CHERSUS MUST BE AFFIRMED.

Appellant contends the HOA Sale was commercially unreasonable because the sales price paid by First 100 at the HOA Sale was grossly inadequate; and because there was evidence that fraud, unfairness, or oppression affected the sale. *See Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp. Inc*., 366 P.3d 1105, 1112 (Nev. 2016). In *Shadow Wood*, the Nevada Supreme Court held NRS 116.31166 did not preclude courts from granting equitable relief from a defective

foreclosure sale when appropriate. 366 P .3d at 1110-1111. In this regard, the Court held that a foreclosure sale could be set aside if there was a grossly inadequate sales price, and a showing of fraud, unfairness, or oppression. *Id.*

In *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 643-44, the Court restated inadequacy of price alone is not a sufficient ground for setting aside foreclosure sales. It held the party seeking to set aside the sale had the burden of proving fraud, unfairness, or oppression affected the sale. *Id*.

Moreover, a district court cannot grant equitable relief when an adequate remedy at law exists. *Las Vegas Valley Water Dist. v. Curtis Park Manor Water Users Ass'n*, 98 Nev. 275, 278 (1982). The failure to utilize legal remedies makes granting equitable remedies unlikely. *Bayview Loan Servicing, LLC v SFR Invs. Pool J, LLC, 2017 U.S. Dist. LEXIS 41309* (D. Nev. 2017); *See also West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 420 P.3d at 1037 at fn. 5 (the Court did not address equitable bona fide purchaser argument because the sale was valid).

(1) The HOA Sale Was Valid and Equitable Relief Is Not Warranted.

As is stated above, based on the facts of this case, and the Nevada Supreme Court's holding *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 420 P.3d 1032 (2018), the Court determined the HOA Sale was valid. Thus, the district court properly concluded it did not have authority to grant equitable relief to the Appellant. *Las Vegas Valley Water Dist.*, 98 Nev. at 278.

In this regard, it important to reiterate it is undisputed that GMAC and Appellant were aware of the HOA Sale and they could have paid, or at least tendered, the amount of the superpriority portion of the HOA Lien. Yet, they failed to do so. The district court properly found GMAC and Appellant failed to exercise adequate remedies at law. Thus, the district court held it could not grant equitable relief in this case and Appellant's arguments regarding the grossly inadequate sales price, and a showing of fraud, unfairness, or oppression are irrelevant.

(2) *Even If Equitable Arguments Were Available to Appellant, It Produced NO EVIDENCE Fraud, Unfairness, or Oppression Affected the HOA Sale.*

To support its contention that the HOA Sale was Commercially Unreasonable, Appellant offered the report of expert witness, R. Scott Dugan to show the price paid at the HOA Sale was grossly inadequate. Mr. Dugan opined the value of the Property was $148,000 as of the date of the HOA Sale. *Id. at ¶ 90*. In this regard, Appellant contended the $3,500.00 paid by First 100 was 2.6% of the value of the Property.

Chersus did not dispute Mr. Dugan's valuation of $148,000. However, Mr. Atkinson's testimony and Mr. Mehta's testimony showed First 100 and Chersus paid far more than $3,500.00 to acquire the Property. *See id. at ¶¶ 51 and 58.* The district court correctly noted it did not need to resolve whether the price paid at the HOA Sale was grossly inadequate need because Appellant produced NO EVIDENCE that fraud, unfairness, or oppression affected the sale. *Id. at ¶ 91.*

Appellant's claims of collusion, fraud, unfairness, or oppression included:

> *a. The HOA Sale was not conducted during normal business hours. The HOA Sale took place on Saturday, May 25, 2013, at 9:00 a.m. at ULS's office-8965 S. Eastern Ave., Suite 350, Las Vegas, NV 89123.*
>
> *b. The HOA, ULS and First 100 colluded to ensure First 100 would obtain the Property at the HOA Sale because: (1) the PSA set the minimum bid at $99, and prohibited the HOA from making a credit bid or otherwise interfering with First 100's efforts to collect on the account or acquire the Property.*
>
> *c. The HOA relinquished authority to control the HOA Sale and irrevocably made ULS its collection agent and foreclosure trustee for First 100.*
>
> *d. Even though the HOA Sale …took place in the HOA's name, all actions were conducted for the benefit of First 100 pursuant to its agreement with the HOA.*

The district court concluded Appellant's produced NO EVIDENCE that collusion, fraud, unfairness, or oppression affected the sale. *Id. at ¶ 93-98.*

(a) Appellant Produced NO EVIDENCE That Conducting the HOA Sale on a Saturday Led to Fraud, Unfairness, Or Oppression.

The district court found the HOA Sale on Saturday, May 25, 2013, at 9:00 a.m. at ULS's office was not patently unfair, fraudulent, or oppressive. *Id. at ¶ 93.* ULS's 30(b)(6) witness, Robert Atkinson testified he conducted HOA Sales on Saturday because his office did not have a conference room and he did not want potential bidders wandering around his office. *Id. at ¶ 94.* He testified he conducted the auction, recalled it was well attended, and it was reasonable to infer there was active bidding based on the $3,500 sales price; which is significantly above the $99.00 opening credit bid stated in the PSA. *Id.* Atkinson testified a "core number

of NRS 116 type buyers" always showed up for HOA Sales at his office, and many buyers, other than First 100 attended HOA Sales and purchased homes. Thus, the district court found Appellant produced NO EVIDENCE that holding the HOA Sale on Saturday led to collusion, fraud, unfairness, or oppression. *Id.*

(b) Appellant Produced NO EVIDENCE of Collusion

The district court concluded Appellant produced NO EVIDENCE showing the HOA, ULS and First 100 colluded to ensure First 100 obtained the Property at the HOA Sale. *Id. at ¶ 95.* To the contrary, Atkinson testified a "core number of NRS 116 type buyers" always showed up for HOA Sales at his office, many buyers, other than First 100, attended foreclosure sales he conducted, and many buyers other than First 100 purchased homes at the HOA sales he conducted. *Id.*

The district court also noted the Nevada Supreme Court's holding in *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 420 P.3d 1032, 1037 (2018), contradicts Appellant's unsupported claim the HOA, ULS, and First 100 unlawfully colluded to sell the Property to First 100. In *West Sunset,* First 100 was a party to a PSA with a separate HOA that was similar to the PSA in this case. *Id.* The *West Sunset* Court analogized First 100's PSA to a "factoring agreement" and stated factoring agreements serve the valid purpose of providing HOAs with immediate access to cash, and help them meet their perpetual upkeep obligations. *Id. at 1035-1036.* The Court specifically noted the PSA did not affect the relationship between

the debtor and the HOA, the debtor did not become indebted to First 100 because of the PSA, and the HOA is obliged to continue collection efforts on past due assessments via its agent. *Id. at 1037.* The Court stated "[t]he agreement merely instructs the agent to remit all payments directly to First 100. *Id.* The Court also emphasized: (1) Nationstar did not provide any argument why the Court should discourage HOAs from executing factoring agreements, (2) factoring agreements serve a valid purpose, and (3) unless there is a showing that a factoring agreement causes harm, the Court is disinclined to interfere with HOA's financing practices. *Id.* There is nothing in the *West Sunset* Court's statements about the validity of the PSA, or its comments about factoring agreements, which indicate PSAs/factoring agreements are inclined to lead to fraud, unfairness, or oppression. The district court determined the PSA signed by the HOA, ULS, and First 100: (1) was similar to the PSA discussed in *West Sunset*, and served the valid purpose of providing the HOA with access to cash. *Id. at ¶ 97.* The Court determined Appellant produced NO EVIDENCE the PSA led to unlawful collusion, fraud, unfairness, or oppression. *Id.*

(c) Appellant Produced NO EVIDENCE That Other Terms of the PSA Led to Collusion, Fraud, Unfairness, and Oppression.

The district court found Appellant produced NO EVIDENCE the PSA: (1) led to collusion, fraud, unfairness, or oppression; or affected the HOA Sale. *Id. at ¶ 98.*

1. Appellant Produced NO EVIDENCE The $99.00 Minimum Credit Bid Requirement led to Collusion, Fraud, Unfairness, or Oppression

The district court determined Appellant produced NO EVIDENCE the $99.00 Minimum Credit Bid provision in the PSA led to collusion, fraud, unfairness, or oppression. *Id. at ¶ 98.* Contrary to Appellant's speculative claims, Atkinson stated the PSA set a Minimum Credit Bid of $99.00 to encourage the bidding process. *Id.*

2. Appellant Produced NO EVIDENCE That Restricting the HOA From Making Credit Bids Led to Collusion, Fraud, Unfairness, or Oppression

The district court determined Appellant produced NO EVIDENCE the PSA that restrict the HOA from making Credit Bids led to collusion, fraud, unfairness, or oppression. *Id. at ¶ 98.* Contrary to Appellant's speculation, Atkinson testified that prohibiting the HOA from making a credit bid was not material to the HOA. *Id.* He stated the HOA did not want to make credit bids to acquire vacant properties because it did not want to be responsible for paying assessments, cleaning up the property, being subject to fines, or evicting squatters. *Id.* The HOA wanted the Property to be sold to new owners who would be active in the community and pay assessments. *Id.*

d. Appellant Produced NO EVIDENCE That The Actions Of the HOA, ULS, and First 100 Were Undertaken For the Benefit of First 100, Thereby Leading to Collusion, Fraud, Unfairness, or Oppression

The district court determined Appellant produced NO EVIDENCE to support its speculative claim that all actions of the HOA, First 100, and ULS were conducted

to benefit First 100 pursuant to the PSA. *Id. at ¶ 49 and ¶98.* Contrary to Appellant's speculation, the tripartite agreement benefited all the parties. *Id*. First 100 purchased the Property for its benefit, the HOA received an influx of cash to help its operations and a new owner to start paying assessments, and ULS was paid fairly for conducting the HOA Sale. *Id.* Appellants produced NO EVIDENCE that First 100, the HOA, and ULS conspired and colluded so First 100 could receive all the benefits.

(3) Appellants Arguments Regarding Balancing of the Equities Lack Merit.

Notwithstanding the district court's well-supported findings of fact and conclusions of law, Appellant argues the district court erred in granting quiet title to Chersus because it failed weight the relative equities. In this regard, Appellant cites cases that held the weighing of the equities was a relevant in those cases. Appellant also notes the Court has held where price is grossly inadequate, the HOA Sale may be voidable on a showing of slight additional evidence of unfairness or irregularity.

However, Appellant incorrectly argues the district court was required to consider whether the HOA Sale was voidable by evaluating: (1) the purported grossly inadequate sales prices, and (2) other facts that show the sale was affected by some element of fraud, unfairness, or oppression. *See Opening Brief at p. 13.* Appellant argues the district court erred when it concluded it did not need to resolve whether the price paid at the HOA Sale was grossly inadequate because Appellant failed to show any evidence of collusion fraud, unfairness or oppression.

XIV:AA2758 at ¶91. In this regard, Appellant incorrectly argues the district court was first required to determine if the sale price were grossly inadequate before it could "know the amount of evidence necessary to prove fraud, oppression or unfairness in the HOA Sale sufficient to set aside the HOA Sale." It appears Appellant wrongfully presumes there will always be at least "slight evidence" of fraud in every HOA Sale.

Appellant clearly fails to understand there are many cases, like the case at bar, where there is NO EVIDENCE OF FRAUD. In cases where there is no evidence of fraud, the Court has repeatedly held gross inadequacy of price, however gross, is not a sufficient ground for setting aside an HOA Sale and there must be at least a nominal showing of fraud. *See e.g. Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon* , 133 Nev. 740, 405 P.3d 641, 643 (2017). In this case, the district court did not mince words. It did not engage in a "back and forth" consideration over whether there might be some nanoscopic evidence of fraud. Here, the district court clearly and repeatedly found Appellant produced NO EVIDENCE OF COLLUSION FRAUD, UNFAIRNESS, OR OPPRESSION. Since Court determined Appellant produced no evidence of fraud, the sale could not be set aside regardless of how grossly inadequate the sales price may have been. Thus, the district court did not error when it declined to address the inadequacy of sales price.

(4) Appellants Arguments Re: The Inadequate Sales Price Are Superfluous

Appellant continues argue about the purported inadequate sales price in this case. Appellant attempt to describe gross inadequacy by: (a) comparing the sales price to the fair market value of the Property; (b) disputing the amounts paid by First 100 or Chersus; and (c) disputing the relevancy of their payments.

Based on the purported inadequacy in price, Appellant returns to arguments that it was only required to show slight fraud given the gross inadequacy in price. Again, Appellants arguments without merit and superfluous because the district court found Appellant produced NO EVIDENCE OF FRAUD.

C. APPELLANT'S ARGUMENT THE DISTRICT COURT ERRED WHEN: (A) IT FOLLOWED WEST SUNSET AND (B) IT DETERMINED APPELLANT PRODUCED NO EVIDENCE OF COLLUSION, FRAUD, UNFAIRNESS, AND OPPRESSION LACKS MERIT.

In arguing the district court committed multiple errors, Appellant makes arguments based on incorrect and inaccurate statements of fact and law. Appellant claims the district court erred in not actually considering the Factoring Agreement. Appellant baselessly speculates, for the first time, the PSA was designed to artificially depress the bids amount at the HOA Sale for the benefit of First 100. Appellant claims its unsupported speculation is sufficient "slight evidence of fraud, oppression or unfairness" to allow for equitable relief.

Appellant also claims the district court's ruling must be reversed on appeal. It claims, "subsequent decisions of this Court [reject] *West Sunset* and found identical Factoring Agreements presented potential "slight evidence of collusion."

Appellant makes arguments based on pure speculation that are not based on the evidence in this case. Appellant improperly asserts arguments it did not raise when the district court heard and ruled on the parties motions for summary judgment. Appellant claims the district court's erred by relying on *West Sunset* because:

(a) The District Court Did Not Error in Relying on West Sunset

The district court did not rely on *West Sunset* in concluding Appellant produced NO EVIDENCE of collusion, fraud, unfairness, oppression. The FOFCOL clearly shows Appellant produced NO EVIDENCE of collusion and Chersus produced substantial evidence showing the HOA, ULS, and First 100 did not collude for the benefit of First 100. Yet, Appellant argues the district court erred because "the issue of collusion was not before the Court in *West Sunset."* This argument is a "red-herring" because the district court did not rely on *West Sunset* when it made detailed well-supported factual findings based on the evidence actually produced.

Appellant claims the district court erred by not finding the terms of PSA "present the requisite very slight evidence of fraud, oppression or unfairness…" Appellant also claims, "the district court's conclusions to the contrary were erroneous and grounds for reversal." XIV:AA2759. Appellant's claims lack merit.

In *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.*, 2019 WL 4054161, 446 P.3d 1157, *2 (2019) (unpub. disposition) ("*Lahrs Trust*"), the Court stated an HOA's decision to enter into a PSA with First 100 does not cast doubt on the HOA Sale. In other words, Appellant was required to produce evidence showing the PSA presents slight evidence of collusion. Once again, the district court found Appellant produced NO EVIDENCE of collusion, fraud, unfairness, and oppression.

Appellant further argues the district court erred by finding the PSA was valid and it did not amount to evidence of collusion, fraud, unfairness, and oppression. In arguing the district court erred, the Appellant erroneously contends the district court did not consider collusion and other factors. The Appellant alleged certain provisions of the PSA, including: (1) the opening bid for $99.00, (2) the requirement that the HOA use ULS (hand-picked by First 100) as its foreclosure agent, (3) ULS's right to hold the HOA Sale outside of regular business hours, provided very slight evidence of collusion, fraud, unfairness, and oppression.

In its Opening Brief, Appellant contends for the first time that $99.00 bid is too low and the opening bid should be for the amount of the lien of the unpaid assessments. Appellant did not make this argument at the summary judgment hearing in the district court and it has not provided any evidentiary basis for its argument, which in all respects, an opinion. This argument lacks merit because the Court considered extensive deposition testimony from Mr. Atkinson where he

explained that requiring an opening bid equal to the lien amount makes it difficult to sell the property and the $99.00 opening bid is designed to get the bidding started. Based on the evidence presented at the summary judgment hearing, the district court determined that the $99.00 opening bid was not evidence of collusion, fraud, unfairness, and oppression.

Appellant also makes a conclusory argument that the district court erred when it concluded that it was proper for ULS to conduct the HOA Sale outside of regular business hours because Mr. Atkinson did not want potential bidders walking around his office. Appellant speculates/opines the HOA Sales should have been conducted in a traditional auction location, such at the courthouse steps. Appellant also make the unsupported and conclusory claim ULS set up a foreclosure sale designed to reduce the number of bidders and/or depress bidding. Appellant's arguments lack merit because the district considered extensive deposition testimony from Mr. Atkinson where he explained that the auction was well attended and the $3,500 sales price shows there was active bidding on the Property. Based on the evidence presented at the summary judgment hearing, the district court determined that Mr. Atkinson's practice of conducting HOA Sales on Saturdays was not evidence of collusion, fraud, unfairness, and oppression.

Appellant also argues Atkinson's testimony is not reliable because it is "self-serving." The Oxford Dictionary defines "self-serving" as having concern for one's

own welfare and interests before those of others. Appellant has provided NO EVIDENCE that Atkinson has an interest in the outcome of this case and/or that he benefitted from his deposition testimony. This argument is frivolous.

Appellant provides no evidentiary support for its new argument that the fact that the HOA was required to use ULS as its foreclosure agent is evidence of fraud. Appellant provided no evidence to support this argument. Moreover, in *West Sunset*, the Court acknowledged the PSA required: (1) the HOA, to continue its collection efforts on the past-due assessments via ULS, (2) ULS was instructed to remit payments directly to First 100. 420 P3d at 1037. The Court determined the PSA, including these provisions was valid. Based on *West Sunset* the district court found these PSA terms were not evidence of collusion, fraud, unfairness, and oppression. (3) subsequent decisions of this Court have rejected West Sunset and have found that identical Factoring Agreements between ULS, First 100 and an HOA provided slight evidence of collusion.

(b) Appellant's Contention that Subsequent Court Decisions Of This Have Rejected West Sunset is Without Merit and the Cases Cited by Appellant Are Readily Distinguishable.

Appellant misleadingly claims subsequent court decisions have "rejected" *West Sunset.* A review of the cases cited by Appellant shows they do not reject *West Sunset.* Instead, the cases cited by Appellant are readily distinguishable from *West Sunset* and this case.

For example, the Court's recent decision in *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.*, 2019 WL 4054161, 446 P.3d 1157, *2 (2019) (unpub. disposition) ("*Lahrs Trust*") does not reject *West Sunset.* To the contrary, the Court confirmed an HOA's decision to enter into a factoring agreement with First 100 did not cast doubt on the legitimacy of a HOA Sale. *Id.* (citing *West Sunset*, 134 Nev. at 355-57).

On the other hand, the Court noted certain factoring agreements have provisions that "suggest that there was some unfairness in the foreclosure process that affected the sale." *Id.* The Court also found there was a lack of competitive bidding specifically referred to concerns about provisions: (1) setting the opening bid at $99.00, and (2) prohibiting the HOA from credit bidding. *Id.*

Importantly, in *Lahr's Trust,* the Court also found the HOA sent a pre-foreclosure letter/notice to JP Morgan advising them of the HOA Sale. *Id.* The letter/notice expressly stated, "[t]he Association's Lien for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder. This Lien may affect your position." *Id.* The Court noted other Courts have held this type of letter may constitute unfairness because it gives the impression that a purchase would remain subject to the first DOT on the property. *Id.*(citing *ZYZZX2 v. Dixon*, No. 2:13-CV-1307, 2016 WL 1181666, at *5 (D. Nev. 2016). It is also important to note the opinion in *Lahr's Trust* does not indicate that First 100 or Lahr's Trust produced any evidence explaining why the opening $99.00 bid and the restriction on HOA credit

bids would not lead to collusion, fraud, oppression and unfairness. *Id.* Based on the foregoing, *Lahr's Trust* is distinguishable from this case and it does not mandate the reversal the district court judgment.

Appellant also cites to *United States Bank Nat'l Ass'n v. Gifford W. Cochran*, 2020 WL 2521786, 462 P.3d 1228 (2020) (unpub. disposition). In *Cochran*, the HOA signed a similar PSA with First 100 and the PSA had provisions regarding the $99.00 initial bid and a restriction that HOA could not credit bid at the auction. *Id.* The district court granted summary judgment against the bank. *Id.* On appeal, the Court raised concerns about certain provisions in the PSA. *Id.* In addition, the Court pointed out there was substantial evidence in the record that the foreclosure agent failed to mail U.S. Bank a notice of foreclosure sale and U.S. Bank did not have actual notice of the sale date. *Id.* In addition, the HOA represented on multiple occasions to multiple entities that the HOA's lien was junior to the first deed of trust on the property. *Id.* Given these circumstances, the Court determined US Bank was entitled to equitable relief. *Id.*

Like *Lahr's Trust*, the *Cochran* case is distinguishable from this case. Here, there is no claim/evidence Appellant did not receive notice of the HOA Sale and it is clear Appellant, its predecessor, and its counsel had notice of the HOA Sale and failed to tender the superpriority amount. Also, there is no evidence in this case the HOA told Appellant its assessment lien was junior to the DOT. Also, unlike

Cochran, Chersus provided substantial evidence the PSA did not lead to collusion, fraud, oppression, and unfairness. In fact, the district court found Appellant produced NO EVIDENCE of collusion, fraud, oppression or unfairness. This case is readily distinguishable from *Cochran*.

Appellant also references *Las Vegas Dev. Grp., LLC v. Yfantis*, 173 F.Supp.3d 1046 (D. Nev. 2016) where the court state collusion between the winning bidder and the entity selling the property may constitute fraud, oppression, or unfairness. *Id.* However, the Court's opinion in *Yfantis* was part of an order denying Wells Fargo's motion to dismiss Appellant's quiet title action. *Id*. Given the vastly different procedural postures, *Yfantis* is, at best, persuasive *dicta* and it does not provide adequate authority for reversing the district court's order granting Chersus's MSJ.

Appellant cites to *Wells Fargo Bank, N.A. v. First 100, LLC*, 2019 WL 919585, Case No.: 3:17-cv-00062-MMD-WGC (D. Nev. 2019). In *Wells Fargo*, appellant argued equitable relief was warranted because: (1) the HOA Sale price was grossly inadequate, (2) the HOA Sale took place on a Saturday, outside of normal business hours; and (3) the Factoring Agreement showed the HOA colluded with First 100 to sell the Property to First 100 at an unreasonably low price. The Court found Appellant was entitled to equitable relief because the undisputed evidence showed: (1) a grossly low sale price, and (2) at least slight evidence of unfairness. *Id.* The Court determined the terms of the Factoring Agreement indicated the HOA

Sale was unfair and that the HOA colluded with First 100 to ensure First 100 could purchase the Property for an unreasonably low price. *Id.*

Again, this case is distinguishable from *Wells Fargo because* Appellant has provided NO EVIDENCE that First 100, ULS, or the HOA colluded to ensure First 100 could purchase the Property for an unreasonably low price. Thus, the district court's order cannot be reversed based on *Wells Fargo.*

(c) The District Courts Order Must Be Affirmed Because Appellant Makes Numerous Speculative Arguments, Misstates Facts, and Makes Arguments That Were Not Raised In the District Court.

1. Appellant Makes Multiple Erroneous, Misleading, Speculative Assertions That Contradict the Evidence in the Record.

a. Appellant erroneously states the Factoring Agreement terms present the requisite very slight evidence of collusion. In this regard, Appellant appears to argue: (1) the Factoring Agreement alone is sufficient evidence of collusion, fraud, oppression or unfairness, (2) the district court's conclusions to the contrary were erroneous and grounds for reversal, and (3) Appellant does not have produce evidence the Factoring Agreement led to collusion, fraud, oppression or unfairness.

2. Contrary to Appellant's Arguments, The Deposition Testimony of Robert Atkinson Is Reliable and Unrefuted and Is a Sound Basis for the District Court's Factual Findings.

a. Appellant's contention that Mr. Atkinson's testimony is unreliable, biased, and self-serving testimony lacks merit. Appellant erroneously contends Atkinson testified in general terms and lacked personal knowledge of the following topics.

1. The HOA Sale

2. That the opening bid price of $99 was set to encourage bidding,

3. Auctions were generally well-attended by "NRS 116 type buyers"; and

4. HOAs did not want to acquire a property via a credit bid

Appellant contends no evidence was presented "to confirm Atkinson's testimony about these topics was in any way true or applicable to the HOA Sale here."

Appellant's contention demonstrates a fundamental misunderstanding of what constitutes evidence, whether a witness is competent to testify, and the admissibility of testimony given under oath with opportunity for cross-examination. Mr. Atkinson is clearly a competent witness; he has personal knowledge of the matters he addressed in his deposition, he was responsible for drafting the PSAs, and he performed legal work required to foreclose on properties. Mr. Atkinson's testimony was given under oath and Appellant had the opportunity to cross-examine him. His testimony in this case clear, persuasive, and his testimony is undisputed.

b. Appellant has produced NO EVIDENCE showing the Factoring Agreement did result in a sale that was conducted in a manner intended to benefit First 100 exclusively. In fact, the evidence shows the tripartite agreement benefited all parties.

4. Appellant's contend that setting the opening bid at $99 allowed First 100: (a) to acquire properties for $100.00; (b) schedule auctions so no other bidders appeared; and (c) allowed "First 100 [to] enter an unchallenged bid for $99,

guaranteeing it would win and acquire a property for a miniscule fraction of the value of the Property. This contention is pure speculation and Appellant produced NO EVIDENCE to support this speculative assertion.

5. Appellant unintelligibly speculates about other reasons why First 100 set "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]. Appellant continues speculating that "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. This speculative contention is unintelligible and to the extent it can be deciphered, Appellant has produced no evidence to support this speculative contention.

6. Appellant wrongfully claims there was no competitive bidding at the HOA Sale and it has produced NO EVIDENCE TO SUPPORT THIS ASSERTION.

7. Appellant further speculates that in a competitive bidding situation First 100 could bid any amount "because the final winning amount would be nothing more than a number on paper" and there is no evidence confirming "that any actual exchange of funds occurred here." Appellant produced no evidence to support this speculative contention.

8. Appellant further speculates even if an exchange of funds occurred, 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. Appellant has produced no evidence to support this contention. Appellant failed to raise this issue in the district court.

9. Appellant claims 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).] Appellant then speculates that 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. Appellant has produced no evidence to support this speculative claim the claim misstates how the PSA is set up.

10. Appellant makes the unsupported and conclusory allegation that the "evidentiary record here confirms" the HOA's ledger reflects First 100 simply wrote off the remaining amount of the HOA's lien as "bad debt" instead of paying the HOA for the remaining portion of its lien. [IV:AA0596.] Appellant has produced no evidence supporting this allegation and it did not make this claim in the district court.

11. Appellant speculates First 100's bad debt write-off is also evidence of collusion, fraud, unfairness and oppression because, "First 100 would outbid any other bidder to guarantee it was the winning bidder because it knew it would obtain…the Property without actually paying any money at the HOA Sale. Appellant produced no evidence of this claim and it did not raise this issue in the district court.

12. Appellant tries to argue there is very slight evidence of fraud, oppression or unfairness based on the specification of ULS and ULS's conduct of sales outside of regular business hours and the district court erred by not recognizing it. This argument is without merit. Appellant goes on to make claims how First 100 paid the $3,500 purchase price but ultimately paid $0.00. Again, there is no evidence to support this and it was not raised in the district court.

(d) The District Courts Order Must Be Affirmed Because Appellant's "Bona Fide Purchaser" Argument is Flawed and Irrelevant.

The district court granted Chersus' Motion for Summary Judgment and held the DOT was extinguished at the HOA Sale. Consequently, ¶ 106-107 state that any bona fide purchaser claims or allegations are irrelevant. However, Appellant claims the district court erred in reaching this conclusion because bona fide purchaser status is relevant when weighing the equities. Appellant argues neither First 100 nor Chersus are bona fide purchasers for value. Given the FOFCOL's statements that the bona fide purchaser claims or allegations are irrelevant, Chersus contends it is not necessary to respond to the Appellant's bona fide purchaser arguments.

E. THE DISTRICT COURT'S JUDGMENT AND AWARD OF MONETARY DAMAGES IN MUST BE AFFIRMED.

1. Summary Judgment on Chersus's Counterclaims Must Be Affirmed.

The district court concluded Chersus's substantial proof showed there many undisputed facts and circumstances surrounding the HOA Sale and there were no genuine issues of material fact. XIV:AA2740-80 at ¶108. Chersus also demonstrated it was entitled to judgment on its Counterclaims for Wrongful Foreclosure, Quiet Title, Declaratory Relief, Trespass and Conversion, and unjust enrichment as a matter of law. *Id.* The order granting Chersus summary judgment must be affirmed.

a. Wrongful Foreclosure

In support of its wrongful foreclosure claim, Chersus showed when GMAC exercised the power of sale and foreclosed on the Property, no breach of condition or failure of performance existed on Chersus' part which would have authorized the foreclosure or exercise of the power of sale. *Id. at ¶ 109.* There was no dispute that when GMAC exercised the power of sale and foreclosed, the DOT had been extinguished by the HOA Sale. There is no dispute GMAC and Appellant knew that after the HOA Sale: (1) GMAC had no interest in the Property; (2) GMAC had no authority to authorize the foreclosure or exercise the power of sale that had been extinguished by the HOA Foreclosure Sale; (3) GMAC had no authority to convey the Property and Appellant had no right to take possession of the Property.

Thus, the authorization of the foreclosure sale, the exercise of the power of sale, the sale to Appellant, and Appellants taking possession of the Property was clearly wrongful and Chersus is entitled to summary judgment on its wrongful foreclosure claim as a matter of law. Chersus' damages will be discussed *infra*.

b. Quiet Title

Chersus has shown the undisputed facts surrounding the HOA sale prove it is the rightful owner of the Property via a chain of title starting with First 100's purchase of the Property at the HOA Sale and reflected in the deed recorded May 29, 2013. *Id. at ¶ 112*. Chersus has shown Appellant had actual and constructive notice of First 100's superior claim to the Property. *Id. at 113.* Chersus showed the Appellant's purportedly interest, was extinguished at the HOA Sale. *Id. at ¶ 114.* Thus, Appellant did not acquire any interest in the Property when it received the Trustee's Deed Upon Sale. Thus, the district court correctly held Chersus was entitled to an order quieting title to the Property. *Id. at ¶ 115.*

c. Declaratory Relief

In its Third Cause of Action, Chersus asserted a dispute arose with Appellant that is ripe for adjudication, which concerns the ownership of the Property and the interpretation of NRS 116.3116 et. seq. *Id. at ¶ 117.* Chersus asserted that per NRS 30.030 and 30.040, it was entitled to declaratory relief concerning the proper interpretation/enforcement of NRS 116.3116 et. seq. *Id.at ¶ 118.* Chersus has shown

there are no genuine issues of material fact and it has proven it is the rightful owner of the Property via chain of title starting with First 100's purchase of the Property at the HOA Sale and reflected in the deed recorded May 29, 2013. *Id. at ¶ 119.*

Chersus has shown the DOT was extinguished at the HOA Sale and Appellant did not acquire any interest in the Property when it received the Trustee's Deed Upon Sale. *Id. at ¶ 121.*Thus, the district court held Chersus is entitled to an order declaring: (1) it is the lawful owner of the Property, (2) it holds fee simple title to the Property, and (3) the Property is not subject to the Deed of Trust. *Id.*

d. Trespass and Conversion

The district court held Appellant wrongfully deprived Chersus of its right to own and possess the Property. The Property includes the land and the appurtenant structures (the "Real Property") and any improvements that are personal property ("Personal Property). *Id. at ¶ 124.* The district court held Appellant wrongfully exercised control over the Real Property and Personal Property.

e. Unjust Enrichment

In support of its claim for Unjust Enrichment, Chersus noted the appraisal performed by Appellant's expert appraiser Scott Dugan in 2014 showed Appellant was the record owner of the Property pursuant to a Deed recorded January 13, 2014. Further, the appraisal shows Mr. Dugan estimated the monthly market rent to be

$1,050.00. *Id. at ¶ 132*. Chersus also showed Appellant was unjustly enriched by the substantial improvements Chersus made to the property. *Id. at ¶ 136.*

In this case, there was no contract between Appellant and Chersus. It is well established that a court will imply a quasi-contract to grant unjust enrichment where there is no legal contract but the person sought to be charged is in possession of property which in good conscience and justice should not be retained. *Id. at ¶ 133.* In *Asphalt Prods. Corp. v. All Star Ready Mix*, 111 Nev. 799 (1995), the Court determined that the seller prevailed on its claim for unjust enrichment and the court compelled the buyer to pay the reasonable rental value for use of the tractor after the buyer failed to obtain financing according to an unenforceable sales agreement. *Id.* The Court stated it is well established that a court will imply a quasi-contract to grant unjust enrichment where there is no legal contract. *Id*.

Here the district court found no contract between Appellant and Chersus and implied a quasi-contract to grant unjust enrichment to Chersus. XIV:AA2740-80 at ¶¶ 133-134. The amount of Chersus's damages are address below.

2. Appellant's Argument The FOFCOL Should Be Reversed Lacks Merit

Appellant argues district court erred in concluding that Chersus was entitled to quiet title, a declaratory judgment that Chersus acquired title to the Property free and clear of the DOT and Appellant's interest. Thus, Appellant argues the district

court erred in granting summary judgment to Chersus on its counterclaims and it awarding damages to Chersus. Appellant's arguments lack merit.

a. Wrongful Foreclosure

Appellant appears to argue that only a borrower can assert a claim for wrongful foreclosure and that all wrongful foreclosure claims are governed by *Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 304 (1983). While a borrower can assert a claim for wrongful disclosure, other parties can assert wrongful foreclosure claims under different circumstances and those claims are not governed by *Collins*.

Wrongful foreclosure is a common law tort claim can be asserted as an equitable action or an action for damages resulting from the sale, on the basis that the foreclosure was improper. *See Miles v. Deutsche Bank National Trust Co. (2015) 236 Cal.App.4th 394, 410.* The elements of a claim for wrongful foreclosure are: (1) the trustee caused an illegal, fraudulent, or willfully oppressive sale of real property pursuant to a power of sale in a mortgage or deed of trust; and (2) the party attacking the sale (***usually but not always the trustor or mortgagor***) was prejudiced or harmed. A minor violation of the foreclosure process does not give rise to a tort claim. *Id*. The foreclosing party must have had no authority to foreclose under the facts of the case." *Id.* at p. 409. Plaintiff may recover all damages proximately caused by the wrongful foreclosure. *Id.* at p. 410. A party must be currently entitled to enforce a debt to bring a lawful foreclosure action. *Yvanova v. New Century*

Mortgage Corp. (2016) 62 Cal.4th 919, 928. Plaintiff can assert a claim for wrongful foreclosure when any party has declared a default and ordered a trustee's sale. *See Sciarratta v. U.S. Bank National Association, as trustee, et al*., 202 Cal.Rptr.3d 219, 230-231 (citing *Yvanova*, supra, 62 Cal.4th at p. 938).

In *Las Vegas Dev. Grp., LLC v. Blaha*, 416 P.3d 233 (Nev. 2018), the Plaintiff acquired its ownership interest at a HOA Foreclosure sale. Plaintiff subsequently brought a claim against Bank of America (and its predecessors) for wrongful foreclosure. *Id.* In reversing the district court's dismissal order, the Court held "there are instances apart from those enumerated in NRS 107.080(5) in which a court may set aside a nonjudicial foreclosure sale." *Id.* (citing *Shadow Wood Homeowners Ass'n, Inc. v. N.Y . Cmty . Bancorp , Inc*., 132 Nev. 366 (2016) (court may set aside a nonjudicial foreclosure sale if equitable grounds exist for doing so). In fact, many beneficiaries of deeds of trust have filed wrongful foreclosure actions against HOA's that foreclosed on HOA liens. *See e.g. SFR Invs. Pool 1, LLC v. Bank of Am., N.A.* 135 Nev. Adv. Op. 75 (Nev. 2014). In *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725 (Nev. 2008), Countrywide foreclosed on the wrong property and the Court described its conduct as a "wrongful foreclosure." (Defendants knowledge of the probable harm cause by wrongful foreclosure supported punitive damages award). Based on the foregoing, it is clear Appellant's argument lacks merit.

b. Trespass/Conversion

The district court noted held Appellant wrongfully exercised control over its real Property and personal property when it wrongfully foreclosed on the Property. Thus, Appellants actions constituted trespass as to real property and conversion of personal property. Whether Appellant's actions amounted to Conversion or Trespass turns on the character of the property over which Appellant wrongfully exercised control. *See e.g. Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725 (2008).

Appellant argues the district court erred when it concluded that Appellant wrongfully deprived Chersus of its right to own and possess the [the Property]. because the Loan Foreclosure was not wrongful. Appellant also denies it forcibly entered the Property under NRS 40.220 and/or prevented the owner from access or occupancy per NRS 40.230(1). Appellant argues Chersus did not prove Appellant "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).

Appellant did not raise this argument in this district court. Further, NRS Chapter 40 lists the requirements for obtaining possession in a summary proceeding.

However, Chersus' claim for trespass is broader than the summary proceeding definition. A plaintiff seeking to recover damages for intentional trespass must show

the defendant made a direct forcible entry upon plaintiff's property. *Aftercare of Clark County v. Justice Ct.*, 120 Nev. 1, (2004). A forcible entry can occur on, above, or below the surface of the land. *Id*. A forcible entry can occur indirectly. *See Elton v. Anheuser-Busch Beverage Group, Inc*. (1996)(50 Cal.App.4th 1301)(holding "forcible entry may be accomplished by setting in motion an agency which, when put in operation, extends its energy to the plaintiff's premises to its material injury." (75 Am.Jur.2d, Trespass, § 11, p. 16, fn. omitted.) *See also Countrywide Home Loans, Inc. v. Thitchener,* 192 P.3d 243, 124 Nev. 725 (2008)(affirming jury verdict for trespass where lender forcibly entered and wrongfully foreclosed on property). Here, the district court determined Appellant committed unlawful trespass when it wrongfully foreclosed on the Property, recorded the Trustee Deed and unlawfully took possession of the property. Thus, Appellant's arguments lack merit.

c. Unjust Enrichment.

The district court ruled Chersus had produced substantial evidence supporting its claim for unjust enrichment. *XIV:AA2740-80 at ¶ 132-135*. In support of its claim for Unjust Enrichment, Chersus emphasized the appraisal performed by Plaintiff's expert appraiser Scott Dugan proved Appellant was the owner or record pursuant to a Deed recorded January 13, 2014. In addition, the appraisal indisputably showed Mr. Dugan estimated the monthly market rent to be $1,050.00.

In this case, there was no contract between Plaintiff and Defendant Chersus. It is well established a court will imply a quasi-contract to grant unjust enrichment where there is no legal contract but the person sought to be charged is in possession of property which in good conscience and justice should not be retained. *Lease Partners Corp. v. Robert L. Brooks Trust Dated Nov. 12*, 1975, 113 Nev. 747, 756 (1997). Further, in *Asphalt Prods. Corp. v. All Star Ready Mix*, 111 Nev. 799 (1995), seller prevailed on its claim for unjust enrichment and the Court compelled the buyer to pay the reasonable rental value for use of the tractor after the buyer failed to obtain financing according to an unenforceable sales agreement. Here, the Court imposed a quasi-contract upon Appellant and compelled it to pay Chersus the reasonable rental value of the property as established by Plaintiff's expert's appraisal. The Court also held appellant was unjustly enriched by any improvements Chersus made to the Property. The amount of restitution owed to Chersus is addressed below.

Appellant wrongfully contends the district court erred in imposing a "quasi-contract" upon Appellant and compelling it to pay Chersus the reasonable rental value of the property as established by Plaintiff's expert's appraisal." *XIV:AA2765* at ¶134. Appellant argues, for the first time, on appeal that the elements of a claim for unjust enrichment are: (1) plaintiff confers a benefit on the defendant, (2) the defendant appreciates such benefit, and (3) 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 (2012).

While those elements may establish a claim for unjust enrichment they are not rigid and an action for unjust enrichment is available as an equitable remedy to provide restitution to persons who have been unjustly enriched at the expense of another. *See The Restatement (Third) of Restitution & Unjust Enrichment: Some Introductory Suggestions 68 WASH. & LEE L. REV. 899 (2011)M. Traynor* (The first and central principle is that "[a] person who is unjustly enriched at the expense of another is subject to liability in restitution.") The district court correctly determined that Appellant wrongfully foreclosed on the Property and Chersus was not able use the Property. As is discussed below, the measure of damages for loss of use of real property is lost rental value. Thus, Appellant's arguments lack merit.

d. Award of Lost Rental Income

The measure of damages/restitution for unjust enrichment includes the amount of rent retained by Appellant and its retention of the improvements that Chersus made to the premises. *Tri-Lin Holdings, LLC v. Flawlace, LLC*, 2014 Nev. Unpub. LEXIS 461 (Nev. 2014). The calculation of restitution is addressed below.

Appellants make an inordinately lengthy, largely academic, and inaccurate argument that the district court abused its discretion by awarding Chersus damages-restitution for lost rental income and costs it claims were based solely on the

testimony of an untimely disclosed expert witness and an untimely filed Memorandum of Costs. Appellant inaccurately claims Chersus solely relied on the testimony of an undisclosed expert witness to prove its alleged lost rental income. Appellant also wrongfully claims the district court erred by awarding monetary damages to Chersus based on the amount of so-called "hypothetical rental income" that Chersus lost from November 2016 through March 2021.

It also appears Appellant contends the only proof Chersus submitted was the affidavit and "report" of an undisclosed expert witness (namely John Zimmer, a licensed realtor/broker-salesperson) and the district court abused its discretion by basing its award solely on the undisclosed expert's testimony. *XVIII:AA3479*. Appellant further claims the district court also abused its discretion 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. Notably, Appellant's arguments related to these issues are extensive and account for more than five pages of its Opening Brief.

Appellant's arguments are disproportionate and without merit because Mr. Zimmer's opinions and testimony were based on, derived from, and consistent with the rental value stated in the Appellant's expert, R. Scott Dugan's report from 2014. Mr. Zimmer's testimony was limited to his opinions about rental increases occurring from 2014 through 2022. His opinions were consistent with the following chart.

Year	Rental Amount	Months	Total
2014	$1,100.00	12	$13,200
2015	$1,200.00	12	$14,400
2016	$1,200.00	12	$14,400
2017	$1,300.00	12	$15,600
2018	$1,400.00	12	$16,800
2019	$1,550.00	9	$13,950
Total			$88,350.00

Chersus's counsel did not dispute Mr. Zimmer was not disclosed as an expert witness prior to the original discovery cut-off in March/April 2016. However, Chersus's current counsel had not been retained in 2016 and did not recognize the potential need for a realtor to testify about potential increase in market rental rates until it became clear Chersus would need a separate prove-up hearing for damages. Chersus originally filed its Motion for a Prove-up in October 2019. However, the district court would not set a hearing date until it heard the Appellant's Motion for Reconsideration that was filed around June 2019. Due to COVID and other personal issues, the Court did not hear the Motion for Reconsideration until approximately February 2021. The original Judge retired soon thereafter and the earliest date Chersus could obtain for a hearing on its Motion for Prove-up was March 2021.

On the other hand, it is important to note that Mr. Zimmerman provided a "CMA Report" for the Motion for Prove-up filed in October 2019 and he provided a Declaration that was filed with the Motion. Appellant filed its Opposition to the Motion for Prove-up on October 29, 2019. Appellant did not object to the CMA Report or Mr. Zimmer's Declaration in its Opposition. In fact, Appellant did not

complain that Mr. Zimmer had not been timely disclosed until about the time that the Motion for Prove-up was set for hearing in March 2021, almost 18 months after the Motion for Prove-up was filed and it could have/should have objected to his testimony long before March 2021.

Regardless, the district court had broad discretion regarding the admissibility of expert testimony and whether an expert witness is qualified is within the district court's discretion. *Mulder v. State* , 116 Nev. 1, 12-13(2000). Further, per NRCP 16.1 the Court is not required to exclude a witness who was not disclosed. In fact, NRCP 16.1 and NRCP 37 provide the Court may exclude a witness not timely disclosed, unless the failure to disclose was harmless. Here, Appellant was aware of Mr. Zimmer's Declaration and his CMA Report since October 2019 and his improper disclosure was harmless.

Importantly, at the March 5, 2021 hearing, the district court clearly found Mr. Zimmer's Declaration and the CMA Report to be helpful. Generally, an expert witness must : (1) be qualified in an area of scientific, technical or other specialized knowledge, (2) have specialized knowledge that assists the trier of fact to understand the evidence, and (3) limited his/her testimony to the scope of his/her specialized knowledge. *Hallmark v. Eldridge* , 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). However, the district court has broad discretion in determining whether an expert witness is qualified. *Mulder*, 116 Nev. at 12-13. Mr. Zimmer is a Realtor and is

licensed by the Nevada Department of Real Estate as a broker/licensee. He regularly generates CMA Reports, and his testimony was limited to rental increases from 2014 to 2022. The district court had discretion to permit his limited testimony.

With respect to awarding costs, the district court has broad discretion in awarding costs. *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462 (2002). Appellant argues the district court erred in awarding costs because the bill of costs not filed timely. At the hearing on the Motion for Damages, Chersus explained the FOFCOL ordered Chersus to file a separate motion and request for an evidentiary hearing regarding Chersus's damages, attorney's fees, and costs. Thus, the FOFCOL governed the deadline for filing a Bill of Costs. Due to the delays with the Motion for Reconsideration, Chersus did not file its Motion for Damages and its bill of costs until October 2019. Appellant moved to retax the costs, but the matter was not set for a hearing. Given the foregoing, the district court allowed Chersus's bill of costs and it had discretion to do so.

CONCLUSION

For all the foregoing reasons, Respondent Chersus Holdings, LLC respectfully submits the judgment of the district court must be affirmed.

DATED this 18th day of April, 2022.

/s/ Vernon A. Nelson, Jr.
VERNON A. NELSON, JR., ESQ.
Nevada Bar No. : 6434
LAW OFFICE OF VERNON NELSON
9550 S. Eastern Ave., Suite 253
Las Vegas, Nevada 89130
Telephone Number 702-525-7884
vnelson@nelsonlawfirmlv.com
Attorney for Respondent
CHERSUS HOLDINGS, 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 opening brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 13,882 words.

FINALLY, I CERTIFY that I have read this **Respondent's Answering 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 answering 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 that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 18th day of April, 2022.

/s/ Vernon A. Nelson, Jr.

VERNON A. NELSON, JR., ESQ.
Nevada Bar No. : 6434
LAW OFFICE OF VERNON NELSON
9550 S. Eastern Ave. Suite 253
Las Vegas, Nevada 89123
Telephone Number 725-777-5447
vnelson@nelsonlawfirmlv.com
Attorney for Respondent
CHERSUS HOLDINGS, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of The Law Office of Vernon Nelson, and that on the 18th day of April, 2022, I caused to be served a true and correct copy of the foregoing **APPELLEE'S AMENDED ANSWERING BRIEF**, electronically to the parties registered on the Court's E-Flex System.

/s/ Vernon Nelson
An employee of The Law Office of Vernon Nelson