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. A606357

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. INTRODUCTION

Chersus' Answering Brief falls substantially short of presenting this Court with cogent legal argument and authorities, supported by citations to evidence in the record, to uphold summary judgment in its favor. Chersus simply points the finger at Ocwen to deflect Chersus' shortcomings before the district court which render summary judgment unsustainable. Chersus cannot avoid the fact that the district court committed substantial errors in finding that the HOA Sale was valid where it failed to analyze whether the HOA Sale price was grossly inadequate and failed to consider the terms of the Factoring Agreement, simply concluding that the Factoring Agreement was not evidence of fraud, oppression or unfairness because Factoring Agreements are not, in and of themselves, improper. Reversal of summary judgment is necessary and, as a result, all of Chersus' derivative counterclaims for monetary damages fail because they cannot remain independent from the quiet title ruling.

As set forth at length in Ocwen's Opening Brief and herein, the district court erred in entering summary judgment against Ocwen and awarding monetary damages to Chersus. Accordingly, Ocwen respectfully requests that this Court reverse and remand to the district court with instruction to enter judgment in favor of Ocwen.

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II. LEGAL ARGUMENT

A. THE UNDISPUTED RECORD AND BINDING NEVADA PRECEDENT CONFIRM THAT THE HOA SALE WAS NOT VALID AND JUDGMENT IN FAVOR OF CHERSUS MUST BE REVERSED.

i. Chersus cannot avoid the district court's error in failing to consider the grossly inadequate sale price and the actual terms of the Factoring Agreement.

Ocwen seeks reversal and remand because the district court erred in concluding that the HOA Sale was valid. Specifically, the district court's findings of fact and conclusions of law cannot be upheld because the express terms of the Factoring Agreement, which the district court failed to consider, are the requisite *slight* evidence of fraud, oppression or unfairness, where they required a depressed opening bid amount and prohibited the HOA from bidding at the HOA Sale. These limitations placed on the HOA Sale show an intent to chill and depress bidding, which resulted in a commercially unreasonable and voidable sale.

In its Answering Brief, Chersus contends that Ocwen was not entitled to equitable relief because it could have simply tendered the superpriority portion of the HOA's lien. Answering Brief at 22-23. This position is incompatible with binding Nevada precedent. This Court has repeatedly confirmed that a district court should weigh the equities in considering whether a HOA foreclosure sale is voidable. *See U.S. Bank National Association v. Resources Group, LLC,* 135 Nev. Adv. Op. 26, 444 P.3d 442 (2019) ("*Resources Group*") (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)). No such analysis would ever be necessary if Chersus' position were correct that the record beneficiary of a deed of trust always has the remedy of tender and is, therefore, always precluded from receiving equitable relief.

As set forth in the Opening Brief, Nevada law permits a district court to find that an HOA lien foreclosure sale is voidable as commercially unreasonable where the property is sold for an inadequate price and there is evidence of fraud, oppression or unfairness that brought about the low sale price. *Resources Group, LLC,* 135 Nev. Adv. Op. 26, 444 P.3d 442; *Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646; *Shadow Wood*, 132 Nev. at 56, 366 P.3d at 1110 (2016); *Golden*, 79 Nev. 503, 387 P.2d 989. Chersus does not dispute that the fair market value at the time of the HOA Sale was $148,000, per Ocwen's expert witness's opinion. Answering Brief at 23. Chersus merely repeatedly contends that there "is no evidence" of fraud, oppression or unfairness. *Id*. at 24-30. But Chersus' position fails to consider that the actions undertaken prior to and during the HOA Sale, required by the Factoring Agreement, *are* the evidence of fraud, oppression or unfairness that resulted in a significantly inadequate sale price.

Specifically, Chersus contends without any supporting law that the district court correctly concluded that there was no evidence of fraud, oppression or unfairness when the HOA Sale was conducted on a Saturday in ULS's office. *Id*. at 24-25, 33. However, as explained by Ocwen in its Opening Brief, the fact that the HOA Sale was held on a weekend inside of ULS' office is itself the *slight* evidence of fraud, oppression or unfairness because it was designed to reduce the number of potential bidders. Mr. Atkinson's flippant explanation that he did not want potential bidders walking around his office [XIV:AA2758 at ¶94] was not a valid reason to conduct the HOA Sale outside of regular business hours and inside ULS's office. There is no justification or explanation in the record why ULS did not simply hold the HOA Sale *outside of its office* during business hours *or at a public location*, such as the courthouse steps. The only logical conclusion to be reached is that ULS intentionally designated the foreclosure sale to take place outside of regular business hours and inside of ULS's office in order to intentionally reduce the number of potential bidders and depress bidding to ensure the lowest price to First 100.[1] This

[1] To the extent that Chersus contends Mr. Atkinson's testimony was not self-serving, this Court need merely review the terms of the Factoring Agreement to see that Mr. Atkinson had a vested interest in ensuring the HOA Sale proceeded in accordance with the Factoring Agreement. The Factoring Agreement required any HOA entering into it to agree to use ULS as its foreclosure agent and ULS would be paid by First 100. [III:AA0396-412 at ¶ 3.02(a).] Therefore, in order to ensure that ULS would continue to receive business as a result of tri-party Factoring Agreements entered into between ULS, First 100 and an HOA, ULS would certainly want to ensure the validity of such agreement and the terms therein. Moreover, ULS has an

fact, taken together with the evidence of fraud, oppression and/or unfairness presented by the terms of the Factoring Agreement (the intentionally low opening bid price and the HOA's prohibition from bidding, among other terms) is more than sufficient *slight* evidence of fraud, oppression or unfairness necessary for the district court to have concluded that the HOA Sale was commercially unreasonable and, therefore, voidable. The district court committed a reversible error by concluding that the HOA Sale was valid.

Chersus next contends that the sale price of $3,500, where the Factoring Agreement set the opening bid at $99, is evidence of active bidding. Answering Brief at 24-25. But Chersus' focus on the actual dollar amount to prove the validity of the HOA Sale is misplaced. The fraud, oppression and unfairness in the sale price is proven by what happened next. 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 – meaning First 100 effectively paid nothing to purchase the Property at the HOA Sale. This "refund" provision in the Factoring Agreement is further evidence of collusion in the bidding process. Even if there was competitive bidding at first to drive the sale price above

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interest in ensuring a Factoring Agreement is not deemed void or otherwise deemed fraudulent, oppressive or unfair so that ULS can avoid any liability for a sale conducted pursuant to a Factoring Agreement.

the $99 minimum set by the Factoring Agreement, First 100 would always be able to outbid any other third-party bidder because it knew it would always receive a refund of its bid amount. The sale price was nothing more than a number on paper.

Chersus further contends that there is no evidence of fraud, oppression or unfairness from the other terms of the Factoring Agreement. Answering Brief at 26-30. But Chersus fails to provide this Court with any legal argument or point to any evidence in the record to support its position. It merely claims that Ocwen "incorrectly argues the district court was first required to determine if the sale price were (sic) grossly inadequate…[and] wrongfully presumes there will always be at least 'slight evidence' of fraud in every HOA Sale." *Id.* at 29. Chersus' position is incorrect and fails to accurately read Ocwen's Opening Brief and Nevada precedent on point.

First, this Court has repeatedly confirmed that a district court must weigh the equities; the sale price is a relevant and necessary element of such analysis. 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, LLC*, 135 Nev. Adv. Op. 26, 444 P.3d 442 (citing *Shadow Canyon*, 113 Nev. at 746, 405 P.3d at 646 (quoting *Golden*, 79 Nev. at 515, 387 P.2d at 915).

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The district court erred when it summarily concluded that there was no evidence of fraud, oppression or unfairness just because Factoring Agreements are permitted. [XIV:AA2758-59.] Had the district court correctly considered the terms of the Factoring Agreement, it would have found that a number of those terms rose to the level of fraud, oppression or unfairness required to be weighed under the foregoing authorities. But in order to determine how much evidence of fraud, oppression or unfairness would be tolerable to deem the HOA Sale valid or void, the district court necessarily would first need to consider whether the sale price was grossly inadequate. Without that initial threshold analysis, and in combination with its legally erroneous reliance on *West Sunset*, the district court reached an erroneous conclusion and Chersus' reliance is equally flawed.

Second, Ocwen did not wrongfully presume that there will always be "slight evidence" of fraud, oppression or unfairness in every HOA foreclosure sale. Answering Brief at 29. However, to the extent that there were other foreclosure sales conducted pursuant to an identical Factoring Agreement, those sales would similarly involve the same level of fraud, oppression or unfairness because such issues are inherent in their improper terms. Again, Chersus' reliance on the district court's summary conclusion that the HOA Sale was valid because Factoring Agreements are permissible, without any actual analysis of the terms of the Factoring Agreement, was error and requires reversal. As discussed at length in Ocwen's Opening Brief,

the district court relied upon *West Sunset 2050 Trust v. Nationstar Mortg., LLC*, 134 Nev. 352, 420 P.3d 1032 (2018) to conclusively assume that the Factoring Agreement was valid. But *West Sunset* is not on point or instructive, as it only issue concerned whether the foreclosing HOA had standing to foreclose after entering into a "factoring agreement." 134 Nev. at 355-57, 420 P.3d at 1035-37. *West Sunset* is not relevant to this case, and whether a Factoring Agreement can nonetheless contain terms which inject fraud, oppression or unfairness into a foreclosure sale by requiring a depressed opening bid amount or preventing an HOA from bidding.

The district court erred in failing to conduct a thorough analysis under *Resources Group*, which resulted in the erroneous conclusion that the HOA Sale was valid. Therefore, reversal and remand is necessary.

ii. Chersus does not meaningfully distinguish *Lahrs Family Trust*, *Cochran* and *Wells Fargo v. First 100* and bare allegations against Ocwen are insufficient to uphold the judgment.

Chersus attempts to distinguish *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.*, 2019 WL 4054161, 446 P.3d 1157 (2019) (unpub. disp.) by arguing that "the opinion in *Lahr's* (sic) *Trust* does not indicate that First 100 or Larh's (sic) 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 or unfairness." Answering Brief at 35-36. But this argument fails to distinguish *Lahrs Family Trust* in any meaningful way. In fact, Chersus admits that this decision confirmed that

provisions in an identical Factoring Agreement "suggest that there was some unfairness in the foreclosure process that affected the sale[,]" notably that there was a lack of competitive bidding because the opening bid was set at $99.00 and the Factoring Agreement terms forbid the HOA from credit bidding. Answering Brief at 35.

As discussed at length in Ocwen's Opening Brief, while the HOA's decision to enter into a Factoring Agreement with ULS and First 100 does not by itself cast doubt on the legitimacy of the HOA Sale, the fact that the Factoring Agreement mandated that the opening bid amount be set at $99, despite a higher outstanding lien balance, and forbid the HOA from credit bidding were sufficient facts to suggest some level of unfairness in the foreclosure process that affected the sale. *See* Opening Brief at 17. Those identical facts are present in the record below and the district court erred by not considering those undisputed facts to reach the conclusion that there was evidence of fraud which brought about the low sale price.

Chersus next attempts to distinguish *U.S. Bank Nat'l Ass'n v. Gifford V. Cochran*, 2020 WL 2521786, 462 P.3d 1228 (2020) (unpub. disp.) by arguing that the court considered additional evidence regarding lack of notice, as well as express representations made to the lender by the HOA that the HOA's lien was junior. Answering Brief at 36. But Chersus completely ignores a significant conclusion reached by the *Cochran* court that the identical Factoring Agreement,

> …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; or that First 100 purchased the property at the foreclosure sale. These facts support a conclusion that bidding was chilled.

462 P.3d at *2-3 (citing *Las Vegas Dev. Grp.t 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); *Country Exp. Stores, Inc. v. Sims*, 87 Wn. App. 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")).

Although the *Cochran* court also considered additional facts – that the HOA's misrepresentation that its lien was subordinate to the bank's interest and a lack of notice of the foreclosure sale date – those additional facts do not negate the court's conclusion that identical terms in the Factoring Agreement prove that bidding was chilled and support a finding of fraud, oppression or unfairness in the foreclosure process. *Cochran* supports Ocwen's position that the district court erred in not considering certain terms in the Factoring Agreement that this Court has repeatedly held are evidence of fraud, oppression or unfairness in the foreclosure process.

Lastly, Chersus attempts to distinguish *Wells Fargo Bank, N.A. v. First 100, LLC*, 2019 WL 919585, Case No.: 3:17-cv-00062-MMD-WGC (D. Nev. 2019) by simply concluding that "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." Answering Brief at 38. Chersus' repeated conclusory argument that there is "NO EVIDENCE" fails where Ocwen pointed the district court and this Court to admissible and undisputed evidence in the record identical to the evidence considered in *Lahrs Family Trust*, *Cochran* and *Wells Fargo v. First 100*. The undisputed record clearly shows that there is evidence – including the Factoring Agreement itself - to support Ocwen's position, which Ocwen outlined before both the district court and this Court on appeal. *See* Opening Brief at 4-7, 19-22.[2] Chersus' frivolous argument to the contrary should be summarily disregarded.

[2] To avoid doubt, this evidence, undisputed by Chersus, includes:

- 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, 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).
- Pursuant to the HOA Lien, the HOA proceeded to foreclose against the Property on May 25, 2013, 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 Chersus for free. [II:AA0247-49; IV:AA0625 at line 9 - AA0629, line 25.]
- 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. *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 (emphasis added).]
    - 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:

> **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

Similarly, Chersus' conclusory allegations that Ocwen's arguments regarding the Factoring Agreement and Mr. Atkinson's testimony are "speculative" or "unintelligible" (*see* Answering Brief at 38-42) should be disregarded. Not only did the Opening Brief repeatedly point to evidence in the record to support a finding of fraud, oppression or unfairness, in response, Chersus did not present any cogent legal authorities supported by evidence to substantiate its own position.[3] Regardless, the record confirms that Chersus' arguments hold no water. First 100 financially benefitted from the Factoring Agreement and the HOA Sale was affected by fraud, oppression and unfairness because of the terms set forth in the Factoring Agreement. *See* Opening Brief, *passim*; *see also* fn. 1, *supra*.

In sum, Nevada law requires that an HOA foreclosure sale should be set aside as voidable where the sale price was grossly inadequate and there is evidence of fraud, oppression or unfairness which brought about the low sale price. *Resources Group,* 135 Nev. Adv. Op. 26, 444 P.3d 442; *Shadow Canyon*, 133 Nev. at 746, 405 P.3d at 646; *Shadow Wood*, 132 Nev. at 56, 366 P.3d at 1110; *Golden*, 79 Nev. 503, 387 P.2d 989. The record indisputably confirms that the fair market value of the

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placement fee, and, if applicable, remediation costs.

[*Id*. at §1.6.]

[3] "Argument is not evidence." *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 253, 396 P.3d 754, 759 (2017) (noting respondent's failure to present any action evidence to support its position and suggesting instruction to the district court to consider on remand whether appellant was entitled to summary judgment) (J. Stiglich concur.).

Property was $148,000 at the time of the HOA Sale and the sale price was less than 3% thereof, rendering the sale price grossly inadequate and requiring only *slight* evidence of fraud, oppression or unfairness to meet the voidable threshold. Certain terms of the Factoring Agreement also mandated that the opening bid would be $99.00 regardless of the amount of the HOA's lien, and that the HOA was forbidden from bidding at the HOA Sale. These terms, taken together with other terms of the Factoring Agreement and undisputed evidence regarding First 100's relationship with Chersus confirm that there was the requisite *slight* evidence of fraud, oppression or unfairness which brought about the low sale price.[4]

iii. Bona fide purchaser status is a necessary inquiry in a voidable analysis.

The district court erred in not considering Chersus' lack of bona fide purchaser status. *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."). The party asserting bona fide purchaser status bears the burden of establishing that status. *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246 (1979).

Chersus fails to provide this Court with any authority to support a finding that it is entitled to bona fide purchaser status upon reversal of summary judgment, and instead simply argues that the district court did not err in concluding such analysis is irrelevant. Answering Brief at 42. In fact, Chersus fails to respond to the

[4] *See* footnote 2, *supra*.

substantial discussion of Nevada law and evidence in the record confirming that Chersus is not a bona fide purchaser. This Court should treat Chersus' failure to meaningfully respond to this entire section of Ocwen's Opening Brief as an admission that this argument has merit. *First 100, LLC v. TGC/Farkas Funding, LLC*, 2022 WL 831467, 506 P.3d 319 (Mar. 17, 2022) (unpub. disp.) (citing *Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (recognizing that failure to respond to an argument can be treated as a confession of error)). Accordingly, Chersus is not entitled to bona fide purchaser status.

B. THE DISTRICT COURT'S JUDGMENT ON CHERSUS' COUNTERCLAIMS MUST BE REVERSED WHERE THE RECORD PROVES THE HOA SALE WAS VOIDABLE AND THE DEED OF TRUST REMAINED VALID.

i. Where the HOA Sale is proven by the undisputed record to be commercially unreasonable and voidable, Chersus' derivative counterclaims necessarily fail.

Ocwen's Opening Brief explained that the district court's ruling on Chersus' counterclaims for wrongful foreclosure, quiet title, declaratory relief, trespass and conversion, and unjust enrichment are automatically invalid and must be reversed where they are all derivative of the erroneous conclusion that the HOA Sale was valid and extinguished the Deed of Trust. *See* Opening Brief at 30-38. Chersus' Answering Brief fails to respond to any of Ocwen's arguments and simply reiterates that Chersus remains entitled to judgment. Answering Brief at 43-46. This Court should disregard Chersus' unresponsive and conclusory arguments.

To the extent that Chersus provides a substantive response regarding some of its counterclaims, those arguments nonetheless fail on their merits.

a. Chersus cannot prevail on a wrongful foreclosure cause of action where the Deed of Trust remained a valid encumbrance against title to the Property after the HOA Sale.

Chersus, largely relying on California law, argues that even as a non-party to the Loan, it can assert a cause of action for wrongful foreclosure. Answering Brief at 47. Chersus cites to *Miles v. Deutsche Bank National Trust Co.*, 236 Cal.App.4th 394, 410 (2015); *Yvanova v. New Century Mortgage Corp.,* 62 Cal.App.4th 919, 928 (2016) and *Sciarratta v. U.S. Bank National Association et al.*, 202 Cal.Rptr.3d 219, 230-31 (2016) in support, though these California opinions have no application to this Nevada action.

Chersus' reliance on *Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 416 P.3d 233 (2018) fares no better. The *Blaha* court considered the statute of limitations applicable to a third-party purchaser's claim for wrongful foreclosure against the beneficiary of a deed of trust. However, the court did not opine on the validity of a wrongful foreclosure cause of action in the context of a third-party HOA purchaser against a deed of trust beneficiary or otherwise set forth the elements for the purchaser prove up such cause of action. *Id*. Therefore, *Blaha* does not lend any support to Chersus' position.

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Here, Ocwen was entitled to pursue foreclosure under the Deed of Trust after the HOA Sale because the Deed of Trust remained a valid lien against title to the Property (because the HOA Sale was commercially unreasonable) and the borrowers remained in default in their repayment obligations. Opening Brief at 31-32. Chersus is silent on this and provides no response to Ocwen's position that it was entitled to foreclose because the Loan remained in default. *See Farkas Funding*, 2022 WL 831467, 506 P.3d 319 (citing *Ozawa*, 125 Nev. at 563, 216 P.3d at 793 (recognizing that failure to respond to an argument can be treated as a confession of error)). Accordingly, Ocwen need not respond further to support its request for reversal.

b. Summary judgment on Chersus' counterclaim for trespass must be reversed because there is no evidence in the record to show any forcible entry onto the Property by Ocwen.

Chersus attempts to avoid the result of the erroneous judgment on the counterclaim for trespass by side-stepping Ocwen's arguments. *See* Opening Brief at 33-35. Chersus instead cites to cases which discuss "forcible entry" and an action for trespass without anything further in support. Answering Brief at 49-50. Importantly, Chersus fails to address the fundamental errors committed by the district court which form the basis of Ocwen's appeal. Specifically, while a cause of action for trespass requires that there is a "forcible entry" (NRS 40.220-230), the district court erred by concluding that Ocwen committed a trespass simply by foreclosing under its Deed of Trust and allegedly depriving Chersus of its right to

own and possess the Property. Opening Brief at 34 (citing [XIV:AA2763 at ¶124]). The district court did not make any finding that Ocwen forcibly entered the Property in any manner defined by NRS 40.230 such that Chersus was entitled to monetary damages.[5] Chersus never presented any argument or evidence to the district court to prove that it was deprived of its possession of the Property. Accordingly, the district court's conclusion that Ocwen committed trespass and is liable to Chersus for monetary damages is arbitrary. Chersus does not dispute this in its Answering Brief and fails to identify any evidence in the record to support its trespass counterclaim.

Accordingly, summary judgment against Ocwen on Chersus' trespass counterclaim must be reversed.

c. The record is void of any argument or evidence by Chersus before the district court that it conferred any benefit upon Ocwen which Ocwen wrongfully retained.

The district court erred in granting summary judgment to Chersus on its counterclaim for unjust enrichment because Chersus did not confer any benefit upon Ocwen which Ocwen wrongfully retained. *See* Opening Brief at 35-38. Instead of responding to Ocwen's argument, Chersus incorrectly argues that the elements of a cause of action for unjust enrichment "are not rigid" and concludes that the "district

[5] Chersus contends that this is a new argument by Ocwen on appeal. This is not true. Damages related to Chersus' counterclaim for trespass were discussed in Ocwen's Opposition to Chersus' Motion for: (1) Judgment or Prove-Up Hearing for Compensatory and Punitive Damages; (2) Order Awarding Attorney's Fees to Chersus; and (3) Orders for Specific Performance. [XVII:AA3360-3418.]

court correctly determined that Appellant wrongfully foreclosed on the Property and Chersus was not able to use the Property." Answering Brief at 51-52.[6] Chersus argument is unresponsive to Ocwen's arguments and fails to address or rebut them. This Court should consider this failure to respond as an admission that Ocwen's argument has merit and Ocwen need not respond further. *See Farkas Funding*, 2022 WL 831467, 506 P.3d 319.

There is no evidence in the record before the district court, or presented by Chersus to this Court, that Chersus ever conferred a benefit, monetary or otherwise, upon Ocwen which Ocwen wrongfully retained. Accordingly, the district court erred in granting summary judgment to Chersus on its unjust enrichment counterclaim and the judgment must be reversed.

d. Because summary judgment on the unjust enrichment counterclaim was erroneously entered against Ocwen, the award of monetary damages against it for lost rental income must be reversed.

The district court erred in awarding lost rental income to Chersus because summary judgment on Chersus' counterclaim for unjust enrichment was entered in error and must be reversed. But even if not reversed on that basis, the district court nonetheless abused its discretion by awarding Chersus monetary damages in the

[6] To the extent that Chersus accuses Ocwen of raising this argument for the first time on appeal, Ocwen again points Chersus to its arguments set forth in Ocwen's Opposition to Chersus' Motion for: (1) Judgment or Prove-Up Hearing for Compensatory and Punitive Damages; (2) Order Awarding Attorney's Fees to Chersus; and (3) Orders for Specific Performance. [XVII:AA3360-3418.]

amount of allegedly lost rental income because no such supporting evidence was disclosed during the discovery period and the late disclosure did not meet the requirements of NRCP 16.1(a)(2)(B). Consequently, the district court abused its discretion in basing its award of monetary damages on Mr. Zimmer's report regarding rental value of the Property. *See* Opening Brief at 39-44.

In its Answering Brief, Chersus agrees that it did not timely disclose Mr. Zimmer as its expert witness, and instead simply argues that its prior counsel did not recognize the need for an expert witness prior to the discovery cut-off and that Ocwen did not object to the late disclosure until the prove-up hearing. Answering Brief at 54-55. Chersus admission of a late disclosure because of its prior counsel's failure to timely disclose an expert witness is not sufficient to defeat Ocwen's challenge, which also was based on the expert witness's failure to comply with the requirements of NRCP 16.1 in his report. Specifically, NRCP 16.1(a)(2)(B) mandates that disclosure of an expert witness be accompanied by the witness's written report, which is required to contain certain information concerning: the witness's opinions; the basis and reasons for the opinions; the facts or data considered in forming the opinion; any exhibits used to summarize or support the opinion; the witness's qualifications; a list of all other cases where the witness testified at trial or deposition within the last four years; and a statement of the compensation paid to the witness. No such information was ever presented to the

district court by Chersus with its untimely disclosure of Mr. Zimmer and, therefore, Mr. Zimmer's report fell well below the requirements of NRCP 16.1(a)(2)(B). Chersus did not address this failure in its Answering Brief, or the district court's failure to conduct a sufficient analysis of Mr. Zimmer's qualification and methodology, as required by *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). The district court's decision to not strike Mr. Zimmer as an expert witness and admit his report into evidence at the prove-up hearing was an abuse of discretion where the court failed to conduct the necessary analysis under *Hallmark* and reach a conclusion supported by substantial evidence. *Id*. 124 Nev. at 499, 189 P.3d at 651. Accordingly, reversal of the monetary damages award against Ocwen for lost rental income is necessary.

e. Chersus admits that it failed to timely file its 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 or the district court's order. [XIV:AA2771.] In its Answering Brief, Chersus summarily argues that the district court did not abuse its discretion in awarding costs because of delays in the litigation, but does not present any other justification for the late disclosure or any legal

authorities supporting its position that the late disclosure was permissible. Answering Brief at 56. This Court should construe Chersus' failure to adequately respond to Ocwen's arguments as an admission that the arguments have merit. *Farkas Funding,* 506 P.3d 319.

III. CONCLUSION

Based on the foregoing and the arguments set forth at length in Ocwen's Opening Brief, Ocwen respectfully requests that the Court reverse summary judgment against it and remand to the district court with direction to enter summary judgment in favor of Ocwen on all claims and counterclaims.

DATED this 24th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 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 5,679 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 24th day of June, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 24th day of June, 2022, the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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[X] (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.

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