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. A636357

PETITION FOR REHEARING

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I. INTRODUCTION

Appellant, Ocwen Loan Servicing, LLC ("Ocwen") respectfully brings this Petition for Rehearing, pursuant to NRAP 40, because this Court appears to have inadvertently overlooked and/or misapprehended a number of material facts and legal arguments set forth in Ocwen's Opening and Reply briefs. Specifically, Ocwen seeks rehearing on the basis that this Court, respectfully:[1]

(1) overlooked or misapprehended the evidentiary record in this action when it affirmed the district court's conclusion that there was no fraud, oppression or unfairness in the subject HOA Sale process despite the same facts admitted as those presented in *U.S. Bank National Ass'n v. The Gifford W. Cochran Revocable Living Trust*, No. 77642, 2020 WL 2521786 (Nev. May 15, 2020) ("*Cochran Trust*") and *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.,* 74059, 2019 WL 4054161 (Nev. Aug. 27, 2019) ("*Lahrs Family Trust*"), which were deemed to be sufficient evidence of fraud, oppression or unfairness;

(2) overlooked or misapprehended the evidentiary record in this action when it concluded that the HOA Sale price was more than the $100 paid in *Cochran Trust* and *Lahrs Family Trust* and, therefore, did not show collusion in the HOA Sale despite the undisputed fact that the Factoring Agreement guaranteed First 100 a full

[1] Defined terms have the meaning ascribed to them in Ocwen's Opening Brief.

refund of all amounts it paid at the HOA Sale, thereby meaning it paid $0 to acquire the Property, an indisputable sign of pre-foreclosure collusion;

(3) misapprehended applicable law when it concluded that Ocwen owes Chersus damages under an unjust enrichment theory despite the fact that it is undisputed that Chersus did not "confer" any benefit upon Ocwen nor did Ocwen receive and retain any benefit from Chersus; rather, the undisputed record confirms that Chersus continued to lease the Property to its tenant after Ocwen's foreclosure under the Deed of Trust and Chersus provided no evidence that Ocwen then prevented Chersus from continuing to lease the Property or took rental income from Chersus' tenant to Chersus' detriment; and

(4) misapprehended or overlooked applicable law in upholding the district court's ruling that the late disclosure of Chersus' expert witness was harmless where Chersus did not dispute that its expert witness disclosure failed to comply with the requirements of NRCP 16.1(a)(2)(B) and there was no investigation in the record of Mr. Zimmer's qualifications as an expert. The untimely *and* insufficient disclosure was prejudicial to Ocwen, improperly placed the burden on Ocwen to object, and resulted in the admission of Mr. Zimmer as an expert witness that was arbitrary, capricious and an abuse of discretion requiring reversal.

Accordingly, Ocwen respectfully submits that rehearing is warranted to promote substantial justice.

II. ARGUMENT

a. Legal standard for rehearing.

Pursuant to NRAP 40(c), "[t]he court may consider rehearing in the following circumstances: (A) When the court has overlooked or misapprehended a material fact in the record or a material question of law in the case, or (B) When the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." Where a litigant can show that this Court "has overlooked material matters and that rehearing will promote substantial justice," rehearing by the panel is warranted. *Calloway v. City of Reno*, 114 Nev. 1157, 1158, 971 P.2d 1250, 1250 (1998) (granting petition for rehearing).

b. Rehearing is necessary as the Court has overlooked material facts in the record which confirm that this action does not concern "different evidence" compared to *Cochran Trust* and *Lahrs Family Trust.*

This Court concluded in the Affirmance Order that "[b]ased on the arguments presented to the district court, however, we are not persuaded that the district court erred in finding that there was no evidence of fraud, unfairness, or oppression in this case." Order at 3. This Court added,

> To the extent that appellant contends this case is identical to *U.S. Bank National Ass'n v. The Gifford W. Cochran Revocable Living Trust*, No. 77642, 2020 WL 2521786 (Nev. May 15, 2020) (Order Vacating Judgment and Remanding), we are not persuaded, as this case contains different evidence. Similarly, *Lahrs Family Trust v. JP Morgan Chase Bank, N.A.,* 74059, 2019 WL 4054161 (Nev. Aug. 27, 2019) (Order of

> Affirmance), is distinguishable because the winning bid in that case was only $100, *id.* at *1.

Order at 3, fn. 3.

Respectfully, this Court overlooked the underlying facts of this matter when it concluded that "this case contains different evidence" to the evidence presented in *Cochran Trust*, in which the court deemed the identical factoring agreement terms were sufficient evidence of fraud, oppression or unfairness to declare the homeowner's association lien foreclosure sale voidable as to its effect on the first position deed of trust.[2] Although the sale price at the subject HOA Sale was purportedly higher ($3,500) compared with the sale price in *Cochran Trust* and *Lahrs Family Trust* ($100), Chersus did not dispute that the identical factoring agreement terms involving ULS and First 100 were involved in this action, as well as *Cochran Trust* and *Lahrs Family Trust*, and did not dispute that the Factoring Agreement **provided for a refund of the sale price back to First 100**.[3] This refund provision negates any effect that the allegedly higher sale price had because it was nothing more than a number on paper and the record reflects that no money was actually exchanged between First 100 and the HOA. Chersus' silence on this point

[2] *See* Opening Brief at 17-22.

[3] *See* Answering Brief at 24-25 arguing active bidding, without any supporting evidence, and ignoring the Factoring Agreement provision, which expressly provided for a refund of the sale price back to First 100 and the undisputed fact that First 100 actually paid nothing to acquire the Property at the HOA Sale because of that refund provision.

was a confession of error, and an acknowledgement that the false sale price and terms of the Factoring Agreement were, in fact, evidence of collusion, fraud, oppression or unfairness. *See Ozawa v. Vision Airlines, Inc.*¸125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (citing *Bates v. Chronister*, 100 Nev. 675, 682, 601 P.2d 865, 870 (1984) (treating the failure to respond to an argument as a confession of error)).[4]

In *Cochran Trust*, the Court concluded that the factoring agreement between ULS, First 100 and the foreclosing homeowner's association "required the HOA to use First 100's preferred foreclosure agent and prevented the HOA from bidding any higher than the agreed-upon starting bid of $99[.]" 2020 WL 2521786. at *2. This undisputed fact, along with the undisputed fact that First 100 purchased the property at the foreclosure sale, "support[s] a conclusion that bidding was chilled." *Id*. (citing *Yfantis,* 173 F. Supp. 3d at 1058 (noting that collusion between the winning bidder and the entity selling the property may constitute fraud, oppression, or unfairness); *Country Exp. Stores, Inc. v. Sims*, 87 Wn. Ap.. 741, 943 P.2d 374, 379 (Wash. Ct. App. 1997) (noting that one type of chilled bidding "is intentional, occurring where there is collusion for the purpose of holding down the bids.")).

[4] *See* Reply Brief at 8-9, setting forth that Chersus admitted that *Lahrs Family Trust* 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. *See* Answering Brief at 35.

Here, ULS, First 100 and the HOA entered into an identical Factoring Agreement as the one in *Cochran Trust*. [III:AA0396-412.] Pursuant to the terms of the Factoring Agreement, in pertinent part, the HOA sold its interest in both the delinquent assessments and its right to collect future delinquent assessments. *Id*. at ¶¶ 2.01 and 4.02(h). The Factoring Agreement prohibited the HOA from continuing to use its preferred foreclosure agent, Red Rock, and required ULS to be used as the foreclosure agent. *Id*. at ¶ 3.02(a). Again, in the same manner as the factoring agreement in *Cochran Trust,* 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). First 100 was the winning bidder in *Cochran Trust* and was the winning bidder at the subject HOA Sale. [II:AA0243-45.]

Accordingly, the identical, undisputed facts that *Cochran Trust* deemed sufficient evidence of collusion to present slight evidence of fraud, oppression or unfairness, were overlooked in the record here. This identical evidence meets the *very slight* evidence of fraud, oppression or unfairness necessary to deem the HOA

Sale voidable as to the Deed of Trust.[5]

To the extent this Court believes that the HOA Sale price here, an alleged $3,500, was a sufficient amount to no longer be evidence of fraud, oppression or unfairness, compared with the $100 sale price in *Cochran Trust* and *Lahrs Family Trust* (Order at 3, fn. 3), the difference in sale price cannot be viewed in a vacuum. The difference in alleged sale price actually weighs in Ocwen's favor and against Chersus when viewed in light of certain overlooked terms within the Factoring Agreement.[6] Specifically, neither this Court nor the district court considered the undisputed fact that the sale price was irrelevant because First 100 actually paid nothing for the Property: the Factoring Agreement **guaranteed that any amounts collected by ULS at the HOA Sale would be paid back to First 100**. [III:AA0401 at 4.02(a).] So whatever amount First 100 bid and allegedly paid at the HOA Sale was immediately returned to First 100. Consequently, the facts here are even more egregious than the $100 sale price fact presented in *Cochran Trust* and *Lahrs Family*

[5] It remains undisputed that the HOA Sale price was a mere 2.6% of the fair market value of the Property. [IV:AA0681-708.] As such, only *very slight* evidence of fraud, oppression or unfairness was necessary. The "relationship [between price and sale irregularities] 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." *U.S. Bank National Association v. Resources Group, LLC,* 135 Nev. Adv. Op. 26, 444 P.3d 442 (2019) (emphasis added) (citing *Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017); quoting *Golden v. Tomiyasu*, 79 Nev. 503, 515, 387 P.2d 989, 995 (1963)).

[6] *See* Opening Brief at 14-15.

Trust. Again, it did not matter how much First 100 allegedly bid at the HOA Sale because it was guaranteed a full refund. Additional evidence was presented to confirm this: the HOA's ledger reflects that First 100 simply wrote off the remaining amount of the HOA's lien as "bad debt" instead of paying the HOA for the remaining portion of its lien [IV:AA0596] and then disbursing the excess proceeds resulting from the sale price, if any, in accordance with the distribution statute, NRS 116.31164(3)(c).[7] This is further evidence of collusion, fraud, unfairness and oppression; First 100 would outbid any other bidder (if there were any, there was no admissible evidence of competitive bidding submitted in the record of this action) to guarantee that it was the winning bidder because it knew it would obtain ownership of the Property ***without actually paying any money*** at the HOA Sale. Chersus did not dispute this fact before the district court or this Court, nor could it because it was not the purchaser at the HOA Sale, First 100 was.[8] *See Ozawa*, 125 Nev. at 563, 216 P.3d at 793. Substantial justice will be promoted by rehearing in order to maintain the uniform application of rulings concerning the ULS and First 100 Factoring Agreements, where identical facts are presented in this action to *Cochran Trust* and *Lahrs Family Trust*, and First 100 paid nothing to acquire the Property as a result of the Factoring Agreement terms that reflect pre-foreclosure collusion between ULS,

[7] The version of the statute In effect at the time of the HOA Sale.
[8] *See* footnote 3, *supra*.

First 100 and the foreclosing HOA.

c. Rehearing is necessary as the Court has overlooked or misapplied the applicable law in concluding that the district court correctly admitted Chersus' expert witness' testimony to support Chersus' alleged unjust enrichment damages.

To the extent that this Court does not grant rehearing as to the quiet title judgment in favor of Chersus and against Ocwen (which would necessitate reversal of the unjust enrichment damages award), rehearing should nonetheless be granted as to the unjust enrichment damages against Ocwen because the Court overlooked or misapplied the applicable law.

1. Chersus did not "confer" a benefit upon Ocwen nor did Ocwen "receive" any benefit from Chersus.

This Court disagreed with Ocwen's challenge to the propriety of entering judgment in favor of Chersus on its claim for unjust enrichment, concluding that "the 'benefit' that [Chersus] 'conferred' upon [Ocwen] was the *ability* to use the property as a source of income." Order at 5 (emphasis in original). But in doing so, this Court misapplied the law concerning unjust enrichment, which requires an affirmative act by Chersus to "confer" a benefit upon Ocwen and not just passive inaction.[9]

This Court cited to *Certified Fire Prot., Inc. v. Precision Const. Inc.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012), and *Leasepartners Corp. v. Robert L. Brooks r.*

[9] *See* Opening Brief at 35-38.

Dated Nov. 12, 1975, 113 Nev. 747, 756,, 942 P.2d 182, 187 (1997). Both cases, however, confirm that (1) an affirmative act to confer a benefit to another must occur and (2) there must be an actual benefit received in order for a party to be unjustly enriched. Neither element occurred here.

In *Precision Const.*, Certified Fire Protection ("Certified") submitted a bid to Precession Construction, Inc. ("Precision") for the design and installation of a sprinkler system. 128 Nev. at 375, 283 P.3d at 253. Certified won the bid and obtained a copy of the subcontract with a set of construction plans and sprinkler system specifications. *Id*. Certified objected to the subcontract as imposing terms that differed from the bid specifications and did not sign the subcontract, despite starting work preparing sprinkler system designs. 128 Nev. at 376, 283 P.3d at 254. Due to the failure to sign the subcontract and errors in the sprinkler system designs, Precision terminated its relationship with Certified. *Id*. Certified sought damages for unjust enrichment, arguing that it had conferred a benefit upon Precision through the design work it had already undertaken. *Id*. The district court concluded, and the Nevada Supreme Court affirmed, that Precision had not used and, consequently, had not benefitted from, the design drawings. Therefore, Precision had not been unjustly enriched by Certified.

In *LeasePartners*, the Court considered whether LeasePartners Corporation's ("LeasePartners") installation of new signs that were bigger, more attractive and

more state of the art than the old signs that they replaced conferred a benefit upon the Robert L. Brooks Trust Dated Nov. 12, 1975 ("Brooks Trust"). 113 Nev. at 756, 942 P.3d at 187. Brooks Trust was satisfied with the old signs, which were destroyed, and argued that any benefit conferred on it was unwanted. *Id*. Although the Court remanded the appeal back to the district court to determine whether Brooks Trust was unjustly enriched, the *LeasePartners* fact pattern again shows that an affirmative act must be undertaken in order to "confer" a benefit on another party.

Unlike *Precision Const.* and *LeasePartners*, there is no evidence in the record here that Chersus undertook any action to confer any benefit upon Ocwen to Chersus' detriment. Chersus did not purchase any goods or provide any service to Ocwen. Rather, Ocwen foreclosed on its Deed of Trust lien interest against title to the Property as a result of the Borrower's failure to comply with his Loan repayment obligations thereunder, which pre-dated the HOA's lien and of which Chersus had notice when it acquired its interest in the Property. Neither Chersus nor its predecessor, First 100, sought to enjoin the Deed of Trust foreclosure or otherwise pay monies to reinstate the Loan to avoid foreclosure. Further, Chersus and Ocwen had not entered into a quasi- or implied contract and had no pre-existing relationship at any time prior to or after foreclosure under the Deed of Trust proceeded. There is no evidence in the record that Chersus or First 100 ever even attempted to contact Ocwen. But the evidentiary record does show that Chersus knew it was not

purchasing clear title from First 100, would have to litigate a quiet title action and may have acquired title to the Property subject to the Deed of Trust. [XVII:AA3386-90.]

Moreover, there is no evidence in the record that Ocwen *received* and *retained* a benefit from Chersus. Although this Court noted that the potential to lease out the Property was a benefit that Ocwen allegedly received, the fact is Ocwen did not lease the Property to a tenant and, consequently, did not actually "appreciate" any benefit that would be inequitable for it to retain without payment to Chersus. The record reflects instead that Chersus leased the Property to a tenant even after Ocwen foreclosed. [XVIII:AA3546, lines 2-3.] There is no evidence in the record that Ocwen then prevented Chersus from continuing to lease the Property to a tenant or that Ocwen took monthly rental income from Chersus' tenant and refused to hand over that rental income to Chersus. Accordingly, there is no evidence in the record to support the district court's finding, and this Court's affirmance, that Chersus conferred a benefit upon Ocwen and that Ocwen appreciated the benefit to Chersus' detriment. Consequently, the district court's judgment requiring Ocwen to pay damages to Chersus is akin to an improper punitive damages award and not compensatory damages since there was no benefit appreciated by Ocwen to Chersus' detriment for which compensation was necessary.

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2. Chersus' expert witness was not simply untimely disclosed, the disclosure utterly failed to comply with the mandatory disclosure requirements under NRCP 16.1(a)(2)(B); Chersus did not dispute this.

This Court concluded that "[a]lthough appellant did not disclose its expert witness until October 2019, which was after the close of discovery, the prove-up hearing was not held until March 2021…We conclude that the necessary implication behind the district court's decision is that the untimely disclosure was harmless[.]" Order at 6. Respectfully, the egregiously untimely disclosure was not harmless when taking into account the undisputed fact that Chersus' expert witness disclosure completely failed to comply with any of the requirements set forth in NRCP 16.1(a)(2)(B).[10] Ocwen's purportedly late objection to the disclosure of Chersus' expert witness did not absolve Chersus of complying with the expert disclosure requirements. **Chersus did not deny its non-compliant expert witness disclosure**, and presented no justification to the district court or this Court other than improperly shifting blame and burden to Ocwen for not objecting sooner.[11] This Court appears to have overlooked Chersus' failure to address Ocwen's argument that the disclosure of Mr. Zimmer failed to comply with the requirements of NRCP 16.1(a)(2)(B). This should have been deemed a **confession of error**. *See Ozawa*, 125 Nev. at 563, 216

[10] *See* Opening Brief at 39-43.

[11] *See* Answering Brief at 52-56. Chersus is silent regarding Ocwen's challenge that Chersus' expert witness disclosure failed to comply with the requirements of NRCP 16.1(a)(2)(B).

P.3d at 793 (citing *Bates*, 100 Nev. at 682, 601 P.2d at 870).

Even if this Court looks past Chersus' failure to respond, substantial justice requires rehearing of the district court's ruling as to Mr. Zimmer's qualifications and testimony to support Chersus' unjust enrichment damages. Endorsing Chersus' lack of diligence and failure to comply with the expert witness disclosure requirements of NRCP 16.1(a)(2)(A)-(B) tacitly tells Chersus, its counsel and future litigants that it is an acceptable practice to not comply with discovery rules and then lie in wait to see if the opposing party objects. This creates an inherent unfairness in the litigation process which was undoubtedly unintended by the Legislature when it placed affirmative disclosure obligations within NRCP 16.1 and provided numerous rules for sanctions against a party for its failure to comply with discovery disclosure requirements. *See* NRCP 16.1(e), NRCP 26(g), NRCP 37(c).

Moreover, rehearing is necessary because this Court overlooked or misapprehended the district court's determination that Mr. Zimmer was qualified as an expert witness. First, the district court should not have disregarded Chersus' failure to provide the threshold documentary disclosure requirements to determine whether the expert witness was qualified. Specifically, Chersus' expert report did not contain: any expert opinion(s) and the basis and reason for them (NRCP 16.1(a)(2)(B)(i)); the facts and data, or any exhibits, considered by the witness in forming its expert opinion(s) (NRCP 16.1(a)(2)(B)(ii)-(iii)); the witness'

qualifications, list of publications, list of all other cases in which the witness testified as an expert, and a statement of the witness' compensation for the report and testimony (NRCP 16.1(a)(2)(B)(iv)-(vi)). And second, the record reflects that no questions were actually posed to Mr. Zimmer regarding his qualifications and experience with rental income valuation, his employment or his prior experience as an expert witness, if any. The only questions posed to Mr. Zimmer by Chersus' counsel were to inquire about how Mr. Zimmer "[ran] a summary report, a CMA." [XVIII:AA3546-47.] Mr. Zimmer responded "I put in all the different listings around the neighborhoods **and stuff**[.]" [*Id*. at AA3547, lines 2-3 (emphasis added).]

Ocwen respectfully requests that this Court rehear this issue and conclude that the district court abused its discretion in qualifying Mr. Zimmer as an expert witness. The district court improperly disregarded Chersus' failure to comply with NRCP 16.1(a)(2)(B) and failed to conduct any actual assessment of Mr. Zimmer's qualification as an expert witness. At a minimum, substantial justice requires rehearing where the failure to comply with NRCP 16.1(a)(2)(B) prejudiced Ocwen's ability to adequately evaluate Mr. Zimmer's qualifications and testimony as an expert witness and whether it needed to retain and disclose its own rebuttal witness.

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III. CONCLUSION

For all the foregoing reasons, Ocwen respectfully requests that this Court grant the Petition for Rehearing.

DATED this 17th day of October, 2022.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. 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:

(a) This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman, font size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is

(a) Proportionately spaced, has a typeface of 14 points or more, and contains 3,767 words.

DATED this 17th day of October, 2022.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on the 17th day of October, 2022, the foregoing **PETITION FOR REHEARING** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

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Vernon A. Nelson, Esq.

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

/s/ Tonya Sessions
An Employee of WRIGHT, FINLAY & ZAK, LLP