IN THE SUPREME COURT OF THE STATE OF NEVADA

Case No.: 82379

LEO KRAMER AND AUDREY KRAMER,

Appellants,

vs.

NATIONAL DEFAULT SERVICING CORPORATION, et al.,

Respondents.

RESPONDENT'S ANSWERING BRIEF

Respectfully Submitted By:

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies the following are persons and entities pursuant to NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

National Default Servicing Corporation ("NDSC") is a wholly owned privately held corporation.

The law firm of Tiffany & Bosco, P.A., including associates Ace C. Van Patten, Esq. and Kevin Soderstrom, Esq., has represented NDSC throughout the entirety of the underlying litigation.

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STATEMENT OF THE FACTS

Loan Documents

On or about April 4, 2008, Leo Kramer executed an Agreement and Disclosure (the "Note") reflecting a home equity line of credit provided by Washington Mutual ("WAMU"). (ROA Vol. IX, p. 3854).

On or about April 4, 2008, Leo Kramer and Audrey Kramer (collectively, the "Appellants" or the "Kramers") executed a Deed of Trust reflecting that the debt referenced in the Note was secured by the real property located at 1740 Autumn Glen Street, Fernley, NV 89408 (the "Property"). (ROA Vol. IX, p. 3865). The Deed of Trust was recorded with the Lyon County Recorder's Office on or about May 1, 2008. *Id.*

The Deed of Trust encumbers the Property and secures repayment of the Note (collectively, the Note and Deed of Trust are hereafter "the Loan").

The Note was subsequently endorsed in blank.

JPMorgan Chase Bank, N.A. becomes the note holder and beneficiary

On September 25, 2008, the Federal Deposit Insurance Corporation ("FDIC") placed WaMu into receivership. (ROA Vol. IX, p. 3876).

Concurrent with the inception of the FDIC's receivership of WaMu, JP Morgan Chase Bank, N.A. ("Chase") acquired certain assets and liabilities of WaMu from the FDIC pursuant to that certain "Purchase and Assumption

Agreement, Whole Bank, Among Federal Deposit Insurance Corporation, Receiver of Washington Mutual Bank, Henderson, Nevada, Federal Deposit Insurance Corporation and JPMorgan Chase Bank, National Association," dated as of September 25, 2008 (the "PAA"). (ROA Vol. IX, p. 3880).

As part of the acquisition by Chase of certain assets and liabilities of WaMu from the FDIC, acting as Receiver, Chase acquired the rights of WaMu, as lender and beneficiary, respectively, arising under all of the loan assets of WaMu — including the Loan. *Id*.

Leo Kramer's bankruptcy filings acknowledge Chase's status as noteholder and beneficiary

On April 8, 2010, Leo Kramer filed a Chapter 11 bankruptcy petition in Case 10-43951, in the United States Bankruptcy Court, Northern District of California and included, in his schedules, acknowledgment that (i) Chase held a security interest in the Property; and (ii) the amount of Chase's claim was $175,274.00 (without deducting the value of the collateral). (ROA Vol. IX, p. 3925). Leo Kramer then received a discharge on or about June 16, 2011. (ROA Vol. IX, p. 3963).

On September 1, 2011, Leo Kramer filed a Chapter 13 bankruptcy petition in Case 11-49493, in the United States Bankruptcy Court, Northern District of California. (ROA Vol. IX, p. 3967). Chase filed a Proof of Claim regarding the Loan, attaching a copy of the Note and Deed of Trust, and objected to the proposed

Chapter 13 Plan, but the case was ultimately dismissed as Leo Kramer failed to make the required plan payments. (ROA Vol. IX, p. 4004 -4047).

On November 26, 2013, a Substitution of Trustee was recorded on December 5, 2013 in the Official Records of the Lyon County, Nevada Recorder reflecting National Default Servicing Corporation was substituted in by Chase as the trustee under the Deed of Trust. (ROA Vol. IX, p. 4051).

On July 3, 2014, Leo Kramer filed a third bankruptcy petition in the United States Bankruptcy Court, Northern District of California, which was a Chapter 13 petition, assigned Case 14-42866 and in which Leo Kramer filed his schedules whereby he again acknowledged again that (i) Chase held a security interest in the Property; and (ii) the amount of Chase's claim was $176,000.00 (without deducting the value of the collateral). (ROA Vol. IX, p. 4058).

Chase again filed a proof of claim regarding the Loan in Case 14-42866 on October 29, 2014 which included a copy of the Note and DOT. (ROA Vol. IX, p. 4091).

On or about December 22, 2014, Leo Kramer confirmed a Chapter 13 Plan in Case 14-42866, wherein Chase was recognized as a Class 3 creditor, and no payments were to be made to Chase under the Plan, but that expressly called for Leo Kramer to surrender his interest in the Property to Chase upon plan confirmation. (ROA Vol. IX, p. 4125).

The foreclosure sale

On October 6, 2017, a non-judicial foreclosure of the Property was initiated by the recording of a Notice of Default ("NOD" or "Notice of Default") in the Official Records of the Lyon County, Nevada Recorder. (ROA Vol. IX, p. 4053-4056, 4130).

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

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

ii. 1229 Ballena Blvd., Alameda, California 94501

and via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. (ROA Vol. IX, p. 4143-4153).

These were the only addresses in NDSC's possession. (ROA Vol. IX, p. 4053-4056).

A Copy of the Notice of Default, along with a Danger Notice was also posted on the Property on or about October 12, 2017. (ROA Vol. IX, p. 4053-4056, 4155-4163).

The Notice of Default was received by the tenant at the time, Daniel Starling ("Starling").(ROA Vol. IX, p. 4165-4179; *see also* Deposition of Deborah Taylor, pp. 24-25, ROA Vol. IX, p. 4187-4188).

On or about October 16, 2017, Starling advised the property management company, Chaffin Real Estate Services ("Chaffin") that the Notice of Default had been posted and provided a copy of the same to Chaffin. *Id.*

Chaffin advised the Kramers on October 16, 2017, that the Notice of Default had been posted on the Property and provided a copy of the same to the Kramers, of which the Kramers confirmed receipt. (ROA Vol. IX, pp. 4138-4141; *see also* Deposition of Audrey Kramer, p. 45, ROA Vol. IX, p. 4212, 4215. of.

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

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

On or about April 19, 2018, a Notice of Trustee's Sale was recorded in the Official Records of the Lyon County, Nevada Recorder, advising that foreclosure sale would occur on May 18, 2018. (ROA Vol. IX, p. 4241, 4246).

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

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

iv. 1229 Ballena Blvd., Alameda, California 94501

v. 2364 Redwood Road, Hercules, California 94547

and via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. (ROA Vol. IX, p. 4053-4056, 4250-4266).

The Kramers acknowledge receipt of the Notice of Sale. (Deposition of Audrey Kramer, p. 45, ROA Vol. IX, p. 4216).

The Notice of Sale was also posted on the Property on April 19, 2018 and again on April 20, 2018. (ROA Vol. IX, p. 4053-4056, 4268).

The Notice of the Sale was also published in the Reno Gazette-Journal, and Mason Valley news/Leader Courier on April 25, 2018, May 2, 2018, and May 9, 2018. (ROA Vol. IX, p. 4053-4056, 4272).

Starling also provided a copy of the Notice of Sale to Chaffin, who in turn provided the Notice of Sale to the Kramers. Deposition of Deborah Taylor, pp. 24-25, ROA Vol. IX, p. 4187-4188.

On or about June 1, 2018, a Trustee's Deed Upon Sale was recorded in the Official Records of the Lyon County, Nevada Recorder, reflecting that on May 18, 2018, the foreclosure sale of the Property occurred, and that Breckenridge Property Fund 2016, LLC provided the highest bid in the amount of $211,000. (ROA Vol. IX, p. 4274).

The Federal Court Case and subsequent appeal

The Kramers filed a Complaint in case 3:18-cv-0001-MMD (the "Federal Court Case" or "Federal Court Action") in the United States District Court for the District of Nevada on or about January 2, 2018, naming Chase, NDSC, WAMU, and Mortgage Electronic Registration Systems, Inc. ("MERS") challenging the foreclosure and asserting many of the same allegations contained in the instant Complaint. (ROA Vol. IX, p. 4312).

The Kramers initiated the Federal Court Case in response to the Notice of Default. (ROA Vol. IX, p. 4138-4141).

Subsequently, on May 17, 2018, the Federal Court entered an Order finding that the Kramers were judicially estopped from asserting the claims asserted against Chase, WAMU and NDSC "to avoid foreclosure on the [Property]." (ROA Vol. I, p. 131-141).

The Kramers appealed the Order to the United States Court of Appeals for the Ninth Circuit and, on May 29, 2019, the Ninth Circuit entered a Memorandum affirming the lower court's decision. (ROA Vol. IX, p. 4324-4327).

The Kramers subsequently petitioned for a panel rehearing, and when that was denied in September 6, 2019 by the Ninth Circuit, filed a Motion for Relief on December 23, 2019 in the District Court; that Motion was denied on December 27, 2019 by the District Court. (ROA Vol. IX, p. 4329).

The underlying state court litigation

The Kramers filed their Complaint in this action on June 8, 2018, naming NDSC among other parties; on or about October 24, 2018, the District Court entered an Order Granting Motion to Dismiss Plaintiffs' Complaint, dismissing the entirety of the Complaint without prejudice and finding that all claims, except for those relating to the procedural notice of the sale, were precluded from being re-litigated as a result of res judicata.

The Kramers subsequently amended their Complaint and the Court, in turn, entered a second order on May 24, 2019, granting in part and denying in part NDSC's motion to dismiss the First Amended Complaint which further confirmed that the only remaining claim relates to the procedural requirements as it relates to the foreclosure sale conducted by NDSC.

SUMMARY OF THE ARGUMENT

The Kramers argue that the foreclosure sale was improperly conducted because they did not receive the appropriate notice of the Notice of Default, did not receive a Notice of Default which complied with NRS 107.500, and were deprived the opportunity to participate in the Nevada Foreclosure Mediation Program. *See e.g.*, Opening Brief, p. 19. The sale, however, cannot be determined to be void if NDSC substantially complied with the applicable provisions – there is no strict compliance requirement. Here it is undisputed that the Kramers received notice of the Notice of Default as it was provided by the Kramers' tenant to the property management company, who in turned, provided it to Kramers the day it was posted. Moreover, the Kramers do not fall within the entities included within NRS 107.090 because they do not have a recorded request for notice nor have a junior interest in the Property. Similarly, because the Property was not owner occupied, the Kramers are not protected by NRS 107.500 or eligible to participate in the Nevada State Foreclosure Mediation Program.

Moreover, the Kramers provided no admissible evidence to dispute the same. The purported expert was disallowed, and the attempts by the Kramers to utilize piecemeal portions of arguments made during the March 1, 2019, hearing on the Motion to Dismiss the Complaint fails to acknowledge that under the analysis for dismissal under NRCP 12 requires a different standard for acceptance

of facts than a Motion for Summary Judgment under NRCP 56 and that argument under the same is different than testimony. At the end of the day, the foreclosure sale was properly held, the Kramers had notice – and indeed, even commenced federal court litigation in response to the Notice of Default – and the sale was validly completed. As such, the District Court properly granted summary judgment in favor of NDSC and the lower court's decision must be affirmed.

ARGUMENT

A. NDSC substantially complied with the foreclosure sale requirements of NRS 107.

1. Because the Kramers actually received the notices, NDSC substantially complied – if not outright actually complied - with the notice requirements of NRS 107.080 and NRS 107.087.

The Kramers assert that NDSC failed to comply with the notice requirements when the NOD was recorded, rendering the foreclosure void. *See,* Opening Brief, p. 10. NRS 107.080(5)(a) confirms that for a valid sale to occur, the trustee need only "substantially comply" with the provisions of NRS 107.080, a fact which the Nevada Supreme Court has repeatedly recognized. *See e.g., Schleining v. Cap One, Inc.*, 130 Nev. 323, 329, 326 P.3d 4, 8 (Nev. 2014)("the Legislature had expressly imposed a substantial-compliance standard with regard to a lender's duty to provide a borrower with notice of a loan's default and the lender's election to foreclose.")(internal emphasis omitted). Moreover, substantial compliance with the notice requirements is achieved where actual notice occurs

and there is no prejudice to the party entitled to notice. *Id.; see also, Dayco Funding Corp. v. Mona*, 427 P.3d 1038 (Nev. 2018). Here,

a. The Kramers received actual notice when the Chaffin provided them with a copy of the Notice of Default the day it was posted.

There is no dispute that the Kramers had actual notice of the Notice of Default. NDSC sent the Notice of Default via certified mail on or about October 16, 2017, to Appellants at 1740 Autumn Glen St., Fernley, Nevada 89408 and 1229 Ballena Blvd., Alameda, California 94501, the only addresses for the Kramers that NDSC had in its possession at the time. *See,* ROA Vol. IX, pp. 4053-4056, 4143-4153. The Notice of Default was also provided via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. *Id.* Further, the Notice of Default was also physically posted on the Property. *See e.g., See,* ROA Vol. IX, pp. 4053-4056, 4155-4158, 4177-4179.

Indeed, the evidence uniformly confirms that the tenant received a copy of the Notice of Default, provided it to Chaffin, and that the Kramers received copies of the Notice of Default from Chaffin. The Declaration of Declaration of Deborah Taylor, drafted by the Kramers and attached as an exhibit to their Complaint provides:

> **On October 16, 2017, the Kramer's tenant, Daniel Starling, notified me that a Notice of Default had been posted on the Kramer's property. I took the initiative to notify the Kramers immediately via email and attached a copy of the notice to the email.** Mrs. Kramer

> replied immediately and stated she had not received anything regarding a foreclosure and would look into the matter and get back with me as soon as possible. Taylor Declaration, ROA Vol. IX pp. 4165-4167, ¶7. (emphasis added).

Ms. Kramer's own declaration confirms the same, noting:

> Plaintiffs only learned of the NOD from their property management company, Chaffin Rel [*sic*] Estate Services, when Plaintiffs received an email from Deborah Taylor, who is an employee of Chaffin. Ms. Tayler stated in her email that Plaintiffs' tenants had received a NOD posted on the subject property. *See,* Kramer Declaration, ROA Vol. IX pp. 4138-4141, ¶7.

The testimony of the parties confirms the same. The tenant, Starling, brought a copy of the Notice of Default into Chaffin on October 16, 2017, and Chaffin provided it to the Kramers:

> Q. (Mr. Van Patten): All right. I'm going to call this document the notice of default going forward.
>
> A. (Ms. Taylor): Okay.
>
> Q. Have you seen this document before?
>
> A. Yes.
>
> Q. When?
>
> A. October of 2017.
>
> Q. Is this the document provided by Mr. Starling?
>
> A. Yes.
>
> Q. Did you provide a copy of the notice of default to anybody?
>
> A. To Audrey and possibly Lee Anne.

> Q. When did you provide that copy?
>
> A. The day I received it, October 2017.
>
> Q. How did you provide it?
>
> A. By e-mail.
>
> Q. With the exception of e-mail, did you have any other form of communication about the notice of default with the Kramers?
>
> A. By phone.
>
> Q. And when was that?
>
> A. The same time frame, October 2017. *See,* Deposition of Deborah Taylor, pp. 24-25, ROA Vol. IX, p. 4187-4188.

The Kramers attached the emails confirming the same to their own Complaint. *See,* October 16, 2017 email from Deborah Taylor to Appellants, ROA Vol. IX, pp. 4177-4179**.** Those emails confirm Ms. Taylor's testimony that a copy of the Notice of Default was received by the tenant and that Ms. Taylor attached the Notice of Default, providing the same to the Kramers on October 16, 2017. *Id.; see also,* Deposition of Deborah Taylor**,** pp. 26-28, ROA Vol. IX, p. 4187-4188. Ms. Kramer confirms she received the same again in a separate email on October 24, 2017, included as part of that same exhibit. *Id.; see also,* Deposition of Audrey Kramer, p. 54, ROA Vol. IX, p. 4215.

Ms. Kramer's own testimony confirms the same:

> Q. (Mr. Van Patten): Were you ever forwarded any documents which had been posted on the property?

> A. (Ms. Kramer): Debi, when she told me that the tenants received a notice of default, I believe she attached one to the e-mail that she sent me. And I told her I would look into it.
>
> Q. When was that?
>
> A. It was in -- I want to say around October 16th of 2017, approximately. *See,* Deposition of Audrey Kramer, p. 45, ROA Vol. IX, p. 4212.

The Kramers, then, concede that they received actual notice and received the Notice of Default through the tenant and Chaffin. This alone is sufficient to establish NDSC's substantial compliance with NRS 107.080 pursuant to *Schleining*, 130 Nev. at 329, 326 P.3d at 8. Even if they had not received notice, however, the mailing to the addresses on record and in NDSC's possession, as well as to the property, was sufficient as these were the last known addresses to NDSC. Mailing the notices to all the addresses NDSC had in its possession, along with posting physical copies on the Property itself, is sufficient to establish substantial compliance with NRS 107.080. Indeed, this action worked – the tenant, property management company, and the Kramers all received copies of the Notice of Default.

b. The Kramers received the Notice of Sale.

Similarly, there is no dispute that the Appellants actually received the Notice of Sale through the mail. The Notice of Sale was mailed via Certified Mail to the Kramers at: 1740 Autumn Glen St., Fernley, Nevada 89408; 1229 Ballena Blvd.,

Alameda, California 94501; and 2364 Redwood Road, Hercules, California 94547 and via first class mail to Parties in Possession at 1740 Autumn Glen St., Fernley, NV 89408-7204. *See,* ROA Vol. IX, p. 4053-4056, 4250-4266. The Notice of Sale was also posted on the Property twice, on April 19, 2018 and again the next day on April 20, 2018. *See,* ROA Vol. IX, p. 4053-4056, 4268-4270. The Notice of the Sale was also published in the Reno Gazette-Journal, and Mason Valley news/Leader Courier on April 25, 2018, May 2, 2018, and May 9, 2018. *See,* ROA Vol. IX, p. 4053-4056, 4272.

It is undisputed that the Notice of Sale was actually received by the Kramers. In fact, Ms. Kramer testified that she signed for the Notice of Sale that was sent registered mail:

> Q. (Mr. Van Patten): Did you receive a copy of the notice of sale in the mail?
>
> **A. (Ms. Kramer): I believe that I did, my husband did not. That is the only document that I signed for personally that actually came to me.**
>
> Q. What do you mean "signed for"?
>
> **A. Because it was sent registered mail. But, of course, it was invalid, because the notice of default was invalid.** *See,* Deposition of Audrey Kramer, p. 58, ROA Vol. IX, p. 4216.

Chaffin also provided the Kramers with a copy of the Notice of Sale that had been posted that the tenant brought to Chaffin. *See,* Deposition of Deborah Taylor, pp. 28-29, ROA Vol. IX, p. 4188. As a result, there is no dispute that the Notice of

Sale was properly sent by NDSC and actually received by the Kramers. As such, NDSC complied with the required notice procedures not just substantially, but completely.

c. The Kramers were not prejudiced when they received actual notice of the Notice of Default when they acted on the same by filing the Federal Court Case.

Here, the Appellants' receipt of the Notice of Default through the tenant and Chaffin did not prejudice them. As noted above, the Kramers received their copy of the Notice of Default on October 16, 2017, the same date the notices were sent to the other addresses and the date upon which the Notice of Default was posted. *See,* ROA Vol. IX, p. 4138; *see also,* Deposition of Audrey Kramer, p. 45, ROA Vol. IX, p. 4212; Deposition of Deborah Taylor, pp. 24-25, ROA Vol. IX, p. 4187. The Kramers confirmed, however, that they initiated the Federal Court Case as a result of receiving the Notice of Default, asserting that "**In response to the NOD Plaintiffs filed a Complaint in Federal Court on January 2, 2018**, the case is currently under appeal." *See,* ROA Vol. IX, p. 4138. (emphasis added). There was no prejudice, as a result. The Kramers were aware of the Notice of Default and initiated the Federal Court Action and included references to the pending foreclosure action in that litigation, with courts at each and every stage of that litigation finding that the Kramers had not raised any claims with legal merit. As a result, the District Court correctly found that there is no genuine issue of material

fact in dispute and it is clear that the sale was conducted in substantial compliance with NRS 107 such that summary judgment was properly granted in favor of NDSC.

2. The Kramers were not entitled to receipt of the Notice of Default under NRS 107.090.

The Kramers also assert that they were entitled receipt of the Notice of Default via registered or certified mail pursuant to NRS 107.090. Under NRS 107.090(2), within 10 days of recording the Notice of Default and within 20 days of the sale, the foreclosure trustee has to deposit in the mail a copy of the notice of default or sale, sent registered or certified to a) any party who has recorded in the county records a request for a copy of the notice of default and b) any other person "with an interest whose interest or claimed interest is subordinate to the deed of trust." The Kramers, however, neither recorded such a request nor have an interest subordinate to the Deed of Trust.

In fact, Ms. Kramer's testimony confirms that the Kramers did not record any documents relating to the Property:

> Q. (Mr. Van Patten): With regard to the Autumn Glen property, did you ever record in the county records an acknowledge request for the copy -- for a copy of the notice of default?
>
> A. (Ms. Kramer): No, I did not, because I didn't have to… *See*, Deposition of Audrey Kramer, pp.42-43, ROA Vol. IX, p. 4212.

> Q. (Mr. Van Patten): Did you ever record in the county records an acknowledge request for a copy of the notice for sale?
>
> A. (Ms. Kramer): I didn't even know that the sale had taken place. I had contacted -- I don't remember the name of the title company, to find out if there was a sale recorded. And I was told there was not a sale recorded. That's one of the reasons I thought that this was all bogus.
>
> Q. So that's a no?
>
> A. That's a no.
>
> Q. Did you record any document of any type with the county recorder relating to the Autumn Glen property?
>
> A. I don't understand your question.
>
> Q. Did you record any document of any type with the county recorder relating to the Autumn Glen property?
>
> A. No. To be honest with you, I didn't know that I could record anything. I thought that recordings against the property were when you had official transactions. I didn't even know about all of these -- until this event happened, I had no idea all of the shenanigans that were going on behind the scenes on our property. I never knew that could happen. *See,* Deposition of Audrey Kramer pp.43-44, ROA Vol. IX, p. 4212.

No documents were recorded by the Kramers requesting additional notice and, as such, it is undisputed that the Kramers were not entitled to notice under NRS 107.090(2)(a).

The Kramers also are not entitled to notice under NRS 107.090(2)(b), despite their misreading of the statute. The Kramers continue to suggest that NRS 107.090(2)(b) requires notice to be provided to any party with an interest in the property – this ignores, however, that the statute provides that the interest must be "subordinate to the deed of trust." The Kramers' interests were not subordinate to the Deed of Trust, they owned the Property subject to the Deed of Trust. A Deed of Trust does not "convey title" or transfer any interest in the real property, it is "merely a lien on the property as security for the debt." *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 512, 286 P.3d 249, 254 (Nev. 2012). The Kramers' interpretation that NRS 107.090(2)(b) includes borrowers also renders superfluous the other notice requirements in NRS 107. This is especially true when the legislature's actions in defining "Borrower" in NRS 107.410 and references to grantor and trustor throughout NRS 107 confirms they recognized the parties participating in the transaction. As a consequence, the Kramers' interest in the Property was subject to the Deed of Trust, not subordinate to the Deed of Trust *a la* a junior lienholder. Consequently, even ignoring that they actually did receive notice as discussed above – which would satisfy NRS 107.090's requirements - even if it had not occurred, the Kramers were not entitled to notice under NRS 107.090.

3. The Property was not owner occupied and so neither NRS 107.500 nor NRS 107.086 were applicable to the instant sale.

The Kramers further assert that the Notice of Default was defective because it did not comply with NRS 107.500 as it did not include the information required by that statute. Previously, the Kramers have asserted that they did not have any notice about the Nevada Foreclosure Mediation Program provided for in NRS 107.086. The Kramers, however, ignore that both statutes only apply to properties which are owner occupied, and so are irrelevant and inapplicable to the instant case. Moreover, NRS 107.500's requirements are not imposed on the trustee.

Specifically, the Kramers here fail to recognize the limitation imposed by NRS 107.500 for "residential mortgage loans." NRS 107.500(1) requires a pre-default letter to be sent where a foreclosure sale is based upon "a failure to make a payment required by a residential mortgage loan." The Appellants ignore that NRS 107.450 defines "residential mortgage loan" as a loan secured by a "deed of trust on owner-occupied housing." The Foreclosure Mediation Program, codified in NRS 107.086(1) has a similar limitation for owner-occupied property, noting that the only exercise of a power of sale subject to that statute is for "any deed of trust which concerns owner-occupied housing." For either NRS 107.500 or NRS 107.086 to be applicable then, the Property would have to have been owner-occupied. That is not the case here.

There is no dispute the instant action concerns Property which was not owner occupied, either at the time of the foreclosure actions or any time before. Ms. Kramer's own testimony acknowledges the same. In the Declaration of Audrey Kramer attached as Exhibit R to their First Amended Complaint, Ms. Kramer confirmed that the Property was being rented and that the tenant provided the Notice of Default to Chaffin. *See e.g.*, ROA Vol. IX, p. 4138-4141. In her deposition she also confirmed the same, noting that they had never lived in the Property:

> Q. (Mr. Van Patten): Okay. Did you ever live in the Autumn Glen property?
>
> A. (Ms. Kramer): No. We bought it as a second home. And I don't believe -- we didn't rent it out for the first two years, but because of the economy and because of my injuries we were forced to be rent it out. It was never intended to be rented at all. *See*, Deposition of Audrey Kramer, p. 25, ROA Vol. IX, p. 4207.

> Q. (Mr. Schriever): Have you ever lived at the Autumn Glen property?
>
> A. (Ms. Kramer): He did ask that question. Asked and answered.
>
> Q. Okay.
>
> A. Yes. No, I have not. The first two years we did not rent it out. We purchased it as a second home with the intention of it being our retirement home. And I answered the question in that we wanted to retire in Nevada because of no state income tax. And so that was the plan, to move into it.

> Q. And I heard all that, that you didn't rent it for those first two years, but I wasn't sure if you lived at the property.
>
> A. No, we have not lived at the property.
>
> Q. So you've never lived at property?
>
> A. No, but we did pay for gardening and water and utilities and stuff like that**.** *See*, Deposition of Audrey Kramer, pp. 69-70, ROA Vol. IX, p. 4207.

That the Property was being rented from March 2017 to August 2018 by Daniel Starling was also confirmed by the property management company. *See*, Deposition of Deborah Taylor, p. 16, ROA Vol. IX, p. 4185. As a consequence, it is undisputed that the Property was not owner occupied, and has never been owner occupied. The Kramers, then, cannot assert any violation of NRS 107.500 or NRS 107.086 because they did not qualify for the protections afforded under same.

Finally, even if this were an owner-occupied loan and NRS 107.500 was applicable, the notice requirements of NRS 107.500 are imposed on the "mortgage servicer, mortgagee or beneficiary of the deed of trust." NRS 107.440, however, expressly excludes trustees under a deed of trust from the definition of mortgage servicer. NDSC is the foreclosure trustee under the Deed of Trust, not the servicer or beneficiary. *See*, ROA Vol. IX, p. 4051. There is no obligation, then, for NDSC to comply with NRS 107.500 and no basis for the Kramers to challenge the sale on the same, as a matter of law. In any scenario, then, NRS 107.500 is inapplicable to

the instant allegations here regarding the sufficiency of the notices and the appropriateness of the sale.

Ultimately, the sale conducted by NDSC was, at the very least, conducted in substantial compliance with NRS 107. There is no dispute that the Kramers received the notices they were entitled to receive and cannot attempt to hide behind their own erroneous legal interpretations to establish why they took no other action. Indeed, because the owner was not owner occupied, they were not entitled to the additional protections afforded under NRS 107.500 or the Nevada Foreclosure Mediation Program and, as the Federal Court correctly has determined time and time again, the parties conducting the sale could appropriately proceed. Because there is no genuine dispute as to a material fact and because NDSC is entitled to judgment as a matter of law, summary judgment is warranted here and NDSC's motion must be granted in full.

B. Appellants cannot argue that there was no breach of the loan or that the parties lack standing to proceed as the Federal Court Action has adjudicated those issues.

The Kramers also attempt to collaterally attack the underlying basis for the foreclosure by arguing that there was no breach of the terms of the loan. *See*, Opening Brief, p.9. These, claims, however, have been fully adjudicated in the Federal Court Case; similarly, any collateral attack on the basis of any transfers or any parties' standing was similarly adjudicated. The Kramers previously

adjudicated the entirety of the claims relating to the loan documents and standing to foreclosure in the United States District Court for the District of Nevada, as case number 3:18-cv-00001-MMD ("the Federal Court Action") including, specifically, fraud relating to the documents at issue here on the same defects the Kramers continue to suggest exist here. In dismissing the Kramers' claims, the Federal Court specifically found that the Kramers were judicially estopped from arguing the validity of the loan documents at issue. *See,* ROA Vol. I, p. 131-141. That decision was upheld by the Ninth Circuit Court of Appeals, when the Kramers appealed the same. *See,* ROA Vol. IX, p. 4324**.** Any attempts by the Kramers to attack the underlying loan documents or the standing of NDSC and/or JPMorgan Chase, then, was properly recognized as improper by the lower court and the Kramers estopped from relitigating the same.

Even if they had not previously been adjudicated, any issues related to the timing of the recordation of the assignment and Substitution of Trustee are irrelevant since a beneficiary's ratification of the same, cures any defect relating to the Substitution of Trustee. *See e.g.*, *Riger v. Hometown Mortg., LLC*, 104 F. Supp. 3d 1092, 1096 (D. Nev. 2015); (noting "When a beneficiary ratifies the actions of its agent before it is properly substituted, that ratification cures any defect in the filing.")(citing *Hickerson v. Wells Fargo Bank, N.A.*, No. 3:11–cv–0812, 2012 WL 194616, at *2 (D.Nev. Jan. 20, 2012); *see also* was *Wensley v. First Nat. Bank of*

Nevada, 874 F. Supp. 2d 957, 965 (D. Nev. 2012). Here, JPMorgan Chase did so, as acknowledged by their actions in the Federal Court Case. Indeed, under well-established law, the Kramers as nonparties to the documents they are attempting to challenge lack standing to challenge the same since they are not intended third-party beneficiaries to those contracts and agreements. *Wood v. Germann*, 130 Nev. 553, 557, 331 P.3d 859, 861 (Nev. 2014) (citing *Morelli v. Morelli,* 102 Nev. 326, 328, 720 P.2d 704, 705-06 (Nev. 1986).

Finally, because the Kramers proposed to surrender the collateral in an earlier bankruptcy case, courts have recognized that debtors who do so lack standing to assert the claims here relating to the wrongful foreclosure. As part of their confirmed Chapter 13 Plan, the Property was to be surrendered. *See* ROA Vol. XI, p. 4122-4128. "Because 'surrender' means 'giving up of a right or claim,' debtors who surrender their property can no longer contest a foreclosure action. *In re Failla*, 838 F.3d 1170, 1177 (11th Cir. 2016)(noting that "Debtors who surrender property must get out of the creditor's way."). As a result, there is no valid basis for the Kramers' claims under fact or law. Because there is no dispute as to any material fact and NDSC is entitled to judgment as a matter of law on the remaining claim, summary judgment was properly granted in NDSC's favor in the entirety as the sale was properly conducted.

C. The Motion for Leave to Amend was properly denied.

The Appellants further argue that the District Court committed substantial error in not granting the Kramers leave to amend their Complaint to add JP Morgan Chase and to assert allegations of fraud. *See*, Opening Brief, p. 29. The Kramers filed the request three months after the deadline to do so had expired, and was only one month before the close of discovery and deadline to file dispositive motions without showing good cause or good faith; instead it was simply a dilatory move by the Kramers in order to attempt to collaterally attack the Federal Court Order. The information the Kramers rely on was available to the Kramers before the expiration of the deadline to amend the Complaint. The Declaration of the disqualified expert William Paatalo, for example, was executed June 8, 2019, or nearly four (4) months before the deadline to amend would expire and nearly seven (7) months before the Kramers filed their Motion to Amend. *See e.g.*, ROA Vol. VII, pp. 3176-3217 Any such amendment was also recognized by the District Court as being futile since, as discussed above, the Federal Court litigation already adjudicated the parties respective standings to proceed.

CONCLUSION

Here, the District Court properly concluded that the foreclosure sale was properly conducted in substantial compliance with NRS 107. It is undisputed that the Kramers received actual notice of each of the documents required and, indeed, took steps to have their concerns addressed in the Federal Court Action. They did not prevail there and are attempting to rehash and relitigation issues which have already been adjudicated and which are irrelevant to question of whether or not the sale was properly conducted. The District Court correctly recognized the same and applied the appropriate law when granting summary judgment in NDSC's favor, and this Court should affirm the same.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Answering 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 Answering Brief has been prepared in a proportionally spaced typeface using Word in size 14 Times New Roman. I further certify that this Answering Brief complies with the page or type volume limitations of NRAP 32(a)(7)(A) because, excluding the parts exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

Finally, I hereby certify that I have read this 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 and volume number, if any, 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 brief is not in conformity with the requirements of the Nevada Rules of Civil Procedure.

DATED this 30th day of August, 2021.

TIFFANY & BOSCO, P.A.

/s/ Ace C. Van Patten, Esq.
Attorney for Respondent

CERTIFICATE OF SERVICE

I, the undersigned, declare: I am, and was at the time of service of the papers herein referred to, over the age of 18 years, and not a party to this action. My business address is 10100 West Charleston Boulevard, Suite 220, Las Vegas, Nevada 89135.

I hereby certify that on the 30th day of August, 2021, I electronically transmitted the attached document to the Clerk's Office using the Nevada Supreme Court Electronic Filing System for filing and transmittal of a Notice of Electronic Filing to all registered users.

I further certify that I mailed a true and correct copy of the foregoing document on the following parties via U.S. Mail, First Class:

Leo and Audrey Kramer
2364 Redwood Road
Hercules, CA 94547
Appellants in Pro Per

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

EXECUTED this 30th day of August, 2021, at Las Vegas, Nevada.

/s/ Nicole L. Lane
An employee of Tiffany & Bosco, P.A.