NO. 22-CV-0005

DISTRICT OF COLUMBIA COURT OF APPEALS

NEW PENN FINANCIAL, LLC D/B/A
SHELLPOINT MORTGAGE SERVICING,

Appellant,

v.

LASHAN DANIELS; TYROSHI INVESTMENTS, LLC;
AND BRANDYWINE CROSSING I CONDOMINIUM,

Appellees.

Appeal from the District of Columbia Superior Court
2016 CA 002755 R(RP)
(Honorable Robert Rigsby)

BRIEF OF APPELLEE TYROSHI INVESTMENTS, LLC

August 8, 2022

*Ian G. Thomas (Bar No.1021680)
Tracy L. Buck (Bar No. 1021540)
OFFIT KURMAN
1325 G Street NW, Suite 500
Washington, DC 20005
(202) 393-8100
(202) 393-2104
ithomas@offitkurman.com
tracy.buck@offitkurman.com

Counsel for Appellee
Tyroshi Investments, LLC

DISCLOSURE STATEMENT

Appellant (New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing)

- Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing is represented by Andrew J. Narod and Benjamin W. Perry of the law firm Bradley Arant Boult Cumming LLP

Appellee (Tyroshi Investment, LLC)

- Tyroshi Investment, LLC is represented by Ian G. Thomas and Tracy Buck of the law firm Offit Kurman.

Appellee (Brandywine Crossing I Condominium)

- Appellee Brandywine Crossing I Condominium is represented by David Hornstein, Katelyn Brady, Jennifer Jackman, and Thomas Mugavero of the law firm Whiteford, Tayler & Preston, LLP

Appellee (Lashan Daniels)

- Appellee Lashan Daniels is *pro se*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

Constitutional Provisions

INTRODUCTION

The legal issues in this appeal have previously been resolved by this Court. Appellant New Penn Financial, LLC d/b/a Shellpoint Mortgage Servicing ("Shellpoint") challenges the validity of Appellee Brandywine Crossing I Condominium's ("Brandywine") foreclosure of a super-priority lien for condominium dues owed by Appellee Lashan Daniels ("Daniels"), which extinguished Shellpoint's mortgage. However, Shellpoint's equitable arguments challenging the sale are not new and have previously been addressed by this Court's binding decisions on super-priority lien foreclosures over the past eight years since the seminal *Chase Plaza* decision. Rather than accept this Court's precedents, Shellpoint instead asks the Court to ignore them.

Making matters worse, Shellpoint asks this Court to disregard settled precedent based on misrepresentations about this case's procedural posture, the proceedings below, and of the record itself. Shellpoint's brief declines to acknowledge its own failures to cultivate an evidentiary record during discovery to substantiate its unconscionability argument, notwithstanding numerous opportunities to do so. This failure to create a record sufficient to support its position is fatal to Shellpoint's claims and cannot be cured through revisionist history.

Recognizing that its position is directly at odds with precedent and the record, Shellpoint tosses a Hail Mary at the Court, arguing that the condominium lien

foreclosure statute (D.C. Code § 42-1903.13) is unconstitutional because it violates due process and constitutes a regulatory taking. However, these constitutional challenges fail before their merits can be considered because the statute at issue lacks significant state action to implicate both due process and the takings clause. Even considering the substance of the statute being challenged, Shellpoint's arguments are directly undermined by prior precedent from this Court, its sister courts, and the United States Supreme Court.

As set forth below, binding precedent on condominium foreclosures resolve the legal issues raised in this appeal and directly contradict Shellpoint's position. The decision of the lower court should be affirmed.

RULE 26.1 CORPORATE DISCLOSURE

Appellee Tyroshi Investments, LLC is a privately held limited liability company and does not have any members or shareholders that are a publicly traded company.

STATEMENT OF ISSUES

1. Whether the lower court correctly exercised its power under SCR-Civ. 54(b) in revising its prior order to dismiss the equitable claims against Appellees based on a recent ruling of this Court (*RFB Properties II*) that was dispositive of this remaining issue in the case.

2. Whether this Court's decision in *RFB Properties II*, coupled with the dearth of record evidence on appeal, precludes Shellpoint's claims that the foreclosure sale was unconscionable.

3. Whether extinguishment of a first deed of trust under D.C. Code § 42-1903.13 violates the due process and takings clauses in the absence any state action and, when notice is properly provided for in the statute and was actually received by the holder of the first deed of trust.

STATEMENT OF THE CASE

This appeal arises out of an action for judicial foreclosure. On April 12, 2016, Shellpoint filed suit against Daniels, seeking to foreclose on his mortgage loan that was secured by a deed of trust recorded against the subject condominium unit. Shellpoint subsequently amended its complaint on two separate occasions to include Brandywine and Tyroshi as defendants because Brandywine had previously foreclosed on its condominium lien that was secure by the subject unit pursuant to D.C. Code § 42-1903.13 ("Condo Statute") and Tyroshi was the purchaser at the foreclosure sale and is the present record owner of the property. In doing so, Shellpoint asserted claims for declaratory and equitable relief, requesting that the court either find that the condominium foreclosure did not extinguish Shellpoint's lien or to find that the sale to Tyroshi was void due to an unconscionably low sales price. AA078-83.

On March 11, 2019, Brandywine moved to dismiss the Second Amended Complaint ("SAC") – the operative pleading – for failing to state a claim or, in the alternative, sought summary judgment on all counts. AA149. In doing so, Brandywine argued that Shellpoint's claims against it were barred by the statute of limitations and that any efforts to void the sale or prevent the extinguishment of

Shellpoint's lien were precluded by statute. Since the claims against Brandywine directly arose out of its sale to Tyroshi, the arguments were equally applicable to both defendants. Shellpoint opposed this motion on the ground that the sale was unconscionable because it was not properly noticed and resulted in an inadequate sales price. AA213.

On July 12, 2019, the Court granted Brandywine's motions in part ("2019 Order"). AA238. The lower court dismissed Count II of the SAC which sought a declaration that Shellpoint's first deed of trust was not extinguished under D.C. Code § 42-1903.13. AA078-81; AA242-44. However, the Court declined to dismiss Count III stating that a valid claim for unconscionability had been pled based on the sales price resulting from the foreclosure sale. *See* AA244-45 ("The facts as pled suggest that the foreclosure sales price **might** have been unconscionably low") (emphasis added). As a result, the litigation was permitted to proceed.

Between March 23, 2018 and May 4, 2020, the parties conducted discovery in this matter. *See* AA255. Throughout discovery, the Scheduling Order was extended on four separate occasions, and during that extended time period, the parties exchanged and responded to written interrogatories and produced documents to one another. AA255. The record does not reflect that any depositions were noticed and no experts were designated by any parties.

On June 21, 2021, Daniels, representing herself *pro se*, filed a Motion to Dismiss, which was timely opposed by Shellpoint.[1] On August 2, 2021, the lower court entered a Corrective and Omnibus Order ("Corrective Order") that addressed the pending motions. AA297. In doing so, the Court stated that it "reviewed the entire record" before it and, "[d]ue to newly established case law germane to the cause of action in [the case]", the lower court reconsidered its prior 2019 Order denying Brandywine's Motion to Dismiss in part. AA297-98. The newly established case law was the decision in *RFB Props. II, LLC v. Deutsche Bank Tr. Co. Ams.*, 247 A.3d 689, 696 (D.C. 2021), in which this Court held that whether a contract is unconscionable is determined based on the facts as they existed at the time of contract. Applying that ruling to Shellpoint's unconscionability argument, the lower court found that the circumstances surrounding the super-priority lien foreclosure sale – which occurred during a period of uncertainty and prior to the *Chase Plaza* decision – could not be found to be unconscionable as a matter of law.[2]

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[1] Also pending at that time was a Motion to Vacate Default filed by Tyroshi and a Motion for Default Judgment against Tyroshi filed by Shellpoint. *E.g.* AA007-08. Default was entered against Tyroshi on February 5, 2021, for failing to obtain counsel. Tyroshi's previous counsel had withdrawn on July 20, 2020, and Tyroshi had issues retaining new counsel due to the pandemic. Soon thereafter, default was entered. On April 6, 2021, present counsel entered their appearance and requested that Shellpoint consent to vacating the default, but Shellpoint refused to consent instead seeking to obtain a default judgment. AA274.

[2] As discussed in more detail below, whether a super-priority foreclosure sale conducted pursuant to D.C. Code § 42-1903.13 extinguished a first deed of trust was an open and unresolved question of law until this Court's seminal decision in *Chase*

AA307-309. As such, the Court found that Shellpoint's remaining claims could not continue as a matter of law and dismissed the action with prejudice. *See* AA305-311.

On August 30, 2021, Shellpoint moved for reconsideration of the dismissal, which was opposed by both Brandywine and Tyroshi. AA312. Notwithstanding its claim that there were fact disputes concerning the unconscionability of the purchase price, Shellpoint's motion for reconsideration did not append any record evidence supporting its position. AA312. On December 6, 2021, the lower court denied the motion. AA331. Shellpoint noticed this appeal on January 5, 2022. AA338.

STATEMENT OF FACTS

On or about June 7, 2007, Daniels purchased the condominium unit located at 713 Brandywine Street SE, Unit # 202, Washington, DC (the "Property"). AA071. The Property is located in the Brandywine Crossing I Condominium, which is operated by Brandywine. AA019. To finance the purchase of the Property, Daniels obtained a loan from Countrywide Home Loans, Inc. in the amount of $204,000.00, which was secured by a first deed of trust on the Property ("Deed of Trust") that was recorded amongst the District of Columbia land records. AA071.

Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A., 98 A.3d 166, 173 (D.C. 2014). In *Chase Plaza*, this Court confirmed that a foreclosure sale under the Condo Statute did extinguish the junior lien holders, including the holder of the first deed of trust. Thus, prior to the *Chase Plaza* decision, it was (at best) unclear to all parties involved whether the sale would be subject to the first deed of trust.

On April 28, 2010, a Notice of Condominium Lien for Assessments Due ("2010 Condo Lien") was recorded amongst the District of Columbia land records. AA078, AA130. The amount of the 2010 Condo Lien was for $6,040.73, which was inclusive of statutory attorneys' fees and covered over a year of unpaid condo assessments. AA130. After Daniels continued to fail to pay his condominium assessments, on June 24, 2011, a second Notice of Condominium Lien for Assessments Due was recorded amongst the District of Columbia land records ("2011 Condo Lien"). AA132. The 2011 Condo Lien was for 5,455.00, which was inclusive of statutory attorneys' fees. AA132.

Based on the 2010 Condo Lien and the 2011 Condo Lien, on May 22, 2014, Brandywine filed a Notice of Foreclosure Sale of Condominium Unit for Assessments Due ("Condo Foreclosure Notice") amongst the land records and proceeded with a non-judicial foreclosure. A133-135. At the time of filing, Shellpoint was not the holder of the Note on the Property nor was it the beneficiary of the Deed of Trust; rather, it was held by Shellpoint's predecessor-in-interest, Bank of America.[3] AA178. A copy of the Condo Foreclosure Notice was sent by Brandywine to Bank of America on two separate occasions, each time through certified mail, which was received and acknowledged. AA181-197. As such, not

[3] At all times herein, reference to "Shellpoint" shall include not only Shellpoint Mortgage Servicing, but each of its predecessors-in-interest, including Bank of America (unless otherwise indicated).

only was the Condo Foreclosure Notice filed amongst the public land records, **but Shellpoint was directly notified of the sale twice, and acknowledged receipt of same**. *Id.*

Pursuant to the Condo Foreclosure Notice, on June 24, 2014, a foreclosure auction was held for the Property. At the auction, Tyroshi was the highest bidder and purchased the Property for the amount of $5,000 ("Condo Sale"). AA199. A Trustee's Deed was subsequently executed by Brandywine in favor of Tyroshi on July 19, 2014. AA199. As the deed indicates, the parties at the time were under the impression that the sale was "subject to the balance on a first deed of trust in the face amount of $204,000.00." *Id.* The Trustee's Deed was subsequently recorded amongst the land records on September 25, 2015.

Several months after the Property was sold to Tyroshi, this Court issued its ruling in *Chase Plaza v. JP Morgan Chase Bank*, 98 A.3d 166 (D.C. 2014). In *Chase Plaza*, this Court held that a condominium association foreclosing on its six-month super-priority lien pursuant to D.C. Code § 42-1903.13(a)(2) extinguishes a first deed of trust on the foreclosed upon property. *Id.* at 175. As such, while it was not clear at the time of sale whether Tyroshi was purchasing the Property subject to Shellpoint's Deed of Trust, in the wake of the *Chase Plaza* decision, this Court

clarified that as a matter of law, Tyroshi's purchase of the Property was free and clear of any first deed of trust.[4]

At or around the time that Brandywine foreclosed on its lien, Daniels also ceased to make his mortgage payments to Shellpoint, and subsequently went into default on June 1, 2014. A notice of default was sent to Daniels on December 30, 2014, but nevertheless, Daniels' allowed the default to persist. AA111-122. Shellpoint proceeded to make collection efforts upon Daniels for the delinquent mortgage payments and ultimately sought judicial foreclosure, notwithstanding the fact that its Deed of Trust had already been extinguished by Brandywine's prior foreclosure of its condominium super-priority lien. *See supra*.

SUMMARY OF THE ARGUMENT

The lower court should be affirmed and Shellpoint's arguments to the contrary fail for a litany of reasons. Procedurally, the lower court was well within its rights to revise its prior ruling under SCR-Civ. 54(b), particularly in light of new case law from this Court that rendered Shellpoint's claims unsound as a matter of law. Rather than address the true basis for the lower court's ruling, Shellpoint instead analyzes and applies the wrong rule, mischaracterizes the record, and fails to point to a single

[4] The ruling in *Chase Plaza* has been confirmed and subsequently expounded upon by its progeny. *See Liu v. U.S. Bank National Association*, 179 A.3d 871, 873-874 (D.C. 2018); *4700 Conn 305 Trust v. Capital One, N.A.*, 193 A.3d 762, 764 (D.C. 2018); *RFB Properties II, LLC*, 247 A.3d 689, 691-92 (D.C. 2021).

piece of record evidence that would undermine, or called into question, the lower court's holding. There is no procedural infirmity in the lower court's decision.

The substance of the lower court's decision is equally as solid. This Court's decision in *RFB Properties II* clearly established that, for the purposes of unconscionability, super-priority lien condominium foreclosures are to be judged at the time of sale, not based on hindsight. Based on the collective understanding of the law at that time, pre-*Chase Plaza*, any analysis of the price Tyroshi paid has to be viewed as including the first mortgage even though it was ultimately extinguished by the sale. As a matter of law, Shellpoint's claims that the sale fails due to an unconscionably low sales price are without merit.

Moreover, Shellpoint has done nothing to cultivate a record that would support unconscionability in the first place. After several years of litigating this matter, Shellpoint does not point to any procedural impropriety with the Condo Sale nor does it point anything beyond the outstanding balance of its loan and the tax assessment on the Property to support its position. Well-established case law demonstrates that these are not a proper measuring stick for the value of a foreclosed upon property. As a result, there is no evidence to support Shellpoint's position.

Finally, the Condo Statute is undoubtedly constitutional under the Due Process Clause and the Takings Clause. In each instance there is no state action necessary to implicate the constitution in the first place. Even if there were, the

notice requirements of the statute are designed to provide proper notice, and in this instance actual notice was received and acknowledged by Shellpoint, undermining its due process claims. The takings claims likewise fail because the statute is discretionary and there is a lack of a public purpose for the statute.

As discussed in more detail below, the lower court should be affirmed.

STANDARD OF REVIEW

An appeal from a motion to dismiss or from a motion for summary judgment is taken de novo. *Hoff v. Wiley Rein, LLP*, 110 A.3d 561, 564 (D.C. 2015); *Poola v. Howard Univ.*, 147 A.3d 267, 283 (D.C. 2016). Additionally, a trial court's decision to revise or reconsider a prior order is reviewed for an abuse of discretion. *E.g.*, *Forgotson v. Shea*, 491 A.2d 523, 527 (D.C. 1985)

ARGUMENT

Long standing statutory law and almost a decade's worth of jurisprudence from this Court require that the lower court's decision be affirmed. Shellpoint's Deed of Trust was extinguished under D.C. Code § 42-1903.13 as established by this Court's holding in *Chase Plaza* and its unconscionability defense fails as a matter of law based on the Court's decision in *RFB Properties II*. Shellpoint failed to protect its lien after receiving two notices of the sale, and then failed to substantiate a record below after it was on notice that a request for dismissal was made based on *Chase Plaza* and its progeny. Perhaps recognizing the folly in its

efforts to re-litigate settled law from this Court, Shellpoint advances constitutional challenges to D.C. Code § 42-1903.13 that are neither implicated by the facts of this case nor meritorious. As discussed more herein, the decision on appeal should be affirmed.

I. SHELLPOINT HAD NOTICE AND AN OPPORTUNITY TO ADDRESS THE REQUEST FOR DISMISSAL AND CANNOT OFFER ANY EVIDENCE THAT UNDERMINES ITS FACTUAL BASIS

A. The Lower Court Properly Exercised its Revisory Power over a Prior Order

The lower court acted within its power, as prescribed by the Court Rules, to revise its prior 2019 Order concerning Brandywine's Motion to Dismiss. It is well settled that:

> any order or other decision…that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and **may be revised at any time before the entry of a judgment** adjudicating all the claims and all the parties' rights and liabilities.

SCR-Civ. 54(b) (emphasis added). This revisory power includes orders that "would otherwise constitute final judgments with respect to a single claim against a single party." *Williams v. Vel Rey Properties, Inc.*, 699 A.2d 416, 419-20 (D.C. 1997). In the 2019 Order, the lower court dismissed part of Shellpoint's claims against Brandywine but left part of the claims, which were based on a theory of unconscionability, intact. AA238. That 2019 Order was, at all times and without notice, subject to revision by the lower court. *See* SCR-Civ. 54.

Indeed, the lower court's exercise of its revisory power was proper in this circumstance. As discussed more *infra*, during the pendency of this case, this Court rendered a decision in *RFB Properties II*, which entirely foreclosed Shellpoint's theory of unconscionability based on the price Tyroshi paid for the Property. Under the ruling in *RFB Properties II*, Tyroshi's purchase price must be viewed as including the balance on the Deed of Trust because that is what was understood at the time of sale. AA199. The result is that, as a matter of law, Tyroshi's purchase price must be viewed as being for approximately $209,000 at the time of sale, which encompasses the purchase price at auction and the value of the underlying mortgage. This is true even though the mortgage was ultimately clarified to have been extinguished in the transaction by the subsequent *Chase Plaza* decision. *RFB Properties II,* 247 A.3d at 697. This legal clarification on how an unconscionability analysis is to be applied to a pre-*Chase Plaza* condominium foreclosure sale warranted the lower court's action under SCR-Civ. 54(b) because Shellpoint's claims were no longer viable as a matter of law.

This is the precise reason why the revisory power under SCR-Civ. 54(b) exists, to address situations in which binding precedent alters the viability of pending claims and changes the legal foundations of prior rulings. *See U.S. Tobacco Coop. Inc. v. Big S. Wholesale of Virginia, LLC*, 899 F.3d 236, 257 (4th Cir. 2018); *see also* 1 Steven S. Gensler & Lumen N. Mulligan, Federal Rules of Civil Procedure:

Rules and Commentary, Rule 54 ("trial courts will exercise their discretion to reconsider interlocutory rulings only when there is a good reason to do so…including (but not limit to)… an intervening change in the controlling law….").
In the 2019 Order, the lower court found dismissal of all Shellpoint's claims to be improper because it raised an argument that the sale of the Property to Tyroshi may have been unconscionable based on the low sales price. AA245. That sole remaining issue was resolved by the decision in *RFB Properties II*. Accordingly, the lower court properly revisited its prior ruling and applied the new case law from this Court.

B. Shellpoint Relies on the Wrong Rule and Mischaracterizes the Record

Faced with the lower court's right to amend its 2019 Order, Shellpoint is forced to mischaracterize the record in an attempt to conjure up a procedural impropriety where no such issue exists. The foundational flaw in Shellpoint's procedural analysis is its focus on SCR-Civ. 56 and its claim that the lower court granted summary judgment in favor of Brandywine. App. Br. at p. 13. This recitation of the record is inaccurate. As the lower court made clear, its Corrective Order was granting Brandywine's Motion to Dismiss, not converting it to a motion for summary judgment. *See* AA297-98 (stating that the lower court was granting Brandywine's "*Motion to Dismiss*" and it was treating **Daniels'** Motion to Dismiss as "a motion for summary judgment") (italicized emphasis original, bold emphasis

added); AA305-09 (analyzing the facts as alleged in the Second Amended Complaint and not relying on evidence outside the pleading to reach its conclusion). To be sure, the lower court was careful in how it characterized each of its rulings. The Court took steps to make clear that, while it did not convert Brandywine's previous motion to dismiss into a motion for summary judgment, it did convert the motion to dismiss filed by Daniels into one of summary judgment. AA297.

The distinction between the lower court treating Brandywine's motion as a motion to dismiss under SCR-Civ. 12(b)(6), as opposed to entering summary judgment under SCR-Civ. 56, is one with a true difference. A motion made under SCR-Civ. 12(b)(6) is based on the pleading itself, and other documents in the public record; but not the record evidence. *See, e.g., Martin v. Bicknell*, 99 A.3d 705, 712 n. 17 (D.C. 2014). Conversely, the court's analysis under SCR-Civ. 56 focuses on an evidentiary review to determine the existence of a fact dispute. *See* SCR-Civ. 56(a)(1). The lower court's focus was on the SAC and the dearth of any factual allegations establishing the existence of an unconscionable sales price in light of *RFB Properties II*. AA305-09. This establishes that its ruling was limited to the pleading and not an evaluation of record evidence. *Id.*

For this reason, the authorities relied upon by Shellpoint are inapplicable. The crux of Shellpoint's argument is that it was entitled to "notice and a reasonable time to respond" prior to entry of summary judgment. App. Br. pp. 14-21. But as

discussed above, the Court did not grant Brandywine summary judgment, it granted Brandywine's prior motion to dismiss. Shellpoint not only had notice of the motion to dismiss, but also actively opposed it. As a result, the strictures of SCR-Civ. 56(f) are not applicable in this circumstance, and neither is the case law, such as *Tobin v. John Grotta Co.*, 886 A.2d 87 (D.C. 2005).

Moreover, Shellpoint had ample opportunity to respond in light of the Court's decision in *RFB Properties II*. Shellpoint is a sophisticated mortgage servicing company that was represented by counsel at all times during this proceeding. AA001-008. Shellpoint is thus charged with knowledge of the decisions of this Court and their import on this dispute. *Lynch v. Meridian Hill Studio Apts., Inc.*, 491 A.2d 515, (D.C. 1985) (knowledge of the law is imputed to counsel). In this instance, Shellpoint was aware that the Court had allowed its claims against Brandywine and Tyroshi to proceed on a theory of unconscionability and is likewise charged with the knowledge that the decision in *RFB Properties II* had eviscerated its claim. Nevertheless, Shellpoint had almost six (6) months to seek to amend its complaint to include facts that would place its claim outside the scope of the *RFB Properties II* decision. Shellpoint did not avail itself of this opportunity and cannot now complain about the consequences of its inaction.

Even assuming *arguendo* that Shellpoint was given an additional opportunity to address the *RFB Properties II* decision and its impact on this case, Shellpoint has

pointed to nothing that would call into question the lower court's decision. While Shellpoint spends pages of its brief decrying the lack of opportunity to respond *RFB Properties II*, in neither its opening brief nor its motion for reconsideration below does it point to a single piece of record evidence that would suggest *RFB Properties II* is not dispositive of the issues. That is because no such evidence exists, as all parties agree that, at the time of purchase, it was understood that Tyroshi's purchase was made subject to Shellpoint's mortgage. *See* AA199. It was only after the transaction was complete and *Chase Plaza* was decided that it became clear what Tyroshi actually purchased – a condominium free and clear of all other encumbrances.

Not only are the facts and timeline surrounding the sale undisputed, but at no point did Shellpoint cite to portions of the record with any contrary evidence concerning the insufficiency of price. At the time of the lower court's ruling, discovery had been closed for several months and had already been extended on multiple occasions. AA002-008; AA261. Shellpoint had more than an adequate opportunity to cultivate an evidentiary record to support its claims and distinguish this matter from the holding in *RFB Properties II*, and did not do so.[5] Shellpoint's

[5] Shellpoint makes a point of arguing that its ability to obtain discovery was impeded by the public health emergency caused by the Covid-19 pandemic. App. Br. at p. 19. However, the case had been pending for years prior to the pandemic and discovery had been extended on four occasions before the public health

silence on this issue speaks volumes and suggests that no such record evidence exists.

Not only does Shellpoint rely on the wrong rule but it also attempts to prop up its procedural argument by misrepresenting the record below in several material ways. First, Shellpoint represents to the Court that Tyroshi "never filed *any* responsive pleading." App. Br. p. 20 (emphasis original). This statement is plainly false. *See* AA136 (Tyroshi Answer to SAC filed October 9, 2018). In fact, not only was a responsive pleading filed, but the responsive pleading also raised a number of affirmative defenses, including that the SAC fails to state a claim upon which relief can be granted. AA136. The aforementioned defense is the precise defense upon which Brandywine's motion to dismiss was granted. The existence of Tyroshi's answer confirms that the Court was correct in dismissing the claims against it.

Second, Shellpoint represents to the Court that its efforts to obtain discovery were "impeded" by the entry of default against Tyroshi. App. Br. p. 19. Importantly, Shellpoint does not discuss how it was impeded by the entry of default and what discovery it was unable to obtain as a result. App. Br. pp. 19-20. In fact, the record does not reflect that any efforts were made by Shellpoint to obtain discovery from Tyroshi while it was in default for failure to have counsel. Conversely, the record

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emergency was declared. AA007. In sum, the pandemic did not materially prevent Shellpoint from obtaining discovery.

does reflect that Shellpoint opposed vacating the default against Tyroshi once it did obtain counsel. AA007. In doing so, Shellpoint delayed Tyroshi's ability to participate in the case. Shellpoint cannot have it both ways, complaining that Tyroshi's default impeded them from discovery while also actively thwarting Tyroshi's ability to participate in the case. The notion that Tyroshi's default had any effect on Shellpoint's claims is a clear mischaracterization of the record.

Finally, and perhaps most problematic, is Shellpoint's claim that Brandywine's motion to dismiss did not address Count III of the SAC, which was the count that contained the unconscionability claim. App. Br. pp. 10, 20. This statement is not accurate. In point of fact, the issues raised in Count III concerning a purported unconscionable sale of the Property from Brandywine to Tyroshi were briefed by both Shellpoint and Brandywine. *See* AA203-219; AA230-36. As such, while Shellpoint attempts to make it appear as though the issue was solely raised by the lower court, in actuality, the arguments concerning the viability of Count III were raised by the parties, and ultimately taken up for decision by the lower court.

At bottom, Shellpoint cannot hide behind procedure to invalidate the lower court's ruling, particularly when it mischaracterizes the record below.

C. The Court's Recent Opinion in the *Omid* Case Does Not Change the Analysis

This analysis is not changed by the Court's recent decision in *U.S. Bank Tr., N.A. v. Omid Land Grp., LLC*, No. 19-CV-0737, 2022 WL 3093734 (D.C. Aug. 4,

2022).[6] In *Omid*, this Court reviewed a grant of summary judgment in favor of the foreclosure purchaser and against the holder of a first deed of trust that was extinguished by virtue of a condominium super-priority lien under the Condo Statute. In granting summary judgment, the lower court declined to consider the lender's unconscionability defense because the lender did not raise it in their operative pleading at the time the summary judgment motion was filed. *Id.* at *1-2. To make up for this, after the summary judgment motion was filed (and after discovery had closed), the lender filed a motion to amend its pleading to include an unconscionability defense. *Id.* The lower court denied the lender's request to amend and instead entered summary judgment in favor of the foreclosure purchaser finding that the first deed of trust was extinguished. *Id.*

On appeal, this Court vacated the lower court's decision and remanded the matter for further consideration. The remand was necessitated by the fact that the lower court erred in not considering the unconscionability claim that was in the record (albeit after the dispositive motion was filed) in the proposed amended complaint to the lender's subsequent motion for leave to amend. *Id.* at *3.

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[6] The decision in *Omid* was issued after Shellpoint filed its brief but only a few days before the Appellee's deadline to file their responsive brief. As such, *Omid* is not cited in Shellpoint's brief; however, Tyroshi wishes to briefly address it out of an abundance of caution to show that the case is not applicable here.

However, the procedural posture of this case is materially distinct. First, the legal landscape in which the unconscionability defense is to be considered was different. Unlike the sale at issue here, the sale in *Omid* occurred post-*Chase Plaza*, and while there was still substantial uncertainty about the impact of a super-priority sale, it was not nearly as uncertain as it was prior to the *Chase Plaza* decision.

Second, the procedural posture of the *Omid* case is distinct from the posture here. In *Omid*, the lender did not raise issue of unconscionability until the eleventh hour, after discovery was complete. *Id.* at * 2. That is different from the posture of this matter. Here, Shellpoint asserted its claim under the unconscionability theory on September 25, 2018, when it filed its SAC. AA003, AA070. Shellpoint had almost three years to develop its legal theory thereafter through the discovery process, and during that time period, the discovery deadline was extended on four separate occasions. AA005, AA256. As such, while in *Omid* there was a limited record on unconscionability and no discovery on the subject, in this case, Shellpoint had almost three (3) years to cultivate an evidentiary record to support its claims, and it did not do so.

Finally, in *Omid*, the lower court did not give serious consideration to the unconscionability theory because it was not part of the operative pleading. *Id.* at *2. The lower court in this case did consider Shellpoint's theory of unconscionability; in fact, it was the centerpiece of its analysis. To that end, the lower court in this

matter did precisely what this Court instructed the lower court to do in *Omid*, analyze the record before it and consider whether unconscionability is viable as a matter of law. For this reason, *Omid* does not alter the analysis or outcome of this matter.

D. Tyroshi was Equally Entitled to Judgment

Like Brandywine, Tyroshi was also entitled to dismissal of all claims. The SAC asserts two claims against Brandywine and Tyroshi, both grounded in equity and both seeking declaratory relief that would void the foreclosure sale between Brandywine and Tyroshi. AA078-82. In each instance, the facts are commonly asserted against both Brandywine and Tyroshi, and they are based on the same transaction in which Brandywine was the seller of the Property and Tyroshi was the ultimate purchaser. *Id.* The rights and liabilities of Brandywine are directly tied to Tyroshi and vice versa. Stated differently, Shellpoint cannot as a matter of law obtain the relief it is seeking against one party, without also obtaining it against the other. The dismissal of a claim against Brandywine functions as a dismissal of a claim against Tyroshi.

II. THERE IS NO BASIS IN FACT OR LAW TO FIND TYROSHI'S PURCHASE UNCONSCIONABLE

Binding precedents from this Court establish Shellpoint's theory of unconscionability is untenable as a matter of law. The Condo Sale was conducted prior to this Court's decision in *Chase Plaza* and in a manner consistent with the statutory requirements. At the time of sale, the record indicates that the parties

believed the purchase was subject to the first deed of trust. *E.g.*, AA199 (Trustee's Deed stating it is subject to a "first deed of trust."). The fact that it was subsequently determined that Shellpoint's deed of trust was extinguished by virtue of the Condo Sale is irrelevant. All that matters is what the parties thought at the time of the transaction. As a matter of law the sale cannot be determined to be unconscionable.

Similarly, the record does not support any finding that the Condo Sale was unconscionable. A party seeking to void a contract due to unconscionability must prove the existence of ***both*** procedural and substantive factors. *Urban Invest., Inc. v. Branham*, 464 A.2d 93, 99 (D.C. 1983). Procedural unconscionability addresses the manner of negotiations and looks to whether one side was prevented from having a meaningful choice in entering the contract. *Id.* at 100. Substantive unconscionability refers to the terms of the deal and requires a showing that the terms of the contract are unreasonably advantageous to one side. *Id.* Absent a *prima facie* showing that the contract, or its terms therein, is so unfair as to "affront [any] sense of decency," the Court should not void the agreement in question. *Id.* (internal citation omitted).

Shellpoint cannot as a matter of law establish the existence of either procedural or substantive unconscionability. Procedurally, Shellpoint cannot establish that it lacked a meaningful choice, as the record demonstrates that it was provided notice of the foreclosure sale on multiple occasions. Likewise, based on

this Court's ruling in *RFB Properties II*, Shellpoint cannot establish substantive unconscionability because the sales price is determined at the time of the sale. Unconscionability cannot form the basis for unwinding the Condo Sale and as a result, the lower court was correct in dismissing Shellpoint's complaint.

A. There is No Procedural Unconscionability

The record is barren of any evidence of procedural unconscionability. There is no dispute that Brandywine complied with all of its statutory requirements in conducting the Condo Sale in accordance with D.C. Code § 42-1903.13(c)(3)-(5). Brandywine recorded the Notice of Sale, the Notice of Sale identified the amount to satisfy the 2011 Condo Lien, and the Notice of Sale was sent to Daniels (the debtor), as well as Bank of America (the holder of the first deed of trust at that time) AA181-197.[7] Shellpoint had over seven (7) weeks after its receipt of notice to take action to protect its lien, yet it did nothing. Tyroshi's purchase derived from an arms-length transaction, and there is no evidence of coercion or one-sided bargaining to render the terms of sale procedurally unconscionable. *See Branham*, 464 A.2d at 100. The consequence of the Lender's inaction is that the super-priority lien foreclosure extinguished its first deed of trust. *See Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 175 (D.C. 2014).

[7] The Notice of Sale that was sent to the Lender does not state that the sale would be subject to a first mortgage or deed of trust. AA189-90.

In light of the above, it is understandable why Shellpoint has been unable to point to any meaningful evidence of procedural unconscionability, in both the lower court and in the pending appeal. The hallmark of an unconscionability analysis is that the party asserting the defense must show that they lack a meaningful choice in the transaction. *See Kenyon Ltd. P'ship v. 1372 Kenyon St. Northwest Tenants' Ass'n,* 979 A.2d 1176, 1186 (D.C. 2009) (citing *Patterson v. Walker-Thomas Furniture Co.*, 277 A.2d 111, 113 (D.C. 1971)). This Court has previously acknowledged that the District of Columbia condominium foreclosure law expects mortgage lenders to take steps necessary to protect their lien position in light of the creation of the super-priority lien. *See Chase Plaza Condo. Ass'n v. JP Morgan Chase Bank, N.A.*, 98 A.3d 166, 174-75 (D.C. 2014) (stating that D.C. Code § 42-1903.13 includes an expectation that the lender "would take the necessary steps to prevent that result, either by requiring payment of assessments into an escrow account or by paying assessments themselves to prevent foreclosure."). The closing documents that Daniels executed in obtaining the loan similarly contemplate the lender stepping in cover unpaid condominium assessments to avoid foreclosure. *See* AA102 ("If borrower does not pay condominium dues and assessments when due then Lender may pay them."). As such, for Shellpoint to show procedural unconscionability, it would need to demonstrate that it was somehow precluded from protecting its position and participating in the process. It cannot make such a

showing.

Shellpoint was provided actual and constructive notice of the Condo Sale and took no action. Shellpoint was sent the Notice of Sale – twice – each time by certified mail for which receipt was acknowledged. AA181-197. The Notice of Sale was also recorded amongst the land records, putting the world on notice that the Condo Sale was scheduled. Shellpoint had actual and constructive notice that a super-priority lien that was related to its first deed of trust was to be foreclosed upon, and nevertheless, it failed to protect its lien position. Shellpoint had a meaningful choice to participate in the Condo Sale or prevent it entirely by paying the super-priority portion of the lien, and it simply chose not to.

The only inconsistency that Shellpoint asserts occurred in the sale process was that "the trustee made affirmative misrepresentations regarding the title being conveyed." App. Br. at p. 27.[8] This conclusory allegation is insufficient to constitute unconscionability, whereby the challenger to the sale must prove that the

[8] Importantly, Shellpoint does not identify what these purported "affirmative misrepresentations" are, and instead leaves it to the Court (and opposing counsel) to guess. Certainly, the Notice of Sale, which was recorded and sent directly to Shellpoint, does not state that the sale is subject to the first deed of trust. AA174. Indeed, the only record evidence that appears to indicate that the sale was subject to Shellpoint's lien was the deed itself, but that document was executed almost a month after the Condo Sale had occurred. AA199. Furthermore, as discussed in *RFB Properties II*, such a statement reflects the state of the law at the time, prior to this Court's decision in *Chase Plaza*, and thus was not an affirmative misrepresentation at all.

unconscionably low sales price raised "a presumption of fraud." *See id.* at p. 23; *Nat'l Life Ins. Co. v. Silverman*, 454 F.2d 899, 916 (D.C. Cir. 1971); *see also Bennett v. Kiggins*, 377 A.2d 57, 59 (D.C. 1977) (fraud must be plead with particularity). Shellpoint does not state what precise misrepresentation was made by Brandywine, or more importantly, does not allege any facts indicating that Shellpoint relied on any representations of Brandywine in deciding not to protect its lien. On this record, and from the pleading itself, the Court cannot find that Shellpoint lacked a meaningful choice to participate in the proceedings. Shellpoint is unable to establish the existence of procedural unconscionability.

B. There is No Substantive Unconscionability

Precedent also dictates that Shellpoint cannot establish the existence of substantive unconscionability based on the theory that Tyroshi purchased the Property for an unconscionably low sales price. As an initial matter, the legal premise of Shellpoint's argument is flawed. While Shellpoint argues that Tyroshi's purchase is unconscionable because the price was well below the tax assessed value or the value of the loan, such considerations are not relevant in the context of a foreclosure sale. *See Pappas v. E. Sav. Bank, FSB*, 911 A.2d 1230, 1237 (D.C. 2006) (A "property's market value is not applicable in the forced-sale context of a foreclosure.") (internal citation omitted). This analysis has been echoed by the United States Supreme Court, which has expressly held that "a fair and proper price.

. . for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the state's foreclosure law have been complied with." *Bfp v. Resolution Trust Corp.*, 511 U.S. 531, 545 (1994). Accordingly, absent a showing that Brandywine failed to comply with its statutory obligations in foreclosing on the Property, the price Tyroshi paid cannot be found unconscionable as a matter of law.[9]

With this in mind, the traditional guideposts that Shellpoint invites the Court to use concerning price have no applicability because the transaction at issue is a forced sale, as opposed to an arm's length transaction. The Supreme Court has acknowledged that traditional concepts of value concerning real property are inapplicable in the foreclosure setting, stating:

> …**market value, as it is commonly understood, has no applicability in the forced-sale context; indeed, it is the very antithesis of forced-sale value**. The market value of ... a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular ... piece of property." **In short, "fair market value" presumes market conditions**

[9] This analysis directly tracks precedent that requires **both** procedural and substantive unconscionability. The law is clear that there needs to be some form of irregularity beyond the after-the-fact subjective opinion of whether a purchase price is sufficient. Stated differently, absent any extraneous factors effecting the integrity of the sale, there can be no unconscionability and the "price is the price."

that, by definition, simply do not obtain in the context of a forced sale.

BFP v. Resol. Tr. Corp., 511 U.S. at 537–38 (emphasis added) (cleaned up). As the Supreme Court acknowledged, a forced sale, such as a foreclosure, does not carry the same free-market considerations as an arms-length transaction, and thus, the traditional notions of "value" cannot be reasonably applied.

It is for this reason that Shellpoint's reliance solely on the tax assessed value of the Property and the amount outstanding under the note to determine the fairness of Tyroshi's purchase price, is not only inapplicable, but it creates an "apples to oranges" comparison. Shellpoint's primary argument is that Tyroshi's purchase price was 2% of the value of the indebtedness on the Property at the time of the foreclosure sale. App. Br. 23, 29; AA82, AA211-12. However, the financing that Daniels obtained when he purchased the Property, as evidenced in the note, was part of an arms-length market transaction – **not a forced sale**. The value considerations that were made by Shellpoint in extending the loan to Daniels were entirely different than the value judgments made by Tyroshi when it purchased a distressed asset that questionably carried with it a mortgage that was over $200,000. If the transaction is judged contemporaneously (as opposed to in hindsight) and based on its particular circumstances, the metrics that Shellpoint uses to argue that the sales price is unconscionable are misplaced.

The above analysis is consistent with the lower court's application of *RFB Properties II*. In *RFB Properties II*, this Court held that unconscionability of a condominium foreclosure sales price should be assessed at the time the auction took place. *RFB Properties II*, 247 A.3d 689, 697 (D.C. 2021).[10] As this Court aptly stated: "just as a court cannot strike down a contract 'simply because the vicissitudes of time proved it to be a 'bad' bargain for one of the parties,' a court cannot set aside a foreclosure sale because a change in the law transforms a market-rate purchase into a bonanza." *Id.* at 697-98. *RFB Properties II* involved another super-priority lien condominium foreclosure sale in which the lender raised the exact same unconscionability argument that Shellpoint raises here concerning a below-market sales price. *Id.* at 693. In *RFB Properties II*, like here, there were indications in the record that the parties believed that the sale may be subject to the first deed of trust. *Id.* at 692 (advertisement stated the sale was "subject to any other superior liens") & AA199 (Deed). These nearly identical sets of fact must result in the same result. The Court stated in *RFB Properties II* that "viewed through the proper temporal lens" the sale mut be "assessed at the time of the [] foreclosure sale, when the property appeared to be encumbered by a substantial mortgage lien (one that only a few months after the sale was in excess of half a million dollars)." *Id.* at 697. As a result, this Court determined that the purchase price in *RFB Properties II* consisted

[10] Shellpoint "does not dispute that principle." App. Br. at 26.

of the auction price and the balance on the mortgage, which "cannot be deemed unconscionable as a matter of law." *Id.* at 697. The Court must apply the same analysis here.

Faced with a recent decision of this Court that directly contradicts its position, Shellpoint looks to focus its argument on a record that simply does not exist. Shellpoint specifically claims that Brandywine's affirmative misrepresentations that the foreclosure would be subject to its lien chilled bidding to yield an artificially depressed sales price. App. Br. at p. 27. However, there is nothing in the record whatsoever that supports such a conclusion and no such allegation appears in the SAC. *See* AA081-82. Indeed, the primary record evidence showing that the parties mistakenly believed the sale was subject to the Deed of Trust is the deed itself, which was executed after the sale was completed. AA199. This lone piece of evidence is not be indicative of anything about the procedure through which the property was sold. Even if that was not the case, this Court has expressly held that a misstatement about the foreclosure of a super priority lien does not invalidate a sale because the anti-waiver provision strips any such language of its legal effect. *Liu v. U.S. Bank National Association*, 179 A.3d 871, 883 (D.C. 2018). Thus, as a matter of fact and as a matter of law, Shellpoint's position is without merit.

III. THE CONDO STATUTE WAS AT ALL RELEVANT TIMES CONSTITUTIONAL

There are no constitutional issues with Condo Statute or the manner in which the foreclosure was conducted. While Shellpoint claims the Condo Statute violates both the Due Process Clause and the Takings Clause, its position is legally wrong for several reasons. At the outset, Shellpoint ignores the complete absence of any state action which prevents any constitutional issue from being implicated in the first place. But even if Shellpoint's position is considered, its merits are equally flawed. The Condo Statute not only satisfies constitutional notice requirements, but in this case, Brandywine went beyond its statutory notice obligations and sent Shellpoint actual notice of the Condo Sale, twice. Shellpoint's takings argument suffers a similar infirmity in that Shellpoint did not take any steps necessary to preserve its lien in advance of the Condo Sale, and thus, any deprivation of its property interest was not due to a constitutional taking but instead was the result of its failure to protect its lien.

A. Due Process is Neither Implicated Nor Violated from Brandywine's Conduct.

Shellpoint's due process challenge fails because there is no state action involved in the Condo Sale and Brandywine provided notice necessary to comport with the constitution. It is axiomatic that the Due Process Clause – like all constitutional rights – protects individuals from state actions that deprive them of their life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. To violate due process, the constitutional deprivation must derive from state

action. *Harris v. Northbrook Condominium II*, 44 A.3d 293, 298 (D.C. 2012). The Supreme Court has created a two-part test to determine whether the deprivation of a property interest resulted from a state action, whereby: (1) "the deprivation [was] caused by the exercise of some right or privilege created by the State" and (2) "the party charged with the deprivation [is] a person who may fairly be said to be a state actor." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Shellpoint cannot establish both elements of the *Lugar* test.

While there is no dispute that Shellpoint was deprived of its lien by virtue of a statutory super-priority lien created by the District of Columbia Council, that is only half of the equation. The second requisite element of the *Lugar* test is not present, because neither Brandywine nor Tyroshi is a state actor. Whether the alleged unconstitutional conduct is attributable to a state actor begins with identifying "'the specific conduct of which the plaintiff complains.'" *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). In circumstances that deal with purely private parties, the Court looks to whether the private entity's actions are "fairly attributable to the State." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999). However, a private party's action, "*without something more*, [is] not sufficient to justify a characterization of that party as a 'state actor'" and the mere enactment of a statute is not enough to constitute "coercive power" or "significant encouragement" by the state. *See Lugar*, 457 U.S. at 939 (emphasis added); *Am. Mfrs.*, 526 U.S. at 52 (a

private entity's acts with "mere approval or acquiescence of the State is not state action.").

With the above in mind, the Supreme Court has held that a private party's right to pursue debt collection through a statutory power of sale does not constitute state action. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 160 (1978). District of Columbia courts have uniformly deferred to the Supreme Court ruling in *Flagg Bros.* to hold that mortgage foreclosure proceedings lack significant state action to uphold constitutional challenges. *See, e.g., Pappas v. Eastern Sav. Bank, FSB*, 911 A.2d 1230, 1237 (D.C. 2006) (holding that a power-of-sale clause in a deed of trust for private debt collection by a mortgage foreclosure did not constitute state action); *Bryant v. Jefferson Fed. Savings & Loan Ass'n*, 509 F.2d 511, 513-515 (D.C. Cir. 1974) (rejecting a constitutional challenge to now D.C. Code § 42-815 (2001), the non-judicial mortgage foreclosure statute, because there was "no significant government involvement" in the foreclosure proceedings). The Condo Sale lacks significant enough state action to implicate the constitution.

The state's role in the Condo Sale also does not exist beyond its creation of the statutory right to foreclose. The Condo Statute itself does not mandate that an association foreclose on its lien, rather, the decision to enforce a lien rest solely in the discretion of the association, a private actor. *See* D.C. Code § 42-1903.13(c). An association can select to foreclose on either the super-priority portion of its lien

or the entirety of the condo lien, both of which could extinguish a lender's security interest. *Id.* An association can also choose to foreclose on its junior portion of the lien, which would result in a lender's lien remaining intact. *See id.*; *see also Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014) (the Condo Statute effectively splits the association's lien into liens of differing priority). Because the decision to foreclose and potentially extinguish a lender's interest lies solely with the association, and not with any state actor, the statutory right to foreclose can be considered no more than "subtle encouragement" by the state. *Cf. JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F.Supp.3d 1141, 1159 (D.Nev. 2016) (finding no state action within its respective HOA lien statute when the statute similarly allowed, rather than required, the HOA to foreclose on its super-priority lien); *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo Bank, N.A.*, 133 Nev. 28 (2017) (holding that the mere enactment of an HOA lien statute does not implicate due process unless there is "some additional showing" that the state compelled the HOA to foreclose on its lien or that the state was involved with the sale).[11]

[11] Tyroshi concedes that the caselaw from Nevada's court system is not binding precedent for this jurisdiction. However, the Nevada courts' analysis of their HOA lien statute can be guiding caselaw in this very instance because the HOA lien statute in Nevada mirrors that of the Condo Statute. Under NRS 116.3116, a condominium association maintains a lien for outstanding assessments owed, but the most recent 9 months (rather than 6 months under D.C. Code § 42-1903.13(a)) of assessments take superior priority to that of a first mortgage or deed of trust.

Brandywine's voluntary choice to enforce a statutory right to foreclose cannot be attributed to any state actor.

Other jurisdictions have similarly held that a private party's statutory right to foreclose did not involve state action to implicate due process. *See Charmicor v. Deaner*, 572 F.2d 694, 695-96 (9th Cir. 1978) (finding that Nevada's statutory source for a power of sale does not, absent more, transform a private, non-judicial foreclosure into state action); *Apao v. Bank of New York*, 324 F.3d 1091, 1095 (9th Cir. 2003) (holding that "'overt official involvement' in the enforcement of creditors' remedies" is required for state action to exist); *Levine v. Stein*, 560 F.2d 1175, 1176 (4th Cir. 1977) (declining to find state action within Virginia's non-judicial foreclosure procedures because the statute merely creates the power of sale and does not require intervention of any court or judicial officer during the auction process); *Northrip v. Fed. Nat'l Mortg. Ass'n*, 527 F.2d 23, 28-29 (6th Cir. 1975) (finding a private entity's statutory power of sale to be "simply permissive" rather than to "suggest encouragement" by the state, even when a sheriff conducted the auction). The state's involvement in the Condo Sale here is lacking. Absent a showing of significant state intervention in the foreclosure process, Brandywine's conduct cannot be attributed to the state.

However, even assuming *arguendo* that there was state action, there are no issues with notice, in either this particular transaction or in the statute in general.

The elementary precondition to due process is that notice is "reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The constitutional notice requirement is satisfied, at bare minimum, when notice is sent "by mail or other means as to ensure actual notice." *Malone v. Robinson*, 614 A.2d 33, 37 (D.C. 1992). To provide notice to a mortgagee whose interest is publicly recorded, and reasonably identifiable, due process is satisfied if notice of the proceeding impacting their interest is "mailed to the mortgagee's last known available address, or by personal service." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983). Brandywine exceeded its notice obligation to Shellpoint here by sending notice of the Condo Sale to Shellpoint by certified mail twice – on May 5, 2014 and May 27, 2014. AA181-197 (providing copies of the mailed envelopes and the signed green cards confirming receipt of certified mail); AA133 (the Notice of Foreclosure was sent to the Borrower "and all interested parties"). Shellpoint had over seven weeks from receipt of its first notice of the Condo Sale to preserve its lien, yet it did nothing.

Shellpoint's inaction directly undermines its constitutional claims.[12] This Court has acknowledged that a lender, such as Shellpoint, should take proactive steps

[12] Perhaps most problematic about Shellpoint's constitutional argument is its complete omission of the fact that it received direct notice of the Condo Sale on at least two separate occasions.

to protect its lien "either by requiring payment of assessments into an escrow account or by paying assessments themselves to prevent foreclosure." *Chase Plaza*, 98 A.3d at 175. Put another way, there are a myriad of options through which Shellpoint could have protected itself under the Condo Statute, either by proactively setting money aside to protect against any potential default on condominium assessments, or by stepping in once written notice of the non-payment is received. Shellpoint did neither and the result, the loss of its lien, is not a constitutional problem; but rather, one of Shellpoint's own making.

Putting aside Shellpoint's own shortcomings, even if this Court were to scrutinize the notice aspect of the Condo Statute on its face, as Shellpoint requests, the constitutional challenge still fails. Generally, "facial challenges to the constitutionality of a statute impose a heavy burden on the parties and rarely succeed." *Plummer v. U.S.*, 983 A.2d 323 (D.C. 2009). This is so because a facial challenge will only succeed by "'establish[ing] that no set of circumstances exists under which the[a]ct would be valid,' *i.e.*, that the law is unconstitutional in all of its applications." *Id.* (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)) (cleaned up). To do so, Shellpoint must demonstrate that the terms of the statute itself contain a "constitutional infirmity that invalidates the statute in its entirety." *Conley v. U.S.*, 79 A.3d 270, 277 (D.C. 2013) (internal citation omitted).

The only aspect of the Condo Statute that Shellpoint is challenging is the fact that at the time of the Condo Sale, the version of the statute that was then in effect did not explicitly mandate notice of the sale be given to junior lienholders if an association enforced its super-priority lien. *See* App. Br. at 35.[13] However, Shellpoint halts its analysis of the notice requirements there, and in doing so, fails to consider the entirety of the Condo Statute. *See Grayson v. AT & T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (statutory interpretation requires consideration of all its text, giving effect to all of the statute's provisions); *see also Tillery v. United States*, 238 A.3d 961, 969 (2020) (when considering a facial constitutional challenge, the statute must be considered "in all its applications"). If the complete Condo Statute is considered, due process is plainly satisfied.

The Condo Statute has always required that a condominium association provide multiple forms of public notice. The Condo Statute requires that the notice of foreclosure be recorded amongst the District of Columbia land records, placing the public at large on notice of the *in rem* action. *Frassetto v. Barry*, 497 A.2d 109, 113 (D.C. 1985) (recordation of notice is an equally significant notice requirement to notify the public of a sale in the event that all other notice fails (personal notice and public advertising)). Beyond record notice, the Condo Statute provides that:

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[13] The Condo Statute has always required that notice be sent to the unit owner and the Mayor or the Mayor's designated agent at least 30 days before the sale. D.C. Code § 42-1903.13(c)(4).

> The executive board shall give public notice of the foreclosure sale by advertisement in at least 1 newspaper of general circulation in the District of Columbia **and by any other means the executive board deems necessary and appropriate to give notice of sale**.

D.C. Code § 42-1903.13(c)(5) (emphasis added). The language "by any other means… to give notice of sale" indicates that notice can be given to the public by other means or to other individuals impacted by the sale. Indeed, it is (and was at the time of the Condo Sale) a foreclosure industry practice to send notice to all lienholders of record who could be impacted by the auction, as Brandywine did here.[14] AA133 (the Notice of Foreclosure was sent to the Borrower "and all interested parties"); AA181-197. This Court cannot view the Condo Statute's notice requirements of subsection (c)(4) in a vacuum, but rather, must read in conjunction with subsection (c)(5), which permits additional notice to all interested parties. *Thomas v. Buckley*, 176 A.3d 1277, fn. 12 (D.C. 2017) (confirming that for notice to be proper, the requirements under subsections (c)(4) and (5) must be complied with). The Condo Statute's notice requirements are not as narrow and confined to solely subsection (c)(4) as Shellpoint suggests.

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[14] Condominium associations would typically send notice to all junior lienholders, as it was well-settled that those individuals would be impacted by any foreclosure sale. *See Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 173 (D.C. 2014) (A general principle of foreclosure law is that lower priority liens are extinguished by a valid foreclosure sale if the auction yields proceeds insufficient to satisfy higher-priority liens.). Indeed, in the *Chase Plaza* case, the Court recognized that the *Chase Plaza* association similarly sent notice to all lienholders of record. *Id.* at fn. 7.

To the extent that this Court were to deem the language "by any other means… necessary and appropriate to give notice of sale" to be ambiguous, the canon of constitutional avoidance guides our interpretation of this language. If statutory language is ambiguous when pitted against the Constitution, the Court is to apply the principle of constitutional avoidance to interpret such language "to avoid serious constitutional doubts." *Mack v. U.S.*, 6 A.3d 1224, 1233-34 (D.C. 2010). As applied here, this Court should interpret "by any other means" to mean that an association could provide notice of sale in a manner that will provide notice to all those interested parties impacted by the auction. *See* D.C. Code § 42-1903.13(c)(5). Such an interpretation avoids constitutional confrontation and is a reasonable reading in light of common law foreclosure principles. *See supra* at n. 3.[15]

B. The Takings Clause is Neither Implicated nor Violated

Shellpoint's takings arguments fail because the Condo Statute does not constitute a regulatory taking nor is its creation of a super-priority lien for a public

[15] Of final note, the facial constitutional challenge to the former version of the Condo Statute is moot. Shellpoint acknowledges that in 2017, the legislature amended the Condo Statute to expressly require notice of a foreclosure sale be sent to all junior lienholders of record, including any holder of a first deed of trust or mortgage. *See* App. Br. at p. 42; D.C. Code § 42-1903.13(c)(4)(E). Contrary to Shellpoint's editorializing, in amending the Condo Statute the legislature did not concede that its prior version of the statute was unconstitutional; but rather, expounded upon, *inter alia*, notice requirements for a sale. The legislature continues to update the Condo Statute as recently as February 2022 to clarify condominium foreclosure proceedings.

use. The Takings Clause prohibits the state from taking private property for public use without just compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005); U.S. Const. amend. V. The Takings Clause was designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Takings Clause is not implicated by this Condo Sale or the Condo Statute itself, because there is no "government action" or a taking "for public use." Absent these prerequisite components to the takings clause, this constitutional challenge fails.

1. There is no government action

The government was not involved in Brandywine's purported taking of the Shellpoint's security interest. It is undisputed that the government did not directly appropriate or invade the subject Property or Shellpoint's lien. App. Br. at 46 (claiming a taking occurred through the enactment of the Condo Statute rather than by a state actor directly).[16] As discussed above, there is no government involvement

[16] If this Court were to adopt Shellpoint's position that the mere statutory right to foreclose on a higher priority lien constitutes a constitutional taking, than each time a more junior lien is extinguished by such a foreclosure sale, it would entitle those lienholders to just compensation. This logic is at odds with common law foreclosure principles that summarily extinguish *all* junior liens whose debts are not satisfied from foreclosure sale proceeds of superior lien sales. To accept Shellpoint's position would be to undermine the very nature of lien priority that is embedded in centuries of case law.

in the Condo Sale beyond the passive enactment of the Condo Statute. *See supra* at § III(A); *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 514 (D.C. Cir. 1974) ("[s]tatutes and laws regulate many forms of purely private activity…and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept."); *see also Armstrong v. United States*, 364 U.S. 40, 48 (1960) (while the destruction of a lien constituted a taking of compensable property in that case, government action was present to implicate the Takings Clause there because the United States took title to the property that rendered the liens unenforceable). Absent government action here, the Takings Clause is not implicated.

2. The taking was not for a public purpose

It is also undisputed that neither the Condo Statute nor the Condo Sale can be construed to be a taking for a public purpose. A state's conveyance of private property from one to another, for just compensation, is allowed so long as the purpose of the taking is for "use by the public." *Kelo v. City of New London, Conn.*, 545 U.S. 469, 477 (2005). An analysis of the legislative history of the Condo Statute confirms that its power of sale clause lacks any public purpose.

This Court has recognized that the Condo Statute was designed to benefit private condominium associations. Specifically, the statutory creation of the super-priority lien was to ensure that the associations can "take prompt steps to obtain

timely payment of assessments" because these assessments are the lifeblood of a condominium association. *Chase Plaza Condominium Ass'n, Inc. v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 177 (D.C. 2014). Shellpoint confirms this position in stating that the alleged public use in the creation of a super-priority lien is to "support for COAs and the maintenance of common interest communities."[17] App. Br. at 48. Support of private housing associations is not a public use, and Shellpoint's concession confirms that the Condo Statute's power of sale clause is designed solely to create a private benefit. *Cf. Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 514 (D.C. Cir. 1974) (confirming that the state can regulate private conduct and transactions without violating the constitution).

3. The was no physical or regulatory taking.

Notwithstanding the fact that neither government action nor a public use exists to implicate the Takings Clause, the taking itself is absent as well. As discussed above, it is undisputed that a direct government appropriation or physical invasion of private property did not occur. Shellpoint instead claims that the Condo Statute itself constitutes a "regulatory taking." *See* App. Br. at 46. To constitute a "regulatory taking," the government regulation of private property must be "so

[17] Condominium associations are private entities. Moreover, Shellpoint's mention of maintenance of common interest communities is, in actuality, a reference to the maintenance of the association's common elements – shared areas for all unit owners. The public does not benefit from a private association's operation of its common elements for its unit owners.

onerous that its effect is tantamount to a direct appropriation or ouster." *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005). The factors this Court is to consider in whether a regulatory taking occurred is "(1) the 'character of the governmental action;' and (2) 'the economic impact of the regulation on the claimant….'" *See Potomac Development Corp. v. District of Columbia*, 28 A.3d 531, 539 (D.C. 2011) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). Neither factor exists here.

Concerning the former, the character (and extent) of the government's action in relation to the Condo Statute is simply its passive enactment; nothing more. *See supra*. The Condo Statute itself does not mandate that an association foreclose on its lien; it is in the sole discretion of an association if and when it exercises its right to foreclose. *Id.* A condominium association is just as free to foreclose on its lien as it is to contact the first lienholder or borrower and work out some form of settlement. Simply put, the discretion provided by the statute confirms that the government has no hand in the purported "taking."

There is also no economic impact necessary to establish a regulatory taking. In order to show an economic impact, Shellpoint must show that the "deprivation [is] significant enough to satisfy the heavy burden placed upon one alleging a regulatory taking." *Potomac Development Corp. v. District of Columbia*, 28 A.3d at 541 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493

(1987)) (internal citation omitted). Here, the enactment of the Condo Statute does not, in and of itself, have any economic impact on Shellpoint's lien. Not only does the Condo Statute vest the condominium association with discretion, but it also provides a "*reasonable* alternative economic use for the property after the imposition of the restriction on that property", and as a result, "there is no taking…." *See 900 G St. Assocs. v. Dep't of Hous. & Cmty. Dev.*, 430 A.2d 1387, 1390 (D.C. 1981). Perhaps most importantly, the Condo Statute itself does not mandate that a foreclosure occur at all, but rather only allows for it when a unit owner fails to pay their assessments. Stated differently, the statute allows for a lien to be extinguished, but it does not mandate it. As a result, it cannot be said that the Condo Statute itself has an economic impact sufficient to be a regulatory taking. Shellpoint has not met its burden of proof in establishing that there is no other reasonable economic use for its lien by the mere enactment of the Condo Statute. *See id.* at 1391.

CONCLUSION

Shellpoint was afforded every opportunity to protect its lien position, but it did not do so. Years later, Shellpoint is now asking the Court to ignore a diverse array of precedent to fix its mistakes that were made in the original Condo Sale. The reality is that the lower court was within its rights to dismiss this matter and the Court's precedents confirm that the Condo Sale was both proper and constitutional. The lower court's decision should be affirmed.

Respectfully, submitted,

OFFIT KURMAN, P.A.

/s/Ian G. Thomas

Ian G. Thomas (Bar No. 1021680)
Tracy L. Buck (Bar No. 1021540)
1325 G Street NW, Suite 500
Washington, DC 20005
(202) 393-8100
(202) 393-2104
ithomas@offitkurman.com
tracy.buck@offitkurman.com

Attorneys for Appellee Tyroshi Investments, LLC

CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, the foregoing document was served on all counsel of record via the Court of Appeals Electronic Filing System. I further certify that a copy of the foregoing was served on Appellee Lashan Daniels via first class mail at the following address:

Lashan Daniels
7513 Snowbell Lane
Clinton, MD 20735

/s/Ian G. Thomas

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Ian G. Thomas
Signature

22-CV-0005
Case Number(s)

Ian G. Thomas
Name

August 8, 2022
Date

ithomas@offitkurman.com
Email Address