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IN THE SUPREME COURT OF THE STATE OF DELAWARE

REO TRUST 2017-RPL1, Plaintiff Below, Appellant/Cross-Appellee, v. SHORT SALE, LLC, Defendant Below, Appellee/Cross-Appellant, FCS LENDING, LLC, Interested Party Below, Appellee/Cross-Appellant.	)	No. 306, 2023 On Appeal from the Superior Court of Delaware C.A. No. N20L-10-029 DJB

APPELLEES' POST REMAND SUBMISSION

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INTRODUCTION

Before the Court is the appeal by Plaintiff, REO Trust 2017-RPL1 ("REO"), and the cross appeal of Defendant, Short Sale, LLC ("Short Sale"), and Interested Party, FCS Lending, LLC ("FCS") (collectively, "Appellees"), from the August 1, 2023 Opinion of the Superior Court (the "Opinion") addressing the post-mortgage foreclosure sale motions filed by Short Sale and FCS, relating to a *sci. fa. sur* mortgage foreclosure action filed by REO.

Following briefing and argument on the Appeal, this Court entered an Order remanding the matter to the Superior Court to make a "factual record regarding the circumstances underlying the Second Sheriff's Sale, the assignment, and the parties' interests in the outcome of the proceedings," and allowing that Court to "reconsider any aspect of its decision on which those factual findings bear."[1]

The Superior Court then scheduled and held two (2) days of hearings and directed the Parties to submit briefing on the record developed during the hearings and on matters the parties wished the Court to consider about that record.

Following those submissions, the Court entered, on June 26, 2026, the Order On Remand Following Evidentiary Hearing (the "Remand Order").[2] As it

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[1] Docket Index ("D.I."), 22, ¶ 15. Submitted herewith is the Appellees' Post-Remand Supplemental Appendix, and the cites thereto are "B .."

[2] Attached hereto as Exhibit A.

concluded in its initial Opinion, the Superior Court once again found no basis to invalidate the Second Sheriff's Sale, and again concluded, consistent with this Court's holding over a decade ago in *Eastern Savings Bank, FSB v. CACH, LLC*,[3] that Delaware is a "first-in-time, first-in-right" state when determining priority relating to the distribution of mortgage foreclosure proceeds and that the proceeds of the Second Sheriff's Sale should be distributed in accordance with that priority.[4]

By letter from this Court dated August 27, 2026, the Parties were directed to file supplemental memoranda addressing "the factual findings and legal conclusions in the Order on Remand, particularly how those findings and conclusions affect the parties claims on appeal and cross-appeal."[5]

This is Appellees' Post-Remand Submission in support of their request in this appeal to dismiss the action, set aside the Second Sheriff's Sale or, in the alternative, to enforce payment of the foreclosure sale proceeds to FCS.

[3] 55 A.3d 344 (Del. 2012) ("*Eastern Savings Bank*").

[4] B577-603.

[5] D.I. 27.

THE FACTUAL RECORD

It would be an understatement to say that this Court and the Superior Court have been perplexed by the unusual posture of this matter. The record developed on remand now explains exactly why this case is in this posture. It is because of the pre-foreclosure conduct of the second in line mortgage holder, REO, because of its post-foreclosure change of position where it now claims entitlement to the benefit from a sale **from a bidder who would not have bid, but for REO's pre-foreclosure representations and actions**, and because of REO's dogged determination, now for over five (5) years, (i) to eschew what it knew, confirmed and agreed with Appellees was the law – that foreclosure proceeds are distributed to the first in time, first in line mortgage holder – and instead (ii) to advocate for a novel second in line, first to receive distribution scheme, a scheme that has now been rejected in two decisions of the Superior Court and that, as found by that Court, is contrary to the holding of this Court in *Eastern Savings Bank*.

Appellees submit that this matter is no different than what this Court has addressed before, first in *Burge v. Fidelity Bond & Mortgage Co.*[6] ("*Burge*"), and thereafter in *Eastern Savings Bank:* A mortgagee holding a successful bid seeking to void a sale, essentially allowing for a "do over," in which all parties will know, in advance of the sale, exactly how to bid, the *Burge* case, **or**, also as here, a first in

[6] 648 A.2d 414, 418 (Del. 1994).

time lienholder seeking to confirm what was its expectation prior to the Sheriff's Sale -- the distribution of the foreclosure proceeds to itself, the party legally entitled thereto, the *Eastern Savings Bank* case. Appellees' positions being litigated in this matter, positions which they fervently believe are correct and correct applications of the law to the facts of this particular case, are proffered to protect themselves from the fact that REO wants to extract from Appellees the economic benefit of its opportunistic and inequitable change of position, and to continue to litigate its post-foreclosure adopted position to obtain it.[7]

This Court's remand to make certain factual findings now provides definitive explanations for the concerns outlined by this Court in the Order remanding this matter. Indeed, understanding how and why the Second Sheriff's Sale went as it did, including why Short Sale bid at that Sale and why FCS was assigned the winning bid, begins and ends with the pre-foreclosure actions and inactions of REO with respect to the Appellees, conduct upon which Appellees relied to their detriment.

Appellees, for purposes of this submission, offer the following from the factual record developed during remand regarding the circumstances underlying the

[7] Counsel for the Appellees are zealously seeking to protect the interests of their clients, given that they cannot guarantee the outcome of REO's pursuit of its post-foreclosure adopted "first to foreclose, first to receive" distribution arguments asserted in this litigation, and believe that they are doing so fully consistent with their obligations to this Court and to the profession where their clients have been placed in an extraordinarily difficult situation by REO.

Second Sheriff's Sale, the assignment, and the parties' interests in the outcome of the proceedings.

A. The Second Sheriff's Sale: Appellees' Reliance on REO's Agreement and Confirmation that FCS, as the First-in-Time, First-in-Right Mortgage Holder, Would be Paid First from the Proceeds of the Second Sheriff's Sale.

The factual hearings, mandated by the remand, provides much needed clarity about what transpired leading up to the Second Sheriff's Sale. Those undisputed pre-foreclosure facts are as follows:

- FCS' mortgage, recorded in 1999, was first in line, over REO's mortgage, recorded in 2004.[8]

- REO's counsel was informed of the legal position of Appellees with respect to the distribution of the proceeds following a Sheriff's Sale: That FCS, as the first-in-time lien holder, would be paid first.[9]

- REO's counsel, six months before the Sale, provided a written response, which confirmed and agreed that REO shared the same understanding regarding the distribution of the proceeds following a Sheriff's Sale: That FCS, as the first in time lien holder, would be paid first.[10]

- A week prior to the Second Sheriff's Sale, Appellees counsel confirmed, in writing, in the letter sent to both REO's counsel **and** the Sheriff's Office on April 6, 2021 (the "April 6th Letter"), the agreement

[8] B532; B541.

[9] B561; B563; B297-301.

[10] B561.

between REO and Appellees: That FCS, as the first in time lien holder, would be paid first.[11]

- Neither REO nor its counsel responded to that letter of confirmation.[12]

- Neither REO nor its counsel told Appellees or their counsel that it disagreed with the agreement between the parties over the distribution of the Sheriff's Sale proceeds.[13]

- At no time before the Second Sheriff's Sale did REO inform Appellees that its position on such distribution, as it now asserts, was allegedly "mistaken."[14]

- The Sheriff's Office received the April 6th Letter, and the Deputy Sheriff in charge of the Sale read and understood the April 6th Letter.[15]

- **The Deputy Sheriff knew that the distribution agreed upon by the parties as set forth in the April 6th Letter did not conform to the Office's "standard practices**."[16]

- No one from the Sheriff's Office responded to the April 6th Letter.[17]

- **At no time before the Second Sheriff's Sale did Sheriff's Office inform Appellees that the agreement by the parties was**

[11] B563-564; B314-318.

[12] B318-319.

[13] *Id.*

[14] B318-319; B116.

[15] B470-473.

[16] B473.

[17] B318-319.

inconsistent with what that Office believed was its "standard practices" regarding the distribution of the proceeds of the Sale.[18]

- The Appellees' representative, Robert Stella, was aware of the letters of confirmation on the agreement on the distribution of the foreclosure proceeds, understood that no response objecting to the position set forth in the April 6th Letter had been offered and that at no time before the Second Sheriff's Sale did REO or its counsel inform Appellees that its position on such distribution was allegedly mistaken (collectively, the "Representations").[19]

- Mr. Stella **relied on** the fact that REO had made the Representations.[20]

With respect to the day of the Second Sheriff's Sale, the record created during the hearing provided these further undisputed facts about that Sale:

- The Second Sheriff's Sale was the first Sale following the post-COVID-19 year-long shut down of foreclosure sales.[21]

- There were far more sales at this Sale than at past Sheriff's Sales, and the Sale took place in new and different facilities using different procedures and with staff that had not done a Sheriff's Sale before.[22]

- Mr. Stella, **in reliance** on REO's Representations, bid at the Second Sheriff's Sale.[23]

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[18] *Id.*

[19] *Id.*

[20] B328-329.

[21] B313-314; B320.

[22] *Id.*; B459.

[23] *Id.*

- That if REO had not made those Representations, he would not have bid at the Second Sheriff's Sale.[24]

- That if Mr. Stella had known that REO had made what it now alleges was a "mistake," he would not have bid.[25]

- Mr. Stella learned of the Sheriff's Office's differing position on distributions **only after** the completion of the Sale.[26]

- **That if the Sheriff's Office, which knew that the parties' agreement was inconsistent with its "standard practices," had responded to the April 6th Letter prior to the Sale, that it disagreed with the parties over the distribution of the Sheriff's Sale proceeds, Mr. Stella would not have bid and, in fact, would not have "gone" to the Sale**.[27]

- If Mr. Stella had been told, by anyone, that he would not receive the proceeds of the sale, he would not have bid.[28]

There was no rebuttal evidence, testimony or otherwise, offered by REO to undermine any of these facts about the Second Sheriff's Sale.

B. The Assignment.

The record now provides the reason why the assignment of the Sheriff's Sale Bid took place. On the day of the Second Sheriff's Sale, as Mr. Stella explained to

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[24] *Id.*; B369.

[25] B328-329.

[26] B341-343.

[27] *Id.;* B341-343; B473.

[28] B328-329; B369.

the Sheriff's Office staff, **immediately following the conclusion of the Second Sheriff's Sale**, Mr. Stella expected and wanted to be able to use the well-established "set off" process used in the Sheriff's Office, the right to be credited the amount by the Sheriff's Office that would nominally be paid to FCS as the first in time, first in right lienholder. He told the Sheriff's Office staff -- as admitted by the Deputy Sheriff who testified at the hearing -- that not only was he the representative of the holder of the winning bid, but he was the representative of the holder of the party that would be paid the proceeds of that winning bid, and that he expected that he would be able to take advantage of the right to set off the payment,[29] a process he testified he had done with the Sheriff's Office many times.[30]

Mr. Stella responded to REO's Interrogatory requesting the "intention" behind assigning that bid from Short Sale to FCS as follows:

> "The intention in assigning the bid for the Property from Defendant [Short Sale] to Interested Party [FCS] was to put such bid, and the possible ownership of the Property, if the Sale was confirmed, into the hands of the Interested Party, the holder of the senior mortgage on the Property. The benefit to Interested Party of the consolidation of the potential for full ownership right if the Sale could be confirmed, and holding the only remaining mortgage/lien is manifest as full unencumbered property ownership would then be in Interested Party. In addition, as the holder of the winning bid and as the senior mortgage holder, the Interested Party would be entitled, under the well-established process and procedures used by the Sheriff's office, to the

[29] B348-349.

[30] B332-338; B498-499; B345-350; B455-456.

right to a "credit bid," a "set off" of the amounts remaining to be paid and the amount to be paid to it as the senior mortgage holder."[31]

Further, Mr. Stella confirmed that the business reasons set forth in that statement were the sole reasons for that assignment, [32] and he forthrightly discussed in detail the benefits of such assignment.[33] Moreover, as the Court was told, Mr. Stella, as part of his business in holding mortgages on properties he owns or intends to buy, has many times assigned his bids in the identical manner that took place in this case and for the identical reasons offered as the basis for such assignment.[34]

There was no rebuttal evidence offered by REO to undermine those business reasons given for the assignment of the winning bid.

C. The Parties' Interests in the Outcome of this Matter.

Appellees' interests in the outcome of this appeal are simple: They want to avoid the inequitable and entirely unfair result, the payment of the escrowed foreclosure proceeds not to FCS as the parties expected pre-foreclosure would be the result, but to REO, which unjust result is attempted to be extracted from them by

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[31] B529-530.

[32] B345-350.

[33] *Id.*

[34] *Id.* There is not one shred of evidence that Appellants had undertaken that assignment for the purpose of giving FCS independent standing to assert any of the claims made in the litigation. B349-350.

REO through this litigation. This result would give REO an extraordinary and undeserved windfall created solely by its highly inequitable pre-and post-foreclosure actions and inactions.[35] Appellees do not believe its money should be paid to REO, a party to whom no money would have been paid based on a junior lien, if REO had not engaged in its inequitable conduct and had not lulled Appellants into bidding at the Sheriff's Sale.[36]

As to REO's interests, the Court is without any direct testimonial evidence of the interests of REO in the outcome of this matter. Indeed, despite the mandate from this Court for the parties to provide evidence on this subject, REO chose not to bring or offer any representative witness who could or would testify about its interests in the outcome of this matter (or, for that matter, about any of the matters this Court directed to be addressed on remand.).

Yet, the evidence that there is of what REO's interests are in the outcome is crystal clear: REO wants a highly inequitable, unjust and entirely unfair outcome. **REO wants this Court, evident through its arguments and the continued prosecution of its appeal, to give the entire benefit of the foreclosure sale**

[35] B350-359.

[36] *Id.*

proceeds to itself, the second in time and line mortgage holder.[37] It wants that result despite confirming in writing the parties agreement that FCS, as the "first-in-time" mortgage holder, would be paid the proceeds of the Sale before it, as the junior mortgage holder, and despite having had the opportunity to recant that position immediately following its receipt of the April 6th Letter. The inequity, unfairness and injustice of that outcome is manifest.

[37] REO has not withdrawn its appeal, nor has it offered to pay such proceeds over to FCS should this Court award such proceeds to REO. B350-357.

ARGUMENT ON APPEAL

III. THE SUPERIOR COURT CORRECTLY GRANTED FCS' MOTION FOR DISTRIBUTION OF PROCEEDS.[38]

A. Merits.

On remand, the Superior Court directly addressed the identical arguments that REO is making on this appeal. Specifically, the Court considered whether 10 *Del. C.* §4985, *Woolley's Practice in Civil Actions*[39] and the holding in *Cedar Inn v. King's Inn, Inc.*,[40] allegedly support a first to foreclose, first to participate in foreclosure proceeds distribution scheme advocated by REO.[41] The Court rejected those arguments.

In thoroughly analyzing *Eastern Savings Bank*, including the opinion on appeal from the Superior Court in that action, and after considering §4985, *Woolley's* and *Cedar Inn*, the Court concluded as this Court did that "the only logical rule of law that *Cedar Inn* could have applied would be the first in time, first in line rule of priority in distribution…," noting that this Court affirmed the Superior Court's

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[38] The Remand Opinion does not directly address Arguments I and II of REO's Appeal, and, accordingly, Appellees continue to rely on their Answering Brief and arguments made during oral argument for the response to these two issues.

[39] 2 Woolley, Victor B., *Practice in Civil Actions and Proceedings in the Law Courts of the State of Delaware,* § 1140 (1906) ("*Woolley's*").

[40] 269 A.2d 781 (Del. Super. 1970) ("*Cedar Inn*").

[41] *Cf.* D.I. 16, pp. 9-12 with B595-603, ¶¶ 37-51.

judgment and the conclusion that the "first filed priority lien was entitled to priority distribution despite not being the executing party."[42]

In directly addressing REO's repeatedly made claim that *Woolley's*, §1140 supports its position, the Court considered the matter and wrote that "Judge Woolley notes that land purchased upon execution of a judgment is, 'subject to the mortgage lien, and it is discharged from all liens subsequent to it,'" and concluded that "unless a sale is **noted** to be sold subject to the first mortgage, given that mortgage liens are not discharged from a property upon execution of sale, the proceeds must be distributed in a first in time, first in line priority order … [o]therwise lien priority has no benefit."[43]

The Superior Court concluded, once again, that the issue of lien priority and distribution of proceeds, in light of Delaware's pure race recording statute has been decided, that this Court's holding in *Eastern Savings Bank* controls, and consistent with the race recording statute, the proceeds of a sheriff's sale are to "be distributed in order of priority, **regardless of foreclosing party**…."[44] That decision, made by

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[42] B600, ¶ 46 *(citing Eastern Savings Bank*, p. 351). The Court further noted that the *Cedar Inn* decision was based upon the fact that "the Property was sold subject to the Delaware Trust mortgage, which is why all parties agreed the mortgage held by Delaware Trust would not partake in the distribution of proceeds." *Id.*, ¶ 48.

[43] B602, ¶ 50 (*citing Woolley's*, § 1140) (emphasis added).

[44] *Id*., ¶ 51 (emphasis added).

the Superior Court in its Opinion and again in the Remand Order is correct, and correctly applies the precedent of this Court, both in *Eastern Savings Bank*, and, a couple years later, in another appeal in that same litigation, *Eastern Savings Bank v. CACH, LLC*.[45]

After having looked directly at REO's cited authorities, the Superior Court did take the opportunity to "clarify" its earlier Opinion, concluding that "the execution sale proceeds are to be distributed in order of priority, regardless of the foreclosing party, **unless that sale is made subject to any prior mortgage encumbrances**."[46] The Superior Court further noted that this "subject to" announcement requirement "should prove to alleviate any unintended burden on the Sheriff's Office, as it is the foreclosing party's assumed risk and responsibility to ensure that an execution sale is both properly noticed and properly conditioned for sale, subject to any applicable prior liens."[47]

Appellees see the significant benefit in this clarification, in that, had REO at the time of sale made the public announcement that the sale was "subject to the mortgage," Appellees would have been on notice of REO's attempted change of position at the time of the sale and would not have bid, knowing that the proceeds

[45] 124 A.3d 585 (Del. 2015).

[46] B601-602, ¶ 51 (emphasis added).

[47] *Id*.

would not be distributed to it, and likewise, and just as importantly, the public and potential bidders would have been aware that **none** of the proceeds would have been going to pay off the first in line mortgage, such that they would know that the first in time mortgage would remain outstanding as a full and unsatisfied encumbrance on the property if they chose to bid.

Of course, REO offered no evidence in the hearings that the sale had been publicly announced that it would be made in that manner. Indeed, given the pre-foreclosure agreement of Appellees and REO that FCS's mortgage would be first in priority for distributions, **it cannot be questioned that there was no agreement prior to this sale that the sale would or could be made "subject to" FCS' mortgage such that the proceeds would go to REO**.

In the end, the Superior Court's decision, as clarified, is entirely consistent with *Eastern Savings Bank*, that the distribution of the foreclosure proceeds should be on a first in time, first in right basis, a result that requires FCS to be paid first from the proceeds of the Second Sheriff's Sale.

For the reasons set forth herein and as argued in Appellees' Answering Brief on appeal, the Opinion as clarified in the Remand Opinion on the distribution of proceeds of a sheriff's sale should be affirmed.

ARGUMENT ON CROSS-APPEAL

I. THE SUPERIOR COURT ERRED IN FAILING TO CONCLUDE THAT THE MORTGAGE FORECLOSURE ACTION WAS VOID *AB INITIO* BECAUSE THE SUPERIOR COURT HAD NO SUBJECT MATTER JURISDICTION.

A. Merits.

In the Opinion, the Superior Court's correctly concluded that there was a "defect in the *scire facias* process" -- that the Estate, who was not made a party, was a necessary party in a writ of *scire facias sur* mortgage foreclosure action.[48] The consequence of that conclusion is that the Superior Court never had jurisdiction over this matter in the first instance and everything done in the litigation in the Superior Court, including a resulting sheriff's sale, was void *ab initio*.[49]

Nonetheless, the Superior Court, in conceding that the issue raised by Appellees involves the subject matter jurisdiction of the Court, summarily concluded, without more, that "The Superior Court has jurisdiction over mortgage foreclosures and properly exercised that jurisdiction when confirming the now

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[48] B227.

[49] *See Imbraguilo v. Unemployment Ins. Appeals Bd.*, 223 A.3d 875, 880 (Del. 2019) (Where there was a failure to comply with the statutory mandates, this Court held that the "Superior Court lacked subject matter jurisdiction to entertain the appeal, and its decision is rendered void.") ("*Imbraguilo")*; *Thompson v. Lynch*, 990 A.2d 432, 433 (Del. 2010) ("*Thompson*").

contested sale of the Property."[50] Yet, that statement proves exactly Appellees' point: The Superior Court's authority, its jurisdiction to act, is statutorily based.

What the Court did not address, what is critical to the Court's jurisdiction and what must be considered, is what should be the result when the strictures of the statute investing that jurisdiction in that Court, here 10 *Del. C.* § 5061 (a), have not been met in light of its earlier conclusion that there was a failure to name the legally required party which must be commanded by the Sheriff to appear before the Court to respond to the writ of *scire facias.*[51]

The Superior Court never addressed the consequences of REO's failure, in light of this Court's holdings in *Imbraguilo* and *Thompson*. If it had, it would have concluded that REO's failure to comply with the jurisdictional statute divested the Court of any jurisdiction over the matter and that everything done in the case was void.

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[50] B593 (*citing* 21 *Del. C*. §2101). Appellees believe that this reference should be to 10 *Del. C.* § 5061 (a), the jurisdictional statute which is also the statute under which REO brought the underlying mortgage foreclosure matter.

[51] Former President Judge Jan Jurden's history of equity and the statutorily based writ of *scire facia sur* mortgage proceedings in the Superior Court, in the case of *American National Insurance Co. v. G-Wilmington Associates, L.P.*, 2002 Del. Super. LEXIS 555 (Del. Super. Oct. 18, 2002), confirm that, absent this **statutory** jurisdictional hook, the Superior Court would not have jurisdiction over mortgage foreclosures.

This matter was void *ab initio*. The Superior Court erred in failing to dismiss this matter. The Court should remand with directions to vacate the foreclosure sale and to dismiss this matter.

II. THE SUPERIOR COURT ERRED IN HOLDING THAT THERE IS NO PREJUDICE SUFFICIENT TO VACATE THE MORTGAGE FORECLOSURE SALE.

A. Merits.

Upon remand, the Superior Court once again had before it the Appellees' application to vacate the Second Sheriff's Sale along with this Court's directive to open the record, to permit testimony and evidence on the facts and circumstances surrounding the Second Sheriff's Sale. Appellees' application, as this Court has recognized, "is simply the means whereby a person who considers himself aggrieved may call the Court's attention to some defect, irregularity, neglect, misconduct or other sufficient matter whereby his rights **have been prejudiced**."[52]

Appellees have argued, twice before the Superior Court, in this Court and now once again before this Court, that **the Estate and Appellees have been prejudiced by the Second Sheriff's Sale**. The new evidence now available from that expanded record demonstrates beyond cavil that irregularities, neglect and misconduct in the process has been so pervasive and so prejudicial that the Superior Court should have set aside this Second Sheriff's Sale.[53]

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[52] *Burge,* 648 A.2d at 418 (*quoting Central National Bank of Wilmington v. Industrial Co.*, 51 A.2d 854, 856 (Del. Super. 1947).

[53] Where a party has been prejudiced, the Court has "broad discretion to set aside a Sheriff's sale…." *Burge*, 648 A.2d at 420.

The Court, in considering Appellees' original application, certainly asked for, was presented with and considered the prejudice experienced by the parties and the Estate, based on the record then before it.[54] On the remand that permitted the expansion of the factual record, specifically with respect to the circumstances surrounding the Second Sheriff's Sale, Appellees certainly called to the attention of the Court, based on that expanded record, the further evidence of prejudice suffered by Appellees, prejudice substantially similar in nature to that experienced by the mortgagee in *Burge*, as well as the prejudice to the Estate, in light of what this Court, in *Burge*, requires the Court to consider with respect to the interests of the mortgagor, and its successor.[55]

As to Appellees, the Superior Court originally considered the prejudice issues and concluded that they would suffer no prejudice based on the then record before it. Yet, as the now expanded record demonstrates, there were irregularities, neglect and misconduct throughout the Second Sheriff's Sale, such that prejudice, injury and injustice is manifest and inherent in the entire process here.

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[54] B227-229.

[55] *Burge*, 648 A.2d at 418 ("While the court **must** scrutinize the sale to ensure that the mortgagor is treated fairly… the interests of the mortgagee and other parties affected by the sale must be considered as well.") (emphasis added).

It is an injustice to allow REO to reap the benefits of what it did here. It is highly prejudicial and an injustice that REO would be allowed to agree with Appellees that the funds being paid at the foreclosure sale would go to FCS, let Appellees rely on that assertion and then turn around, after the sale, and claim for itself the very funds that would not have been bid and paid by Appellees had REO not made such representations.[56]

It is highly prejudicial and an injustice that REO, when it was given a chance to recant its position, remained silent and let Appellees' representative bid at the Sale, all the while having to know that Appellees' representative was relying on Appellees previously expressed and un-retracted statements.[57]

Furthermore, prior to the Sale, the Sheriff's Office was told what the agreement was between REO and FCS,[58] knew that such position was not consistent with its "standard practices,"[59] and, despite knowing that, the Sheriff's Office did

[56] *Supra*, pp. 5-8.

[57] *Id.*

[58] B563-564; B314-318.

[59] B473.

not respond to the April 6th Letter or correct the understandings of the two mortgage holders.[60]

Had it done so, and informed Appellees of its position, a position contrary to *Eastern Savings Bank*,[61] Appellees' representative would not have bid at the Second Sheriff's Sale.[62] With both the auctioneer and the selling mortgage holder in the Second Sheriff's Sale knowing of the Appellees' position and with neither bothering to inform Appellees of what their post-foreclosure positions would be -- and with both having been able to do so and both having been given the notice and opportunity to do so, **well before the day of the Second Sheriff's Sale**[63] -- it is highly inequitable, prejudicial and unjust to allow this Sale to stand.

It would be highly inequitable and unconscionable and therefore prejudicial to allow REO to receive an enormous windfall benefit, a benefit that it did not expect, or intend that it would receive **and** told Appellees that it would not receive.

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[60] B318-319. The Sheriff's Office, of course, had its hands full with the massive number of the post-COVID shutdown backlogged sales. *See supra*, pp 5-8

[61] The Sheriff's Deputy who was in charge of the Sale and who testified at the hearing, was, prior to this litigation, unaware of the holding in *Eastern Savings Bank*. B466-467.

[62] B328-329; B473.

[63] B563-564; B314-318; B341-343.

This Court need only consider its *Burge* case,[64] and its parallels to this matter, to conclude, as this Court did in such case, that there is ample support in the expanded record for concluding that this Second Sheriff's Sale can be vacated based on the prejudice documented in the newly developed record and to "correct a plain injustice, consistent with principles of equity."[65]

Yet, the Superior Court, in its Remand Order, suggests that Appellees claims are new and because they were not allegedly raised initially before the Superior Court and are not before this Court, such arguments are "waived."[66] The Superior Court is mistaken. The issue of prejudice, **as to Appellees and to the Estate**, was before the Superior Court.[67] Appellees made arguments before the Court as to the

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[64] *Burge*, 648 A.2d at 421 (Concluding that it was not an abuse of discretion by setting aside the sheriff's sale when it was "neither arbitrary nor capricious for the court to find that this unilateral mistake would work an unconscionable result to [the mortgagee].").

[65] *Burge*, 648 A.2d at 421.

[66] B592.

[67] The remand, which opened the record, for all of the matters this Court asked for a record on, allowed for the development of the record that the Court did not have on the appeal, as a direct result of how this appeal arose and the limited scope of a motion record, rather than a trial record. This expanded record cannot be used as a one-way street: Using facts supporting one argument, standing or waiver, but ignoring those facts which support another argument, prejudice, an argument specifically raised below and on this appeal.

prejudice that that they experienced, based on the evidence **then before the Court**.[68] The Appellees, when the issue of prejudice was decided against them, raised the issue of prejudice on appeal. The issue of prejudice as to Appellees and to the Estate is before this Court, was preserved on appeal and, based on the record this Court directed to be expanded, is now rightfully before this Court again.

In short, prejudice to the Appellees was not waived, but rather it has been consistently argued and was available for the Court to consider. Its failure to consider those facts, and the evidence of the prejudice it exposed, is in error.

In any event, the issue of prejudice to the Estate was preserved. Yet, when Appellees asked the Superior Court to look anew at the matter, in light of what it failed to consider with respect to what the *Burge* case requires -- the exact argument before this Court on this appeal -- the Court never addressed that issue.[69]

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[68] The Superior Court originally dismissed Appellees' arguments concerning the prejudice they suffered, contending that foreclosure sales are "buyer beware." B229. Yet, what the expanded record now shows, as set forth in detail above, is that because of the inequitable conduct of REO in the Sale process, and the exceptionally unique circumstances of the first post-COVID Sheriff's Sale, the massive number of sales which occupied the time and effort of the Sheriff's office and its staff, and where the Sheriff's Office was fully aware of the parties' position on distributions and knew that such position was inconsistent with its "standard practice," **but did not inform the parties of its differing position**, there are sufficient facts of record to show that neglect, irregularities and misconduct permeated the entire sale process creating prejudice in such a manner that allows the Court to vacate the sale.

[69] It is not clear why the Superior Court did not address this issue given that it addressed the issue of prejudice to the Estate in its original Opinion. B257-259.

While the Superior Court found in its original Opinion that no prejudice to the Estate was likely, what the Court did not consider on remand, even though it was brought to the Court's attention, was whether the Estate was treated "fairly," the actual touchstone required by this Court concerning consideration of the protections offered by the Mortgage Foreclosure Statute to the mortgagor and its successors.

This Court, in reviewing every sheriff's sale, is laser-focused on considering the protections afforded to the defaulting mortgagor, recognizing that such protections are of "paramount importance."[70] Indeed, the Court's focus is in "scrutiniz[ing] the sale to ensure that **the mortgagor** is treated fairly."[71]

REO's actions and position in this matter are the antithesis of treating the mortgagor or its successor "fairly." **In fact, REO's actions in not bothering to bring this necessary party to the table guaranteed that the mortgagor's successor, the Estate, would be treated unfairly**.

Here, the Court had and has no personal jurisdiction over the Estate, as it was never formally brought into the action and before the Court. As a result, none of the statutorily mandated fixed protections which would have guaranteed

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That Court and this Court, when any sale is brought before it, has an independent obligation to consider such prejudice. *Burge*, 648 A.2d at 418.

[70] *Burge*, 648 A.2d at 418.

[71] *Id.* (Emphasis added).

evenhanded/entirely fair treatment **by the mortgagee** and allowed for a validation of the debt and the amount of the debt before rights could be taken from the Estate were granted to the Estate or had been available to have been exercised by the Estate.[72]

Here, when the issue of fairness is scrutinized, especially from the perspective of a guarantee of the availability of the statutory protections from the potential depravations of a mortgagee, and of whether the statutorily mandated standards that safeguard a mortgagor and its successors have been faithfully observed, it is abundantly obvious that unfairness exists, an injustice has taken place, that an injury in fact has been sustained and that prejudice, substantial and irremediable prejudice, exists such that this Court must conclude that the impact on the vested rights of the party to whom the statute was created to protect mandates that the Sale be vacated.

[72] 10 *Del. C.* § 5061 *et seq.* A "writ of *scire facias sur mortgage* is a rule to show cause that **requires the mortgagor** to appear and establish why the mortgagee should not be allowed to foreclose." *American National Insurance Co.*, 2002 Del. Super. LEXIS 555, at *4 (emphasis added). It would seem to be no less than **a fraud against the mortgagor**, here the Estate, to allow a mortgagee to avoid naming it and to cause a matter to proceed toward foreclosure given that the mortgagor is the only party who could show cause as to why foreclosure under law should not occur, **as the defenses, such a payment, satisfaction, or any other defense to the asserted payment obligation, belonged to it**, not to any other party that could be named to the action.

CONCLUSION

WHEREFORE, Appellees and Cross-Appellants, Short Sale, LLC and FCS Lending, LLC, respectfully request that this Court enter an Order (i) directing the dismissal of this action for lack of subject matter jurisdiction, or, in the alternative, vacating the Sheriff's Sale, or (ii) affirming the decision in the Opinion and the Remand Order confirming that the proceeds of the Second Sheriff's Sale will be distributed to FCS, as the "first in time, first in right" lien holder and as provided for in *Eastern Savings Bank*.

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Dated: September 30, 2026

CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of the State of Delaware, hereby certifies that on September 30, 2026, he caused copies of the foregoing APPELLEES' POST-REMAND SUBMISSION to be served by File & ServeXpress upon the following:

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