IN THE SUPREME COURT OF THE STATE OF NEVADA

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BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATIONS SYSTEMS, INC.; and THE BANK OF NEW YORK MELLON; Appellants, vs. THOMAS JESSUP, LLC SERIES VII; Respondent.	Case No. 73785

APPEAL
from the Eighth Judicial District Court, Department VII
The Honorable Linda Marie Bell, District Judge
District Court Case No. A-13-693205-C

APPELLANTS' REPLY BRIEF

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Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

> Bank of America, N.A. is 100% owned by BANA Holding Corp., which is 100% owned by BAC North America Holding Company. BAC North America Holding Company is 100% owned by NB Holdings Corp., which is in turn 100% owned by Bank of America Corporation, whose shares are publicly traded on the New York Stock Exchange under the ticker symbol BAC. Bank of America Corporation does not have any parent corporations, and no publicly held company has an ownership interest of 10% or more.
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>
> Akerman LLP served as counsel for the appellants before the district court and is now serving as appellate counsel.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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INTRODUCTION

The court should reverse the district court's order and order entry of judgment in favor of Appellants Bank of America, N.A. (**BANA**), Mortgage Electronic Registrations Systems, Inc. (**MERS**) and The Bank Of New York Mellon (**BONY**) (jointly the **Appellants**). As servicer of the loan in this case, BANA offered to pay the full amount of the superpriority portion of an HOA's lien and requested information regarding that amount. In response, the HOA's agent Absolute Collection Services (**ACS**) told BANA that there was no superpriority lien until BANA foreclosed and that it recognized the Deed of Trust as senior to the HOA lien.

ACS also refused to provide the information BANA requested (the nine months of assessments due), instead telling BANA that its only option was to pay for ACS to create a full Statement of Account on the property. This demand violated the HOA's CC&Rs, which guaranteed first mortgagees a right to access the books, and was inconsistent with the HOA's policy of giving homeowners a full Statement of Account upon request. After refusing the offer to pay off the lien and telling BANA that the Deed of Trust was a senior property interest, ACS sold the property to an entity related to Respondent Thomas Jessup, LLC Series VII's (**Jessup LLC**) for less than 5% of fair market value.

The district court's decision must be overturned. **First**, the authorities agree that a rejected offer to pay a sum due constitutes tender, and so BANA tendered the

superpriority lien when it offered to pay that full amount, and was met with a refusal by ACS. **Second**, the HOA agent's statement that there was no superpriority lien can be interpreted as a decision to foreclose only on the subpriority lien, which would make sense in light of the miniscule sale price that Jessup LLC's predecessor paid for an interest. **Third**, if the HOA is understood as foreclosing on the superpriority lien despite ACS's contrary statement and rejection of BANA's offer and request for the superpriority amount, the sale must be set aside on equitable grounds.

If, nevertheless, this Court does not overturn the district court's ruling that title should be quieted in favor of Jessup LLC, it should reverse the district court's denial of the Appellants' counterclaims against the HOA and ACS for wrongful foreclosure, tortious interference with contractual relations, unjust enrichment, and breach of the duty of good faith. ACS and the HOA unreasonably prevented BANA from determining an extremely simple amount—the nine months of delinquent assessments. Not only was the decision to withhold this information illogical, it was contradicted by the HOA's publicly recorded CC&Rs. This inequity was compounded by the HOA's willful disregard for the Appellants' deed of trust when it conducted the foreclosure sale. As a result, if the Deed of Trust was somehow extinguished, ACS and the HOA should pay BANA for the resulting damages.

SUMMARY OF THE ARGUMENT

Respondents Jessup LLC, the HOA, and ACS fail to rebut the numerous reasons the Appellants presented in their opening brief as to why the decision below should be reversed. First, BANA's tender of the superpriority portion preserved the priority of the deed of trust. Jessup LLC ignores the clear weight of authorities that hold that the rejected offer to pay is a complete and sufficient tender of the amount due; Jessup LLC also engages in verbal gymnastics to deny that ACS flatly rejected the offer and refused to tell BANA the assessment rate. Jessup LLC also fails to explain how ACS's statement to BANA that it recognized the Deed of Trust as a senior lien and believed there was no superpriority lien at the time did not amount to an election to foreclose only on the subpriority HOA lien. Finally, Jessup LLC does not rebut the Appellants' argument to have the sale set aside on equitable grounds. Unfairness and oppression on the part of the HOA and ACS, along with the low sale price, render the sale inequitable.

Alternatively, if the district court's judgment in favor of Jessup LLC on the quiet title claims is affirmed, this Court should reverse the district court's judgment insofar as it rejected the Appellants' counterclaims against the HOA and ACS. The Appellants asserted claims for wrongful foreclosure, tortious interference with contractual relations, unjust enrichment, and breach of the duty of good faith. If the

foreclosure had the effect of extinguishing the deed of trust, then ACS and the HOA would be liable to the Appellants for damages and unjust enrichment.

ARGUMENT

I. BANA's Offer To Pay Was A Tender Of The Superpriority Amount.

The district court's decision should be reversed because it erroneously ruled against the Appellants on the quiet title claims despite BANA's unconditional, good-faith offer to pay the full superpriority amount. Under Nevada law and basic principles of tender, this constituted a tender, which necessarily extinguished the superpriority portion of the HOA's lien. Jessup LLC is left arguing that ACS had the right to refuse BANA's tender and tell BANA that its only option was to pay ACS to produce a Statement of Account detailing all charges on the property, even when such a demand violated the HOA's own binding CC&Rs.

A. An offer to pay is sufficient to discharge the lien even if rejected.

As pointed out in the opening brief, this court has repeatedly held that an offer to pay is sufficient tender. *See, e.g.*, *Ebert v. Western States Refining Co.*, 337 P.2d 1075, 1077 (Nev. 1959); *Cladianos v. Friedhoff*, 240 P.2d 208, 210 (Nev. 1952). Since the filing of the opening brief, this court clearly affirmed that rule in the context of NRS 116 liens. *Bank of America, N.A., v. Ferrell Street Trust*, No. 70299, *slip op.* at *2 (Nev. Apr. 27, 2018) (hereinafter "*Ferrell Street*") (defining tender as

"an unconditional **offer of payment in full** or with conditions for which the tendering party has a right to insist") (emphasis added). Other authorities agree that tender is "**an offer of payment** that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." *Fresk v. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74 AM. JUR. 2D *Tender* § 22 (2014) (same).[1]

Even if a tender is rejected, it still operates to discharge the superpriority lien. *See Ferrell Street*, *slip. op. at* *2 ("When rejection of a valid tender is unjustified, the tender effectively discharges the lien."); *see also Stone Hollow Avenue Trust v. Bank of America, N.A.*, 382 P.3d 911 (Table), 2016 WL 4543202, at *1 (Nev. Aug. 11, 2016) (unpublished), *vacated on other grounds*, 391 P.3d 760 (Table), 2016 WL 8613879 (Dec. 21, 2016) (en banc) (unpublished).[2] *Accord*, *e.g.*, *Ivey v. Henry's*

[1] Jessup LLC claims that Black's Law Dictionary defines tender as "the actual proffer of money." JAB 14-15. As a threshold matter, a dictionary cannot overrule holdings by this Court. More importantly, though, Jessup LLC's citation is wildly wrong; the dictionary actually defines tender as "[a] valid and sufficient **offer** of performance; specif., an unconditional **offer** of money or performance to satisfy a debt or obligation." TENDER, Black's Law Dictionary (10th ed. 2014) (emphasis added).

[2] Specifically, this Court vacated the panel opinion in *Stone Hollow Avenue Trust* on the basis that "unresolved question(s) of fact remain[ed]" as to whether the lienholder submitted a "legally adequate tender." 2016 WL 8613879, at *1. The Court did not purport to reject the legal reasoning stated in the panel opinion that, as a matter of law, a legally adequate tender would result in the discharge of the lien. *See id.*

Diesel Serv., Inc., 418 P.2d 634, 637 (Okla. 1966) ("[U]nconditional tender to a creditor of the amount due on a debt acts to extinguish the lien on personal property pledged to secure its payment . . . ."); *Lanier v. Mandeville Mills*, 189 S.E. 532, 535 (Ga. 1937) ("[W]here the creditor has collateral, mortgage, or other form of security upon the property of the debtor, the failure to accept a lawful tender discharges the lien which was intended to secure payment."); *Hilmes v. Moon*, 11 P.2d 253, 260 (Wash. 1932) ("[O]ne having an interest in mortgaged property, being entitled to pay the mortgage and making a tender of a sufficient amount, all other circumstances being in his favor, may, his tender having been refused without justification, obtain a decree clearing his property from the lien of the mortgage."). It is undeniable that BANA's offer to pay was sufficient to extinguish the superpriority lien.

Jessup LLC purports to distinguish the cases presented by BANA, but it only lists immaterial factual differences. *See* Jessup LLC's Answering Br. (hereinafter "JAB") at 15-17. Immaterial distinctions do not defeat the value of those rulings, which hold that an offer to pay is satisfactory tender. *Hart v. Massanari*, 266 F.3d 1155, 1172 (9th Cir. 2001) (when there are "factual differences between the current case" and "apparently controlling authority," "the court must determine whether those differences are material to the application of the rule"); *United States v. Johnson*, 862 F.2d 1135, 1146 (5th Cir. 1988) (Goldberg, J., dissenting) ("Factual distinctions mean little, however, unless they also denote substantive differences

between the cases one is comparing"). Tender is a coherent, unified legal doctrine that does not differ depending upon whether the obligation due is for taxes, construction services, or any other factual scenario.

Jessup LLC also makes a failed analogy with a California case where a delinquent borrower attempted to avert foreclosure by sending several partial payments of the amount due, each of which was rejected for not covering the whole amount. JAB at 18-20. That case has no similarity with this one—here BANA offered to pay "the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment lien" (A.A. 156), which was the exact amount of the superpriority lien.[3]

Finally, Jessup LLC seems to misunderstand BANA as arguing that when a first deed of trust holder offers to pay the superpriority portion, an HOA must then rescind the notice of delinquent assessment lien. *See* JAB at 18-20. That is not BANA's position. BANA is arguing that when a first deed of trust holder offers to pay the superpriority lien and requests that total, the HOA **should provide the amount**. If the first deed of trust holder then fails to fulfill the offer to pay that amount, there would be no tender. Jessup LLC appears to insinuate that BANA would not have paid the amount (*see* JAB at 20), but the record rebuts this: at trial,

[3] If BANA had made three separate attempts to pay three months of assessments, Jessup LLC might be able to draw a comparison with the California case. That is not what happened here.

Mr. Jung (BANA's attorney) explained that if had he been able to determine the assessment rate, his firm would have issued a check to the HOA for nine months of assessments in satisfaction of the superpriority of the lien. (A.A. 691:14-692:2). Jessup LLC does not point to any evidence showing otherwise.

B. ACS unjustifiably prevented BANA from learning the superpriority amount.

ACS's response to BANA's tender absolved it of any responsibility to undertake further actions. ACS rejected BANA's offer and refused to disclose the assessment rate, even though ACS understood that Mr. Jung was offering to pay nine months of delinquent assessments preceding the July 15, 2011 notice of delinquent assessment. (*See* A.A. 625:9-13; 627:14-16). ACS told BANA's attorney that it was rejecting the offer because it did not believe there was a superpriority lien **at all** unless BANA foreclosed and became the owner. (A.A. 253). It further stated that it would only provide a "9 month super priority lien Statement of Account"[4] if BANA foreclosed on the property and "submit[ted] the Trustees Deed Upon Sale." (A.A. 253). Finally, ACS's letter stated BANA was "the senior lien holder." (A.A. 253).

[4] It is also relevant that this "super priority lien Statement of Account" would have claimed collection costs and fees as having superpriority, as this was ACS's understanding of the superpriority composition. (*See* A.A. 588:3-8; 234:22-235:16). Therefore, even if ACS had been willing to tell BANA what **it** considered the total superpriority portion, this amount would have been inaccurate.

To sum up: ACS unambiguously rejected the offer, told BANA's attorney that it recognized BANA as "the senior lien holder," and stated that it would not provide the superpriority amount unless BANA foreclosed on the first deed of trust and became the owner. In the answering brief, Jessup LLC states that BANA is blameworthy for not correcting ACS's "misunderstanding" of NRS 116. JAB at 11-12, 21-22. Leaving aside the strangeness of the notion that BANA's attorneys had an affirmative duty to teach Nevada's HOA statute to a **company that managed HOA collections**, the Miles Bauer letter laid out a full explanation of the superpriority statute. That letter told the HOA all it needed to know about the superpriority lien, had it been willing to listen.

Furthermore, Mr. Jung did not walk away with the impression that the HOA had a correctable misunderstanding of the superpriority lien. Instead, he interpreted ACS's letter as stating "there was no superpriority lien amount that was due and owing" and that ACS "[was] waiving any right to demand such an amount at that time." (A.A. 695:1-4). Deposition testimony from ACS confirms that Mr. Jung's understanding of ACS's position was accurate. (A.A. 632:24-633:2). Jessup LLC's effort to show BANA acted in bad faith has no merit.

Jessup LLC attempts to justify ACS's actions by pointing to its proposal to produce a full Statement of Account for all charges on the property in exchange for a $50 payment. JAB at 26-28. However, ACS understood that BANA was not

requesting a full statement of account and that BANA only needed to know the monthly assessment rate. (*See* A.A. 625:9-13; 632:8-17). Withholding that information was unreasonable and not in good faith. Seeking to charge BANA for a comprehensive financial history of the account was not a substitute for telling the assessment rate to Mr. Jung. ACS's refusal to disclose that information excused any obligation for BANA to take further steps. *See* 74 AM. JUR. 2D *Tender* § 4 ("A tender is excused where the amount depends on the balance shown by accounts that are inaccessible to the [tendering party] . . . and such information is ascertainable only from the accounts of the creditor, who does not disclose the required information to the [tendering party.]").

ACS's actions violated the HOA's CC&Rs, which **guaranteed** BANA the right to learn this answer. The CC&Rs permitted a mortgagee "to inspect the books and records of the association during normal business hours" by making "a written request." (A.A. 637:5-19).[5] The CC&Rs necessarily denied ACS any authority to charge BANA for the monthly assessment amount. ACS's payment demand was unauthorized—BANA did not have to comply. "[A] tender is excused by the

[5] Jessup LLC claims that NRS 107.310 authorized ACS to charge BANA to learn the amount. JAB at 27. That argument is meritless because the statute cited refers to **deed of trust beneficiaries** producing payoff statements for **mortgage loans**. Jessup LLC claims that it "is likewise applicable for foreclosing trustees on HOA lien foreclosures" without citing any authority. *Id*. NRS 116, not NRS 107, is the governing statute for HOAs.

imposition of unwarranted conditions by the person to whom it is to be made." 74 AM. JUR. 2D *Tender* § 4.[6]

Even if ACS had a misunderstanding of NRS 116, its refusal to disclose the nine months of assessments, or even the monthly assessment rate, was not justified. ACS unjustifiably deprived BANA of the opportunity to make a payment it was able and willing to send. This rejection did not invalidate the tender.

C. No additional steps were required after the tender in order to preserve the priority of the First Deed of Trust.

Jessup LLC makes lengthy and misguided attacks on BANA for not taking expensive and time-consuming steps after the tender was rejected, such as purchasing the property from the HOA or filing an injunction to stop the HOA sale. JAB at 20-25. These criticisms have no force. First, BANA was not obligated to do any of those actions. NRS 116 requires only that a first deed of trust tender the superpriority portion of the lien. As this court recently wrote, "tender of payment operates to discharge a lien" and "a valid tender satisfies the superpriority portion of the HOA's assessment lien." *Ferrell Street, slip op.* at *1, *3. There are no other requirements to satisfy the superpriority portion.

[6] Further undermining Jessup LLC's attempt to defend ACS's refusal of BANA's request is ACS's policy of producing a full Statement of Account free of charge for homeowners. (*See* A.A. 611:12-612:23). ACS has not explained why it could provide comprehensive financial statements to homeowners for free but would not tell a single line item to BANA.

Second, even if a deed of trust holder typically were required to file an action to enjoin the HOA sale or bid on the property (which it is not), ACS's response was reasonably construed by BANA's attorney as stating "there was no superpriority lien amount that was due and owing" and that ACS "[was] waiving any right to demand such an amount at that time." (A.A. 695:1-4). There is no reason to conclude that BANA anticipated, let alone desired, that the property would be sold to a party that mistakenly believed the deed of trust had been extinguished.

Furthermore, the district court's imposition of *ad hoc* requirements without any statutory basis on BANA infringes on the Legislature's prerogative. The district court apparently assumed that a tender's effect can be negated by equitable weighing, when it stated that it would not "implement an equitable remedy to a party that sat on their rights." (A.A. 769:13-14). However, this court has recognized that NRS 116 is a "specially devised mechanism designed to strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *SFR Investments*, 334 P.3d at 412 (internal punctuation omitted). In enacting NRS 116, Nevada Legislature has **already weighed the equities** to create a rule that tender is the only requirement for a deed of trust holder to preserve the priority of its interest. Penalizing parties that sought to do exactly what the statute required would upset the Nevada Legislature's design. Because BANA offered to pay off the superpriority

lien and was prevented from doing so by the HOA for no good reason, it made a valid tender and thereby preserved the deed of trust.

III. ACS's Response To BANA's Tender Demonstrated It Intended To Foreclose Only On The Subpriority Portion Of The Lien.

BANA has also laid out an alternative ground upon which it is entitled to summary judgment. This record presents sufficient evidence to conclude that the First Deed of Trust survived because ACS only foreclosed on the subpriority HOA lien. This court has not issued a published opinion delineating exactly how an HOA can conduct only a subpriority sale, but in *River Glider Avenue Trust v. Wells Fargo Bank, N.A.*, it affirmed a district court's decision that "the HOA foreclosed on only the sub-priority portion of its lien" after examining the terms of the foreclosure deed. No. A-13-686536-C, 2015 WL 9666694, at *2 (Nev. Dist. Ct. Nov. 4, 2015), *aff'd*, *River Glider Ave. Tr. v. Wells Fargo Bank, N.A.*, No. 69229, 385 P.3d 50 (Table), 2016 WL 6072421 (Nev. Oct. 14, 2016) (unpublished). Although this fact pattern is different, a weighing of the equities supports a ruling that ACS foreclosed only on the subpriority portion, leaving the superpriority portion of the lien to be paid off at a later time.

ACS told BANA that it did not believe a superpriority lien could even arise unless BANA first foreclosed and became the owner of the property. (A.A. 253). Mr. Jung had communicated with ACS extensively in earlier HOA foreclosure cases and construed ACS's response letter as "waiving any right to demand" a

superpriority amount. (A.A. 695:1-4). Kelly Mitchell, ACS's owner, testified that ACS believed that it did not have a superpriority lien "until the bank foreclosed." (A.A. 631:24-632:2; *see also* 629:1-23). Thus, both BANA and ACS believed that the HOA was only conducting a subpriority sale.

Even if BANA had not made tender and the superpriority lien had remained on the property, this court should conclude that ACS's representations demonstrated that it only sought to foreclose on the subpriority portion of its lien. Even if the HOA's statement did not estop it from foreclosing on the superpriority amount, the record also demonstrates that ACS had no interest in accepting a superpriority payment; ACS's policy was to refuse payments from Miles Bauer to satisfy the superpriority portion. (A.A. 629:1-23). BANA cannot be penalized for not taking further action to pay the lien when it is undisputed that a payment would have been rejected. *See* 74 AM. JUR. 2D *Tender* § 4 ("Since the law does not require a useless formality, the making of a formal tender that otherwise would be required is excused where it is reasonably clear that if made, such a tender would be of no avail[.]").

In light of ACS's representations to BANA at the time of foreclosure, ACS's actual belief that its foreclosure did not have superpriority effect, and the undisputed evidence that ACS would not have accepted a superpriority amount, this court should hold that the HOA only foreclosed the subpriority portion of the lien.

IV. Alternatively, The Sale Must Be Set Aside On Equitable Grounds.

A second alternative basis to reverse the judgment below is the inequity of the foreclosure. In the opening brief, BANA explained that the property was sold for less than 5% of its fair market value, which qualifies as "grossly inadequate" under this court's precedent and weighs in favor of setting the sale aside. Unfairness, oppression or fraud is present in several ways. ACS told BANA's attorney that it recognized the First Deed of Trust as senior to the entire HOA lien. ACS refused to tell BANA's attorney the amount of the assessments, instead demanding that BANA pay for a full statement of account. This violated the HOA's CC&Rs, was inexplicably inconsistent with ACS's willingness to disclose the amount of the lien to homeowners, and failed to fulfill the statutory duty of good faith. As a result, the facts support setting aside the sale, and the Appellants are also entitled to judgment on that alternative basis.

Jessup LLC does not dispute that the price was grossly inadequate. *See* JAB at 31-33. The parties stipulated that the fair market value of the property at the time of the HOA's foreclosure sale was $127,000. (A.A. 508:5-6). However, ACS sold the HOA's interest in the property to CSC—Jessup LLC's predecessor-in-interest—for only $5,401.00. (A.A. 261-264). This was only 4% of the property's fair market value, far below the 20% threshold the *Shadow Wood* Court recognized as "grossly

inadequate as a matter of law." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1112-13 (Nev. 2016).

Because of this wide disparity between the price and market value, setting aside the sale requires only "**very slight evidence of unfairness or irregularity**." *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 648 (Nev. 2017) (emphasis added) (hereinafter "*Nationstar*"). The Appellants have presented several distinct grounds that constitute such "unfairness or irregularity."

- ACS rejected BANA's offer even though it understood that BANA was attempting to make an unconditional payment to protect its security interest.

- ACS refused to provide BANA with the monthly assessment rate and instead demanded BANA pay for a comprehensive statement of account, which violated a covenant in the CC&Rs giving BANA the right to inspect financial records.

- ACS informed BANA's attorney that it considered any superpriority tender to be invalid because BANA's interest in the property was a senior lien. This was a representation that the foreclosure sale would not extinguish the first deed of trust.

See Opening Br. at 28-33.

The district court did not consider whether these facts were "unfairness or irregularity" sufficient to set the sale aside. (A.A. 770:2). Instead, it merely held that that there was no "evidence of collusion on price." *Id*. Since it addressed only one possible form of fraud—which the Appellants had not even alleged—this ruling

failed to examine "the entirety of the circumstances that bear upon the equities" as this court required in *Shadow Wood*, 366 P.3d at 1114.

Jessup LLC does not engage with the Appellants' explanation of how the facts in this case prove fraud, unfairness, or oppression. Instead, it parrots the district court's myopic focus on collusion, claiming that "fraud, unfairness, or oppression" only exists if there is "manipulation of price through the collaborative actions of the HOA, the trustee and any third party bidders." JAB at 32. Jessup LLC cites no authority for this claim, *see id.*, and it is clearly inconsistent with this court's holdings that non-collusive actions can suffice to set a sale aside. *See Nationstar*, 405 P.3d at 648 n.11 (mentioning failure to provide notices, an HOA's representations that the foreclosure sale will not extinguish the first deed of trust, and misrepresentation of the sale date).

Jessup LLC also asserts that "the trial court was not compelled to consider the standard articulated by *Nationstar*." *See* JAB at 33. However, *Nationstar* did not announce any new law on setting aside a sale; instead, it followed earlier Nevada cases, perhaps most notably *Shadow Wood*, and cited a variety of cases that had set aside sales. *Nationstar*, 405 P.3d at 647-49. In any event, the district court had the benefit of *Shadow Wood*, which affirmed the broad "fraud, unfairness, or oppression" standard to set aside a sale and gave no indication that collusion was the only sufficient form of inequity.

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Aside from the fact that BANA's payment extinguished the superpriority portion of the lien, the sale can also be set aside on equitable grounds. The pattern of oppressive and unfair conduct by the HOA and ACS require setting the sale aside. This provides an alternative basis to overturn the decision below and order judgment in the Appellants' favor.

V. The Appellants Are Entitled To Judgment On Their Counterclaims Against The HOA And ACS.

The Appellants' opening brief also argued that the Appellants had sufficiently proven their counterclaims against the HOA and ACS for wrongful foreclosure, tortious interference, unjust enrichment, and breach of the duty of good faith. These claims were brought in the alternative: if the Deed of Trust was extinguished by the foreclosure sale, then the HOA and ACS should be liable to the Appellants for the resulting damages. The district court ruled against the claims on mistaken bases. Therefore, if this court does not reverse the district court's holding that the Deed of Trust was extinguished, then it should rule in favor of the Appellants on these counterclaims.

In their answering brief, the HOA and ACS assert that each of the Appellants' counterclaims failed as a matter of law. However, their arguments lack any merit.

A. The Appellants have shown that the HOA's foreclosure was wrongful.

The Appellants' wrongful foreclosure claim is, in a nutshell, that any foreclosure on the superpriority portion of the lien would be wrongful in light of the HOA's representation to BANA that there was no superpriority lien, as well as BANA's tender of the superpriority lien. "[T]he material issue of fact in a wrongful foreclosure claim is whether the trustor was in default when the power of sale was exercised." *Collins v. Union Fed. Savings & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983). Adapted to the context of an NRS 116 foreclosure that affects a first deed of trust, the question becomes whether BANA was in default to the HOA on the superpriority lien, the only amount a deed of trust holder can owe to an HOA.

The HOA and ACS respond to the Appellants' counterclaim with a misguided argument that the homeowner's default precludes a wrongful foreclosure claim. *See* HOA and ACS's Answering Br. (hereinafter "HAB") at 16-17. However, the Appellants are not arguing that it was wrong for the HOA to foreclose on the subpriority portion of the lien. Rather, the counterclaim is based solely on the premise that a **superpriority** foreclosure would be wrongful.

First, it is wrongful because the superpriority lien was tendered prior to the sale. The HOA and ACS assert that "BANA had no right to only pay the superpriority amount to protect its deed of trust." HAB at 17. This is based on the allegation that "BANA claims an interest only as the holder of a second deed of

trust." *Id*. However, trial testimony established that BANA was the beneficiary of the First Deed of Trust and the servicer of the loan secured by the First Deed of Trust. (A.A. 689:2-15). The HOA and ACS never challenged BANA's interest in the First Deed of Trust at trial or at summary judgment. Therefore, it cannot be disputed that BANA's tender of the superpriority lien was done to "avert loss of" the First Deed of Trust. *See SFR Investments Pool 1 v. Green Tree*, 334 P.3d 408, 414 (Nev. 2014).

Second and separately, the foreclosure was wrongful because the HOA and ACS told BANA that it owed no amount until BANA had foreclosed on the First Deed of Trust. (A.A. 253). Even if BANA had not extinguished the superpriority lien, BANA could not be in default for an obligation that, according to the HOA, did not exist. If the HOA is allowed to foreclose on the superpriority portion of the lien after representing it did not yet exist, then its foreclosure was wrongful, and it should be held liable for BANA's damages.

B. The HOA and ACS's actions satisfied the requirements for tortious interference with contractual relations.

Appellants have also shown that ACS and the HOA would be liable for tortious interference with contractual relations if the First Deed of Trust were extinguished by ACS's foreclosure. This claim has five elements: "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of

the contract; and (5) resulting damage." *See J.J. Indus., LLC v. Bennett*, 71 P.3d 1264, 1267 (Nev. 2003).

The HOA and ACS dispute only two elements in their answering brief. Their primary argument is against the third element, where they repeat the district court's mistaken statement that this element requires evidence that the tortfeasors had a **motive** that the contract be disrupted. HAB at 11-12. However, as demonstrated in the Appellants' Opening Brief at 36-37, **motive** is a different concept from "intent or design" and therefore cannot be regarded as synonymous. The Appellants do not have to show that ACS acted out of actual malice towards them (*i.e.* conducting all of the foreclosure to achieve the goal of extinguishing the Deed of Trust), but merely that they were aware that the Deed of Trust would be extinguished and proceeded anyway. A conscious indifference to the financial interests of the Appellants is enough to show that there were intentional acts intended or designed to disrupt the contractual relationship.

The other element ostensibly addressed by the HOA and ACS is the fourth—actual disruption of a contract. However, this argument is easily dismissed. The HOA and ACS merely allege that "BANA may still claim a valid contract with the former homeowner and can seek repayment under the Note[.]" HAB at 12. However, it cannot seriously be disputed that eliminating a security interest and thereby transforming the loan into an unsecured debt "disrupts" the contractual relation

between a debtor and lender. "Disruption" of a contract is all that is required under the fourth element of a tortious interference claim. *J.J. Indus.*, 71 P.3d at 1267.

The HOA and ACS also attack the Appellants' tortious interference counterclaim as inconsistent with their arguments that the First Deed of Trust survived. HAB at 12. This line of reasoning is misguided. The Appellants have clearly explained that their counterclaims are in the alternative. If ACS and the HOA did not conduct a foreclosure sale that extinguished the First Deed of Trust, then the counterclaims are moot. However, if the HOA and ACS **did** conduct an effective superpriority foreclosure, then the tortious interference claim stands.

C. Unjust enrichment is satisfied by the HOA's retention of subpriority portions.

As laid out in the opening brief, ACS and the HOA would be liable to the Appellants for unjust enrichment if the First Deed of Trust had been extinguished by the foreclosure. Specifically, they were unjustly enriched by retention of proceeds that should have been distributed to BANA—whose First Deed of Trust was axiomatically senior to **subpriority** portions of the HOA's lien, whether or not there had been a superpriority tender.

The HOA and ACS make a convoluted argument that despite the split-lien approach of NRS 116, BANA was not entitled to proceeds in excess of the superpriority portion of the lien. HAB at 8-9. Instead, the HOA and ACS claim that sale proceeds should have gone to pay the subpriority portion of the HOA's lien

before the Deed of Trust, **even though the Deed of Trust was senior**. They ground this conclusion in the fact that the superpriority portion and the subpriority portion are two parts of the same lien. HAB at 9. However, that fact does not show that HOA liens are an exception to the basic rules of lien priority, which require that senior liens be paid before junior liens following a foreclosure sale.

The HOA and ACS claim it is "absurd" if HOAs "were to only be able to collect on [their] superpriority piece[s] from foreclosure." HAB at 9. That is not the Appellants' argument. Instead, the Appellants argue that the HOA's foreclosure sale proceeds must be applied in the order of priority. If the HOA sells the property for a tiny fraction of its value that is insufficient to cover the full deed of trust, then it will not be able to recover the subpriority portion of the lien. However, if the HOA sale garners more than enough money to cover (1) the reasonable expenses of the sale; (2) expenses of securing possession and paying governmental charges and insurance premiums before the sale; (3) the superpriority amount of the association's lien; and (4) the full value of the senior deed of trust, then the remaining proceeds will be applied to the "subordinate" portion of the association's lien. NRS 116.31164; 116.3116.

If the Legislature intended HOAs to recover their full lien amounts from the sale proceeds before deed of trust holders, then its decision to enact a unique split-priority lien system would be inexplicable. The Legislature could have accomplished

that purpose by enacting a conventional unitary HOA lien that was entirely senior to deeds of trust. The idea put forward by the HOA and ACS—that there is a split-priority lien but both portions are senior to all other interests—is oxymoronic.

Since the HOA retained money to which BANA entitled under NRS 116, all the elements of unjust enrichment are met. Therefore, the district court's ruling on this counterclaim must be overturned in the event that this court does not hold that the First Deed of Trust survived the HOA's foreclosure.[7]

D. The HOA and ACS are liable for a breach of the duty of good faith.

The final counterclaim brought by the Appellants is for breach of NRS 116.1113. This provision states that "[e]very contract or duty governed by this chapter [*i.e.*, NRS 116] imposes an obligation of good faith in its performance or enforcement." ACS and the HOA's actions did not comply with that obligation. In rejecting BANA's tender, refusing to disclose the assessment rate, and conducting the sale with the sole goal of recovering the bare minimum amount owed to the HOA, they displayed bad faith towards the Appellants' property interests.

The HOA and ACS claim that they had no duty "in NRS 116" to "disclose specific lien component amounts to any interested party." HAB at 13. That

[7] The HOA and ACS also make a lengthy argument that they were permitted to foreclose on the subpriority lien after BANA tendered. HAB at 8. The Appellants have never disputed the HOA's right to conduct a subpriority foreclosure; their unjust enrichment counterclaim only challenges the distribution of the proceeds.

contention is obviously wrong. NRS 116.1113 applies to "every contract," which necessarily includes the CC&Rs (a contract between homeowners and the HOA). As previously mentioned, the CC&Rs allowed mortgagees, such as BANA, "to inspect the books and records of the association during normal business hours" by making "a written request." (A.A. 637:5-19). It is indisputable that the CC&Rs are governed by NRS 116. Therefore, it cannot be denied that the HOA and its agent, ACS, had an obligation of good faith to enforce and perform the provisions of the CC&Rs, including the right of inspection of the HOA's "books and records."

ACS's bad faith towards the Appellants' property interest continued after rejecting the tender. In conducting the foreclosure sale, ACS "chose the bid price solely based on the amount necessary to get the HOA paid." (A.A. 614:4-6). ACS has admitted that it displayed no regard for the property's fair market value (A.A. 229:2-5) or the amount still outstanding on the loan taken out by the Borrower, (*see* A.A. 229:6-9). The duty of good faith required the HOA and ACS to give at least some consideration to the Appellants' interest.

The HOA and ACS also make a confused attempt to deny that they had any obligation of good faith in their handling of the foreclosure auction. Their argument centers around the fact that a provision of NRS 116.31164 allows an HOA to credit bid on the property "up to the amount of the unpaid assessments and permitted costs, fees, and expenses incident to the enforcement of its lien." *See* HAB at 13-14.

However, because this is not a case where the HOA purchased the property via credit bid, that section has no relevance. Furthermore, that subsection merely specifies that the HOA can credit bid up to the amount of the full lien. NRS 116.31164(6)(b). It says nothing about the starting amount for public bidding, and certainly does not state that an HOA can utterly disregard other secured interests in the property purely for its own convenience.

Because ACS and the HOA breached the duty of good faith they owed to BANA, they would be liable to the Appellants if the Deed of Trust had been extinguished by the foreclosure sale.

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CONCLUSION

For all of the above reasons, this court should reverse the district court's ruling and order the entry of judgment in the Appellants' favor on their quiet title and equitable claims. Alternatively, the district court's judgment should be reversed on Appellants' counterclaims, and judgment rendered in favor of the Appellants on the counterclaims against ACS and the HOA.

DATED this 8th day of May, 2018.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this reply brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY that this reply brief complies with the page or type-volume limitations of NRAP 32(a)(7) and NRAP 32(a)(7)(ii) because, excluding the parts exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 5,692 words.

FINALLY, I CERTIFY that I have read this **Appellant's Reply Brief**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this reply brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying answer is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 8th day of May, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 8th day of May, 2018, I caused to be served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF**, in the following manner:

(ELECTRONIC SERVICE) The above referenced document was electronically filed on the date hereof with the Clerk of the Court for the Supreme Court of the State of Nevada by using the Court's CM/ECF system and served through the Court's Notice of electronic filing system automatically generated to those parties registered on the Court's Master E-Service List.

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