Case No. 74416

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Appellant,

vs.

MARCHAI B.T., A BANK TRUST,

Respondent.

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APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable LINDA MARIE BELL
District Court Case No. A-13-689461-C, Consolidated With A-16-742327-C

AMENDED APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made so the judges of this court may evaluate possible disqualification or recusal.

Appellant, SFR Investments Pool 1, LLC, is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In District Court, SFR Investments Pool 1, LLC, was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., Karen L. Hanks, Esq., of Kim Gilbert Ebron fka Howard Kim & Associates. Ms. Gilbert, Mr. Kim, Ms. Ebron and Ms. Hanks of Kim Gilbert Ebron represent Appellant on appeal.

DATED this 30th day of November 2018.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1). The District Court entered judgment in favor of Marchai BT ("Marchai") on all claims between Marchai and Wyeth Ranch Homeowners Association, and Marchai and SFR on October 3, 2017, and the notice of entry of that Order was entered on October 4, 2017. (7JA_1483, 7JA_1489.) SFR obtained default judgments against Cristela Perez and U.S. Bank on April 26, 2018, notice of entry of which was served on April 27, 2016. (7JA_1581, JA_1585). Marchai obtained default judgments against Cristela Perez and U.S. Bank on August 6, 2018, notice of entry of which was served on August 7, 2018. (7JA_1592, JA_1597). SFR filed its notice of appeal on November 3, 2011. (7JA_1556). SFR filed an amended notice of appeal including the default judgment obtained by Marchai against Cristela Perez and US Bank on August 8, 2018. (7JA_1604).

APPELLANT'S ROUTING STATEMENT

The Supreme Court should retain this matter. This case is a quiet title action that does not fall under any category presumptively assigned to the Court of Appeals pursuant to NRAP 17(d).

Pursuant to NRAP 28(a)(5), SFR states that this case contains "matters raising as a principal issue a question of first impression involving the United States or Nevada Constitutions or common law[.]" Pursuant to NRAP 17(a)(10) this case also

involves "matters raising as a principal issue a question of statewide public importance." NRAP 17(a)(11). Specifically, this appeal addresses whether payments made to a homeowner's association by a homeowner may apply to the superpriority portion of the association's lien as a windfall to the bank holding a senior deed of trust who has taken no steps to protect the deed of trust.

ISSUES PRESENTED

1) Whether the lower court erred in granting summary judgment in favor of Marchai and against SFR *sua sponte*, and then later altering or clarifying its order of summary judgment against SFR in a second *sua sponte* order.
2) Whether the lower court erred in determining that a 2008 notice of delinquent assessment lien was the lien foreclosed upon when the Association recorded a subsequent notice of delinquent assessment lien in 2011.
3) Whether the lower court erred in determining that payments made by a homeowner obviated Marchai's statutory obligation to pay off the superpriority portion of the Association's lien to protect its deed of trust from extinguishment.
4) Whether the district court erred in determining that SFR could not demonstrate it was a bona fide purchaser.

STATEMENT OF THE CASE

This appeal follows the lower court's *sua sponte* grant of summary judgment in favor of Marchai and against SFR. (JA_1483). Significantly, SFR was given no notice of the Court's intent to consider summary judgment in favor of Marchai, nor any notice of the Court's intent to amend its judgment against SFR *sua sponte* while entering a default judgment against a non-appearing party. The judgment should be reversed on this basis alone.

Even ignoring the procedural defects of the lower court's judgment against SFR, the judgment contains a number of substantive errors that require reversal. This case follows SFR's acquisition of the real property located at 7119 Wolf Rivers Avenue, Las Vegas, Nevada 89113 at the Wyeth Ranch Community Association's (the "Association") properly-conducted foreclosure of its delinquent assessment lien. It is undisputed that Marchai failed to take action to protect its deed of trust from extinguishment prior to the Association's sale. Notwithstanding this failure, Marchai brought suit against SFR, claiming its deed of trust somehow survived the foreclosure sale. After combing through the Association's and its agent's files and finding no other basis to reverse the foreclosure sale, Marchai sought to rely on payments made by the former homeowner, Cristela Perez to rescue Marchai from the consequences of their inaction. There is absolutely no evidence that Perez

intended these payments to satisfy Marchai's obligation to pay off the superpriority lien amount prior to the sale. Similarly, no evidence indicated the payments were actually applied by the Association to absolve Marchai of its responsibilities under the law. Marchai should not be permitted to rely on Perez's payments to excuse their failure to act. Such a result would be detrimental to Perez.

FACTUAL AND PROCEDURAL BACKGROUND

I. FACTUAL BACKGROUND

A. The Association Forclosure Sale

Perez obtained a loan from CMG Mortgage Inc. in October 2005, which was secured by a deed of trust recorded on November 9, 2005. (1JA_0004.) The deed of trust stated that the beneficiary could create an escrow account for the payment of assessments, or pay assessments on behalf of Perez, should she fail to make the required payments herself. (1JA_0027, ¶3; 1JA_0030, ¶9.)

Perez did fall behind on her assessment obligations, and on December 20, 2011, the Association, through its authorized collection agent, Alessi & Koenig ("Alessi"), recorded a Notice of Delinquent Assessment Lien ("NODA"). (5JA_1210.) In accordance with NRS 116.31162, Alessi mailed the NODA to Perez. (5JA_1211-1214.)

More than 30 days later, on February 28, 2012, Alessi recorded a Notice of Default ("NOD") on behalf of the Association. (6JA_1216.) The NOD was served

on all parties required by law. (6JA_1217-1220.) Marchai does not dispute that the NOD was provided to its predecessors in interest, and that it had constructive notice of the NOD. (6JA_1223, 1224, Response #3, #4.)

With the default remaining unresolved, the Association, through Alessi recorded a Notice of Sale. (6JA_1242.) The notice of sale indicated that the property was to be sold at auction on August 28, 2013. (*Id.*) The notice of sale was provided to all parties required by law, posted on the Property, posted at three public places, and published in Nevada Legal News for three consecutive weeks. (6JA_1243-1251.)

Following the recording of the Notice of Sale, On August 12, 2013, an assignment of the Deed of Trust was recorded, transferring the beneficial interest in the Deed of Trust to Marchai. (6JA_1253.) The assignment indicated the deed of trust had been assigned 5 months prior, but Marchai elected not to record until August 12, 2013. (*Id.*) Had Marchai recorded its interest promptly, it would have been entitled to receive service of the Notice of Sale. Nonetheless, Marchai obtained its interest in the deed of trust with record knowledge of the Association's foreclosure sale. (*Id.*)

B. Marchai's (In)action

The day before the sale, Marchai contacted Alessi and requested that Alessi not go forward with the foreclosure sale. (6JA_1376.) However, nothing required

the Association to agree to the postponement, and the Association's board elected to go forward with the foreclosure. (6JA_1377.) Marchai took no action to wire payoff funds to Alessi, to obtain an Order restraining the sale, or arrange to have a representative attend the sale. Thus, as scheduled, on August 28, 2013, the Association held a public auction of the Property based on its recorded lien for unpaid monthly assessments. (6JA_1256.) At the foreclosure sale, SFR made the highest cash bid of multiple bidders, purchasing the property for $21,000.00. (*Id.*) At the time of the foreclosure sale, there was no release of the superpriority lien recorded, there was no *lis pendens* recorded on the property, and SFR had no knowledge of Marchai's contact with Alessi the preceding day. (6JA_1264-1265.) At the time of the sale, Marchai had both actual and record knowledge that the foreclosure was set to occur. (5JA_1242; 6JA_1376.)

Following the sale, a Trustee's Deed was recorded in favor of SFR, vesting title to the property in SFR "without equity or right of redemption." (6JA_1256.) The trustees deed recited:

> Default occurred as set forth in a Notice of Default and Election to Sell, which was recorded on in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.

(*Id.*) SFR had no reason to doubt the veracity of any recital contained in the Trustee's deed. (6JA_1264-1265.)

II. PROCEDURAL BACKGROUND

A. The Complaint and Counterclaim

On September 30, 2013, Marchai filed a judicial foreclosure complaint, seeking to foreclose on its presumptively extinguished deed of trust. (1JA_0002.) SFR answered and counterclaimed for declaratory relief, seeking an Order of the Court establishing that SFR took title to the property free and clear of Marchai's deed of trust. (1JA_0078.) It was not until August 25, 2016, almost three years after the date of the Association's foreclosure, that Marchai filed a separate complaint – case no. A-16-742327 – alleging that its Deed of Trust had not been extinguished. (5JA_1099.) In that complaint, Marchai raised six causes of action for: 1) declaratory relief under the Takings Clause; 2) declaratory relief under the Due Process clauses of the Nevada and United States constitutions; 3) wrongful foreclosure; 4) violation of NRS 116.1113; 5) intentional interference with a contract; and, 6) quiet title. (5JA_1099-1113.) The cases were consolidated on December 13, 2016. (5JA_1140.)

B. Initial Motions for Summary Judgment Denied by District Court

On January 14, 2016, both SFR and Marchai filed competing motions for summary judgment. (1JA_0110, 0192.) Marchai's motion argued, *inter alia*, that the post-notice of lien payments of Perez extinguished the superpriority portion of the lien. (1JA_0149-0151.) On February 25, 2016, the motions came on for hearing

before the lower court, which issued its written decision denying both motions on March 22, 2016. (5JA_1017.) The Order concluded that "further factual development is needed to determine whether Perez's payments to the HOA constituted a valid tender." (5JA_1038.) On September 30, 2016, the district court stayed the case, and lifted the stay on December 13, 2016. (See 5JA_1140.)

C. SFR's Second Motion for Summary Judgment Following Stay

Later, in July 2017, both SFR and the Association filed motions for summary judgment against Marchai. (5JA_1164; 6JA-1277.) Though Marchai filed an opposition, relying on the evidence contained in its unsuccessful 2016 motion for summary judgment, Marchai did not file a motion or countermotion for summary judgment. (6JA_1365.) In its opposition, Marchai notes that Perez's payments following the 2011 notice of lien totaled only $1060.00 – significantly less than the $1,345.50 that was entitled to superpriority under that lien. (6JA_1373, 1375 (stating payments of $300, $295, $165, and $300 were made following the December 2011 NODA).)

On October 3, 2017, the lower court issued an order on SFR and the Association's motions for summary judgment, denying both motions and *sua sponte* entering summary judgment in favor of Marchai, ostensibly on all claims. (7JA_1483-1497.) The lower court found that (1) a 2008 Notice of Delinquent

Assessment Lien recorded by the Association was the operative foreclosing lien, because the Association did not record a rescission of it when it recorded its 2011 lien – despite there being no legal requirement to do so, and (2) since Perez mad made payments in excess of 9 months' worth of assessments following the 2008 lien, the superpriority lien was discharged. (*Id.*) The lower court applied the wrong evidentiary standard in holding that "[u]pon the close of discovery, SFR and the HOA have not presented any evidence that shows Perez did not pay off the superpriority liens." (7JA_1496.) The court then reached an untenable legal solution, holding that "any payment which is at least equal to the amount incurred in the nine months preceding the notice of delinquent assessment lien is sufficient to satisfy the superpriority lien." (*Id.*) These substantive errors provide separate bases upon which this Court should reverse the judgment of the lower court.

SUMMARY OF ARGUMENT

The grant of summary judgment in favor of Marchai should be reversed because the district court sua sponte granted the judgment without any motion pending and with Marchai claiming genuine issues of material fact remained. While, as set forth below, SFR disagrees such facts are material because of the errors in law which make them immaterial, Machai's admission alone made it inappropriate for the district court to grant summary judgment in favor of Marchai. In fact, the district

court had already determined such questions remained as to Marchai's evidence and Marchai provided no additional evidence in opposition to SFR's second motion for summary judgment. Such sua sponte entry of summary judgment in favor of a non-moving party is disfavored without the proper evidence being taken and without giving notice that the other party need defend itself. Thus, the district court erred in granting summary judgment to Marchai in the first instance, and again when amending the judgment at the time of granting Marchai's judicial foreclosure against the former owner.

Additionally, the district court erred as a matter of law in concluding that a homeowner's partial payment can satisfy the superpriority portion of an association lien. Giving the lender or beneficiary of the deed of trust such a windfall has never been contemplated, either by the UCIOA, the Nevada Legislature, and certainly runs afoul of public policy. And any such conclusion would be erroneous where the facts show that the amount of the partial payment did not satisfy even 9 months of assessments.

Finally, the district court erred in dismissing out of hand SFR's claim of bona fide purchaser, when, as here, Marchai failed to pay the superpriority amount and seeks to rely on actions taken by another to protect the deed of trust. Such a claim must be considered in equity. And as this Court has noted, equity requires

the party seeking such relief to come with clean hand. Marchai cannot meet that standard.

For these reasons, this Court should reverse the grant of summary judgment in favor of Marchai and remand with instruction to enter judgment in favor of SFR.

ARGUMENT

I. STANDARD OF REVIEW

Questions of law are reviewed *de novo* by this Court. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006).

This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law." *Id.*; NRCP 56(c). All evidence and inferences must be viewed in a light most favorable to the non-moving party on a summary judgment motion. *Safeway*, 121 Nev. at 729, 121 P.3d at 1029

II. THE DISTRICT COURT'S ERRED BY GRANTING SUMMARY JUDGMENT IN FAVOR OF MARCHAI *SUA SPONTE*

The lower court erred in impermissibly granting summary judgment in favor of Marchai on all claims when (1) Marchai had not filed a motion for summary

judgment and (2) Marchai produced no new evidence beyond that which was included in its 2016 motion for summary judgment that was denied. This Court has held that "[a]lthough district courts have the inherent power to enter summary judgment sua sponte pursuant to [NRCP] 56, that power is contingent upon giving the losing party notice that it must defend its claim." *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 83, 847 P.2d 731, 735 (1993). This Court further noted that it is "troubling" when a district court grants summary judgment sua sponte without having taken evidence in the form of affidavits or other documents. *Sierra Nev. Stagelines, Inc. v. Rossi*, 111 Nev. 360, 364, 892 P.2d 592, 594–95 (1995). Further, this Court directed that "A district court must not elevate "promptness and efficiency" over fairness and due process by entering summary judgment before claims are properly before it for decision." *Renown Reg'l. Med. v. Second Jud. Dist. Ct.*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014). In *Renown* this Court reiterated "that the defending party must be given notice and an opportunity to defend itself before a court may grant summary judgment sua sponte." *Id.* In *Renown*, the Court reversed a sua sponte issuance of summary judgment on contract claims that were not included in the prevailing party's motion for summary judgment. *Id.*

Here, there was not even a motion for summary judgment by Marchai, or notice of any type that would allow SFR to know that it was required to defend against a non-existent motion for summary judgment. Indeed, a nonmoving party's

requirement to produce evidence of a genuine issue of material fact is only triggered once a motion for summary judgment is filed that is supported as required by NRCP 56; *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713–14, 57 P.3d 82, 87 (2002). Since Marchai never submitted a motion at all, let alone one supported as required by NRCP 56, SFR was not required to do anything to avoid the entry of summary judgment in Marchai's favor. In order for Marchai to obtain summary judgment on all claims, it bore the initial burden of proving its entitlement to summary judgment before the burden shifted to the SFR to respond. *See Cuzze v. Univ. and Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007) (moving party must make initial showing of both an absence of genuinely disputed material facts as well as entitlement to judgment as a matter of law before burden shifts to opposing party).

It is also incomprehensible that Marchai was granted summary judgment on all claims, including its claim of judicial foreclosure, when it produced no evidence - either by motion for summary judgment, or in its opposition - that would allow the court to grant a judicial foreclosure against SFR. In order to judicially foreclose, in the State of Nevada, a beneficiary of a deed of trust must prove, through admissible evidence the following: (1) that the foreclosing party is the present beneficiary of a valid deed of trust; (2) that the foreclosing party is the holder in possession of the note, with the right to collect the funds due to it under the terms of the note; (3) that the borrower is presently in default; and (4) the amount presently owed. See NRS

40.430 and *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 512, 286 P.3d 249, 254 (2012)(stating "The deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment"). Marchai never submitted affirmative evidence that it was the beneficiary of the deed of trust and holder of the note, entitled to enforce the note in a motion against SFR. Nor did Marchai submit any evidence against SFR of Perez's default or a calculation demonstrating the amount Perez owed. That evidence was not submitted until after SFR had filed its notice of appeal, in a motion for default judgment filed by Marchai against Perez and U.S. Bank. (7JA_1593.) Despite the fact that SFR was not a party to the default judgment motion, in ruling on the motion, the lower court *sua sponte* amended or clarified its earlier entry of judgment against SFR, to state that it was granting an order of judicial foreclosure against SFR as well. (7JA_1594.) This caused SFR to amend its notice of appeal to include the default judgment of judicial foreclosure in its appeal. (7JA_1605.) SFR was not provided with notice that a motion for default judgment against other parties could result in an amended or clarified judgment of judicial foreclosure against SFR. Because the lower court entered judgment against SFR *sua sponte* without affording SFR notice, and then later amended or clarified that judgment *sua sponte*, again without notice to SFR, the judgment of the lower court requires reversal.

III. THE 2011 NODA WAS THE OPERATIVE LIEN

The lower court held that the 2008 lien was the operative, foreclosed upon lien triggering a superpriority, because the association had never rescinded the 2008 lien and subsequent notice of default at the time it recorded its most recent NODA in 2011. (7JA_1493-1494.) However, there was no legal requirement for the Association to record any rescissions. The Nevada Legislature was certainly aware that it could create a requirement to record releases of Association liens prior to allowing an Association to record a subsequent lien, and elected not to impose such a requirement for delinquent assessment liens. This is apparent as NRS 107.077 not only requires the prompt recording of a release of a deed of trust once satisfied or otherwise discharged, but also imposes penalties for a beneficiary's failure to do so. The lower court's order impermissibly imposed a recording requirement on the Association that simply did not exist as a precursor to the Association's recording of a new lien. A purchaser, such as SFR, could not have determined that the 2011 NODA was not the operative, foreclosing lien, as nothing that existed in Nevada Law would have allowed a purchaser to arrive at such a conclusion.

This Court has held that providing a notice of delinquent assessment lien constitutes the "action to enforce the lien," which creates a superpriority lien, and the date by which the amount of the 9-month superpriority component is calculated. S*aticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133

Nev., Adv. Op. 3, 388 P.3d 226, 231 (2017); s*ee also* NRS 116.3116(2) (2012) (describing the superpriority component of an HOA's lien as "the assessments for common expenses ... which would have become due in the absence of acceleration *during the 9 months immediately preceding institution of an action to enforce the lien*" (emphasis added).

Here, Marchai, in its opposition, asserted that Perez made payments totaling $1060 following the recording of the December 2011 NODA. (6JA_1373, 1375.) payments of $300, $295, $165, and $300 were made following the December 2011 NODA). At the time of the recording of the 2011 NODA, the Association collected $448.50 assessments quarterly – meaning the total assessments which would have become due during the 9 months immediately preceding the NODA equaled $1,345.50. (2JA_0337.) Here, the payments made by Perez following the recoding of the NODA were insufficient to cover nine months' worth of assessments, and could not, under any circumstances, have extinguished the superpriority component of the lien. Further, each of the four payments made by Perez in 2012 were insufficient to cover Perez's current quarterly assessment obligations, let alone her past due obligations. The decision of the lower court should be reversed.

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IV. THE LOWER COURT APPLIED AN INCORRECT EVIDENTIARY BURDEN AND ERRED IN HOLDING HOMEOWNER PAYMENTS EXTINGUISHED THE SUPERPRIORITY LIEN

The proper foreclosure of an Association lien containing an unsatisfied superpriority portion extinguishes a first deed of trust. *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 743, 334 P.3d 408, 409 (2014). The sale is entitled to a presumption of validity. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. ___, ___,405 P.3d 641, 646 (Nev. 2017), en banc reconsideration denied (Feb. 23, 2018, 2017) (citing NRS 47.250); *see also* NRS 47.250(16)-(18) (stating that there are disputable presumptions "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such a presumption is necessary to perfect the title of such a person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed."). "A presumption not only fixes the burden going forward with evidence, but it also shifts the burden of proof." *Yeager v. Harrah's Club Inc*., 111 Nev. 830, 834, 897 P.2d. 1093, 1095 (1995). "These presumptions impose on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probably than its existence." *Id.* (citing NRS 47.180).

Here, it is undisputed that neither Marchai, nor its predecessors in interest made any payment to satisfy the superpriority portion of the Association's lien. Marchai demonstrated it was aware that it needed to pay of the superpriority portion of the lien, when it contacted Alessi on the eve of the sale, and asked that the sale be halted, so that it could pay off the lien. (6JA_1376.) Rather than pay the money to extinguish the Association's lien, Marchai, aware of both the sale and its failure to pay off the superpriority lien, allowed the property to be sold to an innocent third party – SFR. Marchai then failed to take any action to contest the validity of the sale for nearly three years. (5JA_1099.)

The basis upon which Marchai succeeded in obtaining a judgment that its deed of trust was not extinguished – the post-lien payments made by Perez, was information that neither party possessed at the time of the sale. Moreover, neither party would have been able to obtain the information regarding the payments, as the Fair Debt Collection Practices Act prohibits the disclosure of such information.

No evidence was presented to the lower court that payments made by Perez was intended for or applied to the superpriority portion of the Association's lien. The payments Perez made in a good-faith attempt to keep up with her obligations to the Association share should not inure to the benefit of Marchai, and to the detriment of Perez. This Court should reverse ruling of the lower court on this additional basis.

A. Public Policy Disfavors Allowing Homeowner Payments to Satisfy the Superpriority Portion of an Association's Lien

NRS 116.3116 is silent on who can satisfy the superpriority portion of the lien. Thus, this Court must analyze both Legislative intent and public policy. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (courts look past a statute's plain language when it is ambiguous or silent on the instant issue, and read statutes harmoniously to avoid unreasonable or absurd results); *see also Davenport v. Comstock Hills—Reno*, 118 Nev. 389, 392 n. 4, 46 P.3d 62, 64 n. 4 (2002) ("when the language . . .does not speak to the issue, we construe it according to that which reason and public policy would indicate the legislature intended." (internal citations omitted)). Allowing payments made by a homeowner to their Association extinguish the superpriority portion of the Association's lien would lead to absurd consequences to the detriment of Nevada homeowners, and those that purchase properties at foreclosure. For example, here, since Perez's payments to her Associton allowed Marchai to prevail in the litigation, Perez's payment were the reason Marchai was able to obtain a judgment of attorney's fees pursuant to EDCR 2.20(3) against Perez in the amount of $127,142.50. Perez could not have foreseen that her partial payments would expose her to such a significant judgment seven years later. Such results defy public policy.

1. The Intent of the Superpriority Lien is Not Served by Allowing Homeowner Payments to Satisfy the Lien

The superpriority portion of an association lien 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*, 130 Nev. at ___, 334 P.3d at 412 (quoting 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2).

Extinguishing a deed of trust is a powerful tool. Without it, holders of a first deed of trust have no incentive to ever pay associations their borrowers' overdue assessments. The very goal in creating the superpriority lien was to bring the bank to the table, so "the first mortgage lender would promptly institute foreclosure proceedings and pay the prior six months of unpaid assessments to the association to satisfy the limited priority lien—thus permitting the mortgage lender to preserve its first lien position and deliver clear title in its foreclosure sale." *See* Report of the Joint Editorial Board for Uniform Real Property Acts, The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act at p. 4 (June 1, 2013). Put simply, get a paying owner in the property.

First deed of trust holders are disincentivized to protect a deed of trust if a homeowner's partial payment can satisfy the superpriority amount. The banks sit back, wait for a foreclosure sale, then challenge the sale years later in hopes that the

association tried to work out a payment plan with the homeowner or the homeowner made some payments which the banks can later claim satisfied their obligation to pay off the superpriority amount. In other words, be entitled to what is a true windfall. "[W]indfall. An **unanticipated** benefit, usu. in the form of a profit, and **not caused** by the recipient." Blacks Law Dictionary at 1835 (10th ed. 2014) (emphasis added).[1]

In the meantime, the foreclosure sale purchaser has rehabbed the property, paid taxes, insurance, assessments, utilities and other expenses on the property. That is what happened in *Golden Hill*.[2] The bank in *Golden Hill* did nothing to protect its deed of trust. Only after the fact, in litigation—when constitutional, sales price, and similar arguments failed—did the bank learn of the borrower's partial payments and asserted those payments absolved the bank of its responsibility to pay what the Nevada Legislature deemed was the bank's fair share. That is not how the statutes were intended to work. If that were the case, the Legislature would not have adopted a non-judicial foreclosure method of enforcing the lien. Property interests aren't meant to be determined *post-hoc,* through litigation and discovery – placing an

[1] This is in contrast to SFR, which **invested money** with the **anticipated benefit** that it was purchasing the Property at auction free and clear of the first deed of trust.

[2] *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank*, 408 P.3d 558 (Nev. Dec. 22, 2017) (unpublished disposition).

extreme burden on judicial resources. The goal of recorded title is to put the world on notice of the property interest that may be transferred by any form of sale. As this Court recently reiterated "[t]he very purpose of recording statutes is to impart notice to a subsequent purchaser." *SFR Investments Pool 1, LLC v. First Horizon Home Loans, a Division of First Tennessee Bank, N.A.*, 134 Adv. Op. 4, 409 p.3d 891, 893 (2018).

Allowing homeowner payments to discharge a superpriority lien would also cause Associations to decline to enter into payment plans to help residents save their homes from foreclosure, as doing so would jeopardize its superpriority status and subject the Association to the risk of post-sale litigation. An Association would be required to re-start the foreclosure process after accepting any payments from the homeowner to ensure it maintained its superpriority status, incurring further collection costs, and placing both the Association and homeowner deeper in debt.

The Legislature did not intend that banks would sit idly by, allowing properties to proceed to foreclosure to unwitting third parties, and by lucky coincidence, find their presumptively extinguished deed of trust somehow survived the foreclosure sale through post-sale litigation. The only way for the statute to properly work and meet the drafters' and Legislature's intent, is to make the bank the only party that can satisfy the superpriority amount.

2. ***The 2015 Amendments to 116 Evince Legislative Intent that Only First Secureds May Pay the Superpriority Portion***

In 2015, the Legislature amended NRS 116.3116 *et seq*. Currently, the notice of default must state that "if **the holder of the first security interest** on the unit **does not satisfy** the amount of the association's lien that is prior to the first security interest . . . the association may foreclosure its lien by sale and that the sale may extinguish the first security interest as to the unit[.]" NRS 116.31162(1)(b)(3)(I) (emphasis added). Similarly, the statutes allow only the holder of the first security interest to pay only the superpriority portion up to five days before a sale and protect the deed of trust so long as it records a satisfaction of that portion of the lien is recorded at least two days before the sale. NRS 116.31162(1)(b)(3)(II). The statute does not give the unit owner such authority. The homeowner's partial payments are not, and have never been, intended to satisfy the superpriority portion of the lien. That responsibility and authority belongs only to the first secured.

This amendment also demonstrates that recording the satisfaction of the superpriority portion of the lien has always been required – not because the amended statute says so, but because under Nevada law, as discussed above, unrecorded assignments and lien satisfactions are not effective against a subsequent purchaser for value without notice. Following the clarifying amendments, one need no longer

look to NRS 111 or 106 for guidance. The statutes simply set forth what has always been required by law.

3. Nevada Homeowners Would Be Harmed by Allowing Banks to Rely on Homeowner Payments to Associations

When the State of Nevada became ground zero of the foreclosure crisis, the Legislature acted quickly to shield struggling Nevadans from lifelong financial ruin. In 2009, Nevada enacted an anti-deficiency statute to protect foreclosed upon homeowners from being subjected to judgments they would never be able to pay. The statute codified at NRS 40.455(3) states:

> If the judgment creditor or the beneficiary of the deed of trust is a financial institution, the court may not award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust, even if there is a deficiency of the proceeds of the sale and a balance remaining due the judgment creditor or beneficiary of the deed of trust, if:
>
> (a) The real property is a single-family dwelling and the debtor or grantor was the owner of the real property at the time of the foreclosure sale;
>
> (b) The debtor or grantor used the amount for which the real property was secured by the mortgage or deed of trust to purchase the real property;
>
> (c) The debtor or grantor continuously occupied the real property as the debtor's or grantor's principal residence after securing the mortgage or deed of trust; and
>
> (d) The debtor or grantor did not refinance the mortgage or deed of trust after securing it.

In short, where borrower obtained a loan to purchase their home, and that loan was later foreclosed upon, lenders could not pursue monetary judgments against the borrower when the proceeds of the foreclosure were insufficient to satisfy what was owed to the bank. With many properties underwater, the anti-deficiency statute has saved thousands of Nevadans from judgments that would take a lifetime to pay and gave those who lost their homes a chance at a fresh start.

If a homeowner making payments to their Association in an effort to save their home was, unbeknownst to them, paying off a superpriority lien, the homeowner would be robbed of the protections the Legislature intended to afford them by enacting 40.455(3). Once the deed of trust was found to be rescued by the homeowner's partial payments, the lender would then proceed to foreclosure. Not only would a second foreclosure have deleterious effects on the homeowner's credit, because the former homeowner would no longer be the owner of record at the time of the second foreclosure, they would no longer satisfy requirement (a) of NRS 40.455(3), and would be subject to a deficiency judgment, where the Legislature intended them to be protected.

Even homeowners who would not have been eligible for deficiency protection by 40.455(3) (because of refinance or other disqualification) would be harmed by allowing their payments to revive a first deed of trust. If the deed of trust were extinguished by the Association's foreclosure, the 6-month period for the lender to

file for a deficiency judgment would have long since expired. NRS 40.4639. If banks were allowed to rely on the homeowner's payments to satisfy their superpriority obligations, the homeowner would unknowingly expose themselves to a second foreclosure by the first deed of trust holder, and a second 6-month time period in which their bank could pursue a deficiency judgment. Assemblyman Marcus Conklin testified regarding the intent behind the 6-month limitation imposed by NRS 40.4639:

> [Banks] are only going to win a deficiency judgment if the person has the assets to pay out on a deficiency. It is unlikely that the person's financial situation will change enough in six months for him or her to have the assets to pay a deficiency. On the other hand, the junior lienholder has six years to commence this action. There is no benefit for the junior lienholder to help the homeowner get out from under the loan. All the junior lienholder needs to do is wait for the economic situation to get better and file a deficiency judgment at that time.

See Hearing on A.B. 273 Before the Senate Comm. on Judicary at p.3, 76th Leg. (Nev., May 3, 2011.).[3] [4]. Many of the properties presently in litigation as a result of Association foreclosures were foreclosed upon 6 or 7 years ago. The property at issue in this case was foreclosed upon over 5 years ago. Ms. Perez has likely moved

[3] Available at https://www.leg.state.nv.us/Session/76th2011/Minutes/Senate/JUD/Final/1043.pdf

[4] On appeal, this Court may take judicial notice of legislative histories. *Fierle v. Perez*, 125 Nev. 728, 737 n.6, 219 P.3d 906, 912 n.6 (2009), overruled on other grounds by *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013).

on with her life and hopefully improved her financial situation over the past 5 years. Allowing payments Perez made to her Association in 2011 to subject her to a deficiency action from her lender in 2019 or 2020 would punish Perez for her good-faith attempt to meet her obligations to the Association while she struggled financially. It would expose Perez them to financial ruin a second time.[5]

4. If Banks are Permitted to Rely on Homeowner Payments, Purchasers Would be Unable to Ascertain What They Were Buying at Foreclosures

Banks, and in this case Marchai, want to be rescued from their own failure to act by homeowner payments that the banks (and the property purchasers) did not know existed until post-sale litigation. Not only is such reliance inequitable, it would act as a repeal of the Legislature's allowance of a nonjudicial foreclosure process under NRS 116, as purchasers would be unable to ascertain what they were bidding on, requiring post sale litigation akin to a game show where the foreclosure sale purchaser learns "what's behind door number one" – what property rights it purchased at the foreclosure sale.

[5] Former homeowners would also be divested of their right to participate in foreclosure mediation to attempt to mitigate the effects of a second foreclosure on their credit or financial recovery. NRS 107.086 (requiring properties to be owner occupied to enroll in the mediation program). This would allow lenders to fast-track second foreclosures at the expense of the very borrowers that saved the lender's deed of trust from extinguishment.

Assuming, *arguendo*, that a bank could utilize homeowner payments to fulfill its superpriority payment to protect its deed of trust, bidders attending foreclosure sales would be required to contact the Association collection agents prior to the sale to request information regarding any payments made by the homeowners subsequent to the recording of a NODA. Obtaining this crucial information would be the only way the prospective purchaser could ascertain whether they were bidding on a superpriority lien foreclosure, or a subpriority lien foreclosure. However, the Association's collection agent is barred by federal law from disclosing this account information to third parties. *See* 15 U.S.C. § 1692c(b).

The Congressional intent behind enacting the Fair Debt Collection Practices Act ("FDCPA") was to eliminate unfair debt-collection practices such as embarrassing communications wherein information regarding a debt is communicated to third parties, which might be the debtor's friends, family, employer, or neighbor. *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1024–25 (9th Cir. 2012). The FDCPA, for good reason, prohibits an Association's collection agent from disclosing the status of homeowner accounts and payments to 30 or 40 prospective bidders at a public auction. Additionally, no evidence was submitted to show that there was any policy or rule setting forth how partial payments are to be applied to past-due debts. Even the most diligent of prospective bidders would be unable to ascertain the property interest being sold at Association

foreclosure sales, as the bidders could not learn of the payments, nor how potential payments might be applied. Such vast uncertainty in title was not the intent of Nevada Legislators, and effectively does away with the possibility of utilizing the non-judicial foreclosure process that was specifically provided for by NRS 116. Properties purchased at NRS 116 foreclosures would be rendered unalienable in the absence of post-foreclosure litigation.

Peres, while struggling to make ends meet, did more to meet her obligations to her Association than Marchai and its predecessors, who had vast resources available to pay the *de minimis* portion of the Association lien entitled to superpriority. This Court should not punish Perez and other similarly-situated Nevadans for their efforts by allowing their payments to revive a deed of trust that should have been extinguished.

B. Marchai Failed to Demonstrate Perez's Payments Were Applied to Superpriority Amounts

Even assuming Marchai could rely on Perez's payments to protect its deed of trust from extinguishment, which they cannot, Marchai failed to demonstrate that the Perez's payments were applied to the superpriority portion of the Association's lien, and the court improperly ruled that this information was irrelevant, providing a further basis for reversal. (7JA_1496.)

In the unpublished *Golden Hill* Order, this Court observed that "[t]he record contains undisputed evidence that the former homeowner made payments sufficient to satisfy the superpriority component of the HOA's lien **and that the HOA applied those payments to the superpriority component** of the former homeowner's outstanding balance…" *Golden Hill*, 408 P.3d 558 (emphasis added). Thus, even if banks are permitted to rely upon the payments of homeowners, the *Golden Hill* Order also requires that those banks demonstrate the payments were *actually applied* to the superpriority component. Here, Marchai has not and cannot demonstrate that the payments were applied to the superpriority amounts.

First, there was no evidence submitted demonstrating how the Association actually applied the payments received from Perez, other than simply as a reduction of the total amount owed by Perez. (*See generally*, 2JA_0272-4JA_0816; see also 6JA_1365-1433.) There was nothing submitted to demonstrate any rule or policy that would require the Association to apply partial payments to delinquent assessments first, before late fees, interest, costs, violations, or any other amounts that comprise the Association's lien. (*Id.*)

Indeed, even with the benefit of reviewing the entire Alessi foreclosure file, the entire Association account, and lengthy discovery, there is no evidence that demonstrates how Perez's partial payments were applied. The payments were merely applied to the account to reduce the debt in generally, and not applied to any

specific assessments or other charges. (2JA_0377.) If the Association had accepted payment from Marchai or one of its predecessor banks prior to the foreclosure sale, those payments would, without doubt, have been applied to the superpriority lien, as that is the only portion of the lien a bank is obligated to pay. However, a homeowner is obligated to pay the entire amount of an Association's lien. For that reason, *Golden Hill* did not hold that *any* payment made by a homeowner in excess of the superpriority amount could discharge a bank's obligations. *Golden Hill* narrowly held that only a payment of sufficient amount that was actually applied to the superpriority portion of the lien could discharge the bank's obligations. *Golden Hill*, 408 P.3d 558. The *Golden Hill* ruling essentially abrogates the ruling of the lower court in this case, that found that payment intent and payment application were irrelevant considerations. (7JA_1496.)

Finally, the lower court erred in granting judgment in favor of Marchai where Marchai, in it opposition (as it did not file a motion for summary judgment), relied on the same evidence from its 2016 motion for summary judgment that the lower court found was insufficient to demonstrate an absence of issues of material fact. (6JA_1365-1432.) Marchai submitted no new evidence with respect to its homeowner payment argument. (*Id.*) Indeed, the only new evidence submitted by Marchai in 2017 was a copy of an initial expert disclosure including a retroactive appraisal of the property, which did not factor into the lower court's entry of

judgment in favor of Marchai. (*Id.*) Evidence that was insufficient to resolve material issues of fact in 2016 is insufficient in 2017.

V. THE LOWER COURT ERRED IN HOLDING SFR WAS NOT A BONA FIDE PURCHASER

This Court recognized the importance of a bona fide purchaser ("BFP") and instructed the district courts to give it full consideration when it stated:

> When sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities…This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief.

Shadow Wood HOA v. N.Y. Cmty. Bancorp, 132 Nev. ___, ___, 366 P.3d 1105, 1114 (2016), *citing Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966) ("Equitable relief will not be granted to the possible detriment of innocent third parties."); *In re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003) ("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 56 Cal. Rptr. 195, 199 (Ct. App. 1967) ("[E]quitable relief should not be granted where it would work a gross injustice upon innocent third parties.")

This Court further stated that "[c]onsideration of harm to potentially innocent third parties is especially pertinent here where [a party] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as seeking

a temporary restraining order and preliminary injunction and filing a *lis pendens* on the property." *Shadow Wood*, 366 P.3d at 1114 fn. 7 citing Cf. Barkley's Appeal. Bentley's Estate, 2 Monag. 274, 277 (Pa. 1888) ("in the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

In other words, when a *bona fide* purchaser has no notice of pre-sale issues, such as the partial payments made by Perez that, years later, Marchai would attempt to rely on, equity cannot be granted where the party seeking to unwind the effects was in a position to seek relief earlier and prevent anyone from becoming a *bona fide* purchaser.

In emphasizing "the legal remedies available to prevent the property from being sold to a third party," this Court placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status. *See First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 71 Cal. Rptr. 2d 295 (Cal.Ct.App. 1998) If that party's inaction allows a purchaser to become a BFP, then equity cannot be granted to the detriment of the innocent third party. Put another way, equitable relief cannot be granted at the expense of a BFP.

This seemingly harsh result is reinforced by the fact that not even a due process violation is sufficient to overcome an individual's status as a BFP. *Swartz v.*

Adams, 93 Nev. 240, 245–46, 563 P.2d 74, 77 (1977) (finding that where notice of sale was not given to owners, property still could not be returned to the owners because the property was purchased by a BFP). This Court remanded *Swartz* to allow the owners to seek compensatory relief against the person who initiated the sale rather than harm an innocent third party. *Id.*

Here, Marchai and its predecessors had numerous options at their disposal to prevent SFR from becoming a BFP but elected to take no action. SFR undeniably paid valuable consideration for the property, and without knowledge of any pre-sale activity between Marchai and the Association or Perez and the Association. (6JA_1264-1265.) Even considering the factors outlined in the *Shadow Wood* opinion:

(1) The public records showed only (a) that a deed of trust was recorded after the CC&Rs; (b) that the homeowner was delinquent and defaulted on Association assessments; and (c) that the Association was going to sell the Property at a publicly held auction.

(2) Marchai's predecessors received all statutorily required notices but failed to adequately protect its interest.

(3) Had Marchai promptly recorded its assignment of deed of trust, Marchai would have been entitled to receive the recorded Notice of

Foreclosure Sale. Instead, Marchai waited 5 months to record its interest in the deed of trust.

(4) Marchai, unbeknownst to SFR, contacted the Association on the eve of foreclosure sale and asked for the sale to be halted. Marchai could have paid the lien to halt the sale, but chose not to, and chose to take no further action to protect its deed of trust.

(5) Marchai could have paid the super-priority portion of the Association lien. They did not.

(6) Marchai could have shown up at the public auction and placed the highest bid for the Property. They did not.

(7) Marchai could have immediately filed a complaint and recorded a *lis pendens* on the property prior to the sale. They did not.

There was no evidence presented that would lead even an experienced purchaser to a duty to inquire as to any irregularities as to this sale. Indeed, had SFR made any inquiry, it would have only learned that the foreclosure notices were provided in accordance with the law, and Marchai and its predecessors all failed to tender any payment to the Association. SFR's witness, Chris Hardin, provided unrefuted testimony that SFR had no reason to doubt the recitals contained in the trustee's deed, and that SFR had no relationship with the Association or Alessi, other than as a bidder at foreclosure sales, and a present owner of property within the

Association (6JA_1264-1265.) Mr. Hardin also confirmed that SFR had no knowledge of any pre-sale dispute between the Association and Marchai. (*Id.*) The lower court found that SFR could not establish, as a matter of law, that it was a bona fide purchaser, based on its 2016 denial of summary judgment, which held that, because multiple notices of delinquency, default, and sale were recorded, the court could not rule on whether or not a reasonable purchaser would be "put on notice" at the summary judgment stage. (5JA_1041.) Though the order does not describe what SFR might have been put on notice of by the multiple foreclosure notices, inquiry notice only charges SFR with notice of what a reasonable investigation would reveal. *Berge v. Fredericks*, 95 Nev. 183, 189, 591 P.2d 246, 249 (1979). Since the FDCPA prohibits the disclosure of the payments made by Perez, as well as any information related to Perez's account (as discussed in greater detail *supra*), SFR cannot be charged with knowledge of the payments. SFR could only have learned that Marchai knew about the impending sale and failed to make any payment to protect their deed of trust. "Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." *Shadow Wood*, 132 Nev. at 66, 366 P.3d at 1116. Marchai knew of the impending foreclosure sale and knew of its obligation to pay the superpriority portion of the lien to protect its interest. Marchai did nothing.

Equity should not intervene to reward Marchai for its inaction while prejudicing SFR, which purchased the property in good faith. The lower court erred in entering judgment against SFR when SFR demonstrated it was a BFP

CONCLUSION

Marchai allowed its deed of trust to be extinguished by failing to take action to protect it, despite actual and constructive knowledge that its security interest was at risk of extinguishment. As a result of the lower court's impermissible *sua sponte* grant of summary judgment in favor of Marchai, SFR's interest in the property has been rendered valueless, and Cristela Perez will be subjected to a second foreclosure, a judgment for attorneys fees totaling over $127,000 and a potential deficiency judgment following Marchai's foreclosure – all as a result of a few good-faith payments she made to her Association, each of which was insufficient to cover her accruing assessments, let alone reduce her past-due assessments. Such a result is inequitable and contrary to public policy and the reliability of recorded title and non-judicial foreclosures in the State of Nevada.

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This Court should reverse the judgment of the lower court, with instructions to enter judgment in favor of SFR.

DATED this 30th day of November 2018.

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CERTIFICATE OF COMPLIANCE

1. I 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7)(A)(ii) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and is less than 14,000 words (8394 words on 46 pages).
3. I hereby certify that I have read this appellate 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 brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), 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.

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

Dated this 30th day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30th day of November 2018. Electronic service of the foregoing **Amended Appellant's Opening Brief and Volumes 1 through 7 of Joint Appendix** shall be made in accordance with the Master Service List as follows:

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Case Category Civil Appeal
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Jacqueline Gilbert
David Merrill

Dated this 30th day of November 2018.

/s/Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON