IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Appellant, vs. MARCHAI, B.T., a Nevada business trust, Respondent.	Supreme Court Case No. 74416 District Court Case No. A-15-689461-C, Consolidated with A-16-742327-C

APPEAL
From the Eighth Judicial District Court
The Honorable Linda Marie Bell

Respondent's Answering Brief

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NRAP 26.1 Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities 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.

Marchai, B.T., is a Nevada business trust that has no parent corporation and no publicly-traded company owns 10% or more of an interest in Marchai.

Benjamin D. Petiprin of the Law Offices of Les Zieve initially represented Marchai in the district court. David J. Merrill of David J. Merrill, P.C. took over the representation in the district court and is representing Marchai in this appeal.

Dated this 30th day of January 2019.

David J. Merrill, P.C.

By: */s/ David J. Merrill*
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Statement of the Issues

Whether the district court properly granted summary judgment for the beneficiary of a first deed of trust and against the third-party purchaser when the undisputed evidence demonstrated that the homeowner paid far more than the superpriority portion of a homeowners association's lien and, as a matter of the common law, the association applied the homeowner's payments to the superpriority portion of the lien.

Statement of the Case

In August 2013, Wyeth Ranch Community Association foreclosed upon an association lien. (2JA476.) SFR Investments Pool 1, LLC submitted the winning bid of $21,000 for a property with a fair market value of $360,000. (2JA476, 6JA1402.) In September 2013, Marchai, B.T., the beneficiary of the first deed of trust recorded against the property, sued for judicial foreclosure. (1JA3–67.)

In 2016, Marchai and SFR both submitted extensively-briefed, competing motions for summary judgment. (1JA111–5JA992.) Marchai sought summary judgment on (among other things) its claim for judicial

foreclosure. (1JA144–48.) Following a hearing, the district court denied the motions, concluding that a genuine issue of material fact existed. (5JA1018–42.)

In August 2016, Marchai filed a new complaint against SFR and added Wyeth Ranch as a party. (5JA1101–14.) The district court consolidated both cases. (5JA1133–34.)

Despite the district court's prior ruling that genuine issues of material fact precluded summary judgment, in 2017, SFR again moved for summary judgment, which Marchai opposed.[1] (5JA1165–6JA1276, 6JA1366–1433.) The district court reconsidered its prior decision. (7JA1484–98.) The district court now agreed with SFR that no genuine issues of material fact existed. (7JA1497.) But it concluded that SFR could not prevail on its quiet title claim because the prior homeowner's payments had satisfied the superpriority portion of Wyeth Ranch's lien. (7JA1494–96.) Hence, the district court denied SFR's motion for

[1] Wyeth Ranch also filed a motion for summary judgment, which the district court denied. (6JA1278–1364.) But Wyeth Ranch did not appeal the district court's decision.

summary judgment. (7JA 1497.) And it granted summary judgment for Marchai. (7JA1497.)

To obtain a final judgment in the district court, Marchai applied for Default Judgment *and* Entry of Final Judgment on Order Shortening Time. (RA1–19.) The application sought the entry of a default judgment against Cristela Perez, the former homeowner, and U.S. Bank, N.A., the holder of the second deed of trust. (RA1.) It also sought the entry of a final judgment—which included a judgment for Marchai on its claim for judicial foreclosure—consistent with the district court's prior decision and order that granted summary judgment for Marchai. (*Id.*) Marchai attached a draft of the proposed judgment to the motion. (RA16–19.) *SFR did not oppose the motion*. Hence, the district court entered judgment for Marchai. (7JA1593–96.)

The judgment granted Marchai the right to judicial foreclosure, concluded that Perez owed Marchai $535,178.50, which may be satisfied by the foreclosure, and that SFR's interest in the property is subordinate to Marchai's interest. (*Id.*)

Factual Background

A. In 2004, Cristela Perez purchased the property as a second home by obtaining two loans from Countrywide Home Loans, both of which Countrywide secured by recording deeds of trust.

In 2004, Cristela Perez, a resident of California, purchased the property at 7119 Wolf Rivers Avenue, Las Vegas, Nevada 89131 for $457,545.00. (2JA279, 299–302, 304.) Title in the property, which is in the Wyeth Ranch community, vested in Perez, a married woman as her sole and separate property. (2JA304.) Perez purchased the property as a second home. (2JA309–35.) To purchase the property, Perez entered into two loans with Countrywide Home Loans, Inc.—one for $366,000.00 and a second for $68,631.00—both of which Countrywide secured by recording deeds of trust. (2JA309–35, 337–48.)

B. In October 2005, Perez refinanced her two loans by obtaining one loan from CMG Mortgage and in January 2006, she obtained a home equity line of credit from U.S. Bank.

In October 2005, Perez refinanced her loans with Countrywide by entering into one InterestFirst Adjustable Rate Note with CMG Mortgage, Inc. for $442,000. (2JA478, 2JA482–3JA490.) CMG Mortgage secured the note by recording a deed of trust against the property.

(2JA350–71.) After the refinancing of the loans Countrywide reconveyed its deeds of trust. (2JA280, 283–84, 86–87.)

In April 2006, U.S. Bank, N.A. recorded a deed of trust against the Property to secure a home equity line of credit that U.S. Bank extended to Perez in January 2006. (3JA527–34.)

C. In September 2008, Wyeth Ranch Homeowners Association commenced non-judicial foreclosure proceedings against Perez due to the non-payment of her assessments.

The Wyeth Ranch Homeowners Association collected its association dues on the first day of each quarter. (2JA373.) In 2008, Wyeth Ranch collected $420.00 per quarter—$140.00 per month—for its association dues. (*Id.*) Perez failed to timely pay dues to Wyeth Ranch on January 1, April 1, or July 1, 2008.[2] (*Id.*) Hence, on September 30, 2008, Alessi & Koenig, LLC, an agent hired by Wyeth Ranch to collect assessments, instituted an action to foreclose its lien against Perez by sending her a Notice of Delinquent Assessment Lien. (2JA379–80.) According to the notice, Perez owed Wyeth Ranch $1,425.17, which included collection costs, attorney's fees, late fees, service charges, and

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[2] Perez ultimately made a payment of $507.60 on April 16, 2008. (2JA375.)

interest. (*Id.*) Alessi recorded the notice on October 8, 2008. (2JA280, 289.)

On January 5, 2009, Alessi recorded a Notice of Default and Election to Sell Under Homeowners Association Lien on behalf of Wyeth Ranch. (2JA382.) According to the notice of default, Perez owed Wyeth Ranch $3,096.46 as of December 17, 2008. (*Id.*)

On January 14, 2010, Alessi recorded a Notice of Trustee's Sale. (2JA389.) According to the notice, Perez owed Wyeth Ranch $6,964.25 for unpaid assessments. (*Id.*)

D. After it instituted an action to enforce its lien, Wyeth Ranch accepted payments from Perez.

Despite instituting foreclosure proceedings in 2008 that included recording a notice of delinquent assessment, notice of default, and notice of trustee's sale, by January 2010, Wyeth Ranch had still not foreclosed. Instead, Wyeth Ranch accepted payments from Perez.

For example, in February 2010, Alessi sent a demand to Perez in which Alessi claimed that Perez owed Wyeth Ranch $6,977.61. (2JA395.) In response to the demand, Perez paid Wyeth Ranch $900. (2JA397.)

Following its receipt of the $900 payment, Alessi sent Perez a letter proposing a payment plan. (2JA399–400.) Perez did not make the payments proposed by the plan, but she did continue to make payments. For example, in May 2010, Perez made a $300 payment to Wyeth Ranch for past due assessments. (2JA402.)

Despite its receipt of the payments, in July 2010 Wyeth Ranch continued with its foreclosure. Alessi sent Perez a letter that demanded $19,071.21. (2JA404.) In response, Perez made another $805 in assessment payments between August 2010 and March 2011. For example, in August 2010, Perez paid Wyeth Ranch $250. (2JA406.) Perez followed her August payment with a payment of $220 in September 2010. (2JA408.) In November 2010, Perez paid Wyeth Ranch another $175. (2JA410.) Finally, in March 2011, Perez paid $160 to Wyeth Ranch. (2JA412.)

In March 2011, Alessi rescinded the January 14 notice of sale. (2JA280, 291.) But that same month, Alessi recorded another notice of sale. (2JA281, 293.)

In July 2011, Alessi sent Perez a letter notifying her that because she did not agree to or comply with the proposed payment plan Alessi

would continue the foreclosure. (2JA420.) In response to the letter, Perez paid Wyeth Ranch $165. (2JA422.)

On October 1, 2011, Perez defaulted under her loan from CMG Mortgage. (2JA479, 3JA520–22.)

E. In 2011, Wyeth Ranch recorded new notices of lien and default, but rescinded none of the prior notices and continued to accept payments from Perez.

In November 2011, Alessi sent Perez a second notice of lien. (2JA424–25.) The notice claims a total amount due of $9,296.56. (*Id.*) Alessi recorded the notice but did not release or rescind the notice of lien it recorded in 2008. (2JA281, 295–97, 427.)

In February 2012, Alessi recorded a second notice of default but again failed to release or rescind the notice of default it recorded in 2009. (2JA295–97, 431–33.) According to the notice, Perez owed Wyeth Ranch $10,625.06 in unpaid assessments. (2JA431.) And the notice states that Perez first defaulted on her obligations to Wyeth Ranch in January 2008. (*Id.*) In response to the notice of default, in March 2012, Perez paid Wyeth Ranch $300. (2JA437.) And in May 2012, Perez paid Wyeth Ranch $295. (2JA439.)

F. In May 2012, CMG Mortgage assigned its interest in its deed of trust to CitiMortgage and endorsed the note payable to the order of CitiMortgage.

On May 25, 2012, Mortgage Electronic Registration Systems, Inc., as the nominee for CMG Mortgage, Inc., assigned CMG Mortgage's deed of trust to CitiMortgage, Inc. (2JA478, 3JA515–16.) Likewise, CMG Mortgage endorsed the note payable to the order of CitiMortgage. (2JA486.) On June 5, 2012, CitiMortgage recorded a Corporate Assignment of Deed of Trust. (3JA515–16.)

G. In July 2012, Wyeth Ranch continued with its foreclosure, and Perez continued to make payments.

In July 2012, Alessi sent Perez a letter demanding $11,371.07. (2JA441.) In response to the letter, Perez paid Wyeth Ranch $165. (2JA443.)

H. In July 2012, CitiMortgage assigned its interest in the deed of trust, and endorsed the note, to U.S. Bank.

On July 26, 2012, CitiMortgage assigned the deed of trust it obtained from CMG Mortgage to U.S. Bank, as trustee for Stanwich Mortgage Loan Trust, Series 2012-6. (2JA445–46.) CitiMortgage also signed an allonge, endorsing the note payable to U.S. Bank. (3JA489.) On July 26, 2012, U.S. Bank recorded the Assignment of Mortgage with

the Clark County Recorder. (2JA445–46.) On October 3, 2012, Carrington Mortgage Services, LLC, U.S. Bank's loan servicer, sent Perez a Notice of Intent to Foreclose. (3JA520–22.) According to the notice, Perez defaulted on the loan on October 1, 2011, and owed U.S. Bank $36,281.60. (*Id.*)

I. In October 2012, Alessi recorded yet another notice of sale and Perez made another payment.

In October 2012, Alessi prepared yet another notice of sale. (2JA448.) According to the notice, Perez owed $11,656.07. (*Id.*) Alessi recorded the notice of sale on October 31 but did not rescind the notice of sale it recorded on March 29, 2011. (2JA295–97, 458.)

In response to the notice, Perez made a $300 payment. (2JA460.)

J. In March 2013, U.S. Bank assigned its interest in the deed of trust to Marchai.

On March 12, 2013, U.S. Bank assigned its interest in the deed of trust to Marchai, B.T., a Nevada business trust. (2JA479, 3JA524–25.) Contemporaneously with the assignment, U.S. Bank executed an allonge endorsing the note to Marchai. (3JA490.) Even though Marchai acquired its interest in the note and deed of trust in March 2013, U.S. Bank did not transfer the servicing information for the loan to

Marchai's loan servicer until July 2013. (4JA839.) U.S. Bank did not inform Marchai of Wyeth Ranch's lien or its efforts to foreclose upon that lien. (*Id.*)

K. In July 2013, Alessi prepared *yet another* notice of sale.

In July 2013, Alessi executed yet another notice of sale. (2JA543.) The notice claimed that Perez owed $14,090.80 in unpaid assessments. (*Id.*) On July 31, 2013, Alessi recorded the notice but again failed to rescind the notice of sale recorded in October 2012. (2JA471.)

L. Marchai's servicer learned about Wyeth Ranch's sale on August 27, 2013 (the day before the scheduled sale) and immediately tried to postpone the sale so it could pay the lien.

Because of U.S. Bank's delay in sending the loan servicing file, the assignment of the deed of trust from U.S. Bank to Marchai did not get recorded until August 12, 2013. (3JA524–25, 4JA839.) Marchai did not know of Wyeth Ranch's lien or its efforts to foreclose upon that lien until after Wyeth Ranch's foreclosure. (4JA842.) Instead, Peak Loan Servicing, Marchai's servicer, learned about the trustee's sale late in the afternoon on August 27, 2013, less than twenty-four hours before the scheduled foreclosure. (4JA839.) Upon learning of the sale, Peak

contacted Alessi and asked it to postpone the sale so it could pay the lien. (*Id.*)

On the morning of the day of the sale, Naomi Eden at Alessi & Koenig sent an e-mail to Brittney O'Connor, the accounting clerk at Complete Association Management Company, who manages Wyeth Ranch's accounts, in which she notes that "[t]he mortgage company is asking for an extension so they can get it paid off." (4JA844, 847–51.) Eden asked O'Connor if Alessi could postpone the sale. (4JA850.) O'Connor responded to the e-mail asking Eden how many oral postponements of the sale Wyeth Ranch could still make. (*Id.*) Eden advised O'Connor that Wyeth Ranch still had three postponements left. (4JA849.)

O'Connor then sent an e-mail to Michele Weaver, a manager at CAMCO, in which she communicated that Wyeth Ranch had a foreclosure sale set for that morning at 10:00 am, that Wyeth Ranch could still postpone the sale three times, and that "[t]he mortgage company would like an extension so they can pay off the account." (4JA849.) In her e-mail to Weaver, O'Connor recognized the reasonableness of Marchai's request as she noted that she "will use all

postponements then go to sale on the 3rd sale date set," "[u]nless otherwise directed by the board." (*Id.*) According to the last e-mail in the chain, Weaver "received confirmation" that Wyeth Ranch did "NOT want to postpone." (*Id.*) Thus, Wyeth Ranch refused to postpone the sale so Marchai could pay off the account and proceeded with the foreclosure.

M. On August 28, 2013, Alessi conducted the foreclosure sale, at which time SFR Investments Pool 1, LLC submitted the winning bid of $21,000.

On August 28, 2013, Alessi conducted a foreclosure sale. (2JA476.) At the sale, SFR submitted the winning bid of $21,000. (*Id.*) According to Alessi, Perez owed Wyeth Ranch $14,677.80 in assessments at the time of the foreclosure. (*Id.*) The Declaration of Value asserts that the Property has a "Transfer Tax Value" of $307,403. (2JA475.) On the day of the sale, the property had a fair market value of $360,000. (6JA1402.) Hence, SFR bid a mere 5.8% of the fair market value of the property. (*Compare* 2JA476 *with* 6JA1402.) Alessi recorded the Trustee's Deed Upon Sale on September 9, 2013. (2JA476.)

Perez failed to pay the amounts due and owing on the note. (2JA479, RA14.) As of January 31, 2018, Perez owed Marchai

$534,939.55; $430,113.48 for the unpaid principal balance of the note, $96,327.50 in interest, and $8,498.57 in late charges. (RA14; *see also* 2JA479–80.)

Summary of the Argument

The district court properly granted summary judgment for Marchai.

Wyeth Ranch instituted an action to enforce its lien on September 30, 2008. Perez owed Wyeth Ranch $1,425.17. The superpriority portion of the lien totaled $840; the past due April 1 and July 1, 2008 association dues. But after Wyeth Ranch instituted an action to enforce its lien, Perez paid Wyeth Ranch $3,230. Wyeth Ranch did not maintain separate superpriority and subpriority accounts. Instead, Wyeth Ranch had one account. And it applied Perez's payments to that one account. NRS 116 is silent concerning how associations must apply pre-foreclosure payments. Thus, this Court must defer to the common law. And the common law directs that payments on an account (absent agreement or the direction of payment by the debtor) must be applied to the oldest amounts first. Applying Perez's $3,230 in payments to the oldest amounts extinguished the superpriority portion of the lien. Thus,

when Wyeth Ranch foreclosed in August 2013, it foreclosed upon a subpriority lien. Hence, SFR acquired its interest in the property subject to Marchai's deed of trust.

SFR argues that the district court did not properly grant summary judgment for Marchai because Marchai did not have a summary judgment motion pending. But the district court could reconsider its prior decision on SFR and Marchai's competing motions for summary judgment. Also, because SFR moved for summary judgment and had a full and fair opportunity to present argument and evidence to support its positions, the district court properly granted summary judgment for Marchai when it concluded that SFR could not prevail. And SFR waived any challenge to the judgment granting Marchai's judicial foreclosure claim because it did not oppose Marchai's motion for entry of final judgment.

SFR also claims that when Wyeth Ranch served a notice of lien in 2011, it granted Wyeth Ranch a new superpriority portion of the lien. But because Wyeth Ranch did not rescind its prior notices nor did it solely seek assessments that accrued after Perez satisfied the

superpriority portion of the lien, this Court has concluded that the 2011 notice could not grant Wyeth Ranch a new superpriority lien.

Although this Court has decided that a homeowner can pay the superpriority portion of an association's lien, SFR contests this Court's conclusion. SFR's arguments fail.

The language of NRS 116 as it existed during the foreclosure, and as amended by the legislature, both recognize that the "unit's owner," can pay the lien. SFR claims otherwise but relies upon language about what the notice of default must say, not who may pay the lien. And allowing a homeowner to pay the association's lien is supported by the purpose of the statute. The association receives at least the minimum amount to which it is entitled, and the holder of the first deed of trust is protected. Also, a homeowner wants to pay the superpriority portion of the lien for its protection. If the association's foreclosure extinguishes the first deed of trust, the homeowner is liable to the beneficiary for the full outstanding balance. If not, the homeowner is liable for (at most) the deficiency following the foreclosure of the first deed of trust. Also, bidders at a foreclosure sale can determine whether the association is foreclosing upon a subpriority lien or a lien containing superpriority

and subpriority amounts by asking the association. The association need not disclose payments, amounts of payments, or who paid and, thus, will not run afoul of the Fair Debt Collection Practices Act. In sum, no justification exists for this Court to conclude that a homeowner cannot pay the superpriority portion of an association's lien.

SFR also asserts that the record does not support a finding that Wyeth Ranch applied Perez's payments to the superpriority portion of the lien. Again, that is not true. Wyeth Ranch applied the payments to the account in general. Under the common law, those payments are thus applied to the oldest amounts, which includes the superpriority portion of the lien.

Finally, SFR argues that the district court erred when it concluded that SFR was not a bona fide purchaser. But that is irrelevant. Because Wyeth Ranch foreclosed upon a subpriority deed of trust, even if SFR is a bona fide purchaser, it took subject to Marchai's deed of trust. The bona fide purchaser doctrine cannot revive a satisfied superpriority lien.

Hence, Marchai requests this Court affirm the judgment of the district court.

Argument

I. The district court properly denied SFR's motion for summary judgment and granted summary judgment for Marchai because Perez's payments after Wyeth Ranch instituted an action to enforce the lien satisfied the superpriority portion of the lien, which consisted of (at most) the nine months of association dues incurred immediately preceding the notice of lien Wyeth Ranch served in September 2008.

In *SFR Investments Pool 1 v. U.S. Bank, N.A.*, this Court concluded that the superpriority portion of an association's lien consists "of the *last nine months* of unpaid HOA dues." 130 Nev. 742, 745, 334 P.3d 408, 411 (2014) (emphasis added). This Court didn't say that the superpriority portion of the lien consisted of *any* nine months of HOA dues but specified that it is the "*last* nine months." *Id.* (emphasis added).

But the Court's opinion left unresolved the question of the last nine months from when? NRS 116 and *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.* answered the question. NRS 116 limits the superpriority portion of an association's lien to the "9 months immediately preceding institution of an action to enforce the lien." NRS § 116.3116(2). An association institutes an action to enforce the lien through the service of a notice of delinquent assessment. *See*

Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A., 133 Nev. Adv Op. 3, 388 P.3d 226, 231 (2017). The superpriority portion of the lien does not include collection fees, late fees, interest, or foreclosure costs. *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 70 (2016). Thus, the superpriority portion of an association's lien includes no more than the delinquent association dues for the nine months before the association serves the notice of delinquent assessment. *See* NRS § 116.3116(2); *Saticoy Bay LLC Series 2021 Gray Eagle Way*, 133 Nev. Adv. Op. 3, 388 P.3d at 231; *Horizons at Seven Hills Homeowners Ass'n*, 132 Nev. Adv. Op. 35, 373 P.3d at 70.

Here, Wyeth served the notice of delinquent assessment on September 30, 2008. Perez had only two quarterly charges for association dues immediately preceding September 30, 2008: April 1 and July 1. Therefore, the past due quarterly assessments from July 1 and April 1 are the only ones entitled to superpriority treatment. *See* NRS § 116.3116(2); *Saticoy Bay LLC Series 2021 Gray Eagle Way*, 133 Nev. Adv. Op. 3, 388 P.3d at 231; *Horizons at Seven Hills Homeowners Ass'n*, 132 Nev. Adv. Op. 35, 373 P.3d at 70. Those charges totaled $840;

$420 per quarter. But after Wyeth instituted an action to enforce its lien, Perez paid Wyeth $3,230. Hence if, as the district court concluded, the $3,230 is applied to the superpriority portion of the lien, Perez satisfied the lien and SFR took subject to Marchai's deed of trust.

NRS 116 contains no statutory section directing the application of pre-foreclosure payments. *See* NRS §§ 116.001 *et seq.* But when NRS 116 is silent, the statute explicitly directs the use of the common law. *See* NRS § 116.1108. "The principles of law and equity . . . supplement the provisions of this chapter, except to the extent inconsistent with this chapter." *Id.* It is well-established that when a person has "a running account with various items of charges and credits occurring at different times and no direction of payment has been made by the debtor, payments on the account as a whole are applied by law to the oldest unpaid portion of the account." *In re Kilgore Meadowbrook Country Club, Inc.*, 315 B.R. 412, 424–25 (Bankr. E.D. Tex. 2004) (citation omitted); *see also L & B 57th St., Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 91 (2d Cir. 1998) ("As a general rule, payment is applied to debts in the order in which they accrue."); *In re Big Sky Farms, Inc.*, 512 B.R. 212, 222 (Bankr. N.D. Iowa 2014) ("In the absence of an agreement, and

when the parties have an open account—as opposed to distinct individual debts, such as notes—the default rule is that payments are applied to the oldest items.")

Here, Perez had a running account with Wyeth Ranch with various charges and credits that occurred at different times. After Wyeth Ranch instituted an action to enforce the lien in 2008, Perez paid Wyeth Ranch $3,230. As SFR concedes, Wyeth Ranch applied the payments "as a reduction of the total amount owed by Perez." (AOB at 28.) SFR agrees that Wyeth Ranch applied the payments "to reduce the debt in general." (AOB at 28.) Because SFR has not demonstrated that Wyeth Ranch or Perez directed payment to a specific charge, as a matter of law Wyeth Ranch applied the payments to the oldest amounts. *See In re Kilgore Meadowbrook Country Club*, 315 B.R. at 424–25; *see also L & B 57th St.*, 143 F.3d at 91; *In re Big Sky Farms, Inc.*, 512 B.R. at 222.

According to the 2008 notice of lien, Perez owed Wyeth Ranch $1,425.17, which included collection costs, attorney's fees, late fees, service charges, and interest. Hence, the *oldest amounts* of the debt *totaled* $1,425.17, which included the superpriority portion of $840, plus

the remaining subpriority portion. But after Wyeth Ranch instituted an action to enforce the lien, Perez paid Wyeth Ranch $3,230, which more than satisfied all amounts due at the time of the 2008 notice of lien. That includes the superpriority amount as that amount is (at most) the nine-months of association dues incurred immediately preceding the institution of an action to enforce the lien. *See* NRS § 116.3116(2); *Saticoy Bay LLC Series 2021 Gray Eagle Way*, 133 Nev. Adv. Op. 3, 388 P.3d at 231; *Horizons at Seven Hills Homeowners Ass'n*, 132 Nev. Adv. Op. 35, 373 P.3d at 70. Thus, Wyeth Ranch's foreclosure as a subpriority lien could not extinguish Marchai's deed of trust. *See Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016). Hence this Court should affirm the decision of the district court.

A. The district court did not err by granting summary judgment for Marchai, even though Marchai did not have a summary judgment motion pending.

SFR first assigns error to the district court by claiming that the district court improperly granted summary judgment for Marchai, even though Marchai had no summary judgment motion pending. (AOB at 9–12.) SFR is wrong.

Before it enters a final judgment, district courts are "free to reconsider" interlocutory orders. *See Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987); *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). Here, the district court did nothing more than reconsider its 2016 decision on the competing motions for summary judgment and concluded that Marchai should prevail, which the district court had the right to do. *See Rust*, 103 Nev. at 688, 747 P.2d at 1382; *Trail*, 91 Nev. at 403, 536 P.2d at 1027.

SFR argues that the district court did not reconsider the prior fully-briefed competing motions for summary judgment but entered summary judgment *sua sponte*. Even if true, the district court did not err.

When a party moves for summary judgment and the non-movant does not file a counter-motion, a court can grant summary judgment for a non-movant if the court agrees with the non-movant and the movant "had a full and fair opportunity to ventilate the issues involved in the motion." *Cool Fuel, Inc. v. Connet*, 685 F.2d 309, 311–312 (9th Cir. 1982); *accord Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 733, 558 P.2d 517, 524 (1976) (citing Wright & Miller, *Federal Practice and*

Procedure § 2719 (1973)). For example, in *Menalco, FZE v. Buchan*, the plaintiff moved for summary judgment on its unfair competition claim. No. 2:07-CV-01178-PMP-(PAL), 2010 WL 428911, at *26 (D. Nev. Feb. 1, 2010). The defendants opposed the motion, arguing that Nevada's Uniform Trade Secrets Act preempted the claim. *Id.* But the defendants did not move for summary judgment regarding this claim. *See id.* The court concluded that the NUTSA preempted the claim. *See id.* Hence, the court denied the plaintiff's motion and granted summary judgment *sua sponte* for the defendants because the plaintiffs "had reasonable notice that the sufficiency of their claim was at issue." *Id.*

Here, SFR and Marchai submitted competing motions for summary judgment in 2016. And in 2017, Marchai again opposed SFR's second motion for summary judgment. As it did in 2016, in 2017 Marchai argued that Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien. And the district court granted summary judgment for Marchai on this ground. SFR had a "full and fair" opportunity to argue the issues to the district court and suffered no prejudice from the district court's decision. *See id.* at *26; *see also Cool*

Fuel, 685 F.2d at 311–12; *Exber*, 92 Nev. at 733, 558 P.2d at 524. Hence, the district court did not err.

The cases on which SFR relies do not compel a contrary result. In *Soebbing v. Carpet Barn, Inc.*, the district court granted summary judgment against a plaintiff on claims contained in an amended complaint that the plaintiff had not yet filed. This Court reversed the district court's grant of summary judgment. 109 Nev. 78, 80, 847 P.2d 731, 733 (1993). Because the plaintiff had no opportunity to argue the merits or submit evidence to support the claims in a not-yet-filed complaint, this Court concluded that the district court erred. *Id.* at 83–84, 847 P.2d at 735–36. In *Sierra Nevada Stagelines, Inc. v. Rossi*, this Court reversed a district court decision that essentially granted summary judgment *sua sponte* for a defendant even though no party had moved for summary judgment. 111 Nev. 360, 892 P.2d 592 (1995). Instead, the district court announced a decision on the first scheduled day of the trial, taking no evidence or hearing argument. *Id.* at 362, 892 P.2d at 593–94. Again, this Court reversed because the plaintiff had no opportunity to submit evidence or argument to support its position. *Id.* at 364, 892 P.2d at 594–95. In *Renown Regional Medical Center v.*

Second Judicial District Court, this Court issued a writ of mandamus that prohibited the district court from entering summary judgment on two claims not argued. 130 Nev. 824, 335 P.3d 199 (2014). Again, this Court reasoned that not granting a party the opportunity to submit evidence or argument to support its position was unfair. *Id.* at 828, 335 P.3d at 202. But here, SFR had a full and fair opportunity to submit evidence and argument not only in the 2016 summary judgment briefing but again in 2017. Hence, the cases on which SFR relies are inapposite.

SFR also argues that even if the district court had the authority to enter summary judgment *sua sponte*, it did not have authority to grant summary judgment in favor of Marchai on its judicial foreclosure claim because Marchai did not submit evidence or brief that issue. (AOB at 11–12.) But that is not true. In the 2016 motion for summary judgment, Marchai submitted evidence and argument to support its judicial foreclosure claim. Hence, the district court properly reconsidered its prior ruling and granted Marchai's judicial foreclosure claim. *See Rust v. Clark County Sch. Dist.*, 103 Nev. 686, 688, 747 P.2d 1380, 1382 (1987).

But even if the district court did not properly reconsider its prior ruling, the district court's decision is harmless error that SFR waived by failing to object. "Failure to comply with the formal requirements of Rule 56 is subject to the harmless-error rule." *Exber, Inc. v. Sletten Constr. Co.*, 92 Nev. 721, 733, 558 P.2d 517, 524 (1976). "To demonstrate that an error is not harmless, a party 'must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached.'" *Khoury v. Seastrand*, 132 Nev. Adv. Op. 52, 377 P.3d 81, 94 (2016) (quoting *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010)). Given the district court's determination that Marchai should prevail, SFR has presented no argument that granting Marchai's claim for judicial foreclosure is anything other than harmless error.

But even if the error was not harmless, SFR waived its argument by failing to object. Marchai applied for Default Judgment *and Entry of Final Judgment* on Order Shortening Time, to which it attached the proposed final judgment that granted Marchai's judicial foreclosure claim. SFR has provided this Court with no brief or transcript in which SFR opposed this motion or objected to the proposed judgment. As the

appellant, SFR bears the burden "to include necessary documentation in the record." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). Because SFR failed to do so, this Court must "presume that the missing portion supports the district court's decision." *Id.*

B. The superpriority portion of the lien consisted of (at most) the nine months of association dues immediately preceding the first notice of lien, not the second, because Wyeth Ranch failed to rescind the prior notice of lien and notice of default and sought dues and expenses that accrued before Wyeth Ranch should have rescinded the first lien.

In its second avenue of attack on the district court's decision, SFR argues that the lien issued by Wyeth Ranch in 2011 was the "operative lien" and because Perez did not pay over nine-months of assessments after the 2011 lien, Perez could not have satisfied the superpriority portion of the lien. (AOB at 13–14.) Essentially, SFR argues that Wyeth Ranch's recording of the second notice of lien and second notice of default in 2011 gave it a second superpriority portion of the lien. As the district court concluded, SFR is wrong.

In *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, the beneficiary of a deed of trust paid an association the superpriority

portion of an association lien recorded in 2011. 200 F. Supp. 3d 1141, 1167 (D. Nev. 2016). The association rescinded the lien. *Id.* But when the homeowner again failed to pay the association's dues, the association recorded a new lien in 2012, based on assessments that accrued after rescinding the 2011 lien. *Id.* The lender argued that the association had only one superpriority portion of a lien and its satisfaction in 2011 meant the 2012 lien had no superpriority portion. *Id.* The district court disagreed. *Id.* It concluded that because the association rescinded its prior lien and recorded a new lien based solely upon charges that accrued after rescinding the first lien, the association received a superpriority portion of the new lien. *Id.*

In *Property Plus Investments, LLC v. Mortgage Electronic Registration Systems, Inc.*, this Court adopted the district court's reasoning in *JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*. 133 Nev. Adv. Op. 62, 401 P.3d 728, 731–32 (2017). This Court held:

> [W]hen an HOA *rescinds* a superpriority lien on a property, the HOA may subsequently assert a separate superpriority lien on the same property based on monthly HOA dues, and any maintenance and nuisance abatement charges, accruing *after* the rescission of the previous superpriority lien.

Id. (emphasis added). Hence, an association receives a separate superpriority portion of its lien only if it rescinds the prior lien and seeks to collect charges accruing after rescinding the prior lien. *See id.*

Here, Wyeth Ranch did not rescind the 2008 lien or the 2009 notice of default. Instead, in 2011, Wyeth Ranch recorded a new lien and, in 2012, recorded a new notice of default. Also, Wyeth Ranch did not base its 2011 lien and 2012 notice of default solely upon amounts accruing *after* the "rescission" of the prior lien. The notice of default expressly states it consists of amounts that went into default as early as January 1, 2008. Based upon this Court's reasoning in *Property Plus Investments*, the lien Wyeth Ranch recorded in 2011 did not grant it a separate superpriority lien. *See id.* Thus, the 2011 lien was not the "operative lien," and the superpriority calculation was the last nine months preceding the 2008 lien. *See id.*

Although the district court based its decision on the *Property Plus Investments* opinion that expressly states rescission of the prior lien is required for the association to obtain a subsequent superpriority portion of a lien, SFR argues that rescission is not needed. (AOB at 13.) But SFR provides no authority to support its conclusion. (*See id.*)

Remarkably, SFR's brief does not even cite the *Property Plus* opinion or make any effort to distinguish it. (*See id.*) Because *Property Plus Investments* requires rescission of the prior lien, this Court should reject SFR's argument. *See Prop. Plus Invs.*, 133 Nev. Adv. Op. 62, 401 P.3d at 731–32.

C. This Court concluded in *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank* that a homeowner can satisfy the superpriority portion of an association's lien, which decision is supported by NRS 116 and sound public policy.

SFR also argues that Perez could not have satisfied the superpriority portion of Wyeth Ranch's lien because only payment from the beneficiary of the first deed of trust can satisfy the superpriority portion.[3] SFR is wrong.

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[3] A heading in SFR's opening brief claims that the district court "applied an incorrect evidentiary burden," but does not explain what incorrect evidentiary burden the district court purportedly applied. (AOB at 15.) Instead, SFR argues that the sale is entitled to a "presumption of validity" because of disputable presumptions. (*Id.*) SFR's argument is irrelevant. The threshold issue is not how Wyeth Ranch conducted the sale, but *what it sold*. Because Wyeth Ranch foreclosed upon a subpriority lien, SFR took subject to Marchai's deed of trust. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113, 121 (2018).

In *Saticoy Bay LLC Series 2141 Golden Hill v. JP Morgan Chase Bank*, the former homeowner made payments that satisfied the superpriority portion of the association's lien. No. 71246, 2017 WL 6597154, at *1 (Nev. Dec. 22, 2017). And the association applied those payments to the superpriority portion of the association's lien. The district court concluded that the association's foreclosure did not extinguish the first deed of trust because the homeowner had satisfied the superpriority portion of the lien. This Court affirmed. *See id.*

Despite this Court's conclusion in *Saticoy Bay LLC Series 2141 Golden Hill* that a homeowner *can* pay the superpriority portion of an association's lien, SFR spends almost half its opening brief arguing against the decision which this Court decided just over one year ago. (AOB at 15–27.) But contrary to SFR's argument, NRS 116 and sound public policy support this Court's decision in *Saticoy Bay LLC Series 2141 Golden Hill*.

1. Although SFR argues that only the beneficiary of a deed of trust can satisfy the superpriority portion of the lien, the statutory language does not support SFR's argument.

When interpreting statutes, this Court's primary obligation is to ascertain the intent of the Legislature. *See Davidson v. Davidson*, 132

Nev. Adv. Op. 71, 382 P.3d 880, 883 (2016). The first place the Court must look to determine legislative intent is the language of the statute itself. *In re Nilsson*, 129 Nev. 946, 949, 315 P.3d 966, 968 (2013). If the statutory language is clear, this Court should go no further. *Id.* This Court is not free to expand upon or modify the statutory language, as that right rests solely with the Legislature. *Williams v. United Parcel Serv.*, 129 Nev. 386, 391–92, 302 P.3d 1144, 1147 (2013).

Thus, the first question this Court must ask is: does the language of NRS 116 support SFR's argument that only the beneficiary of a deed of trust can satisfy the superpriority portion of an association lien? It doesn't. *See* NRS §§ 116.001 *et seq.* SFR has cited no provision of NRS 116, *as it existed during Wyeth Ranch's foreclosure*, that even suggests that NRS 116 requires a deed of trust beneficiary to satisfy the superpriority portion of an association's lien.

Once satisfied that NRS 116 does not mandate that only a deed of trust beneficiary can satisfy the superpriority portion of the lien, the Court must then ask does the language of NRS 116 suggest that someone other than a deed of trust beneficiary can satisfy the superpriority portion of the association's lien? It does. Specifically, NRS

116 states that an association can foreclose if "*[t]he unit's owner or his or her successor in interest* has failed to pay the amount of the lien . . . for 90 days following the recording of the notice of default and election to sell." NRS § 116.31162(c) (2005) (emphasis added). The definition of "unit's owner" *expressly excludes* the holder of a security interest, like the beneficiary of a deed of trust. NRS § 116.095 (2011). NRS 116 defines "unit owner" as "a declarant or other person who owns a unit . . . *but does not include a person having an interest in a unit solely as security for an obligation*." *Id.* (emphasis added). Thus, the plain language recognizes that the unit's owner—the homeowner—which does not include a deed of trust beneficiary, can pay the association's lien. *See* NRS § 116.31162(c); NRS § 116.095; *accord SFR Invs. Pool 1, LLC*, 130 Nev. 742, 746, 334 P.3d 408, 411 (2014) ("The *homeowner* must be given at least 90 days to pay off the lien.") (emphasis added).

By recognizing that someone other than the deed of trust beneficiary can pay the association's lien, the statutory language precludes any conclusion that only a deed of trust beneficiary can satisfy the superpriority portion of the lien. *See In re Nilsson*, 129 Nev.

at 949, 315 P.3d at 968 (recognizing that a court should not go beyond the language of the statute).

In its opening brief, SFR does not analyze the language of the statute as it existed during Wyeth Ranch's foreclosure. (*See* AOB at 21–22.) Instead, SFR focuses on the statute *as amended in 2015* and tries to ascribe intent to the 2005 Legislature based upon language drafted ten years later. And even the language on which SFR relies does not support its argument.

SFR cites the 2015 version of NRS 116.31162, which requires the notice of default to 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 foreclose its lien by sale . . . ." (AOB at 21 (citing NRS § 116.31162(1)(b)(3)(I) (2015))). But that subsection says what information the notice of default must contain, *not* who can pay the lien. *See id.*

SFR also relies upon NRS 116.31162(1)(b)(3)(II) to claim that the statute as amended only permits the beneficiary of the deed of trust to pay the superpriority portion of the lien. (AOB at 21.) But the statute says no such thing. NRS 116.31162(1)(b)(3)(II) also describes the

contents of the notice of default, not who can pay the lien. *See* NRS 116.31162(1)(b)(3)(II) (2015). But *the next two subsections* expressly state that the "unit's owner" *or* the beneficiary of a deed of trust can pay the association's lien. NRS § 116.31162(1)(c) & (d).

The statute states that the association can foreclose its lien if the "*unit's owner* or his or her successor in interest has failed to pay the amount of the lien . . . ." *Id.* (emphasis added). And the next subsection states that the association can foreclose its lien if the "*unit's owner* or his or her successor in interest, *or* the holder of a security interest on the unit . . . failed to pay the assessments . . . ." NRS § 116.31162(1)(d) (2015) (emphasis added).

Hence, the operative language at the time of the foreclosure *and* the current language recognize that the "unit's owner"—the homeowner—can pay the lien, which includes the superpriority portion of the lien. Because the statutory language is clear that the homeowner can pay the superpriority portion of the lien, this Court's analysis should end. *See In re Nilsson*, 129 Nev. 946, 949, 315 P.3d 966, 968 (2013). But even if this Court goes beyond the language of the statute,

the purpose of the statute's enactment also supports Marchai's argument.

2. Recognizing that the homeowner can satisfy the superpriority portion of the association's lien follows the purposes underlying the Uniform Common Interest Ownership Act.

The Uniform Common Interest Ownership Act gave an association lien priority "[t]o ensure the prompt and efficient enforcement of the association's lien for unpaid assessments." Uniform Common Interest Ownership Act § 3-116, cmt. 1 (1982). But UCIOA had to balance the collection of assessments with "the *obvious necessity* for protecting the priority of the security interests of lenders." *SFR Invs. Pool 1, LLC*, 130 Nev. at 748, 334 P.3d at 412 (quoting UCIOA § 3-116, cmt. 2) (emphasis added)). The limited superpriority portion of the lien ensures that an association need not increase association dues to the other unit owners or reduce the provided services when a unit owner abandons the property. *SFR Invs. Pool 1, LLC*, 130 Nev. at 750, 334 P.3d at 413–14. But NRS 116 does not guarantee payment of *all* dues and expenses to the association. Instead, as part of the "equitable balance" struck by

UCIOA, it provides for a superpriority of only nine months of association dues. *See id.* 130 Nev. at 748, 334 P.3d at 411–12.

Where the homeowner pays the superpriority portion of the lien, the purpose of the statute is fulfilled. The association receives the superpriority portion of the lien to which it is entitled. And the association can still proceed with foreclosure of the subpriority portion of its lien or sue the homeowner for the balance. NRS § 116.3116(6) (2011). And the lender receives the protection that UCIOA concluded was of "obvious necessity" by preserving its lien. *See SFR Invs. Pool 1, LLC*, 130 Nev. at 748, 334 P.3d at 412 (quoting UCIOA § 3-116, cmt. 2).

Finally, the homeowner is ultimately responsible for payment of the lien. To force a lender to pay the lien and then seek recovery from the owner when the owner will pay the lien is simply nonsensical. This Court must avoid such an absurd interpretation. *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011). Hence SFR's argument that only Marchai could satisfy the superpriority portion of the lien finds no support in the purpose of NRS 116.

SFR has a "public policy" parade of horribles it contends justifies this Court from deviating from the language of NRS 116 and the legislative intent. None of SFR's arguments have merit.

For example, SFR laments that Marchai obtained a judgment for attorney's fees against Perez. (AOB at 17.) According to SFR, Perez "could not have foreseen that her partial payments would expose her to such a severe judgment seven years later." (*Id.*) SFR cites no authority or any portion of the record for this statement. (*See id.*) Perez was *contractually obligated* to pay Wyeth Ranch's assessments and, if she failed to do so and Marchai had to defend its deed of trust in court, Perez had to pay Marchai's attorney's fee. (1JA28, 30.)

SFR claims that "holders of a first deed of trust have no incentive to ever pay associations their borrowers' overdue assessments." (AOB at 18.) SFR claims that "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." (AOB at 18–19.) SFR also argues that allowing homeowners to pay the superpriority portion of the lien

will deter associations from entering into payment plans. (AOB at 20.) SFR's arguments lack merit.

Marchai is not a bank, so SFR's arguments have no application to this case. And holders of the first deed of trust also want payment from the borrower or to foreclose upon the property so they can get paid. Delays in foreclosure by "banks" often result from the banks trying to work out deals with the borrower, so they don't lose their home. Also, the association can avoid applying homeowner payments toward the superpriority portion of the lien by maintaining separate superpriority and subpriority accounts and specifically applying payments from the homeowner to the subpriority portion. *See In re Big Sky Farms, Inc.*, 512 B.R. 212, 222 (Bankr. N.D. Iowa 2014). But here, Wyeth Ranch had only one account and applied Perez's payments to the account in general, which means it applied the payments to the oldest amounts due. *See In re Kilgore Meadowbrook Country Club, Inc.*, 315 B.R. 412, 424–25 (Bankr. E.D. Tex. 2004) (citation omitted); *see also L & B 57th St., Inc. v. E.M. Blanchard, Inc.*, 143 F.3d 88, 91 (2d Cir. 1998); *In re Big Sky Farms, Inc.*, 512 B.R. at 222.

SFR—who argues that it should receive title to a $360,000 home for a mere $21,000—audaciously asserts that Marchai received a "windfall." (AOB at 19.) Marchai received no "windfall." Perez, not Marchai, is legally responsible for paying Wyeth Ranch's assessments. (1JA28.) Even if Marchai paid the assessments, it could collect the payment from Perez. (1JA30–31.)

Finally, SFR cries unfairness because while the lawsuit was pending it "rehabbed the property, paid taxes, insurance, assessments, utilities and other expenses on the property." (AOB at 19.) SFR claims it "**invested money** with the **anticipated benefit** that it was purchasing the Property at auction free and clear of the first deed of trust." (AOB at 19, n.1.) But SFR fails to disclose that it and the other third-party purchasers *collect rent* during the litigation. And SFR has claimed that it purchased the property for such a low amount because it *knew* it was buying a lawsuit. *See JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F. Supp. 3d 1141, 1174–75 (D. Nev. 2016). Hence, SFR's argument it expected to acquire the property free and clear of the first deed of trust is disingenuous.

This Court's opinion in *Saticoy Bay LLC Series 2141 Golden Hill v. JP Morgan Chase Bank*, NRS 116, and public policy all support a finding that the homeowner can pay the superpriority portion of an association's lien.

3. Neither Perez nor any Nevada homeowner will suffer harm by allowing a homeowner to satisfy the superpriority portion of an association's lien.

In an additional "public policy" argument, SFR argues that allowing a homeowner to satisfy the superpriority portion of an association's lien would harm Nevada homeowners. (AOB at 22–25.) SFR's argument has no foundation in the record and no logical support.

SFR claims that permitting a homeowner to pay the superpriority portion of the lien undercuts Nevada's anti-deficiency statute. (AOB at 22.) But the anti-deficiency statute has no application to this case. Marchai is not a "financial institution," Perez did not use the money to purchase the real property, and the property was an investment property for Perez, not her principal residence.[4] *See* NRS § 40.453(3). Hence, NRS 40.453(3) does not apply.

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[4] SFR also hypothesizes that "Perez has likely moved on with her life and hopefully improved her financial situation over the past 5

But hypothetically, allowing a homeowner to satisfy the superpriority portion of the lien helps, not hurts, the homeowner. Because Perez satisfied the superpriority portion of Wyeth Ranch's lien, Marchai must offset any amount owed by Perez from the amount obtained at a foreclosure. *See* NRS § 40.455 (2009). For example, the judgment provided that Perez owes Marchai $535,178.50. If at foreclosure the property sold for $360,000, then Perez would have a deficiency of $175,178.50. If Wyeth Ranch's foreclosure extinguished Marchai's deed of trust, then Perez owes Marchai the full $535,178.50. *See id.*; *see also SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 763, 334 P.3d 408, 422 (2014) (Gibbons, C.J., dissenting).

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years." (AOB at 24–25.) Thus, according to SFR, "[a]llowing 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." (AOB at 25.) SFR claims that "[i]t would expose Perez . . . to financial ruin a second time." (AOB at 25.) But there is no evidence in the record (and SFR has not cited any) that supports any of these statements. SFR has provided no evidence in the record that "Perez has likely moved on," that she "struggled financially," or that she was subject to "financial ruin." Hence, this Court should disregard them. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal.")

Hence it is *helpful, not harmful*, for the homeowner to pay the superpriority portion of the lien.

4. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, this Court already considered (and rejected) the policy argument that no one other than the association and the homeowner know the make-up of the association's lien.

After reaping the rewards of this Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, when the tables are turned, SFR is suddenly less-enamored with this Court's decision. SFR argues that if a homeowner can satisfy the superpriority portion of the lien, it cannot know what is being purchased at the foreclosure. (AOB at 25–27.) In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, U.S. Bank argued that the notice it received was unfair because it could not determine the superpriority portion of the lien. But this Court rejected that argument and said that "nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale." 130 Nev. 742, 757, 334 P.3d 408, 418 (2014). Likewise, nothing prevented SFR from determining if the superpriority lien was satisfied before the foreclosure.

SFR asserts that bidders at a foreclosure sale would need to inquire whether the homeowner paid the association after it recorded the notice of lien. (AOB at 26.) According to SFR, that would violate the Fair Debt Collection Practices Act. (*See id.*) But the association need not communicate with a bidder "in connection with the collection of any debt," which is what the FDCPA prohibits. *See* 15 U.S.C. § 1692c(b). Everyone knows that the homeowner owes a debt as it is a matter of public record through the recorded foreclosure documents. SFR need not know if a homeowner (or anyone else) made any payments after service of the notice of lien. Nor does it need to know the specific payments and amount of payments.

Instead, a third-party purchaser needs to know if the superpriority portion of the lien was satisfied. SFR has cited no authority that would prevent an association from disclosing whether it was foreclosing upon a lien with both superpriority and subpriority portions or only upon a subpriority lien. And SFR has indicated nowhere in the record where it asked Wyeth Ranch for this information

before it submitted its bid. Thus, contrary to SFR's argument, bidders can know what they are bidding on at a foreclosure sale.[5]

II. Contrary to SFR's contention, the record does support a finding that Wyeth Ranch applied the payments to the superpriority portion of the lien because that is what the common law required.

In its opening brief and again in its Notice of Supplemental Authorities, SFR argues this Court must reverse the decision of the district court because Marchai did not demonstrate that Wyeth Ranch applied Perez's payments to the superpriority portion of the lien. (AOB at 27–30; Notice of Suppl. Authorities at 2.) SFR relies upon this Court's opinions in *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank* and an Order of Reversal and Remand in *SFR*

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[5] In this section of its opening brief, SFR claims that "Peres {sic}, *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 . . . ." (AOB at 27 (emphasis added).) SFR has provided no citation to anywhere in the record that suggests that either Perez was "struggling to make ends meet" or that Marchai "had vast resources available." Hence, this Court should disregard these unsupported statements. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal.")

Investments Pool 1, LLC v. Wells Fargo Bank, N.A. Neither case justifies reversal of the district court's decision.

In *Saticoy Bay LLC Series 2141 Golden Hill*, this Court affirmed the grant of summary judgment for the beneficiary of a first deed of trust because the evidence supported the district court's finding that the homeowner paid the association, which the association applied to the superpriority portion of its lien. No. 71246, 2017 WL 6597154, at *1 (Nev. Dec. 2017). But in *SFR Investments Pool 1, LLC v. Wells Fargo Bank*, this Court reversed a grant of summary judgment for the beneficiary of a first deed of trust because although the homeowner made a payment that exceeded the superpriority portion of the lien, the record did not establish that the association applied the payment to the superpriority portion of the lien *or* "had an obligation to allocate the former homeowner's payment in that manner." No. 70471, 2018 WL 6609670, at *1 (Nev. Dec. 13, 2018).

When a debtor has an open account, and the creditor applies payments to the account in general, the common law *requires* the application of the payment to the oldest charges first. *See supra* § I. Here, Wyeth Ranch applied the payments to the account in general,

which SFR concedes. Because the oldest charges comprised the superpriority portion of the lien those payments satisfied the superpriority portion of the lien. Thus, like *Golden Hill*, and unlike *SFR Investments v. Wells Fargo*, the record supports a conclusion that Perez's payments satisfied the superpriority portion of the association's lien.

III. SFR's argument that the district court erred when it concluded that SFR was not a bona fide purchaser is irrelevant and, even if relevant, the district court was correct.

Confusingly, SFR spends five pages arguing that the district court erred when it concluded that SFR was not a bona fide purchaser. (AOB at 30–35.) But whether SFR was a bona fide purchaser is irrelevant based upon the district court's ruling. Because the district court concluded that Perez paid the superpriority portion of Wyeth Ranch's lien, Wyeth Ranch's foreclosure conveyed the property to SFR *subject to* Marchai's deed of trust. *See Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113, 121 (2018). As this Court stated in *Saticoy Bay LLC Series 2141 Golden Hill*, SFR "has not explained how its putative BFP status could have revived the already-

satisfied superpriority component of the HOA's lien." No. 71246, 2017 WL 6597154, at *1 n.1 (Nev. Dec. 22, 2017).

SFR seems to think that the district court unwound the sale. For example, SFR claims that "equity cannot be granted where the party seeking to *unwind* the effects was in a position to seek relief earlier." (AOB at 31.) Likewise, SFR argues that this Court should not allow payments by a homeowner to "revive a deed of trust." (AOB at 23, 27.) But the district court unwound nothing. And Marchai's deed of trust does not need reviving. Wyeth Ranch's foreclosure of a subpriority lien did not affect Marchai's deed of trust. *See Bank of Am., N.A.*, 134 Nev. Adv. Op. 72, 427 P.3d at 121. And any attempted sale of a satisfied superpriority portion of the lien is void. *See id.*

But even if SFR's putative status as a bona fide purchaser is relevant, the district court did not err when it concluded that SFR was not a bona fide purchaser.

SFR must demonstrate that it is a bona fide purchaser for value.[6] *Bailey v. Butner*, 64 Nev. 1, 7, 176 P.2d 226, 229 (1947). "A subsequent

[6] SFR claims that "*this Court* placed the burden on the party seeking equitable relief to prevent a potential purchaser from attaining BFP status." (AOB at 31 (emphasis added).) But SFR does not cite a

purchaser is bona fide under common-law principles if it takes the property 'for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115 (2016) (quoting *Bailey*, 64 Nev. at 19, 176 P.2d at 234). SFR failed to satisfy its burden as a matter of law because it had at least inquiry notice that Perez may have paid the superpriority portion of the lien and the equities supported Marchai.

Wyeth Ranch started the process to enforce its lien when it served a notice of lien in September 2008. It continued the foreclosure process

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case from *this Court*. Instead, it relies upon an opinion from the California Court of Appeal. (AOB at 31 (citing *First Fid. Thrift & Loan Ass'n v. Alliance Bank*, 71 Cal. Rptr. 2d 295, 301 (Ct. App. 1998).) But even the case SFR cites concludes that a party claiming bona fide purchaser status generally bears the burden of proof. *Id.* An exception is when the plaintiff seeks equitable title relief, like the reinstatement of an extinguished lien. *Id.* Here, Marchai's deed of trust was not extinguished, and the district court did not reinstate Marchai's deed of trust. Instead, the district court concluded that SFR took subject to Marchai's deed of trust. Thus, even the case on which SFR relies concludes that SFR bore the burden of proof before the district court. *See id.*

by recording a notice of default in January 2009, and finally when it recorded the notice of sale in January 2010. But Wyeth abruptly stopped its foreclosure. In December 2011, nearly two years later, Alessi recorded a second notice of lien, a second notice of default, and a few more notices of sale. These documents are a matter of record in the property's title. Thus, SFR had at least inquiry notice that Wyeth Ranch either received some payment by Perez that could have satisfied (and did satisfy) the superpriority portion of the lien. But SFR has cited to no portion in the record where it asked Wyeth Ranch if it was selling only a subpriority lien or a lien with both superpriority and subpriority portions. Because SFR had at least inquiry notice that Wyeth foreclosed upon the subpriority portion of the association's lien, SFR cannot satisfy its burden of demonstrating it is a bona fide purchaser. *See id.*

Conclusion

The district court properly granted summary judgment for Marchai. After Wyeth Ranch instituted an action to enforce its lien, Perez paid Wyeth Ranch $3,230. Because Wyeth Ranch applied those payments to Perez's account in general —and had no separate accounts for the superpriority and subpriority portions of the lien—the common

law holds that Wyeth Ranch applied the payments to the oldest amounts first. The oldest amounts included the superpriority portion of the lien. Thus, Perez's payments extinguished the superpriority portion of Wyeth Ranch's lien. Wyeth Ranch foreclosed upon the subpriority portion of the lien. Hence, SFR took title to the property subject to Marchai's deed of trust. Consequently, this Court should affirm the decision of the district court that granted summary judgment for Marchai.

Dated this 30th day of January 2019.

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Certificate of Compliance

1. 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it is proportionally spaced, has a typeface of 14-points or more and contains 10,567 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is

not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of January 2019.

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Certificate of Service

I certify that I filed the Respondent's Answering Brief electronically with the Nevada Supreme Court on the 30th day of January 2019, and each of the registered users of the Court's electronic filing system shall receive notice.

Dated this 30th day of January 2019.

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