IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE, Appellant, vs. 5316 CLOVER BLOSSOM CT TRUST, and COUNTRY GARDEN OWNERS ASSOCIATION, Respondents.	Case No. 75861

APPEAL

from the Eighth Judicial District Court, Department XXIV
The Honorable Jim Crockett, District Judge
District Court Case No. A-14-704412-C

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

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

U.S. Bank, N.A.

U.S. Bancorp, Inc.

Akerman LLP

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

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STATEMENT OF JURISDICTION

This Court has jurisdiction under NRAP 3A(b)(1) because the district court entered summary judgment in favor of Respondent 5316 Clover Blossom Ct Trust (**Clover Blossom**) on February 7, 2018, and an order granting a motion to dismiss by Respondent Country Garden Owners Association (**the HOA**) on April 13, 2018. Notice of entry of the order granting the HOA's motion to dismiss was entered on April 16, 2018. The motion for reconsideration filed by Appellant U.S. Bank, N.A., as Trustee (**U.S. Bank**) was denied on May 1, 2018. U.S. Bank filed a notice of appeal on May 10, 2018, which was timely under NRAP 4.

APPELLANT'S STATEMENT REGARDING ROUTING

Pursuant to NRAP 28(a)(5), Respondent U.S. Bank states that this case should be assigned to the Court of Appeals. Although the case does not fall under one of the categories of cases presumptively assigned to the Court of Appeals pursuant to NRAP 17(b), the issues presented are controlled by on-point precedent from this Court. Furthermore, this appeal was previously adjudicated by the Court of Appeals, and the district court's order marks an intentional refusal to abide by the Court of Appeals' prior order.

ISSUES PRESENTED

(1) Whether the summary judgment should be reversed because U.S. Bank presented unrebutted evidence that its predecessor-in-interest as servicer of the loan sent payment for more than the full superpriority amount of the homeowner's association lien, thereby discharging the superpriority portion.

(2) Whether the district court's summary judgment should also be reversed because:

(a) it was issued before discovery had closed, and U.S. Bank had not finished discovery on issues including tender and the equity of the sale, and

(b) the district court violated NRCP 12(b) by converting Clover Blossom's motion to dismiss into a motion for summary judgment without providing notice of its intent to do so.

(3) Whether the district court abused its discretion by denying U.S. Bank's motion for reconsideration despite the fact that it included evidence unequivocally demonstrating that Clover Blossom knew it was purchasing this Property subject to the deed of trust.

(4) Whether the district court's dismissal of U.S. Bank's cross-claims against the HOA should be reversed so that further discovery can take place.

STATEMENT OF THE CASE

This is the second appeal in this litigation where the district court indefensibly granted summary judgment against U.S. Bank before discovery was complete. On

June 30, 2017, in Case No. 68915, the Nevada Court of Appeals reversed the first summary judgment against U.S. Bank, stating that the district court had not properly considered the HOA's rejection of tender, and that further discovery should be conducted on several issues.

After remand, Clover Blossom and the HOA both moved to dismiss U.S. Bank's counterclaims and crossclaims. The district court held a hearing on the motions to dismiss before the agreed period of discovery was complete. At the hearing, the district court announced that it was granting summary judgment against U.S. Bank, despite the fact that it had given no prior notice that it would be considering a summary judgment. U.S. Bank later moved for reconsideration, pointing out that it had presented unrebutted evidence of tender. U.S. Bank also attached new evidence demonstrating that the principal of Clover Blossom believed he was purchasing this property with the deed of trust still intact. Nevertheless, the district court denied the motion for reconsideration.

U.S. Bank appealed both of the district court's grants of summary judgment.

STATEMENT OF FACTS

I. Factual Background

A. The Borrowers enter into a Deed of Trust to purchase the property.

In June 2004, Dennis Johnson and Geraldine Johnson (collectively **Borrowers**) purchased real property located at 5316 Clover Blossom Court, North

Las Vegas, Nevada 89031 (the **Property**). To finance this purchase, Borrowers took out a loan in the amount of $147,456.00, which was secured by a deed of trust (**Deed of Trust**) in favor of Countrywide Home Loans, Inc. (2AA 461-492).

The Deed of Trust stated that if there was a "legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Interest (such as a proceeding ... for enforcement of a lien which may attain priority over this Security Instrument)," then the "Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument." (2AA 468-469). It further stated the Lender could "pay[] any sum secured by a lien which has priority over this Security Instrument." (2AA 469). Similarly, the Planned Unit Development Rider to the Deed of Trust stated "If Borrower does not pay [HOA] dues and assessments when due, then Lender may pay them." (2AA 491).

The Deed of Trust was assigned to U.S. Bank via an Assignment of Deed of Trust, which was recorded on June 20, 2011. (2AA 495).

B. The HOA forecloses on the delinquent assessment lien and rejects BANA's tender of more than the full superpriority amount.

Alessi & Koenig, LLC (**HOA Trustee**), acting on behalf of Country Gardens Owners' Association (**HOA**), recorded two Notices of Delinquent Assessment Liens on February 22, 2012, at 9:17 AM, both ostensibly encumbering the Property. One

of the Notices stated the Borrowers owed $1,095.50 to the HOA. (2AA 497). The other Notice stated the Borrowers owed $1,150.50 to the HOA. (2AA 499). On April 20, 2012, the HOA Trustee recorded a Notice of Default and Election to Sell Under Homeowners Association Lien stating the total amount due to the HOA was $3,396.00. (2AA 301).

The Notice of Delinquent Assessment Lien stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. (2AA 297). Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. (2AA 452 at § 9.1).

After receiving the Notice of Default, Bank of America, N.A. (**BANA**),[1] through counsel at Miles Bauer Bergstrom & Winters LLP (**Miles Bauer**), sent a letter to the HOA Trustee that offered to pay the full superpriority portion of the HOA's lien and requested information on that account. (2AA 309-310). Instead of providing a payoff ledger with the exact superpriority amount, the HOA Trustee sent a payoff demand in the amount of $4,186.00. (2AA 312-314). However, the ledger showed the HOA's monthly assessments to be $55.00, meaning the total amount of the last nine months of delinquent assessments was $495.00. (2AA 314). On December 6, 2012, BANA sent $1,494.50—which included both the $495.00 for delinquent assessments and $999.50 in "reasonable collection costs"—to the HOA

[1] At the time, BANA serviced the loan secured by the Deed of Trust.

Trustee with a letter explaining that this amount was sent to satisfy the superpriority lien. (2AA 318). The HOA Trustee refused to accept this tender, and proceeded to foreclose on the Property. (2AA 307, 320).

The HOA Trustee then recorded a Notice of Trustee's Sale on October 31, 2012, stating that it would sell the Property "without covenant or warranty, expressed or implied, regarding title possession or encumbrances. (2AA 303). According to this Notice, the total amount due to the HOA was $4,039.00. *Id*. On January 26, 2013, the HOA non-judicially foreclosed on the Property. (2AA 322-323). According to the recorded Trustee's Deed Upon Sale, the HOA sold the Property to Clover Blossom for $8,200.00. *Id*.

According to an appraisal, the fair market value of the Property on the date of the sale was $105,000. (4AA 715-717). Based on this valuation, the Property was purchased by Clover Blossom for just 7.8 percent of its fair market value.

C. Bankruptcy filings by related trusts reveal that Clover Blossom's manager knew it purchased trusts subject to deeds of trust.

Clover Blossom is owned by Iyad "Eddie" Haddad. Roughly six months before the HOA's foreclosure sale, River Glider, another of the trusts managed by Haddad, filed for Chapter 11 bankruptcy. (4AA 743-782). In that bankruptcy filing, Haddad listed as assets eleven properties that he purchased at association foreclosure sales. (4AA 756-758). For each property, Haddad declared that the senior deed of

trust remained fully enforceable after the respective association's foreclosure. *Id.* Later in the bankruptcy, and a month before he purchased the Property at issue here, the trust filed a motion in which it described its business model as follows: "Mr. Haddad funds the Trust, which then purchases **junior liens** through [homeowners association] sales held at Nevada Legal News, and **thus acquires ownership of the properties, subject to the first mortgage lien on the properties**." (4AA 785) (emphasis added).

Subsequently in the bankruptcy (approximately two months after Clover Blossom purchased the Property) the trust moved to strip the amount of the loan secured by the senior deed of trust encumbering one of those properties acquired at an HOA foreclosure. (4AA 796-802). In that lien-stripping motion, the Haddad-trust stated that it owned the subject property "subject to the following liens …." (4AA 797).

II. Procedural Background

On April 23, 2015, Clover Blossom filed its Amended Complaint. (1AA 001-015). Clover Blossom filed a motion for summary judgment on May 18, 2015. (1AA 016-074). U.S. Bank filed an opposition and countermotion for summary judgment on July 22, 2015. (1AA 075-162). On September 10, 2015, the district court granted summary judgment in Clover Blossom's favor. (1AA 198-204). The summary judgment was appealed by U.S. Bank.

On June 30, 2017, the Nevada Court of Appeals reversed and remanded the summary judgment order in Case No. 68915. The Court of Appeals held that the district court had failed to consider BANA's tender and to consider how the equities bore on the sale. The Court of Appeals directed the district court to "reconsider U.S. Bank's request for an NRCP 56(f) continuance in light of *Shadow Wood*." Order at 2-3. The order mentioned five issues from *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016): the adequacy of the foreclosure sale price; fraud, unfairness, or oppression leading to the foreclosure sale; any inaction by the complaining party; the presence of a bona fide purchaser; and tender by the deed of trust beneficiary. Order at 2.

On August 16, 2017, the district court issued an order setting a 180-day period of discovery, based on a stipulation between U.S. Bank and Clover Blossom. (1AA 206-209). U.S. Bank filed an answer and counterclaim to Clover Blossom's amended complaint on October 10, 2017. (2AA 241-323). This answer included crossclaims against the HOA for unjust enrichment, tortious interference with contractual relations, breach of good faith, and wrongful foreclosure. *Id*.

On October 23, 2017, well before discovery was complete, Clover Blossom moved to dismiss U.S. Bank's counterclaim. (2AA 324-379). The motion argued that BANA had been required to record its tender, that Clover Blossom was a bona fide purchaser, that U.S. Bank's only remedy was against the HOA, and that the

HOA sale was not required to be reasonable. *Id*. U.S. Bank filed an opposition on November 9, 2017. (2AA 380-484). In the opposition, U.S. Bank pointed out that the Nevada Court of Appeals had just remanded the case for further fact-finding and held that there were remaining material questions of fact, making any motion to dismiss untenable. (3AA 381-400).

The HOA then moved to dismiss U.S. Bank's crossclaims on November 9, 2017. (3AA 485-495). The HOA argued that BANA's crossclaims were barred by the statute of limitations and NRS 38.310's mediation requirement, as well as arguing that BANA lacked standing to raise claims under NRS 116. *Id*. U.S. Bank opposed the HOA's motion to dismiss on November 27, 2017. (3AA 508-615). The parties ultimately completed a Nevada Real Estate Department mediation on January 22, 2017. (3AA 675-679).

Before a hearing was held on the motions to dismiss, Clover Blossom filed a reply (3AA 496-507) and then supplemental briefing (3AA 616-642) in support of its motion to dismiss. The district court held the hearing on December 12, 2017. (3AA 660). At the hearing, the district court announced that it would treat both motions to dismiss as motions for summary judgment. *Id*. The Court found that U.S. Bank had "forfeited" its claims and announced that it would grant summary judgment in favor of Clover Blossom and the HOA on all claims, despite the fact that discovery was not complete. *Id*.

The district court issued a written Findings of Fact, Conclusions of Law, and Judgment on February 7, 2018, that ruled against U.S. Bank and in favor of Clover Blossom on the quiet title claims. (3AA 661-674). A notice of entry of order was filed the next day. (3AA 675-695).

U.S. Bank moved for reconsideration of the order on February 26, 2018. (4AA 696-897). The motion pointed out that the district court had violated NRCP 12(b) by issuing summary judgment without giving the parties a reasonable opportunity to present all material relevant to a determination. *Id*. The motion also attached additional evidence that Clover Blossom knew it was purchasing the Property subject to the Deed of Trust, and explained how this evidence bore on the equities. *Id*. Clover Blossom opposed the motion on March 14, 2018. (4AA 898-907).

The district court issued an order granting summary judgment to the HOA on U.S. Bank's crossclaims on April 13, 2018. (4AA 909-920). Notice of entry of the order was filed on April 16, 2018. (4AA 921-935).

On May 1, 2018, the district court denied U.S. Bank's motion for reconsideration, addressing the new evidence presented in the motion but ignoring its violations of NRCP 12(b). (4AA 936-939). A notice of entry of order was filed on May 1, 2018. (4AA 940-945).

U.S. Bank filed a timely notice of appeal on May 10, 2018. (5AA 946-948).

SUMMARY OF THE ARGUMENT

This Court recently held that a tender substantially identical to the one made by BANA in this case "results in the buyer at foreclosure taking the property subject to the deed of trust." *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, -- P.3d --, 134 Nev. Adv. Op. 72, *slip op.* at 1, 2018 WL 4403296 at *1 (Nev. Sept. 13, 2018) ("*Bank of America*"). Here, BANA sent a check to the HOA's trustee NAS for the entire superpriority amount and a portion of the collection costs with an explanation that it was sent to pay off the superpriority portion of the lien. Although NAS rejected the check, there is nothing in the record suggesting that BANA's tender was inadequate or impermissibly conditional. Because of that tender, this Court should reverse the district court's decision and clarify that the superpriority portion of the lien was discharged prior to the sale.

Alternatively, this Court should reverse the summary judgment and remand for full discovery on BANA's tender and the inequity of the sale. U.S. Bank presented evidence that the superpriority portion was tendered by BANA and unjustifiably rejected, that the sale price was grossly inadequate, and that Clover Blossom was aware that it was purchasing the Property subject to the Deed of Trust. The district court had no justification for not recognizing the materiality of these questions, because less than a year earlier the Court of Appeals had reversed an earlier summary judgment against U.S. Bank in this case and directed the district

court to complete discovery on these issues. The district court's premature decision to grant summary judgment is completely indefensible.

Further increasing the error of the summary judgment is the procedural posture when it was issued. No party had filed a motion for summary judgment; instead, Clover Blossom had filed a motion to dismiss U.S. Bank's counterclaim. At the hearing, the district court unexpectedly announced, to the surprise of all parties, that it would *sua sponte* grant summary judgment to Clover Blossom. The district court then denied U.S. Bank's motion for reconsideration, which pointed out that the period for discovery had not closed and that NRCP 12(b) had been violated by converting Clover Blossom's motion to dismiss into a motion for summary judgment without providing notice of its intent to do so. In addition to the substantive problems with the district court's judgment, it should also be reversed for this violation of the Rules of Civil Procedure.

Finally, this Court should also reverse the district court's judgment on U.S. Bank's crossclaims against the HOA. The district court's holding that the statute of limitations barred U.S. Bank from asserting crossclaims is a clear error of law. U.S. Bank's crossclaims could only accrue when the Deed of Trust was ruled extinguished. Furthermore, even if the causes of action had accrued at an earlier point, the accrual would have been equitably tolled by the HOA's inequitable misrepresentations regarding the effect of its foreclosure sale. The district court also

erred in ruling that U.S. Bank lacked standing to raise a crossclaim under NRS 116 and that it had failed to comply with the mediation requirement of NRS 38.310.

ARGUMENT

I. Standard of Review

"This [C]ourt reviews a district court's grant of summary judgment de novo." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 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).

A denial of a motion for reconsideration under NRCP 59 should be reviewed along with the underlying judgment. *AA Primo Builders, LLC v. Washington*, 245 P.3d 1190, 1197 (Nev. 2010). Such an order is reviewed under an abuse of discretion standard. *Id.*; *Land Baron Inv. v. Bonnie Springs Family LP*, 356 P.3d 511, 520 (Nev. 2015), *reconsideration en banc denied* (Jan. 22, 2016). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo*, 245 P.3d at 1197.

II. This Court Should Reverse the Summary Judgment Based on BANA's Undisputed Tender of the Superpriority Amount.

The district court erred in granting summary judgment against U.S. Bank when the pleadings establish that BANA tendered the superpriority portion and discharged the lien. As this Court held in *Bank of America*, 134 Nev. Adv. Op. 72,

2018 WL 4403296, delivery of a check in an amount sufficient to pay the superpriority portion of an association's lien extinguishes the lien and causes any purchaser to take title subject to the deed of trust.[2] The facts of BANA's tender (as alleged in the pleadings and attached materials) in this case are virtually identical to the facts in the *Bank of America* decision. Because the district court demonstrated an unwillingness to consider U.S. Bank's evidence or allow U.S. Bank to complete discovery, this Court should hold that BANA tendered the superpriority portion.

A. BANA's offer and subsequent payment of the superpriority lien were sufficient tender.

BANA's offer and check for the superpriority portion of the lien were a sufficient tender that extinguished that part of the lien. "[T]he purpose of the law of tender is to enable the debtor to relieve himself or herself of interest and costs and to relieve his or her property of encumbrance by offering his or her creditor all that he or she has any right to claim; this does not mean that the debtor must offer an amount beyond reasonable dispute, but it means the amount actually due." *Dohrman v. Tomlinson*, 399 P.2d 255, 258 (Idaho 1965); 74 AM. JUR. 2D *Tender* § 2 (same). "A valid tender of payment operates to discharge a lien." *Bank of America*, *slip op*.

[2] *See also BAC Home Loans Servicing, LP v. Aspinwall Court Trust*, No. 69885, 2018 WL 3544962 (Nev. July 20, 2018) (unpublished); *2713 Rue Toulouse Trust v. Bank of America, N.A.*, No. 68206, 2018 WL 3545359 (Nev. July 20, 2018) (unpublished); *Bank of America, N.A. v. Ferrell Street Trust*, No. 70299, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. April 27, 2018) (unpublished).

at 3, 2018 WL 4403296 at *2 (citing *Power Transmission Equip. Corp. v. Beloit Corp.*, 201 N.W.2d 13, 16 (Wis. 1972)).

In *Bank of America*, BANA delivered a check to the HOA's agent in an amount sufficient to pay nine months of assessments. *Slip op.* at 2, 2018 WL 4403296 at *1. "The letter included with the tender stated that the HOA's acceptance would be an 'express agreement that [Bank of America's] financial obligations toward the HOA in regards to the [property at issue] have now been "paid in full."'" *Id.* This Court held that, despite the HOA's rejection of BANA's check, the tender operated to discharge the superpriority lien. *Id.*, *slip op*. at 5-6, 2018 WL 4403296 at *3. The Court expressly rejected the argument that the tender was invalid because it did not cover the HOA's entire lien, and noted that it was sufficient to pay the full superpriority amount. *Id.*, *slip op*. at 4-5, 2018 WL 4403296 at *3.[3]

Here, just as in *Bank of America*, *Aspinwall*, and *Rue Toulouse*, BANA (through its counsel at Miles Bauer) tendered payment for the HOA's superpriority lien. Specifically, Miles Bauer sent NAS a letter that offered to pay the superpriority portion. NAS provided Miles Bauer with an itemized payoff ledger for the lien. Next, Miles Bauer sent a check for $1,494.50 along with a letter explaining that this was

[3] *See also Aspinwall Court Trust*, 2018 WL 3544962 at *1; *2713 Rue Toulouse Trust*, 2018 WL 3545359 at *1.

composed of $495.00 for delinquent assessments and $999.50 in "reasonable collection costs" to satisfy the superpriority lien.

The letter correctly defined the statutory superpriority sum as "the nine months of assessments for common expenses." *See Horizons at Seven Hills Homeowner Ass'n v. Ikon Holdings, LLC*, 373 P.3d 66, 73 (Nev. 2016) ("[W]e conclude the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather it is limited to an **amount equal to the common expense assessments due during the nine months before foreclosure**.") (emphasis added); *accord Bank of America*, *slip op.* at 4, 2018 WL 4403296 at *2 ("A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments.").[4]

The district court held that BANA's tender was not valid because it "contains conditions." (3AA 668). However, this Court rejected that argument in *Bank of America* when it considered a nearly identical tender. There, this Court wrote that Bank of America "had a right to insist" that "acceptance of the tender would satisfy the superiority portion of the lien, preserving Bank of America's interest in the property." *Slip op.* at 5, *Bank of America*, 2018 WL 4403296134 at *3. The district

[4] There is no evidence that the HOA's superpriority lien included any charges for maintenance or nuisance abatement.

court also held that BANA's tender in this case failed because it did not include collection costs, citing an advisory opinion from the Commission for Common Interest Communities and Condominium Hotels. (3AA 668-669). However, this Court rejected a similar argument in *Bank of America*, where the purchaser had argued that "the payment required to satisfy the superpriority portion of an HOA lien was legally unsettled at the time." *Slip op.* at 4, 2018 WL 4403296134 at *3. This Court held instead that, "a plain reading of NRS 116.3116 indicates that at the time of Bank of America's tender, tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien." *Id.*

Therefore, BANA undeniably satisfied the requirements for tender by submitting a check to pay nine months of unpaid assessments. The tender was not defeated by any conditions, and BANA was not required to tender collection costs to pay off the superpriority portion of the lien.

B. The district court's reasoning for ruling against U.S. Bank was unfounded.

The district court in this case did not rule against U.S. Bank on the basis that BANA did not send the proper amount. Rather, the district court reasoned that the HOA Trustee "did not accept the tender." (3AA 669). This reasoning erroneously assumes that tender must be accepted by the lienholder to be effective. This Court has repeatedly held otherwise; sending a check for the proper amount and an explanation of its purpose is a sufficient tender unless the record shows that the

lienholder rejected it with an adequate justification. *Bank of America*, 134 Nev. Adv. Op. 72, *slip op*. at 5-6, 2018 WL 4403296 at *2-*4; *Ferrell Street*, 2018 WL 2021560 at *1 ("When rejection of a valid tender is unjustified, the tender effectively discharges the lien"); *Rue Toulouse*, 2018 WL 3545359 at *1 ("the district court properly granted summary judgment for Bank of America on the ground that it tendered $540 to the HOA's agent, which, although rejected, … satisfied the superpriority portion of the HOA's lien.").

The district court's reasoning would put obligors completely at the mercy of lienholders; simply by refusing to respond to a tender, a lienholder would be able to wipe out other property interests for any reason whatsoever. However, as this Court noted in 2014, the superpriority portion "is a specially devised mechanism designed to strike an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 412 (Nev. 2014) (internal punctuation omitted).

The district court's other conclusions of law concerning BANA's tender are also contradicted by this Court's rulings. The district court ruled that BANA was required to take further steps after the tender was rejected, such as paying the entire HOA lien and seeking to enjoin the HOA's sale. (3AA 668). However, as discussed above, tender of the amount due is sufficient to discharge the superpriority portion.

Bank of America, *slip op*. at 4-5, 2018 WL 4403296 at *2. Furthermore, the HOA was free to foreclose after the superpriority portion was tendered; this Court held that in such a scenario, "the buyer at the foreclosure tak[es] the property subject to the deed of trust." *Id.*, *slip op.* at 2, 2018 WL 4403296 at *1. BANA had no obligation to stop the HOA from foreclosing on the remaining superpriority portion of its lien.

Finally, the district court erred by holding that Clover Blossom could somehow negate the effects of BANA's tender on the basis of the bona fide purchaser doctrine. (*See* 3AA 660-662). In fact, the bona fide purchaser doctrine has no relevance to the effects of a tender of the superpriority portion. As this Court held in *Bank of America*, when the superpriority portion of the lien has been discharged, "a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property." *Slip op*. at *13, 2018 WL 4403296 at *6. The bona fide purchaser defense cannot reinstate a discharged lien. As a result, the district court was wrong to invoke the bona fide purchaser defense in the context of BANA's tender.

Because there is no factual dispute over whether BANA sent a check for the full superpriority portion, this Court should reverse the judgment below and confirm that BANA made a valid and sufficient superpriority tender.

III. The District Court Erred by Granting Summary Judgment before Discovery Was Complete and Denying Reconsideration.

In addition to the fact that the pleadings and attached materials showed that BANA had tendered the superpriority portion of the lien prior to the sale, the district court also erred by granting summary judgment without notice and before discovery had completed. The district court violated NRCP 12 by granting summary judgment under NRCP 56 when the only dispositive motions that had been filed were motions to dismiss BANA's counterclaims and crossclaims. This ruling also denied U.S. Bank the opportunity to develop a factual record surrounding BANA's tender and the HOA Trustee's rejection, as well as the inequity of the foreclosure sale. The district court's decision to rule before the end of discovery was particularly indefensible in that it came shortly after the Nevada Court of Appeals had reversed that same judge's earlier summary judgment against BANA and held that material questions of fact remained.

A. The district court erred by refusing to allow U.S. Bank to complete scheduled discovery.

The Nevada Court of Appeals reversed the first summary judgment and remanded the case for further fact-finding regarding BANA's tender, the inequity of the HOA's foreclosure sale, and Clover Blossom's bona fide purchaser status. *See U.S. Bank*, Case No. 68915, at 2. However, the district court granted summary judgment to Clover Blossom only a few months after the Court of Appeals' decision.

Significantly, the stipulated discovery period was still open. U.S. Bank had further depositions scheduled, which it was unable to complete before its opposition to Clover Blossom's motion to dismiss was due. Furthermore, at the time of the hearing, U.S. Bank had also not yet received the written production of the HOA. This information was obviously relevant to the questions of tender, inequity of the sale, and bona fide purchaser status.

Because the district court announced at the hearing that it would grant summary judgment, other parties believed that the uncompleted discovery was no longer necessary. Not only was U.S. Bank unable to present the evidence before summary judgment was issued, it also was unable to procure that discovery for a motion for reconsideration. The district court's premature summary judgment prejudiced U.S. Bank's case, and was completely indefensible in light of the Court of Appeals' holding that further fact-finding was required.

B. The district court violated NRCP 12 by converting Clover Blossom's motion to dismiss to a motion for summary judgment without notice.

NRCP 12(b) allows district courts to grant summary judgment upon a motion to dismiss in a limited fashion:

> If, on a [motion to dismiss] for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56,

> and **all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56**.

NRCP 12(b) (emphasis added). However, the district court gave no notice before the hearing on Clover Blossom's motion to dismiss that it would be deciding whether to issue a summary judgment. Therefore, it did not give U.S. Bank a "reasonable opportunity" to present pertinent material.

Converting Clover Blossom's motion to dismiss into a motion for summary judgment meant that the following factual issues, among others, were potentially relevant:

- whether the HOA had given any good-faith reason for its rejection of BANA's tender,
- whether Clover Blossom believed it was purchasing a sub-priority interest in the Property at HOA foreclosure sale;
- whether Clover Blossom's claim that the Deed of Trust was extinguished constitutes fraud or unfairness in light of the statements in Mr. Haddad's other trusts' bankruptcy filings; and
- whether Clover Blossom could show that it lacked all notice of BANA's competing interest in the Property (so as to constitute a bona fide purchaser).

The district court had no justification for failing to recognize that these issues were material when the Court of Appeals had already directed further fact-finding on tender, the inequity of the HOA's foreclosure sale, and Clover Blossom's bona fide purchaser status.

If U.S. Bank could not even conduct scheduled discovery on parties with relevant information, it unquestionably did not have the "reasonable opportunity to present all material made pertinent" by a motion for summary judgment. As such, NRCP 12(b) requires that the district court's summary judgment be reversed and U.S. Bank allowed to complete discovery and present all relevant materials.

C. The district court erred by denying U.S. Bank's motion for reconsideration and overlooking new evidence with equitable significance.

The district court committed an additional error when it denied U.S. Bank's motion for reconsideration. One of the counterclaims raised by U.S. Bank in this action is an equitable one: that the foreclosure sale should be set aside based on the inadequacy of its price along with fraud, unfairness, or oppression.[5] In an action to set aside a sale, a trial court "must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). In the motion for reconsideration, U.S. Bank submitted new evidence that weighed upon the equities. Specifically, U.S. Bank submitted 2012 bankruptcy filings for trusts owned by Iyad

[5] U.S. Bank's tender argument is not affected by the bona fide purchaser defense or other equitable considerations. *See Bank of America*, 134 Nev. Adv. Op. 72, 2018 WL 4403296 at *6*; see also. Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, National Association*, No. 71246, 2017 WL 6597154, at *1 n.1 (Nev. Dec. 22, 2017) (disagreeing with argument that "putative BFP status could have revived the already-satisfied super-priority component of the HOA's lien.").

"Eddie" Haddad, who is also the owner and principal of Clover Blossom. The bankruptcy filing by River Glider Trust explicitly states that it purchased properties "subject to the first mortgage lien" at HOA lien auctions. (4AA 785). Since Clover Blossom is owned by an experienced real estate investor who knew at the time of the purchase of this Property that deeds of trust can survive HOA foreclosures, the district court's determination of bona fide purchaser status was due to be reconsidered.

The burden of establishing bona fide purchaser status rests with the party claiming such status – here, Clover Blossom. *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 248 (1979) (explaining that the putative bona fide purchaser "was required to show that legal title had been transferred to her before she had notice of the prior conveyance to appellant"). The district court's initial conclusion that Clover Blossom was a bona fide purchaser, which was not correct at the time, should certainly have been vacated after U.S. Bank gave sworn filings from its manager, Eddie Haddad, admitting that senior deeds of trust survive HOA foreclosure sales in a bankruptcy filing for another trust he managed.

Only six months before the HOA's foreclosure sale here, one of Haddad's other trusts filed for Chapter 11 bankruptcy. (4AA 743-782). For each of the eleven properties that he had purchased at HOA foreclosure sales, Haddad declared that the senior deed of trust remained fully enforceable after the HOA's foreclosure. *Id.*

Subsequently, only a month before he purchased the Property at issue here, Haddad described his business model as follows: "Mr. Haddad funds the Trust, which then purchases **junior liens** through [homeowners association] sales held at Nevada Legal News, and **thus acquires ownership of the properties, subject to the first mortgage lien on the properties**." (4AA 785) (emphasis added). In a later motion, approximately two months after Clover Blossom purchased the Property in this case, Haddad's trust moved to strip the amount of the loan secured by the senior deed of trust encumbering one of those association-foreclosure properties. (4AA 796-801). In that lien-stripping motion, the trust stated that it owned the subject property "subject to the following liens …." (4AA 797).

These bankruptcy filings, which occurred during the months leading up to and the months after Haddad's purchase of the Property in this case, reveal that Haddad knew that the interests he purchased at HOA foreclosure sales were subject to the senior deeds of trust encumbering those properties. Given the bankruptcy petition of the Haddad-trust, which Haddad himself signed "under penalty of perjury," and the motions the Haddad-trust filed in that bankruptcy, in which Haddad claimed he "acquires ownership" at HOA foreclosure sales "subject to the first mortgage lien on the properties," there is a strong inference that Haddad believed he purchased the Property here on behalf of Clover Blossom subject to the Deed of Trust. Consequently, the district court should have allowed full discovery into whether

Clover Blossom could qualify as a bona fide purchaser for its purchase of the Property.

Furthermore, these filings raise an inference of "fraud, unfairness, or oppression" on Clover Blossom's part, as they suggest that Clover Blossom is acting in bad faith in this present case when it asserts that the Deed of Trust is extinguished, contrary to sworn bankruptcy filings. Thus, this evidence raised new questions that weigh on the equities. Considering that U.S. Bank also presented evidence of a grossly inadequate foreclosure price (less than 8 percent of the fair market value (4AA 715-717)), the district court should not have dismissed U.S. Bank's challenge to the equitableness of the foreclosure sale.

IV. This Court Should Reverse the Summary Judgment Against U.S. Bank on the Crossclaims Against the HOA.

Separately, the district court's summary judgment on U.S. Bank's crossclaims against the HOA is due to be overturned. The district court's holding that the crossclaims were barred by a statute of limitations erred for several reasons: it misunderstood the accrual date for the causes of action, it ignored the doctrine of equitable tolling, and it applied the wrong statute of limitations. The district court also erred by ruling that U.S Bank lacked standing under NRS 116 and was barred by a mediation requirement, which it had fulfilled before the HOA's motion was ruled upon.

A. None of U.S. Bank's crossclaims are barred by a statute of limitations.

The district court incorrectly held that all of U.S. Bank's crossclaims accrued on the date Clover Blossom's Foreclosure Deed was recorded and therefore were barred by statutes of limitations. In reality, none of U.S. Bank's crossclaims accrued until, at the very earliest, the district court granted summary judgment against U.S. Bank. The crossclaims were contingent on a ruling that the Deed of Trust had been extinguished. Even if the crossclaims had accrued on the date that the Foreclosure Deed was recorded, the statutes of limitations should be equitably tolled because the HOA misrepresented that the foreclosure would not affect U.S. Bank's Deed of Trust.

1. U.S. Bank's crossclaims against the HOA will not accrue unless there is a final judgment holding that the Deed of Trust was extinguished.

Statutes of limitations begin to run on "the day the cause of action accrues." *Clark v. Robison*, 944 P.2d 788, 789 (Nev. 1997). "A cause of action accrues when a suit may be maintained thereon." *Id.* A tort cause of action does not accrue until damages occur, as "compensable damages" are an "essential element of a negligent tort." *Szekeres by Szekeres v. Robinson*, 715 P.2d 1076, 1077 (Nev. 1986); *see also City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1051 (9th Cir. 2014) (explaining that limitations period begins running when the last element of a cause

of action occurs, and "[w]hen the last element to occur is damage, the limitations period starts upon the occurrence of appreciable and actual harm").

Here, the district court held that U.S. Bank's crossclaims were time-barred because they were filed more than four years after the HOA's Foreclosure Deed was recorded, the date on which the district court concluded that the claims accrued. (4AA 928-929). However, U.S. Bank did not suffer damages on that date. U.S. Bank will not suffer any compensable damages unless this Court were to affirm that the Deed of Trust was extinguished by the HOA's foreclosure sale. Because U.S. Bank's crossclaims against the HOA are derivative of its quiet title and declaratory relief counterclaims against Clover Blossom, the statutes of limitations on the crossclaims against the HOA have not begun to run.

This statute-of-limitations analysis is a familiar part of Nevada jurisprudence, as the statute of limitations for other derivative claims – like indemnity and attorney malpractice – do not begin running until the judgment is entered that triggers the indemnity right or causes the malpractice claim to accrue. *See Saylor v. Arcotta*, 225 P.3d 1276, 1279 (Nev. 2010). The statute of limitations for an indemnity claim "does not begin to run until the indemnitee suffers actual loss by paying a settlement or underlying judgment." *Id.* Likewise, the statute of limitations for an attorney-malpractice claim does not begin running when the attorney's negligent act occurs. *Brady Vorwerck v. New Albertson's, Inc.*, 333 P.3d 229, 230 (Nev. 2014). Instead,

it begins running when the "underlying legal action has been resolved" because that is when "damage has been sustained" – the final element of the malpractice claim. *Id.* This is so because "[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence." *Id.* at 234. Allowing malpractice damages "to become certain before judicial resources are invested in entertaining the malpractice action" furthers judicial economy. *Id.* at 235.

This same analysis applies to the statutes of limitations for U.S. Bank's crossclaims against the HOA here. It was uncertain whether U.S. Bank suffered any damage on the date of the HOA's sale, as its loan servicer tendered an amount in excess of the superpriority amount to the HOA Trustee before sale. U.S. Bank has always contended that this tender discharged the superpriority lien before the sale, meaning Clover Blossom took title subject to the Deed of Trust. If the Deed of Trust is ultimately ruled to have been extinguished before the sale,[6] that will be the

[6] U.S. Bank asserted its crossclaims for damages against the HOA in the alternative in case Clover Blossom was held to have title free and clear of the Deed of Trust. Alternative pleading is common practice and expressly allowed under the Nevada Rules of Civil Procedure. *See* NRCP 8(a) (explaining that "[r]elief in the alternative or of several different types may be demanded" in a pleading); *E.H. Boly & Son, Inc. v. Schneider*, 525 F.2d 20, 23 n.3 (9th Cir. 1975) (explaining that "although a plaintiff may not recover on both theories, a plaintiff may claim remedies as alternatives, leaving the ultimate election for the court"); *see also Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 38 P.3d 872, 876 (Nev. 2002) ("Federal cases interpreting

moment U.S. Bank incurs damage from the HOA's wrongful rejection of BANA's tender. Until there are damages, the final element of its crossclaims against the HOA is not present.

This is closely analogous to the statute-of-limitations analysis for attorney-malpractice claims – the damage is not incurred and is not even certain when the malpractice occurs. Instead, the damage is incurred when the court enters a judgment against the client caused by the lawyer's negligent act. For example, if a lawyer inexcusably fails to timely file a motion *in limine* to exclude a key piece of unfavorable evidence that would likely be granted, that inaction would likely satisfy the negligence element of a malpractice claim. But if the lawyer nevertheless prevails for his client at trial, there is no malpractice claim because the negligent act never actually damaged the client – "no one has a claim against another without having incurred damages." *See Boulder City v. Miles*, 449 P.2d 1003, 1005 (Nev. 1969). That is why the statute of limitations on an attorney-malpractice claim does not begin to run until the judgment is entered against the client – the damages are too "speculative and remote" at the time of the attorney's negligent conduct. *See Semenza v. Nevada Med. Liab. Ins. Co.*, 765 P.2d 184, 186 (Nev. 1988).

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the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.").

Here, U.S. Bank's damages were too "speculative and remote" to trigger the statutes of limitations on its claims against the HOA when the HOA conducted its foreclosure sale, as the effect of that sale was not and is still not settled. At the time the Foreclosure Deed was recorded, it was uncertain whether the sale had wiped out the Deed of Trust. Accordingly, U.S. Bank's crossclaims against the HOA were not untimely.

2. Alternatively, the statutes of limitations were equitably tolled by the HOA's misrepresentations.

Even if they began running when the Foreclosure Deed was recorded, the statute of limitations on U.S. Bank's crossclaims should be equitably tolled in light of the HOA's misrepresentations regarding the effect of its foreclosure sale. "Where the danger of prejudice to the defendant is absent, and the interests of justice so require, equitable tolling of the limitations period may be appropriate." *Seino v. Employers Ins. Co. of Nevada, Mut. Co.*, 111 P.3d 1107, 1112 (Nev. 2005). Equitable tolling "focuses on whether there was excusable delay by the claimant." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 261 P.3d 1071, 1077 (Nev. 2011). A court "look[s] at several nonexclusive factors" to decide whether equitable tolling applies, including whether the defendant made statements or "false assurances" that misled the claimant, and "any other equitable considerations appropriate in the particular case." *See, e.g., Copeland v. Desert Inn*

Hotel, 673 P.2d 490, 493 (Nev. 1983); *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 265 P.3d 666, 672 (Nev. 2011); *Seino*, 121 Nev. at 152.

Here, the HOA's "false assurances" that its foreclosure would have no effect on the Deed of Trust justifies equitable tolling. The HOA's Notice of Delinquent Assessment Lien stated that the lien the HOA eventually foreclosed was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. (2AA 297). Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. (2AA 452 at § 9.1). These publicly-recorded documents represented to U.S. Bank, Clover Blossom, and the public that the HOA's foreclosure sale would have no effect on the Deed of Trust.

The HOA's agent then unjustifiably rejected BANA's tender—undertaken in an abundance of caution—and proceeded to foreclose on the HOA's lien. After U.S. Bank brought crossclaims against the HOA, it could have taken the position that the CC&Rs did not allow the Deed of Trust to be extinguished. Alternatively, it could have stated that the CC&Rs were ineffective, and taken responsibility for unjustifiably placing the Deed of Trust at risk of extinguishment. It did neither. Instead, it sought to have the courts declare the Deed of Trust extinguished **and** prevent U.S. Bank from recovering any damages caused by the HOA's action.

As it consistently did in its orders thus far against U.S. Bank, the district court thoroughly distorted the equitable tolling analysis to rule against U.S. Bank. The

district court held that the delay in filing "would prejudice the HOA" because "the Bank has not argued that the HOA will not be prejudiced by the Bank's delay in filing." (4AA 933). The sole reasoning here is that U.S. Bank did not prove a negative. However, the district court was unable to give **any** reason that the HOA would be prejudiced. In fact, the HOA suffered no prejudice by first being named in the litigation after the Court of Appeals' reversal and remand. The HOA did not miss any discovery, or lose an opportunity to oppose any dispositive motions that affected the claims in this case.

Likewise, the district court held that U.S. Bank "did not show that it relied on the CC&Rs" because it had sought to pay off the superpriority portion of the lien. (4AA 933). However, it is perverse to punish U.S. Bank for sending money to the HOA to cover the homeowner's delinquencies. At the time of the tender in 2012, there was uncertainty as to the effect of mortgagee protection clauses, like the ones in the CC&Rs. This issue was not resolved until 2014, when this Court ruled that a mortgagee protection clause could not "subordinate" a superpriority lien. *See SFR Investments*, 334 P.3d at 418-19. The district court's rulings put U.S. Bank in a Catch-22—first incorrectly holding that a tender of the correct superpriority amount did not discharge the superpriority portion, and then holding that the tender barred U.S. Bank from later bringing alternative claims against the HOA if the Deed of Trust was extinguished. The district court also held that U.S. Bank "knew all of the

relevant facts that created a claim against the HOA" (*i.e.*, that the foreclosure supposedly would extinguish its Deed of Trust) (4AA 933)., ignoring the resulting implication that the **HOA also knew** that its mortgagee protection clause was erroneous and rejected U.S. Bank's tender anyway.

The district court would impose a total loss on U.S. Bank, the only party that attempted to pay the superpriority portion, for not foreseeing that this Court would strike down mortgagee protection clauses in *SFR Investments*. It would then give the HOA a complete pass for putting in that void and misleading clause and rejecting U.S. Bank's tender of the superpriority amount of the lien. There is nothing equitable in the HOA specifically informing the entire world that its foreclosure would not affect the Deed of Trust, rejecting payment of an amount much greater than the superpriority amount before the foreclosure sale, and then seeking to destroy U.S. Bank's security interest. In light of the HOA's "false assurances" regarding the effect of its foreclosure, U.S. Bank had no reason to bring claims against the HOA until Clover Blossom sued U.S. Bank claiming that its Deed of Trust was extinguished by that foreclosure.

Even if the statutes of limitations began running on the day the HOA's Foreclosure Deed was recorded, those statutes should be equitably tolled by the HOA's inequitable misrepresentations and U.S. Bank's "excusable delay" in

bringing those claims based on those misrepresentations. Under either scenario, U.S. Bank's claims are timely, and the district court's ruling was clear error.

3. The district court applied the wrong statute of limitations for U.S. Bank's wrongful foreclosure claim.

Even if all the statutes of limitations ran un-tolled from January 24, 2013, U.S. Bank's wrongful foreclosure claim would still be timely because it is subject to a six-year statute of limitations. The district court erroneously held that a three-year statute of limitations applied from NRS 11.190(3)(a), which covers "liability created by statute." (4AA 929-930). However, the wrongful foreclosure claim necessarily depended upon the CC&Rs, which stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. (2AA 452 at § 9.1).

This Court has explained that "deciding a wrongful foreclosure claim against a homeowners' association involves interpreting covenants, conditions, or restrictions applicable to residential property." *McKnight Family, LLP v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev. 2013). The HOA's CC&Rs are a recorded "instrument in writing." Therefore, U.S. Bank's wrongful foreclosure claim is subject to NRS 11.190(1)(b)'s six-year statute of limitations because it arises from a "contract, obligation, or liability founded upon an instrument in writing." *See* NRS 11.190(1)(b); *see also Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Ass'n*, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017) (holding that

a mortgagee's wrongful foreclosure claim against an association arising from that association's foreclosure sale is subject to NRS 11.190(1)(b)'s six-year statute of limitations to the extent it implicates the association's CC&Rs).

Accordingly, even if the statute of limitations on U.S. Bank's wrongful foreclosure crossclaim began running on January 24, 2013 and was not equitably tolled, U.S. Bank would have until January 24, 2019, to assert that claim.

B. NRS 38.310 does not apply to U.S. Bank's crossclaims, and even if it did, U.S. Bank submitted the crossclaims to NRED mediation.

The district court held that U.S. Bank's wrongful foreclosure crossclaim against the HOA was due to be dismissed because NRS 38.310 required that it first be mediated by NRED. (4AA 931-032). This holding was in error because NRS 38.310 does not apply to claims brought by mortgagees. Even if the statute did, U.S. Bank satisfied its requirements by submitting all of its crossclaims against the HOA to NRED mediation before filing them.

1. NRS 38.310 does not apply to claims brought by a mortgagee against an HOA.

NRS 38.310 requires mediation before "commencement of certain civil actions." NRS 38.310(b) makes it clear that these "certain" actions only include ones between homeowners and HOAs. That provision states that if the "civil action" applies to property in a planned community subject to NRS 116, then the parties to that action must first exhaust "all administrative procedures specified in any

conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association[.]" NRS 38.310(b).

The district court held that NRS 38.310 required U.S. Bank to have its wrongful foreclosure claim mediated before filing in this action. (*See* 4AA 931-932). However, this reading of NRS 38.310 entails that U.S. Bank would not only be required to mediate its claims, but also to comply with and exhaust the CC&Rs' administrative procedures, like appearing before the HOA's board for a hearing, before filing crossclaims. U.S. Bank is not a unit owner in the planned community, and the CC&Rs contain only a few provisions relating to mortgagees like U.S. Bank. It would be absurd to read NRS 38.310 as requiring U.S. Bank comply with CC&Rs provisions designed to govern the homeowner-HOA relationship.

No part of a statute should be rendered meaningless and its language "should not be read to produce absurd or unreasonable results." *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Reading NRS 38.310's subsections together, it is clear that NRS 38.310's mediation provision applies to homeowners in the planned community, the persons the CC&Rs are designed to govern, and not mortgagees who are strangers to the community aside from having a security interest in a property. NRS 38.310 simply does not apply to U.S. Bank.

Legislative history confirms that the Nevada Legislature never intended to compel deed of trust beneficiaries like U.S. Bank into NRED mediation. At the initial hearing on Assembly Bill 152, which later became NRS 38.310, *et seq.*, the prime sponsor of the Assembly Bill described its purpose:

> Mr. Schneider, the prime sponsor of A.B. 152, stated it is a form of dispute resolution which developed as a result of his working closely with property management associations. Over the past year he has been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own constitutions which are referred to as covenants, conditions and restrictions (CC&Rs). Although these associations have flourished and existed with encouragement, **there are personality problems and management problems between the board and the residents.** As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days rather than the years it takes to a lawsuit to proceed through District Court.

(3AA 550) (emphasis added). This legislative history shows the mandatory mediation provision was designed to steer **homeowner** disputes, which could be resolved in alternative ways, into mediation. The framers of Assembly Bill 152 wanted to direct these "personality driven" disputes into a non-judicial forum to ease the strain on Nevada's court system. NRS 38.310's legislative history confirms that claims from deed of trust holders were not intended to be sent to mediation.

2. If NRS 38.310 applies, U.S. Bank constructively exhausted its requirements by submitting its claims against the HOA to NRED mediation.

Even if NRS 38.310 did apply to mortgagees, the mediation requirement was constructively exhausted here because U.S. Bank submitted the claims, and NRED failed to mediate them within the statutory 60-day deadline. A party constructively exhausts its administrative remedies "when certain statutory requirements are not met by the agency." *Reno Newspapers, Inc. v. U.S. Parole Comm'n*, 2011 WL 222144, at *2 (D. Nev. Jan. 24, 2011) (citing *Taylor v. Appleton*, 30 F.3d 1365, 1368 (11th Cir. 1994) ("A party is deemed to have constructively exhausted all administrative remedies 'if the agency fails to comply with the applicable time limit provisions….'"); *see also Farm Bureau Town & Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348 (Mo. 1995) ("Another exception to the exhaustion of administrative remedies doctrine arises where the applicable administrative procedure must be commenced by the agency and the agency has failed to commence any proceeding."). Under NRS 38.330(1), NRED "mediation must be completed within 60 days after the filing of the written claim."

A mortgagee constructively exhausts the administrative remedies that NRS 38.310 may require if the mortgagee's claims are submitted to NRED and NRED fails to complete mediation within sixty days, as required by NRS 38.330(1). *Bank of America, N.A. v. Hartridge Homeowners Association*, 2016 WL 3563502, at *2

(D. Nev. June 19, 2016). In *Hartridge*, just as here, a mortgagee submitted to NRED claims against an HOA based on the HOA's putative foreclosure of a superpriority lien that had previously been extinguished by Bank of America's superpriority tender. *Id.*, at *2. Also like this case, NRED failed to mediate the mortgagee's claims within the sixty-day deadline imposed by NRS 38.330(1). *Id.* The association moved to dismiss the mortgagee's claims, arguing the mortgagee was "barred from initiating th[e] lawsuit because it had not participated in mediation per the statutory requirement" found in NRS 38.310. *Id.* The *Hartridge* Court denied the HOA's motion, holding that the mortgagee's claims were proper because the mortgagee "properly submitted the claim[s] to mediation per [NRS] 38.310(1)" before asserting them in the district court. *Id.*

Here, U.S. Bank submitted its claims against the HOA to NRED mediation on September 5, 2017, well before it filed the crossclaims in the district court. (*See* 3AA 524-525). Just as in *Hartridge*, here NRED failed to mediate these claims within the sixty-day deadline imposed by NRS 38.330(1). NRED thus "failed to comply with the applicable time limit provisions" for mediating U.S. Bank's claims, meaning U.S. Bank constructively exhausted the administrative remedies purportedly required by NRS 38.310. *See Taylor*, 30 F.3d at 1368.[7]

[7] Notably, any failure to exhaust the administrative remedies prescribed by NRS 38.310 would not deprive the courts of subject matter jurisdiction. *See Allstate Ins. Co. v. Thorpe*, 170 P.3d 989, 993 (Nev. 2007). Rather, any failure would only render

NRED's failure to comply with its statutory duties should not bar U.S. Bank from litigating its claims against the HOA in this suit. U.S. Bank's claims against the HOA arise from the same transaction or occurrence as Plaintiff's quiet title action – the HOA's purported foreclosure of its super-priority lien after that lien was extinguished by Bank of America's super-priority-plus tender. Judicial economy is furthered by allowing U.S. Bank to litigate its claims against the HOA in this action, rather than forcing a separate action after NRED mediates the claims it was required to mediate long ago. And U.S. Bank's constructive exhaustion of any administrative remedies required by NRS 38.310 ensures these claims are justiciable and can be resolved in this action. The district court thus was mistaken to dismiss U.S. Bank's crossclaim on the erroneous holding that U.S. Bank had failed to comply with NRS 38.310.

C. U.S. Bank had standing to raise a claim for violation of NRS 116.1113.

The final erroneous ruling from the district court is that U.S. Bank had no standing to bring a crossclaim for violation of NRS 116.1113, which states "Every

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the matter nonjusticiable as unripe. *Id.* ("While in the past we have held that the failure to exhaust administrative remedies deprives the district court of subject-matter jurisdiction, more recently … we noted that failure to exhaust all available administrative remedies before proceeding in district court renders the matter unripe for district court review."). Even if U.S. Bank's claims were not ripe when filed, they became ripe on November 4, 2017, when NRED's sixty-day deadline expired, which was five days before the HOA moved to dismiss U.S. Bank's crossclaims.

contract or duty governed by this chapter [*i.e.*, NRS 116] imposes an obligation of good faith in its performance or enforcement." The district court held that NRS 116.4117 excludes mortgagees like U.S. Bank from bringing **any** claims against HOAs for violating a provision of NRS 116. (*See* 4AA 930-931).

However, NRS 116.4117 merely clarifies how declarants, community managers, the HOA, and unit owners can bring suits against each other, what liability can exist between them, and when punitive damages and attorney's fees can be awarded. *See* NRS 116.4117. The section itself confirms this, saying, "[t]he civil remedy provided by this section **is in addition to, and not exclusive of, any other available remedy or penalty**." NRS 116.4117(7). Thus, the plain language of the section completely disproves the district court's notion that NRS 116.4117 denies a private right of action to the beneficiary of a deed of trust.

Indeed, it would be inexplicable if the Nevada Legislature had excluded deed of trust beneficiaries from bringing claims for violations of NRS 116. The chapter has many provisions that impose obligations on HOAs to protect deed of trust beneficiaries. For example, two separate provisions in NRS 116 provide that an HOA "shall" send notices regarding a foreclosure to mortgagees who request such notice in advance. *See* NRS 116.31163(1); NRS 116.311635(b)(2). An HOA cannot foreclose on a lien if a deed of trust beneficiary has begun the non-judicial foreclosure process and has not filed a mediation certificate as required by NRS

107.086. NRS 116.31162(6). An HOA also has a duty to distribute proceeds from foreclosure sales to junior lienholders, including beneficiaries of first deeds of trust in the event a super-priority lien is properly foreclosed. NRS 116.31164. Imposing all these duties and then denying any enforcement mechanisms would have been absurd.

In *SFR Investments*, this Court recognized that the Legislature protected deed of trust beneficiaries under NRS 116, noting that that the split-lien system is "a specially devised mechanism designed to strike[] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *SFR Investments Pool 1 v. U.S. Bank, N.A.*, 334 P.3d 408, 412 (Nev. 2014). The district court's notion that deed of trust holders have no standing to bring suits when an HOA violates NRS 116 is contradicted by the statute it cited and a common-sense reading of the chapter as a whole.

CONCLUSION

For all of the above reasons, the district court's summary judgment in favor of Clover Blossom should be reversed with a clear holding that U.S. Bank adequately tendered the superpriority portion. The case should also be remanded to the district court for full and complete discovery on equitable issues, consistent with

this Court's ruling in *Shadow Wood*. Finally, this Court should reverse the judgment against U.S. Bank on the crossclaims against the HOA.

DATED this 24th day of October, 2018.

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CERTIFICATE OF COMPLIANCE

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

I FURTHER CERTIFY that this opening brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C) it is proportionally spaced, has a typeface of 14 points or more and contains 9,991 words.

FINALLY, I CERTIFY that I have read this **Appellant's Opening 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 of the transcript or appendix where the matter relied on is to be found.

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

DATED this 24th day of October, 2018.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 24, 2018, the foregoing **APPELLANT'S OPENING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen
An employee of AKERMAN LLP