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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Statutes

ARGUMENT

This Court should reverse the district court's summary judgment in favor of Clover Blossom and remand with clear instructions that BANA's superpriority tender resulted in Clover Blossom taking title to the Property subject to U.S. Bank's Deed of Trust. While the district court also erred in converting Clover Blossom's motion to dismiss into a motion for summary judgment, it is indisputable that BANA tendered a sufficient amount and the HOA Trustee received the tender, which alone resolves all claims in this case.

Alternatively, this Court should reverse the summary judgments in favor of Clover Blossom and the HOA and remand with instructions to allow discovery on BANA's tender, the inequity of the HOA's sale, and the HOA's liability to U.S. Bank.

I. This Court Should Reverse the Summary Judgment in Clover Blossom's Favor Based on BANA's Superpriority Tender.

This court held in *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. Adv. Op. 72, 427 P.3d 113 (2018) (***Diamond Spur***) "that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust." *Id.* at 116. In *Diamond Spur*, this court evaluated one of BANA's superpriority tenders through Miles Bauer that was substantively identical to BANA's tender here. The court determined the tender was a "valid tender [that] cured the default as to the superpriority portion of

the HOA's lien," meaning "Bank of America's first deed of trust remained after foreclosure" of the association's lien. *Id.* at 122.

Here, no genuine dispute exists about whether the amount Miles Bauer tendered was sufficient to satisfy the superpriority portion of the HOA's Lien. The HOA Trustee provided Miles Bauer with a statement of account showing the HOA's monthly assessments were $55.00 and that the HOA had not incurred any maintenance or nuisance-abatement charges.[1] (2AA 312-314). The maximum superpriority portion of the HOA's Lien – nine months of delinquent assessments – totaled $495.00. *See Bank of America*, 427 P.3d at 117 ("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."). Miles Bauer sent the HOA Trustee a check in the amount of $1,494.50, which included not only the $495.00 superpriority amount, but also $999.50 in "reasonable collection costs." (2AA 318).

A $1,494.50 tender is more than sufficient to satisfy a $495.00 lien.[2] And Clover Blossom admits in its Answering Brief that the HOA Trustee received the

[1] Clover Blossom admits in its Answering Brief that the HOA Trustee sent this account history for the Property to Miles Bauer. *See* Clover Blossom's Br., at 6.

[2] The tendered amount even exceeded the total amount due to the HOA when the Lien was recorded – $1,095.50. (2AA 497). The superpriority amount of an association's lien is set in stone the moment the association records its lien unless the association incurs nuisance-abatement charges after the lien is recorded. *See*

tender. *See* Clover Blossom's Br., at 7 ("Miles Bauer sent a letter to the foreclosure agent and enclosed a check for $1,494.50 … The foreclosure agent returned the check to Miles Bauer."). It is undisputed that: (1) Miles Bauer tendered a sufficient amount; and (2) the HOA Trustee received the tender. This court's analysis should end here – BANA's "valid tender cured the default as to the superpriority portion of the HOA's Lien." *See Bank of America*, 427 P.3d at 121. Consequently, the HOA foreclosed on only the remaining subpriority portion and conveyed the Property to Clover Blossom subject to U.S. Bank's Deed of Trust.

Throughout its Answering Brief, Clover Blossom acknowledges *Diamond Spur* supports the validity of BANA's tender, then states that, "[o]n the other hand, the law of real property in Restatement (Third) of Prop.: Mortgages" dictates a different result. *See, e.g.*, Clover Blossom's Br., at 14, 24, & 26. Restatements of law do not create binding precedent in Nevada – this court's published decisions do. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (explaining that

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Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66, 73 (2016) ("we conclude the superpriority lien … is limited to an amount equal to the common expense assessments due during the nine months" before institution of the action to enforce the lien); *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) (holding that the "institution of the action to enforce the lien" is the recording of the association's notice of delinquent assessment lien). Since the $1,494.50 tendered by Miles Bauer exceeded the $1,095.50 total amount due to the HOA when the Lien was recorded, there is no question that the tender was sufficient to satisfy the superpriority portion of the HOA's Lien.

Supreme Court decisions "hold positions of permanence in [Nevada] jurisprudence—precedent that, under the doctrine of *stare decisis*, we will not overturn absent compelling reasons for so doing"). Clover Blossom seems to believe this court wrongly decided *Diamond Spur*. But that recent, on-point, published opinion establishes binding precedent, not Clover Blossom's belief.

Specifically, Clover Blossom contends it took title to the Property free and clear despite BANA's tender because (1) the tender was not kept "good" (*see* Clover Blossom's Br., at 27); (2) the HOA Trustee rejected the tender in "good faith" (*id.*, at 18-23); (3) the tender was not recorded (*id.*, at 26-30); (4) regardless of whether the tender was effective generally, it could not affect Clover Blossom's interest because Clover Blossom is a bona fide purchaser (*id.*, at 32); and (5) U.S. Bank is not entitled to equitable relief because it has an adequate remedy at law (*id.*, at 40). Each argument is frivolous under *Diamond Spur*.

A. BANA was not required to keep its tender "good."

Clover Blossom contends BANA's tender was ineffective because U.S. Bank did not "prove that Miles Bauer kept the rejected tender 'good.'" Clover Blossom's Br., at 27. U.S. Bank was not required to submit such proof under *Diamond Spur*; it only needed to prove that BANA tendered an amount sufficient to satisfy the superpriority portion of the HOA's Lien. *See Bank of America*, 427 P.3d at 120 (rejecting HOA-sale purchaser's argument that "Bank of America should have taken

further actions to keep its tender good"). In subsequent unpublished decisions, this Court has confirmed that *Diamond Spur* does not require that the tender be "kept good." *See, e.g., Bank of New York Mellon as Trustee for Registered Holders of CWABS, Inc. v. SFR Investments Pool 1, LLC*, 2019 WL 292634, at *2 (Nev. Jan. 17, 2019) (unpublished) ("[The HOA-sale purchaser] contends that [BANA's] tender was ineffective because … [Miles Bauer] needed to keep the tender good … but we recently rejected similar arguments [in *Diamond Spur*.]"); *SFR Investments Pool 1, LLC v. Green Tree Servicing, LLC*, 432 P.3d 220 (Table), 2018 WL 6829002, at *1 (Nev. Dec. 27, 2018) (unpublished) ("[A]lthough SFR contends that … [BANA] needed to keep the tender good … our decision in [*Diamond Spur*] rejected" that argument.); *Nevada Ass'n Services, Inc. v. Las Vegas Rental & Repair, LLC Series 78*, 432 P.3d 744 (Table), 2018 WL 6829004, at *1 (Nev. Dec. 27, 2018) (unpublished) (same).

B. Whether the HOA Trustee rejected the tender "in good faith" is irrelevant.

Clover Blossom next claims the tender was ineffective because the HOA Trustee "had a 'good faith' reason to believe that collection costs and reasonable attorneys' fees were part of the HOA's super-priority lien." Clover Blossom's Br., at 22. This Court rejected the same argument in *Diamond Spur*, explaining that "the [association]'s asserted 'good faith' in rejecting Bank of America's tender [did not allow] the HOA to proceed with [its] sale, thereby extinguishing Bank of America's

first deed of trust." *See Bank of America*, 427 P.3d at 119. Since *Diamond Spur*, this Court has confirmed again and again that an association's "subjective good faith for rejecting" BANA's superpriority tenders "is legally irrelevant, as the tender[s] cure[] the default as to the superpriority portion of [an] HOA's lien by operation of law." *See Bank of America, N.A. v. BDJ Investments, LLC*, 2018 WL 6433115, at *1 (Nev. Dec. 4, 2018) (unpublished); *see also SFR Investments Pool 1, LLC v. Mortgage Elec. Reg. Sys., Inc.*, 431 P.3d 55 (table), 2018 WL 6433003, at *1 (Nev. Dec. 4, 2018) (same); *Pawlik v. Bank of New York Mellon as Trustee for Certificateholders of CWALT, Inc.*, 2018 WL 6617724, at *1 (Nev. Dec. 11, 2018) (unpublished) ("Because the superpriority portion of the HOA's lien was no longer in default following the tender, the ensuing foreclosure sale was void as to the superpriority portion of the lien, and the basis for rejecting the tender could not validate an otherwise void sale in that respect.").

Further, Clover Blossom's argument as to why the HOA Trustee's rejection was made "in good faith" is misplaced. According to Clover Blossom, "the issue … is whether the HOA and [HOA Trustee] had a 'good faith' reason to believe that collection costs and reasonable attorneys' fees were part of the HOA's superpriority lien and not whether that belief turned out to be correct." Clover Blossom's Br., at 22.

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Clover Blossom's contention is misplaced. It is not possible to have a "good faith belief" that a law is not a law because "[e]veryone is presumed to know the law, and this presumption is not even rebuttable[.]" *See Smith v. State*, 38 Nev. 477, 481, 151 P. 512, 513 (1915), *cited in Sengel v. IGT*, 116 Nev. 565, 573, 2 P.3d 258, 262–63 (2000) ("Because of this constructive knowledge [of the law], Sengel's lack of notice argument fails."). As this Court explained in *Bank of America*, "[a] **plain reading** of [NRS 116.3116(2)] indicates that the superpriority portion of an HOA lien includes **only** charges for maintenance and nuisance abatement, and nine months of unpaid assessments." 427 P.3d at 117 (emphasis added). The HOA and HOA Trustee's decision to ignore NRS 116.3116(2)'s plain language to support their purported (and self-serving) "belief" that the superpriority portion of the HOA's Lien secured collection costs and attorneys' fees could not have been in good faith as a matter of law. *See Smith*, 38 Nev. at 481.

C. BANA was not required to record the tender.

Clover Blossom contends that its purportedly free and clear title cannot be affected by BANA's tender because the tender was not recorded. *See* Clover Blossom's Br., at 28-32. According to Clover Blossom, BANA's tender did not "cure[] the default as to the superpriority portion of the HOA's lien" (the effect of the tender under the binding *Bank of America* decision), but instead "assign[ed] the

HOA's superpriority lien rights" to U.S. Bank.[3] *See id.*, at 15. Because an assignment is a "conveyance" of property, Clover Blossom contends BANA's tender had to be recorded to be effective against a third-party purchaser like Clover Blossom under NRS 111.315. *See id.*, at 25.

This argument, like Clover Blossom's other arguments regarding BANA's tender, was rejected by this Court in *Diamond Spur*: "By its plain text, **NRS 111.315 does not apply** to Bank of America's tender. Tendering the superpriority portion of an HOA lien does not create, alienate, **assign**, or surrender an interest in land." *See Bank of America*, 427 P.3d at 119 (emphasis added). This Court has confirmed that BANA did not have to record its tenders in numerous unpublished decisions following *Diamond Spur*. *See, e.g.*, *Zixiao Chen v. Bank of America, N.A.*, 2019 WL 295672, at *1 (Nev. Jan. 17, 2019) (unpublished) ("[The HOA-sale purchaser] contends that … Bank of America needed to record evidence of the tender … but we recently rejected similar arguments [in *Bank of America*]."); *Fiducial, LLC v. Bank of New York Mellon Corp. as Trustee for Certificate Holder of CWALT, Inc.*, 432 P.3d 718 (Table), 2018 WL 6617727, at *2 (Nev. Dec. 11, 2018) (unpublished)

[3] Even if Clover Blossom were correct (it is not) that the tender resulted in an assignment of the superpriority portion of the HOA's Lien, it is worth noting that the import of this argument is the HOA had no right to foreclose on the superpriority portion of its Lien since that portion was assigned to U.S. Bank before the foreclosure sale.

(same). BANA did not have to record its tender to protect U.S. Bank's Deed of Trust from extinguishment here.

D. Clover Blossom's bona fide purchaser status is irrelevant.

Next, Clover Blossom contends it "is protected as a bona fide purchaser" from BANA's superpriority tender. *See* Clover Blossom's Br., at 32. This court squarely rejected that argument in *Diamond Spur,* explaining that an HOA-sale purchaser's status as a bona fide purchaser "is irrelevant" in tender cases. *See Bank of America*, 427 P.3d at 121. This court has confirmed that bona fide purchaser status cannot protect an HOA-sale purchaser from BANA's tenders in unpublished decisions following *Diamond Spur*. *See, e.g., Sage Realty LLC Series 2 v. Bank of New York Mellon as Trustee for Certificateholders of the CWABS, Inc.*, 432 P.3d 191 (Table), 2018 WL 6617730, at *2 (Nev. Dec. 11, 2018) (unpublished) (rejecting HOA-sale purchaser's argument that its purported bona fide purchaser status protected it from BANA's tender because this Court already rejected that argument in *Bank of America*); *Wells Fargo Bank, N.A. as Trustee for Certificate Holders Park Place Securities, Inc. v. Cozy Creek Street Trust Dated 03/09/12*, 429 P.3d 1255 (Table), 2018 WL 6133939, at *1 (Nev. Nov. 19, 2018) (unpublished) (same). Clover Blossom's bona fide purchaser status is irrelevant.

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E. U.S. Bank is entitled to a declaration that the Deed of Trust encumbers Clover Blossom's title to the Property.

Finally, Clover Blossom contends that even if BANA's superpriority tender was effective to protect the Deed of Trust, this court should still hold the Deed of Trust was extinguished because U.S. Bank has "legal remedies available to it" – an award of damages against the HOA. *See* Clover Blossom's Br., at 39. In effect, Clover Blossom's position is that even if it purchased the Property subject to the Deed of Trust as a matter of law under *Diamond Spur*, this Court should hold that it took title free and clear and leave U.S. Bank to find its remedy elsewhere.

First, U.S. Bank seeks a declaration that its Deed of Trust survived under NRS 30.010, *et seq.*, Nevada's version of the Uniform Declaratory Judgment Act. Under the Act, **"[a]ny person** interested under a deed … may have determined any question of construction or validity arising under the instrument… and obtain a declaration of rights, status or other legal relations thereunder." *See* NRS 30.040(1) (emphasis added). The availability of a legal remedy does not limit a party's ability to seek a declaratory judgment under NRS 30.040. *See id.*

Further, Clover Blossom fails to consider that it, too, could be made whole through money damages from the HOA if it truly believes the HOA had a duty to convey clear title to it. Clover Blossom likely does not prefer this remedy over retaining the Property, however, because its damages would be, at most, the price it

paid for the Property, $8,200.00, plus the costs incurred in maintaining the Property, less any rents it has collected since the foreclosure sale.

But Clover Blossom is not seeking to be made whole in this action – it is seeking a windfall from having the encumbered interest it purchased for $8,200.00 turned into free and clear title to the Property worth more than $105,000.00. (4AA 715-717). Clover Blossom claims entitlement to this windfall despite its Manager's, Eddie Haddad, admissions in bankruptcy court filings that the interests he purchased at association foreclosure sales remain encumbered by senior deeds of trust. (4AA 785). Clover Blossom can hardly complain about a judgment that its title is encumbered when that is exactly what it thought it was purchasing.

The fact BANA tendered an amount sufficient to satisfy the superpriority portion of the HOA's Lien renders equitable doctrines irrelevant and all other facts immaterial under *Diamond Spur*. Accordingly, this Court should reverse the judgment below and remand with clear instructions that BANA's superpriority tender cured the default as to that portion of the HOA's Lien, meaning Clover Blossom's title to the Property remains encumbered by U.S. Bank's Deed of Trust.

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II. Alternatively, This Court Should Reverse the Summary Judgments in Favor of Clover Blossom and the HOA and Remand for Further Discovery on BANA's Tender, the Inequity of the Sale, and the HOA's Liability.

Alternatively, if this Court determines it cannot hold that the superpriority portion of the HOA's Lien was satisfied by BANA's tender on the record presented, it should reverse the summary judgments in favor of Clover Blossom and the HOA and remand for further discovery. The district court's decision to convert Clover Blossom's motion to dismiss into a motion for summary judgment without notice deprived U.S. Bank of the opportunity to present evidence that further established that the Deed of Trust survived. Further, the district court's ruling that U.S. Bank lacked standing to assert its crossclaims against the HOA and that the claims were time-barred is a clear error of law.

A. The district court erred by converting Clover Blossom's motion to dismiss to a motion for summary judgment without notice.

Even though the district court had already been overturned once for failing to evaluate the effect of BANA's tender, it nonetheless decided that U.S. Bank was not entitled to present evidence of that tender by converting Clover Blossom's motion to dismiss U.S. Bank's counterclaims into a motion for summary judgment and granting that converted motion without notice. (3AA 660). By doing so, the district court not only ignored the Court of Appeals' express instructions on remand, it violated NRCP 12, which states that:

> 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).

In an attempt to justify the district court's decision, Clover Blossom presents one argument – that U.S. Bank essentially caused the district court to convert the motion by "supporting its opposition to [Clover Blossom]'s motion to dismiss with matters outside the pleadings." *See* Clover Blossom's Br., at 35. However, the only exhibit attached to U.S. Bank's opposition was the HOA's publicly-recorded CC&Rs. (2AA 402-460). On a motion to dismiss, a court may "consider unattached evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the document." *See Baxter v. Dignity Health*, 131 Nev. Adv. Op. 76, 357 P.3d 927, 930 (2015). Considering such evidence does not convert a motion to dismiss to a motion for summary judgment. *See id.*

Here, the HOA's CC&Rs (1) were referred to in U.S. Bank's counterclaims (2AA 250), (2) were central to those counterclaims (*see id.*), and (3) no party questioned the authenticity of the publicly-recorded document. Consequently, U.S.

Bank's decision to attach those CC&Rs to its opposition to Clover Blossom's motion to dismiss did not justify converting it into a motion for summary judgment.

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

By converting Clover Blossom's motion to dismiss into a motion for summary judgment, the district court prevented U.S. Bank from presenting relevant information it had obtained in discovery, and deprived it of the opportunity to obtain additional information through further discovery. The district court did so even though the Court of Appeals expressly instructed it to allow 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.

According to Clover Blossom, U.S. Bank brought this upon itself because it did not request a continuance under NRCP 56(f) in its opposition to Clover Blossom's motion to dismiss. *See* Clover Blossom's Br., at 34. Clover Blossom fails to explain why U.S. Bank should have requested an NRCP 56(f) continuance in response to a motion to dismiss. *See id.* Nor could it, since parties may only request a 56(f) continuance in response to a motion for summary judgment under NRCP 56. *See Choy v. Ameristar Casinos, Inc.*, 127 Nev. 870, 872, 265 P.3d 698, 700 (2011) ("NRCP 56(f) requires that **the party opposing a motion for summary judgment** and seeking a denial or continuance of the motion in order to conduct further discovery provide an affidavit giving the reasons why the party cannot present facts

essential to justify the party's opposition.") (emphasis added). U.S. Bank's "failure" to make a procedurally improper request for a 56(f) continuance does not justify the district court's failure to abide by the Court of Appeals' instructions on remand.

C. This Court should reverse the summary judgment against U.S. Bank on its crossclaims against the HOA.

Separately, this Court should reverse the summary judgment in the HOA's favor on U.S. Bank's crossclaims because the district court erred in holding those crossclaims were time-barred and that U.S. Bank lacked standing to assert them.

1. U.S. Bank timely asserted its crossclaims.

The statutes of limitation on U.S. Bank's crossclaims did not begin running when the Trustee's Deed from the HOA's foreclosure was recorded because U.S. Bank's damages were too speculative at that time. Even if the statutes began running on that date, they should be equitably tolled because the HOA misrepresented that the foreclosure would not affect U.S. Bank's Deed of Trust. Finally, even if the statutes ran un-tolled from the date the Trustee's Deed was recorded, U.S. Bank's wrongful foreclosure claim is still timely because it is governed by a six-year limitations period.

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

As U.S. Bank explained in its Opening Brief, its claims against the HOA did not accrue when the Trustee's Deed was recorded because it did not suffer any damages on that date. U.S. Bank's primary position throughout this litigation has been that BANA's superpriority tender protected its Deed of Trust, meaning the HOA's wrongful rejection of the tender caused no damages. U.S. Bank asserted its claims for damages against the HOA in the alternative, contending the HOA was liable if it wrongfully rejected BANA's superpriority payment and then foreclosed on that portion of its Lien to extinguish the Deed of Trust.

This Court has now confirmed U.S. Bank's primary position is correct – BANA's tender protected the Deed of Trust. *See Bank of America*, 427 P.3d at 116 ("We hold that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust."). Under *Bank of America*, the Deed of Trust survived the sale, and thus U.S. Bank's alternative crossclaims against the HOA are moot, which would justify their dismissal on that basis. *See id.* However, if this Court holds that it cannot determine on the record provided that BANA's tender was sufficient to protect the Deed of Trust, it should also hold that the statutes of limitations for U.S. Bank's crossclaims against the HOA do not begin running unless there is a judgment that

the Deed of Trust was extinguished. Absent such a judgment, U.S. Bank's damages are too "speculative and remote" to trigger the statutes. *See Brady Vorwerck v. New Albertson's, Inc.*, 130 Nev. 632, 640, 333 P.3d 229, 230 (2014). The HOA's contention that the statutes began running on the date of the HOA's foreclosure sale because "it is clear that the Bank was damaged on [that date] by operation of Nevada law" is clearly misplaced under *Bank of America*. *See* HOA's Br., at 10.[4]

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

Even if the statutes of limitations began running when the Trustee's Deed was recorded, they should be equitably tolled in light of the HOA's misrepresentations regarding the effect of its foreclosure sale. In its Answering Brief, the HOA cites federal cases to argue a party seeking equitable tolling must satisfy "two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in his way." *See* HOA's Br., at 11. That is not Nevada law.

Under Nevada law, 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.*, 127 Nev. 631, 641, 261 P.3d 1071, 1077 (2011). To determine

[4] While the HOA contends this lack of damage shows U.S. Bank's claims are not ripe, U.S. Bank would not oppose the dismissal of its claims against the HOA on that basis. *See* HOA's Br., at 9. If the claims are not ripe, the statute of limitations never began running, and U.S. Bank would be free to assert those claims, if needed, after its claims against Clover Blossom are fully adjudicated.

whether equitable tolling applies, courts "look at several nonexclusive factors," 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*, 99 Nev. 823, 826, 673 P.2d 490, 493 (1983); *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 738, 265 P.3d 666, 672 (2011); *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 151, 111 P.3d 1107, 1111 (2005).

Here, the HOA's recorded CC&Rs represented that the HOA's foreclosures could not extinguish senior deeds of trust, stating 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). The HOA's recorded Lien stated it was imposed and would be foreclosed "in accordance with" the HOA's CC&Rs. (2AA 297). Those recorded documents represented to the public – including U.S. Bank (and Clover Blossom) – that U.S. Bank's Deed of Trust would survive the HOA's foreclosure sale.

The HOA contends this argument is "belied by section 4.12 of the CC&Rs … which put the Bank on notice that its deed of trust could be affected" by the HOA's foreclosure. HOA's Br., at 13. It is, however, the HOA's argument that is "belied" by the plain language of the CC&Rs, which state:

> **No breach** of the covenants, conditions, and restrictions in this Declaration, nor the enforcement thereof or of any lien provision, **except as provided in Section 4.14**, shall

> defeat or render invalid the lien of any Security held by an Eligible Security Interest made in good faith and for value.

(2AA 452 at § 9.1 (emphasis added)). Section 4.12 of the CC&Rs does not act as a carve-out to Section 9.1's assurance that the HOA's foreclosures could not affect senior deeds of trust.

Next, the HOA argues that U.S. Bank's "lack of diligence" in protecting its Deed of Trust "renders it incapable of demonstrating that it is entitled to equitable tolling." *See* HOA's Br., at 12. The HOA claims this "lack of diligence" is shown by U.S. Bank's failure to "seek a temporary restraining order and preliminary injunction against the Association prior to the foreclosure sale." *Id.*

The HOA's contention that U.S. Bank did not diligently protect its Deed of Trust is misplaced considering U.S. Bank did exactly what Nevada law required to protect it – tender the superpriority amount to the HOA. *See Bank of America*, 427 P.3d at 117. The HOA's agent, the HOA Trustee, rejected that tender because both it and the HOA had no idea how the laws under which they conducted the foreclosure operated. Now, the HOA seeks to leverage that ignorance to bar U.S. Bank from recovering against it because U.S. Bank did not request a court force the HOA to comply with Nevada law.

In sum, even if the statutes of limitations began running when the Trustee's 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.

c. U.S. Bank's wrongful foreclosure claim is timely even if the statutes began running in 2013 and were not equitably tolled.

Even if 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 for claims arising from a "contract, obligation, or liability founded upon an instrument in writing" – the HOA's CC&Rs. *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 is subject to NRS 11.190(1)(b)'s six-year statute of limitations to the extent it implicates the association's CC&Rs). The HOA disagrees, contending that NRS 11.190(1)(b)'s six-year limitations period does not apply because U.S. Bank's wrongful foreclosure claim is not based on the HOA's CC&Rs. *See* HOA's Br., at 14-15.

Paradoxically, the HOA has contended throughout this litigation that U.S. Bank's crossclaims are based on the HOA's CC&Rs to pull those claims within the ambit of NRS 38.310, which requires that claims "relat[ed] to … the interpretation, application, or enforcement of" CC&Rs be submitted to NRED mediation before they are asserted in a civil action. *See* HOA's Br., at 16 (quoting NRS 38.310).

According to the HOA, U.S. Bank lacked standing to sue the HOA because it did not complete NRED mediation before it filed its crossclaims against the HOA. But now that NRED has mediated U.S. Bank's claims, the HOA has flipped its position with respect to the wrongful foreclosure claim, arguing that it is time-barred because it is not actually based on the CC&Rs. The HOA cannot have it both ways. It has admitted that U.S. Bank's wrongful foreclosure claim is based on the CC&Rs by arguing that NRS 38.310 applied to the claim.

Because the HOA's CC&Rs are a recorded "instrument in writing," NRS 11.190(1)(b)'s six-year statute of limitations applies to U.S. Bank's wrongful foreclosure claim. *See McKnight Family, LLP v. Adept Mgmt.*, 129 Nev. 610, 617, 310 P.3d 555, 559 (2013) (explaining that "deciding a wrongful foreclosure claim against a homeowners association involves interpreting covenants, conditions, or restrictions applicable to residential property"). Even if the statute of limitations began running on January 24, 2013 and was not equitably tolled, U.S. Bank would have until January 24, 2019 to assert that claim. This Court should reverse the district court's holding that U.S. Bank's wrongful foreclosure claim was time barred.

2. NRS 38.310 does not bar U.S. Bank's crossclaims against the HOA.

As U.S. Bank explained in its Opening Brief, even if NRS 38.310 applied to U.S. Bank's crossclaims, U.S. Bank satisfied NRS 38.310's requirements by submitting its claims to NRED mediation before asserting them in this action. The

HOA's sole retort is that U.S. Bank nonetheless failed to satisfy NRS 38.310 because its pleading did not include "a sworn statement indicating that the issues in the complaint ha[d] been mediated … but an agreement was not obtained." *See* HOA's Br., at 18 (quoting NRS 38.330(1)).

U.S. Bank could not include a sworn statement that NRED mediation was complete in its crossclaims because NRED mediation was not yet complete when it filed the claims. Once mediation was complete, U.S. Bank filed a Notice of Completion in the district court. (3AA 675). To the extent U.S. Bank's claims against the HOA were not justiciable until NRED mediation was complete, they are justiciable now. Accordingly, this Court should reverse the district court's holding that NRS 38.310 barred U.S. Bank's crossclaims.

3. U.S. Bank had standing to sue the HOA under NRS 116.1113.

The HOA contends U.S. Bank "failed to provide any basis on which to reverse" the district court's judgment on its breach of NRS 116.1113 claim because U.S. Bank failed to identify any "obligation" the HOA owed to U.S. Bank that it breached. *See* HOA's Br., at 18. The HOA then notes U.S. Bank's NRS 116.1113 claim "is based on allegations that the Association should have accepted the Bank's tender of the super priority portion of its lien." *See id.*, at 19. That is the exact obligation the HOA breached.

In *Bank of America*, this Court explained "a plain reading of NRS 116.3116 indicates that … tender of the superpriority amount by the first deed of trust holder was sufficient to satisfy that portion of the lien." *See Bank of America*, 427 P.3d at 118. Consequently, U.S. Bank had a right under NRS 116.3116 to satisfy the superpriority portion of the HOA's Lien by tendering payment of the superpriority amount. *See id.* BANA's superpriority tender cured the default as to that portion of the HOA's Lien, meaning the Deed of Trust survived the HOA's foreclosure sale and encumbers Clover Blossom's title to the Property. *See id.* at 116 ("We hold that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust."). And judgment in U.S. Bank's favor against Clover Blossom would admittedly moot U.S. Bank's claims against the HOA, as U.S. Bank did not suffer damages if its Deed of Trust survived. However, if the Deed of Trust is somehow held to have been extinguished, then the HOA is liable under NRS 116.1113 for foreclosing on the superpriority portion of its Lien rather than accepting the pre-foreclosure superpriority payment that U.S. Bank had a statutory right to submit, and the HOA had a statutory duty to accept. *See id.*, at 118.

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CONCLUSION

For all of the above reasons, this court should reverse and remand this case with clear instructions BANA's tender caused Clover Blossom to take title subject to U.S. Bank's Deed of Trust. Alternatively, the district court's summary judgments in favor of Clover Blossom and the HOA should be reversed and remanded to the district court with clear instructions to allow full and complete discovery on BANA's tender, the inequity of the sale, and the HOA's liability to U.S. Bank.

DATED this 5th day of February, 2019.

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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 5,423 words.

FINALLY, I CERTIFY that I have read this **Appellant's Reply Brief**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this 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 5th day of February, 2019.

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CERTIFICATE OF SERVICE

I certify that I electronically filed on February 5, 2019, the foregoing **APPELLANT'S REPLY 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