IN THE SUPREME COURT OF THE STATE OF NEVADA

9352 CRANESBILL TRUST; TEAL PETALS ST. TRUST; AND IYAD HADDAD, Appellants, vs. WELLS FARGO BANK, N.A., Respondent.	Supreme Court Case No.: 76017 District Court Case No.: A671509

APPEAL
From the Eighth Judicial District Court
The Honorable Linda Bell

ANSWERING BRIEF

Andrew M. Jacobs
Nevada Bar No. 12787
Kelly H. Dove
Nevada Bar No. 10569
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Telephone: (702) 784-5200
Facsimile: (702) 784-5252
ajacobs@swlaw.com
kdove@swlaw.com

Attorneys for Respondent Wells Fargo Bank, N.A.

NRAP 26.1 Disclosure Statement

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

Wells Fargo Bank, N.A. discloses that Wells Fargo & Company owns 100 percent of the stock of Wells Fargo Bank, N.A. Wells Fargo & Company is a publicly-held corporation and has no parent corporation. No other publicly-held corporation owns 10% or more of Wells Fargo & Company's stock. There are no other known interested parties.

There are no other known interested parties.

Snell & Wilmer L.L.P. has represented Wells Fargo Bank, N.A. in this matter on appeal.

Routing Statement

This appeal raises important and novel questions concerning the interpretation of NRS Chapter 116 that involve issues of statewide significance in need of resolution, and therefore should be resolved by this Court. *See* NRAP 17(a)(13) & (14).

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Introduction

This case is one of many in which a homeowners' association ("HOA") foreclosed on a property, purportedly extinguishing a first deed of trust under NRS 116.3116 et seq. (the "Statute"). However, in stark contrast to most such cases, the homeowner here (1) was in frequent contact with the HOA, (2) paid the superpriority lien amount well before the HOA Sale, ***and*** (3) was told foreclosure proceedings were on hold. Despite all that, the HOA foreclosed anyway. Because there was no foreclosure on a superpriority lien, the sale was improper, and failed to extinguish the Deed of Trust.

The district court correctly ruled that a homeowner can satisfy the HOA's superpriority lien, and that the homeowner here did satisfy the superpriority lien. This Court held the same, explaining that a homeowner can extinguish a superpriority lien by paying an amount sufficient to satisfy it. *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A.*, Case No. 71246, 2017 WL 6597154 (Nev. Dec. 22, 2017) (unpublished disposition) ("*Golden Hill*"). Because the district court's ruling correctly held that a homeowner can and did satisfy the superpriority lien here, this Court should affirm. This Court

can also affirm on the related, alternative bases that the sale was commercially unreasonable based in part on the satisfaction of the superpriority lien at the time of the sale, and because Appellants are not entitled to bona fide purchaser ("BFP") status.

Statement of the Issues

1. NRS 116 provided that foreclosure on an HOA *superpriority* lien can extinguish a first deed of trust, but foreclosure on its *subpriority* lien cannot. Under *Golden Hill*, a homeowner may pay the superpriority lien, leaving an HOA with only a subpriority lien. Here, where the homeowner paid the superpriority lien amount before the HOA foreclosed, did the district court correctly hold that the foreclosure did not extinguished Wells Fargo's Deed of Trust?

2. Whether the sale was commercially unreasonable because the homeowner paid the superpriority lien and was likely not in default at all.

3. Whether the district court correctly declined to find that Appellants are entitled to the protections of a BFP.

Factual Background

I. The Subject Property, Note, and Deed of Trust.

Venise Abelard and non-party Marcus Compere borrowed $226,081.00 from lender, DHI Mortgage Company, LTD, secured by a Deed of Trust on 9352 Cranesbill Court, Las Vegas, Nevada 89149 (the "Property"). APP 170-82. Mortgage Electronic Registration Systems, Inc. ("MERS") was beneficiary solely as nominee for the lender and its successors and assigns. APP 170-82. The Property is located within the community governed by the Fort Apache Square Homeowner's Association.

On November 1, 2010, National Default Servicing Corporation ("NDSC") recorded a Notice of Default and Election to Sell Under Deed of Trust on behalf of Wells Fargo, in which NDSC identified Wells Fargo as a party with an interest in the Loan. APP 184-87. On October 17, 2012, an Assignment of Mortgage from MERS to Wells Fargo was recorded. APP 193-94.

II. Mesa Management's Failures and Inaccurate Records.

In October 2011, Mesa Management ("Mesa") took over management of the Fort Apache Square Homeowner's Association ("Fort Apache Square Account"). APP 255-56, 278. When Mesa

assumes management of an HOA, its policy is to send a welcome letter to the homeowner and populate its accounting software with reports and ledgers provided by the previous management company. APP 281. Mesa did not take any action to verify the accuracy of the reports and information provided by the previous management company regarding Ms. Abelard's account, or to determine whether, and to what extent, any past due amounts related to assessments, late fees, violation fines, attorneys' fees, or other charges. Rather, Mesa's owner and Rule 30(b)(6) designee Tracy Wozniak testified that there is very little Mesa can do to verify the accuracy of the prior management company's records:

> There isn't a lot we can do on transitions. We send notices out to the homeowner on what their balances are. If there is a dispute, then we'll discuss the dispute when they dispute it. There are times that there are disputes with the transition, but we don't know that if the homeowner doesn't communicate it to us.
> * * *
> If we send [the homeowner] a statement and they don't dispute that that's the balance owed, then we don't know to do anything further.

APP 281, 293.

Abelard did not receive a welcome letter from Mesa or a statement showing the balance owed on her account when Mesa took over

management of Fort Apache Square. APP 255-57. She instead learned from a neighbor that Mesa was the new manager, and on June 30, 2011, took the initiative to send a letter to Mesa requesting payment coupons in which she also enclosed a check for six months of unpaid assessments. APP 255-57.

Once she learned that Mesa was managing Fort Apache Square and that her HOA assessments had increased from $56.00 to $61.00 per month, Abelard made consistent, though not always timely, assessment payments. ***Between June 2011 and the July 2012 foreclosure sale, Abelard paid a total of $1,164.50***.

- On June 30, 2011, Abelard made a payment of $366, representing payment of assessments for January through June 2011. APP 256, 301.

- On September 14, 2011, Abelard made a payment of $142.00, representing payment of assessments and late fees for July and August 2011. APP 258, 303.

- On February 1, 2012, Abelard made a payment of $284.00, representing assessment payments and late fees for September through December 2011. APP 305.

- On April 30, 2012, Abelard made a payment of $223.50, representing payment of assessments, which had increased to $64.50 per month in 2012, and late fees for January through March 2012. APP 307.

- On June 20, 2012, Abelard made her final payment of $149.00, representing assessments and late fees for April and May 2012. APP 309.

The HOA and its agent, A&K, relied on Mesa to keep accurate records of homeowner accounts, and did not take independent action to verify the accuracy of Mesa's records. APP 291-92, 312.

III. The HOA and Alessi & Koenig Foreclosure.

On July 12, 2011, A&K, acting on behalf of Fort Apache Square, recorded a Notice of Delinquent Assessment Lien ("Notice of Lien"), alleging unpaid amounts due of $2,337.58. The Notice of Lien does not identify the alleged superpriority amount. APP 196-97. Abelard did not receive the Notice of Lien before the HOA foreclosure sale. APP 274-75.

On September 15, 2011, A&K, acting on behalf of Fort Apache Square, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien ("NOD"), claiming a total amount due of $3,403.58. The NOD does not identify the superpriority amount or otherwise indicate that Fort Apache Square intends to foreclose on a super-priority lien. APP 199-200. Abelard did not receive the NOD

before the HOA foreclosure sale. APP 260, 274-75. The NOD was not sent to Wells Fargo. APP 314; *see also* 318-22.

On May 7, 2012, A&K, acting on behalf of Fort Apache Square, recorded a Notice of Trustee's Sale ("Notice of Sale"), claiming a total amount due of $3,932.58 and setting a foreclosure sale for June 6, 2012. APP 202-03. The Notice of Sale does not identify the super-priority amount or otherwise indicate that Fort Apache Square intends to foreclose on a super-priority lien. APP 202-03. Abelard received the Notice of Sale when it was posted on the front door of her home on May 25, 2012. APP 270. The Notice of Sale was sent to NDSC, but not Wells Fargo. APP 314-15, 324-27. A&K relied on the accuracy of ledgers provided by Mesa when it calculated the amounts stated in the Notice of Lien, NOD, and Notice of Sale. As such, any inaccuracy in the ledgers rendered the amounts stated in the notice unreliable. APP 312.

After seeing the Notice of Sale posted on her door, Abelard immediately contacted A&K to dispute the claim that she was in arrears on her assessment payments. APP 270, 275, 329. In early June, Abelard finally received a ledger from A&K purporting to reflect the balance of her account. APP 266, 331-34.

After reviewing the ledger, Abelard called A&K to request a breakdown or explanation of the "initial balance" of more than $1,204.58, which she did not believe was accurate because up to that point she had paid her HOA dues, even if sometimes late. APP 265, 329. The challenged "initial balance" on the Mesa ledger was a carryover from the prior management company's ledger, but Mesa made no attempt to verify the accuracy of that amount. APP 281, 331-34. Further, the ledger provided by the prior management company begins with a balance of $739.58, an amount that neither the HOA's representative nor Mesa's representative could explain. APP 281, 296, 336.

At A&K's request, Abelard provided copies of checks showing some payments made to Fort Apache Square, and was told by A&K that her account was being placed on hold until management had an opportunity to review the dispute. APP 267. Abelard then called A&K weekly to see what was being done with her account; each time she was told that they were waiting for management review and that the account was still on hold. APP 268.

A&K never called, emailed, sent a letter, or otherwise contacted Abelard to tell her that the hold had been removed from her account and that A&K intended to proceed with foreclosure. APP 268, 340-41.

The Board of Fort Apache Square (the "Board") has final decision-making authority on whether to foreclose on a homeowner's Property. APP 283. The Board is supposed to be notified when a homeowner raises a dispute so that the Board can attempt to resolve the dispute and evaluate whether the foreclosure sale should proceed. APP 282; 297-98. There is no evidence that A&K advised Mesa or the Board of Abelard's payment dispute before proceeding with the HOA Foreclosure Sale. APP 287-89.

Despite being initially noticed for June 6, 2012, the sale was postponed and did not go forward on that date. APP 205-07. On July 11, 2012, A&K, acting on behalf of Fort Apache Square, sold the Property to Cranesbill for $4,900 (the "HOA Foreclosure Sale"). A Trustee's Deed Upon Sale reflecting that sale was recorded on July 18, 2012. APP 205-07.

In July 2012, after the HOA Foreclosure Sale, Abelard received another notice on her door that the Property had been sold and that she

would be required to vacate her home. News of the sale surprised Abelard because A&K never told her that the hold had been removed from her account and that the foreclosure would proceed. APP 268, 272. At the time of the HOA Foreclosure Sale, the Property had a fair market value of $94,000.00. APP 344-68. A few weeks after the HOA Foreclosure Sale, Cranesbill transferred its interest in the Property to Teal Petals by means of a Grant, Bargain, Sale Deed recorded on July 27, 2012. APP 209-13.

Summary of the Argument

This Court should decline to disturb the district court's ruling for several reasons. First, the HOA foreclosure sale by which it acquired title was necessarily subpriority in nature and, thus, subordinate to the Deed of Trust. Before the sale, Abelard paid more than twice the amount of the nine months of assessments due prior to the initiation of the HOA foreclosure. The payments were accepted and applied by the HOA, thus satisfying the superpriority component of the HOA's lien. The district court therefore did not err in concluding that the Deed of Trust survived the sale and remains on the Property.

Second, the HOA sale was improper and should be set aside because it was not properly conducted. The sale was commercially unreasonable because the HOA and its agents sold the property for a grossly inadequate price after its agent misrepresented to Abelard that the foreclosure had been placed on hold pending a review of her dispute over the validity of the debt allegedly giving rise to the HOA's lien. The sale was also unfair because the HOA was unable to explain the origin or validity of many of the charges on Abelard's account, undermining the HOA's lien and the entire basis for the sale. Alternatively, the Court should declare that Cranesbill took title subject to Wells Fargo's deed of trust because the HOA and A&K failed to provide adequate notice to Wells Fargo of the sale.

Third, the district court did not err by finding that Cranesbill was not a bona fide purchaser.

In sum, the undisputed evidence shows that the superpriority portion of the lien was satisfied, and that the HOA, Mesa, and A&K failed to conduct the sale in a commercially reasonable manner and failed to provide Wells Fargo with adequate notice of the sale. As such, Appellants were not entitled to a declaration that it obtained title

through the HOA foreclosure sale free and clear of any liens or encumbrances, including the Deed of Trust. This Court should affirm.

Standard of Review

This court reviews a district court's grant of summary judgment *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Argument

This Court held that payments by a homeowner of an amount sufficient to satisfy the superpriority lien can extinguish the superpriority lien. *Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A.*, 2017 WL 6597154, Case No. 71246 (Nev. Dec. 22, 2017) ("*Golden Hill*"). Moreover, this Court has since declined to disturb that ruling despite challenges to it through a petition for rehearing, a petition for en banc reconsideration, and two amicus briefs. In rejecting the challenges to *Golden Hill*, the Court held that while the UCIOA's drafters may have contemplated lenders paying the superpriority lien, nothing in the Statute precludes a homeowner from doing so. In so holding, this Court correctly gave the unambiguous language of the Statute priority and declined to rewrite it based on

post-enactment statements by third parties – material that cannot be fairly called legislative history.

With that as prologue, the Opening Brief misses the mark. It largely ignores *Golden Hill* and continues to argue that homeowners may not satisfy an HOA's superpriority lien. Its extensive arguments in conflict with that holding therefore fail, and unambiguously so.

This Court should affirm because the district court's ruling was consistent with *Golden Hill*, and the Opening Brief is premised on a plain error of law – the mistaken premise that a homeowner cannot satisfy the superpriority portion of an HOA lien.

I. Because the Homeowner Satisfied the Superpriority Amount Prior to the HOA Sale, the Sale Did Not Extinguish the Deed of Trust.

Appellants' position that a homeowner cannot satisfy the superpriority portion of the lien is unsound and unsupported by the law.

A. This Court Recognized in *Golden Hill* That a Homeowner May Satisfy a Superpriority Lien and Has Declined to Disturb That Decision.

Appellants' position is in direct conflict with this Court's holding in *Golden Hill* that payments by a homeowner of an amount sufficient to satisfy the superpriority lien can extinguish the superpriority lien.

Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A., 2017 WL 6597154, Case No. 71246 (Dec. 22, 2017) (unpublished). In *Golden Hill*, this Court held that where the homeowner paid off the superpriority lien, the investor that purchased the property at the HOA foreclosure sale took the property subject to the deed of trust. *Id.* The position Appellants espouse in their Answering Brief is foursquare against this Court's ruling in *Golden Hill*.

Moreover, *Golden Hill* is consistent with this Court's authority regarding tender. This Court ruled in *Stone Hollow Ave. Trust v. Bank of America*, No. 64955, 2016 WL 4543202, at *1 (Nev. Aug. 11, 2016) (overruled on other grounds) that an HOA may not reject a tender of the superpriority portion of the lien. Thus, if, at the time of a foreclosure sale, the superpriority portion of the lien had been tendered, leaving only the subpriority portion of the lien to be foreclosed, a deed of trust cannot be extinguished by virtue of the sale. *Id.* Because here, the superpriority amount had been paid, the superpriority lien could not have been foreclosed.

This Court has already declined to disturb *Golden Hill* – twice – and in doing so rejected the very arguments Appellants raise here. By

way of background, a panel of this Court issued its decision in *Golden Hill* on December 22, 2017. The appellant petitioned for rehearing on January 24, 2018, which the panel denied the petition for rehearing on February 26, 2018. The appellant then petitioned for en banc reconsideration on March 13, 2018, which this Court denied on April 27, 2018. The petitions raised the same and similar arguments to those Appellants raises here – that the homeowner cannot satisfy the superpriority lien, that allowing a homeowner to do so is inconsistent with the purpose of the superpriority lien mechanism, that the legislative history is inconsistent with that approach, and that only lenders can satisfy the superpriority lien.

This Court's order denying rehearing highlights why Appellants should not prevail here. The panel held that while it "agree[d] that the Uniform Common Interest Ownership Act presupposes a lender satisfying the superpriority component of an HOA's lien, nothing in the Act appears to prevent a homeowner from doing so." (Case No. 71246, Feb. 26, 2018 Order denying petition for rehearing.) The en banc Court summarily denied the petition for en banc reconsideration that had raised the same arguments. These orders illustrate powerfully why this

Court should not disturb the *Golden Hill* decision, as Appellants urges here.

B. The Statute Does Not Restrict Who May Satisfy the Superpriority Amount.

Appellants mistakenly argue that under the Statute, only the lender may satisfy the superpriority amount. The Statute says no such thing. By its terms, the Statute does not limit the ability to satisfy a superpriority lien to lenders or exclude homeowners. As noted just above, this Court has likewise recognized that fact when it denied a petition to rehear the *Golden Hill* appeal. The panel held that while it "agree[d] that the Uniform Common Interest Ownership Act presupposes a lender satisfying the superpriority component of an HOA's lien, nothing in the Act appears to prevent a homeowner from doing so." Appellants' argument therefore fails.

C. Allowing a Homeowner to Satisfy the Superpriority Lien Is Sound Policy.

There is no policy reason standing against homeowners paying the superpriority lien. Statutory silence aside, any suggestion that a homeowner must pay the entire lien amount to protect her interests, and therefore cannot satisfy the superpriority lien, is likewise unsound. While it may be the case that a homeowner must pay the entire lien

amount to save her title interest in the property, it does not follow that satisfaction of the superpriority lien only benefits the lienholder, and does not benefit the homeowner. To the contrary, the satisfaction of the superpriority lien – and with it, the preservation of the deed of trust – provides obvious benefit to the homeowner.

An HOA sale that extinguishes the deed of trust does not extinguish the homeowner's debt. The obligation under the note remains, without the benefit of the property as a means of repayment. When lenders seek repayment from the homeowner, the amount sought from the homeowner individually (as opposed to from the asset) is the full amount of the debt.

Appellants offer no sound reason to limit the payment of a lien to a particular payor. While a lienholder has an interest in receiving payment and satisfaction of its lien, no law supports a lienholder's right to reject a payment because it comes from someone else. If Wells Fargo can pay only the superpriority lien – as no one disputes – so too could the homeowner, or anyone else who would wish to pay off the lien. Notably, the Statute does not limit who may satisfy the superpriority lien or exclude homeowners from doing so.

Appellants' reasoning to the contrary is flawed and contrary to this Court's rulings in *Golden Hill*.

D. Appellants' Claim That Legislative History Supports Its Position Is Incorrect.

As a preliminary matter, the *Golden Hill* panel rejected all of Appellants' arguments relying on the UCOIA comments and Editorial Board Report, when it held that while it acknowledged that the UCOIA "presupposes a lender satisfying the superpriority component of an HOA's lien," but nonetheless held that "nothing in the Act appears to prevent a homeowner from doing so." (Case No. 71246, Feb. 26, 2018 Order denying petition for rehearing.) In addition to that rationale, Appellants' reliance on the 2014 UCOIA comments and 2013 Editorial Board Report are not appropriate sources of authority for the Court to consider here.

1. The Court May Not Look Beyond the Statutory Language Where, as Here, Appellants Have Not Established that the Statute Is Ambiguous.

As a threshold matter, Appellants offer supposed legislative history and policy in support of their position, without first considering the statutory language. However, the Court may not look beyond a statute's plain language unless it is ambiguous. *State v. Lucero*, 127

Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (holding that when a statute is clear on its face, "a court cannot go beyond the statute in determining legislative intent"); *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006). Here, Appellants have not established, or even argued that the statute is ambiguous. The Statute does not restrict who may satisfy the superpriority lien; its plain language permits anyone to pay it. As such, the Statute is not ambiguous, and consideration of legislative history is not permitted, let alone the dubious sources Appellants proffers.

2. The Sources Appellants Supplied Are Not Legislative History and Should Not Be Considered.

Appellants make a number of representations about legislative intent and legislative history, but offers absolutely no evidence of legislative intent, and no legislative history. This Court should reject the post-enactment third-party source materials Appellants proffers.

Legislative history "of course, refers to the ***pre-enactment*** statements of those who drafted or voted for a law." *D.C. v. Heller*, 554 U.S. 570, 605 (2008). "It is considered persuasive by some, not because

they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding." *Id.* "Postenactment legislative history," is a "contradiction in terms," and "refers to statements of those who drafted or voted for the law that are made after its enactment and hence could have had no effect on the congressional vote." *Id.* As such, "[i]t most certainly does not refer to the examination of a variety of legal and other sources to determine the public understanding of a legal text in the period after its enactment or ratification." *Id.* Conflating the two "betrays a fundamental misunderstanding of the Court's interpretive task." *Id.*

"After-the-fact statements … are not a reliable indicator of what [the Legislature] intended when it passed the law, assuming extratextual sources are to any extent reliable for this purpose." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 579 (1995); *see also Nw. Forest Res. Council v. Pilchuck Audubon Soc.*, 97 F.3d 1161, 1168 (9th Cir. 1996) (citing *Gustafson*, 513 U.S. at 579 (holding that a post-enactment letter from six members of Congress was not legislative history because

material not available at the time of enactment cannot be legislative history).

Appellants cite no actual legislative history, i.e., statements by Nevada legislators in contemplating the passage of the 1993 Statute. The purported legislative history Appellants cite is not legislative history at all, but rather post-enactment statements by third parties. The Court should not give credence to these sources – offered twenty years after the 1993 Statute's passage.

a. Comments to the 2014 UCOIA Amendments Are Not Relevant or Helpful.

Appellants argue that comments to the UCOIA "prove" that a superpriority lien was created to require a lender to pay the lien. However, the comments upon which Appellants relies do not inform an analysis of NRS 116.3116 (1993) both because they accompany the UCOIA *as amended in 2014* and because they do not substantively support Appellants' contention.

The 2014 comments Appellants cite significantly post-date the 1993 enactment of the Statute, and thus cannot be considered legislative history of any kind. Moreover, the comments address later versions of the UCOIA, and not the version closest to the governing

Statute. Moreover, the comments do not advocate for the limitation on who may satisfy the superpriority lien, as Appellants contend. Indeed, they contemplate the owners' curing the assessment default:

> This equitable balance was premised on the assumption that, if an association took action to enforce its lien ***and the unit owner failed to cure its assessment default***, the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessments (up to six months' worth) to the association to satisfy the association's limited priority lien.

The comments also acknowledge that the market did not function in the way the UCOIA contemplated following 2007. In a passage Appellants omitted in its selective quoting, the comments note, "The real estate market facing common interest communities post-2007 is substantially different from the one contemplated by the drafters of the original UCOIA. Many units are 'underwater,' with values below the outstanding first mortgage balance. More significantly, long delays have developed in the completion of foreclosures."

The comments contemplate that the lender may pay the superpriority lien to obtain clear title upon a deed of trust foreclosure, but contain no exclusion or limitation as to the homeowner's satisfying the lien. It is clear from the totality of the comments, which in any

event should not be considered, that the comments do not interpret earlier versions of the UCOIA, and that owners are not precluded from satisfying the super-priority lien.

b. The Joint Editorial Board Report Is Not Legislative History, and Appellants Inaccurately Represent It.

The other "authority" Appellants rely upon is a 2013 Report of the Joint Editorial Board for Uniform Real Property Acts. Appellants' reliance is misplaced for several reasons. First, because this post-dates the Statute's enactment by 20 years, this Report is not legislative history. Moreover, it does not come from the Nevada Legislature, and does not even come from the drafting or the drafters of the Uniform Act.

Rather, the Board is a group that "provides guidance … regarding potential subjects for uniform laws." As such, the Board can only comment on what it understands was the intent of the Uniform Act's drafters. Report at 4. Second, the Report includes a retrospective assessment of what the Uniform Act was meant to accomplish. As noted above, it was published in 2013, 20 years after the enactment of the 1993 Statute that governs here, and one year after the sale that

occurred in this case. It is, at best, the equivalent of a law review article.

Additionally, the Report does not support restricting the ability to satisfy a superpriority lien to lenders. The Report of the Joint Editorial Board for Uniform Real Property Acts noted that "[f]undamental" to the working of the Act "was the assumption that, if an association took action to enforce its lien ***and the unit/ parcel owner failed to cure its assessment default***, the first mortgage lender would promptly institute foreclosure proceedings," and pay off the lien so it could deliver clean title to the purchaser at a deed of trust foreclosure sale. Report at 4 (emphasis added). Thus, even according to the Report, either the homeowner or a lender may cure. Appellants' discussion of the above passage conspicuously omits the first part of the statement, which clearly acknowledges a homeowners' ability to satisfy the lien and contemplates the lender's involvement only if the homeowner fails to do so.

This Court should not consider Appellants' authority because the Statute is not ambiguous, and because it is not legislative history. Regardless, neither the 2014 comment, nor the 2013 Board Report

provide any support for its position that a homeowner cannot satisfy a superpriority lien.

E. Because Abelard Paid the Superpriority Portion of the Lien, the Sale Did Not Extinguish the Deed of Trust.

It is undisputed that Abelard paid $1164.20 toward HOA assessments between June 2011 and July 2012. APP 256, 258, 301, 303, 305, 307, 309. Nine months of assessments totals only $549 (9 x $61). APP 256, 301. The HOA did not record a new assessment lien before the HOA sale. Therefore, the HOA could only have foreclosed on its subpriority lien and the HOA's foreclosure sale did not extinguish the Deed of Trust.

Under *Horizons*, the HOA therefore had a superpriority lien for, at most, $549. Abelard paid the superpriority amount of the HOA lien in August 2013, in advance of the HOA sale. In fact, Abelard paid $1164.20, an amount in excess of the superpriority lien amount, and the HOA accepted the payment. *Id.*

Those payment amounts must have been applied to the monthly assessments, as that is the only applicable portion of the HOA's lien that could obtain superpriority. Any alternative argument would mean

that the HOA would be claiming that the entire lien is superpriority unless paid by the "right" entity. That is not the law. There is only one superpriority portion of an HOA lien and the rest is subpriority. *See SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014); *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 70 (2016).

Here, no evidence supports a finding that the payment exceeding the amount of ninth months of assessments failed to satisfy the superpriority lien. Appellants have not established that the payment was not applied to the superpriority lien or should not have been applied to the superpriority lien.

F. "Payment" Does Not Need to be Pled as an Affirmative Defense to Assert Tender.

Appellants assert that "payment" is an affirmative defense that must be pled in Wells Fargo's answer, the exclusion of which is fatal. Opening Br. at 11. As an initial matter, Appellants waived this argument by not raising it before the district court. The Court should therefore reject it. *See Cooke v. Am. Sav. & Loan Ass'n*, 97 Nev. 294, 296, 630 P.2d 253, 255 (1981).

Appellants' argument also fails on the merits. First, the Opening Brief fails to address the standard for analyzing whether the omission of an affirmative defense in a party's initial pleading operates as a waiver. Contrary to Appellants' assertion, NRCP 8(c) does not apply in a vacuum, but rather, only operates as a waiver "if the opposing party is not given reasonable notice and an opportunity to respond." *Williams v. Cottonwood Cove Development*, 96 Nev. 857, 860, 619 P.2d 1219, 1221 (1980) (citing *Schwartz v. Schwartz*, 95 Nev. 202, 591 P.2d 1137 (1979)). In *Williams*, the defendant raised a statutory defense for the first time in its motion for summary judgment. *Id.* In distinguishing *Schwartz* – the case Appellants rely on – the Nevada Supreme Court held: "unlike the appellant in *Schwartz*, the Williamses "had an opportunity and did respond to the motion and no prejudice attached." *Id.* at 860-61.

Not only did Appellants have a full and fair opportunity to address Wells Fargo's tender position in its summary judgment briefing, which was sufficient in *Williams*, the record makes clear that Appellants had been on notice of Wells Fargo's position for significant time as Wells Fargo's discovery efforts focused in large part on the homeowner's payment of the HOA assessments and superpriority lien amount.

Appellants not only had the opportunity to conduct discovery but actually conducted discovery into Wells Fargo's tender defense. Accordingly, there is no prejudice here, and the lack of a "payment" affirmative defense in Wells Fargo's answer is not a valid basis to preclude Wells Fargo from continuing to assert tender on appeal.

Finally, the Nevada Rules of Civil Procedure allow amendments to the pleadings when doing so would conform the pleadings to the evidence: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." NRCP 15(b). Such is the case here. Even if Wells Fargo's answer does not expressly contain a "payment" affirmative defense, the pleadings should be conformed to be consistent with the evidence of tender in this case, which has been in Appellants' possession since discovery.

Finally, Wells Fargo is not bound to only litigate those issues framed Appellants in the complaint or the affirmative defenses enumerated in the answer. Indeed, Wells Fargo filed counterclaims against Appellants that specifically alleged the commercial unreasonableness of the HOA Sale, challenged Appellants' status as a

bona fide purchaser, and requested that the court enter an order declaring that the HOA Sale did not extinguish the Deed of Trust, all of which are based, in part, on Wells Fargo's tender. For all of these reasons, the lack of a "payment" affirmative defense in the answer does not preclude Wells Fargo from asserting tender in its summary judgment briefing.

II. The Sale Following Abelard's Payment of the Superpriority Amount Rendered It Commercially Unreasonable.

Appellants argues only that price alone cannot support a finding of commercial unreasonableness. However, that was not Wells Fargo's position. The HOA sale was commercially unreasonable because the grossly inadequate price was combined with the unfairness arising from Abelard's satisfaction of the lien amount.

Where a significant disparity between the sales price and fair-market-value disparity exists, less evidence of fraud, unfairness, or oppression is necessary to justify setting aside the sale. *Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 405 P.3d 641, 648 (Nev. 2017), *reh'g denied* (Dec. 13, 2017).

Here, a grossly inadequate sales price of less than 20% of the Property's fair market value, combined with unfairness, make this sale

commercially unreasonable. The HOA sale was unfair because Abelard paid the superpriority lien prior to the HOA sale. This defect, coupled with a grossly inadequate sale price, makes the HOA sale commercially unreasonable as a matter of law. These inequities lead to only one conclusion—the HOA sale foreclosed only on a subpriority lien as a matter of law and did not extinguish the Deed of Trust. Also, because the superpriority lien was paid off prior to the HOA sale, the HOA "did not have a legal right to foreclose on the property" in a manner which purported to extinguish the Deed of Trust. *Hines v. Nat'l Default Servicing Corp.*, Case No. 62128, 2015 WL 4611941, at *2 (Nev. July 31, 2015) (citing *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983)).

In sum, the commercial reasonableness of the sale does not provide any basis for reversal.

III. Appellants Are Not Entitled to the Status of a Bona Fide Purchaser.

"The bona fide doctrine protects a subsequent purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance." *25 Corp., Inc. v. Eisenman Chemical Co.*, 101 Nev. 664, 675, 709 P.2d 164, 172 (1985). The

purchaser is also required to demonstrate that "the purchase was made in good faith, for a valuable consideration." *Berge v. Fredericks*, 95 Nev. 183, 186, 591 P.2d 246, 247 (1979).

Appellants could not and cannot show that Cranesbill lacked notice of the Deed of Trust at the time it purchased the Property. "Very little information is necessary to give actual or constructive knowledge to a purchaser sufficient to defeat a bona fide purchaser defense." *Time Warner v. Steadfast Orchard Park, L.P.*, 2008 WL 4350054, *10 (C.D. Cal. Sept. 23, 2008). Indeed, "proper recording of a property interest is generally sufficient under state law to provide constructive notice sufficient to defeat a bona fide purchaser." *Wonder-Bowl Props. v. Kim*, 161 B.R. 831, 836 (B.A.P. 9th Cir. 1993).

Cranesbill undoubtedly had notice of the Deed of Trust because it was properly recorded against the Property years before it acquired its interest in the Property. It is not a BFP, and by extension, neither is Appellants.

Conclusion

For the foregoing reasons, this Court should affirm.

DATED: April 16, 2019

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

ANDREW M. JACOBS
Nevada Bar No. 12787
KELLY H. DOVE
Nevada Bar No. 10569
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Respondent
Wells Fargo Bank, N.A.

CERTIFICATE OF COMPLIANCE

I hereby certify that the **ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 6024 words.

Finally, I hereby certify that I have read the ANSWERING BRIEF, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: April 16, 2019

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

ANDREW M. JACOBS
Nevada Bar No. 12787
KELLY H. DOVE
Nevada Bar No. 10569
SNELL & WILMER L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, NV 89169
Attorneys for Respondent
Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On April 16, 2019, I caused to be served a true and correct copy of the foregoing **ANSWERING BRIEF** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Kelly H. Dove
An Employee of SNELL & WILMER L.L.P.

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