IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association. Appellant, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.	Case No. 70501

APPEAL

from the Eighth Judicial District Court, Department XXI
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-684501-C

APPELLANT'S REPLY 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:

Bank of America, N.A.
Bank of America Holding Corporation
BAC North America Holding Company
NB Holdings Corporation
Bank of America Corporation

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

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INTRODUCTION

This appeal presents clear grounds for reversing the district court's grant of summary judgment. Here, Cross-Defendant-Respondent SFR Investments Pool 1, LLC (**SFR**) claims its purchase of certain property in Clark County, Nevada at a homeowners' association's (**HOA**) foreclosure sale for $21,000.00 extinguished the deed of trust held by Appellant Bank of America, N.A. (**BANA**), which secured a loan of over $74,000.00. However, prior to the foreclosure sale, BANA mailed a check to the HOA for an amount that indisputably covered the superpriority portion of the HOA assessment lien. The district court failed to recognize this tender extinguished the lien, based on the erroneous conclusion the tender was "conditional." In fact, the tender was not conditional, at least not in any way that would justify the HOA's unexplained rejection of the check. This Court should hold the tender preserved the priority of BANA's deed of trust and direct the entry of summary judgment in BANA's favor.

Furthermore, the district court granted summary judgment under the mistaken belief that standards of commercial reasonableness do not apply to HOA foreclosure sales. That reasoning runs contrary to this Court's holding that when considering an equitable argument for setting aside a foreclosure sale, a court must consider the "entirety of the circumstances that bear upon the equities." *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev.

Adv. Op. 5, 366 P.3d 1105, 1114 (2016). The district court failed to take into account the inadequacy of the price paid and the evidence suggesting that the HOA induced bidding by withholding the facts of BANA's tender. This evidence raised material questions of fact precluding the summary judgment in SFR's favor separately from BANA's superpriority tender.

SFR's opposition brief fails to raise any cogent arguments to uphold the summary judgment.[1] SFR's arguments rely on the premise it was a bona fide purchaser. However, the evidence does not support this assumption; in fact, the record actually shows SFR was not a bona fide purchaser due to BANA's recorded deed of trust and the lack of any inquiry on SFR's part. Furthermore, the remaining parts of those arguments fail on other grounds.

ARGUMENT

I. BANA's Tender Extinguished The Superpriority Lien Prior To The HOA's Foreclosure Sale.

The first reason to reverse the summary judgment below is the indisputable fact BANA's counsel sent payment to the HOA Trustee for nine months of assessments, which covered the full superpriority lien. In 2014, this Court confirmed that this action would preserve the priority of the lender's deed of trust.

[1] BANA also observes, in a reversal of the criticism it usually faces, it is attacked by SFR for *not* foreclosing on a borrower after he became delinquent. *See* Resp's Br. at 6.

See SFR Investments Pool 1, LLC v. Bank of America, N.A., 334 P.3d 408, 414 (Nev. 2014) ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien **to avert loss of its security**[.]") (emphasis added); *id.* at 413 ("As a practical matter, secured lenders will most likely **pay the [9] months' assessments** demanded by the association **rather than having the association foreclose on the unit**.") (emphasis added).[2] In this case, the undisputed facts show BANA paid the full superpriority lien, which would preserve the priority of the deed of trust.

A. Tender of the superpriority amount extinguishes that portion.

Since BANA's opening brief, this Court issued a new *en banc* order in *Stone Hollow Avenue Trust v. Bank of America, N.A.*, 382 P.3d 911 (Table), 2016 WL 4543202 (Nev. Aug. 11, 2016) (unpublished) that merits explanation, although it does not contradict BANA's argument that under Nevada law, its tender extinguished the HOA's superpriority lien. Following reconsideration *en banc*, the August 11, 2016 order was vacated on factual grounds, but without retreating from the principle that a valid tender of funds by a lender, though rejected, extinguishes the superpriority lien.

[2] The Nevada Real Estate Division likewise concluded that payment of the super-priority portion of the HOA's lien results in a discharge of the lien. *See* December 12, 2012 NRED Advisory Opinion No. 13-01, at 11 (stating that payment of super-priority abatement charges "relieves their super priority lien status.").

In *Stone Hollow*, the plaintiff purchased the property at issue in an HOA foreclosure sale and then filed suit against the mortgagee to quiet title. The trial court entered summary judgment in favor of the mortgagee, and the plaintiff appealed. *Stone Hollow Ave. Trust v. Bank of Am., Nat. Ass'n*, No. 64955, 2016 WL 1109167, at *1 (Nev. Mar. 18, 2016). On appeal, the Supreme Court initially reversed the trial court, finding that the trial court failed to consider the plaintiff's bona fide purchaser status. *Id*. The lender moved for rehearing on the grounds its tender of the superpriority amount discharged the superpriority lien, rendering equitable doctrines inapplicable. The three-judge panel agreed—reversing its prior ruling and affirming the trial court's grant of summary judgment. *Stone Hollow*, 382 P.3d 911 (Table), 2016 WL 4543202 at *1. In its August 11, 2016 decision, the court found the HOA's rejection of the proffer of the full superpriority lien amount was "unjustified" and "[w]hen rejection of a tender is unjustified, the tender is effective to discharge the lien." *Id.*

Following the August 11, 2016 order, the plaintiff filed a petition for reconsideration *en banc*. The Supreme Court vacated its order and again decided to reverse the trial court, this time on the grounds there was a sufficient factual dispute over the adequacy of the mortgagee's tender to preclude summary judgment. *See Stone Hollow*, Case No. 64955, Slip Op. at 1-2 (Dec. 21, 2016). Notably, however, the court did not abandon the three-judge panel's conclusion

that a legally adequate tender discharges the lien without regard to bona fide purchaser status.[3]

Nothing in the *Stone Hollow* case disturbs this Court's holding in *SFR Investments* that a payment of the superpriority lien will "avert loss of [the lender's] security." Rather, by remanding for further consideration on the adequacy of the tender, *Stone Hollow* continues to serve as persuasive authority that an adequate tender discharges a superpriority lien.

B. The "conditions" alleged by SFR did not defeat the tender.

It is undisputed the check sent by BANA's counsel was for the full amount of the superpriority lien. Unable to argue otherwise, SFR instead makes the baseless argument BANA's tender failed because "conditional offers to pay are not tender." Resp's Br. at 10. The court should reject this argument on at least three grounds: (1) the letter did not include any actual conditions, (2) even if language in the letter is construed as being a "condition," BANA had a right to insist upon it, and (3) there is no evidence the language in the letter was material to the HOA Trustee's rejection of the check.

First, the language in the letter did not include any actual condition. *See Unconditional*, Black's Law Dictionary (10th ed. 2014) ("Not limited by a

[3] *See id.* at 2-3 (Pickering, J., dissenting) (citing 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* § 7:21 (6th ed. 2014)).

condition; not depending on an uncertain event or contingency; absolute."). In a recent case, the U.S. District Court for the District of Nevada reached that conclusion, rejecting the argument a nearly identical payoff letter was conditional. Miles Bauer (as agent for the lender) sent a check to the HOA for the full amount of the superpriority lien accompanied by substantially the same letter as in this case, and the court concluded the letter was not conditional:

> The language Miles Bauer included with their cashier's check states that Miles Bauer, and presumably their client, will understand endorsement of the check to mean they have fulfilled their obligations. It simply delineates how the tenderer will interpret the actions of the recipient (which also turned out to be the correct interpretation of the law). It does not require Red Rock to take any actions or waive any rights. And it does not depend on an uncertain event or contingency. *Cf. US Bank, N.A. v. SFR Investments Pool 1, LLC*, No. 3:15-cv-00241-RCJ-WGC, 2016 WL 4473427, at *6 (D. Nev. Aug. 24, 2016) (no reasonable juror could interpret a similar tender made by Miles Bauer on behalf of U.S. Bank as conditional).

U.S. Bank, N.A. v. Emerald Ridge Landscape Maint. Ass'n, No. 2:15-cv-00117-MMD-PAL, 2016 WL 7826665 at *4 (D. Nev. Sept. 30, 2016).

Second, even if the letter accompanying the check were construed as including conditions, those conditions would not defeat the effectiveness of the tender. A payment only fails if it is dependent on a condition *upon which the paying party is not entitled to insist. Fresk v. Kraemer*, 99 P.3d 282, 287 (Or. 2004) ("[The definition of tender] is more precisely stated as an offer of payment

that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist.").

A condition may be included on the payment if the payor is entitled to that condition. *Millhollin v. Conveyor Co.*, 954 P.2d 1163, 1166 (Mont. 1998) ("[a] tender of payment may be conditional as long as the attached condition is one on which the tenderer has the right to insist."); *Dull v. Dull*, 674 P.2d 911, 913 (Ariz. Ct. App. 1983) ("A tender is not conditional, however, if the condition is one which the person making the tender has a legal right to insist upon."); 74 Am. Jur. 2d Tender § 22 ("where the condition is one that the debtor has the right to insist on, a tender made subject to that condition is valid"). Expressed differently, "tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his or her rights." 74 Am. Jur. 2d Tender § 22.

For example (relevant to the current case), tender does not become ineffective merely because it requires a release from further liability on the recipient's claim. *See Fresk*, 99 P.3d at 287 (finding that under a statute precluding an attorney's fee award to a party to whom full damages were tendered prior to litigation, tender was not invalidated by conditioning payment upon a release of liability). Here, BANA's payment was not dependent on any condition to which the HOA could have a valid objection.

Third, SFR's argument also fails because there is no evidence the HOA Trustee's decision to refuse delivery of the *check* was affected by the language in the *letter*. The record has no evidence on why the HOA Trustee rejected the check. Thus, even if there were an impermissible condition in the letter (which there is not), there would be no factual basis to conclude it actually led the HOA Trustee to reject the check.

1. A citation to NRS 116.3116(2) regarding the lien amount could not justify rejection of the check.

SFR repeats the district court's mistaken conclusion BANA's payment was "conditional" because it "require[ed] the [HOA] to waive its rights as to a currently undecided matter—namely what amounts are included in a superpriority lien pursuant to NRS 116." (JA 794). However, the court erred in stating the composition of the superpriority lien was then undecided—during the period in question, NRS 116.31162(2) *always* specified the superpriority lien as nine months of assessments. Even if the parties had been inclined to negotiate over the amount of the superpriority lien, that amount could not be varied by agreement. *See* NRS 116.1104 ("Except as expressly provided in this chapter, its provisions may not be varied by agreement"). Therefore, the HOA had no "rights" that could have been affected by the letter's language on the superpriority lien amount.

SFR does not even attempt to respond to the discussion in BANA's opening brief of why *Horizon at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC,*

373 P.3d 66 (Nev. 2016) contradicts the claim the superpriority lien composition was undecided. *See* Appellant's Opening Br. at 15-17. *Ikon Holdings* confirmed the "super-priority" lien "is limited to an amount equal to the common expense assessments due during the nine months before foreclosure." 373 P.3d at 72.

Any argument the statute was not controlling until the Court issued *Ikon Holdings* is a non-starter. When a court interprets a statute, "it is explaining its understanding of *what the statute has meant continuously since the date when it became law*." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994) (emphasis added). Nothing in *Ikon Holdings* or subsequent rulings indicates that this Court thought NRS 116.31162(2) to be indeterminate as to the composition of the superpriority lien. Instead, the Court affirmed the plain language of NRS 116.31162(2).

In stating acceptance of the check would be construed as agreement the superpriority lien equaled $720, the most the letter did was to require the HOA to acknowledge a clear statutory provision. The HOA Trustee was not asked to concede any right or privilege because this was indisputably the maximum amount of the superpriority lien *according to Nevada law*. Therefore, this "condition" could not have merited rejection of the check.

2. The letter did not require the HOA to give up any future rights to payment

SFR also distorts BANA's letter to claim it required the HOA Trustee to agree:

> the Bank never again would have to pay the Association further sums after said check. In other words, if, like the bank in *Shadow Wood*, the Bank were to foreclose and take title to the Property, it could argue it was relieved of any obligation to pay assessments despite being the unit owner.

Resp's Br. at 11. Essentially, SFR posits the letter was asking the HOA to waive assessments on the Property in the hypothetical situation BANA became owner. This speculation is utterly unsupported by the text of the letter, which states:

> While the HOA may claim a lien under NRS 116.3102 Subsection (1), Paragraphs (j) through (n) of this Statute clearly provide that such a lien is JUNIOR to first deeds of trust to the extent the lien is for fees and charges imposed for collection and/or attorney fees, collection costs, late fees, service charges and interest. See Subsection 2(b) of NRS 116.3116, which states in pertinent part:
>
> 2. A lien under this section is prior to all other liens and encumbrances on a unit except:

(b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent...

The lien is also prior to all security interests described in paragraph (b) to the extent of the assessments for common expenses...which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien.

Based on Section 2(b), a portion of your HOA lien is arguably prior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment. As stated above, the payoff amount stated by you includes many fees that are junior to our client's first deed of trust pursuant to the aforementioned NRS 116.3102 Subsection (1), Paragraphs (j) through (n).

Our client has authorized us to make payment to you in the amount of $720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

(JA 206-07). The letter refers three times to "nine months of assessments," states BANA is paying its obligations "as a holder of the first deed of trust," and distinguishes between the superpriority and subpriority ("junior") portions of the lien.

No reasonable reading of the letter could conclude BANA was claiming to pay more than the superpriority lien. SFR's claim it required the HOA disclaim to its right to future, hypothetical, assessments is baseless.

3. Any argument from "conditions" in the letter is mere speculation.

Finally, it is important to note any claims "conditions" in BANA's letter justified the HOA Trustee's refusal of the check are *entirely speculative*. The

record does not contain any testimonial or other evidence the HOA Trustee rejected the check because of language in the letter. SFR had the opportunity to depose the HOA and HOA Trustee on this question, but never did so. Instead, SFR merely raised this argument in its summary judgment motion *without any evidentiary support*. *See* (JA 340-41). As the movant, it is SFR's burden to demonstrate the absence of material facts. In fact, upon summary judgment, "any reasonable inference" from the evidence must be drawn in favor of the nonmovant. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). SFR cannot be entitled to summary judgment on the basis of mere speculation, particularly where it passed up its chance to develop the record on this issue.

SFR's argument BANA's tender failed by virtue of being "conditional" is utterly meritless and must be rejected. BANA's tender for the full amount of the lien was sufficient to pay that lien, even though the HOA inexplicably rejected the check.

C. BANA was not obligated to take any additional steps after sending payment.

SFR also claims BANA's tender was insufficient because BANA did not "keep the tender good." Resp's Br. at 12-13. SFR's only citation is to a comment from the Restatement (Third) of Property: Mortgages concerning the redemption of interests subordinate to *mortgages*. *Id*. However, the Restatement (a model law on

mortgages) has no connection to Nevada's HOA Lien Statute.[4] Rather, the HOA Lien Statute is based on the Uniform Common Interest Ownership Act (**UCIOA**), which does not suggest there is any need to "keep good" a tender that was rejected by the HOA. This is consistent with general principles on liens payoffs:

> As a general rule, where a tender is relied on merely defensively, it is not necessary that it must be kept good or that the money be paid into court. Ordinarily, therefore, *where the tender is relied on as having extinguished or discharged a lien, it is not essential to keep it good.*

74 Am. Jur. 2d Tender § 27 (emphasis added).

SFR specifically contends BANA was required to open an escrow account and "communicat[e] to the Association that its offer to pay was kept open" after the HOA rejected the check. Resp's Br. at 12-13. SFR provides no citation these steps are required for HOA lien payoffs in Nevada other than the aforementioned inapposite reference to mortgages. This argument fails to show BANA's tender was insufficient.

D. BANA is entitled to judgment in its favor even if SFR were a bona fide purchaser.

As a final resort, SFR makes the specious argument that *even assuming the tender was sufficient*, SFR should get clear title to the Property because "to the extent an association wrongfully rejects a tender, a lender's remedy is against the

[4] Furthermore, the Restatement's provisions are not automatically governing law in Nevada.

parties who harmed it, in lieu of displacing an innocent third party purchaser." Resp's Br. at 18. This argument fails for several reasons.

First, as discussed in Section I.A., this Court's opinions in *Stone Hollow* confirm the bona fide purchaser defense does not cancel out the effects of a tender. This Court's initial decision reversed the judgment below on the conclusion the court failed to consider the plaintiff's bona fide purchaser status. 2016 WL 1109167 at *1. The lender moved for rehearing on the grounds its tender of the superpriority amount discharged the superpriority lien, rendering equitable doctrines inapplicable. The three panel agreed, vacating its prior ruling and instead affirming the trial court's grant of summary judgment. 2016 WL 4543202 at *1.

Following *en banc* reconsideration, the Court vacated the panel's decision, but solely on the ground "appellant sufficiently challenged in district court whether respondent introduced evidence to establish a legally adequate tender." No. 64955, Slip Op. at 2-3 (Dec. 21, 2016). The full Court did not accept the plaintiff's attempt to have the bona fide purchaser defense revisited. This analysis is confirmed by Judge Pickering's dissent to the *en banc* decision, where she noted "bona fide purchaser status is irrelevant under this prevailing view." No. 64955, Slip Op. at 2-3 (Dec. 21, 2016).

Second, as discussed in Section II.A., *infra*, the record actually reveals SFR was *not* a bona fide purchaser due to BANA's recorded deed of trust. The record certainly does not allow summary judgment in SFR's favor on this issue.

Third, the possibility BANA could seek alternative relief (monetary damages) from another party (the HOA) does not affect the present quiet title action SFR initiated. SFR cannot gain any title greater than what the HOA had at the time of sale. *Brophy Mining Co. v. Brophy & Dale Gold & Silver Mining Co.*, 15 Nev. 101, 1880 WL 4266 (Nev. 1880) ("A quitclaim deed is sufficient to convey *whatever interest the grantor had in the property at the time the conveyance was made*") (emphasis added). Instead, if SFR has a complaint it was misled by the HOA regarding the status of BANA's interest, *SFR* is the party that should seek monetary damages from the HOA or HOA Trustee. SFR—the plaintiff in this action—is not entitled to a summary judgment of quiet title merely on the speculation BANA could seek damages from some other party.

Therefore, on the basis of BANA's tender, this Court should reverse the judgment below and direct the entry of summary judgment in BANA's favor.

II. SFR's Arguments Premised On Bona Fide Purchaser Status Fail.

A. SFR has not proven it was a bona fide purchaser.

The Respondent's Brief repeatedly asserts SFR was a bona fide purchaser, but SFR gives only the flimsiest of arguments it qualified as such. *See* Resp's Br.

at 50-52. Despite entitling a section of its brief "SFR is a Bona Fide Purchaser for Value," SFR can point only to a statement in its affidavit that it has no relationship to the HOA or HOA Trustee. Resp's Br. at 52.

This lackluster response fails to rebut *any* of the arguments in BANA's opening brief:

- SFR has the burden of proof on the bona fide purchaser defense. *Berge v. Fredericks*, 591 P.2d 246, 247-48 (Nev. 1979);
- BANA's recorded deed of trust was a "competing interest" in the Property, *Berge*, 591 P.2d at 247, that inherently precluded a claim to be a bona fide purchaser, *Telegraph Rd. Trust v. Bank of America, N.A.*, No. 67787, 2016 WL 5400134 (Nev. Sep. 16, 2016) (unpublished) (notice of a deed of trust is sufficient to defeat bona fide purchaser status);
- BANA's recorded deed of trust put SFR under a duty of inquiry, i.e. to make "adequate inquiry" into the status of BANA's interest in the Property;
- There is no evidence nor even allegations that SFR made inquiry into the status of the recorded deed of trust; *and*
- SFR's managing member has testified that he knew there would be a need "to expend a bunch of money in litigation" over properties purchased at foreclosure auctions.

See Appellant's Opening Br. at 48-51. Because SFR has not come remotely close to carrying its burden of proof on bona fide purchaser status, any argument premised on this defense fails.

B. BANA was not required to record its superpriority tender.

SFR's other argument as to why it was a bona fide purchaser—that BANA was obligated to record some sort of document memorializing its superpriority tender—also fails for further, independent reasons. Neither the HOA Lien Statute nor any decision by this Court state a lender paying HOA assessments on behalf of a borrower is obligated to record evidence of that payment. Nevertheless, the Respondent's Brief makes various underdeveloped assertions to that effect, citing willy-nilly to inapplicable sections of Nevada statutes. Because a lien payoff does not fit into any of these categories, SFR's argument fails.

1. Tender was not a "conveyance."

SFR asserts the tender was a "conveyance" that needed to be recorded, saying: (1) under NRS 111.325, unrecorded conveyances are void against bona fide purchasers; and (2) under NRS 111.010, "the definition of 'conveyance' includes extinguishment or discharge of the lien." Resp's Br. at 13-14. This second contention is simply false under NRS 111.010, which states:

> 1. "Conveyance" shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered.

NRS 111.010. The tender did not "create, alien, assign, or surrender" "any estate or interest." Before the check was mailed, BANA had a first deed of trust on the Property. After the check was received (and tender was completed), BANA *still*

had that same first deed of trust. No new interest (or estate) was created, nor was BANA's deed of trust aliened, assigned or surrendered.

SFR then seeks to sow further confusion, saying, "The purported satisfaction of the superpriority portion of the association's lien is a surrender or release of the Association's senior position." Resp's Br. at 14. SFR relies on Black's Law Dictionary definition of "surrender," which is "[t]he giving up of a right or claim." *Id*. at 15.[5] Here, SFR seems to think BANA had the power to "surrender" or "release" the HOA's lien. However, it is a basic feature of liens that they can only be surrendered or released by the *lienholder*,[6] which here was *the HOA*. Therefore, not only did BANA lack an obligation to record a release of the HOA's lien, it lacked the *ability*.

Accordingly, even if SFR were a bona fide purchaser, Bank of America's superpriority tender was still effective, meaning SFR's interest in the Property, if any, would be subject to the Deed of Trust.

2. The tender was not a "change in priority."

Additionally, SFR claims Bank of America's tender constituted a "change in priority" to a lien, and thus had to be recorded under NRS 106.220. Resp's Br. at

[5] SFR also seems to assert BANA's tender was a "release of mortgage," which, if anything, makes even less sense, considering BANA *redeemed* its deed of trust, not "released" it. *See* Resp's Br. at 15.

[6] *See, e.g., Allison Steel Mfg. Co. v. Bentonite, Inc.*, 471 P.2d 666, 667-68 (Nev. 1970) (Internal Revenue Services lien released "by Internal Revenue Service").

17-18. However, this statute only applies to "any instrument" causing a change in priority for a mortgage, deed of trust, or lien. NRS 106.020. SFR's argument begs the question: SFR contends Bank of America had to record something under NRS 106.220, yet fails to explain what "instrument" causing the supposed change in priority of a lien. BANA's tender was not an "instrument," but rather a payment, and so, unsurprisingly, SFR cannot point to any "instrument" that went unrecorded.

Any argument BANA failed to record tender runs afoul of the fact that Nevada's recording statutes do not address payments—rather, they address **instruments**. There was no instrument purporting to operate as a matter of law to protect BANA's security interest, and therefore, nothing could have been recorded.

III. Further Material Questions Of Fact Preclude Summary Judgment.

In addition to the fact BANA's tender extinguished the superpriority lien prior to foreclosure, the judgment below was also improper in light of remaining material questions of fact. Therefore, if this Court does not remand and direct the district court to enter summary judgment in BANA's favor, it should remand the case for resolution of remaining fact questions.

A. Even if not clearly sufficient, BANA's tender raises material questions of fact under *Shadow Wood*.

Even if the facts were not clear enough to rule BANA made sufficient tender and thereby extinguished the superpriority lien, they at least would raise material questions of fact that made the summary judgment improper. As this Court noted in a recent decision:

> *In Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, this court recognized that a quiet title action is equitable in nature and, as such, a court must consider the "entirety of the circumstances that bear upon the equities." 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). In particular, we discussed the following factors as potentially bearing on the equities of an HOA's foreclosure sale: (1) a grossly inadequate sale price; (2) a showing of fraud, unfairness, or oppression leading to the sale; (3) the extent to which a complaining party's inaction led to the sale; and (4) the presence of a bona fide purchaser. *Id*. at 1112-16. Additionally, we noted that a deed of trust beneficiary's tender of the purported superpriority portion of an HOA's lien is a relevant consideration when determining whether an HOA foreclosure sale extinguishes the deed of trust. *Id*. at 1114.
>
> Here, the district court granted summary judgment in favor of [the investor-purchaser] before this court issued *Shadow Wood*, and thus, the district court was unable to address BNYM's May 2012 letter offering to tender the superpriority portion of the HOA's lien. Because genuine issues of material fact remain, we conclude that summary judgment in respondent's favor was not proper.

Bank of NY Mellon v. Star Golden Ent. Series 6, No. 68345 (Jan. 25, 2017). If, therefore, this Court does not agree with the discussion in Section I that the facts of this case show a clear, sufficient tender, then the case should be treated as the

decision in *Star Golden* and remanded for consideration according to *Shadow Wood*.

B. The district court did not properly resolve the matter of the sale's compliance with statutory requirements.

On the question of compliance with statutory requirements, SFR continues to misconstrue *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1110 (Nev. 2016) as the exact opposite of its actual holding. BANA's opening brief explained thoroughly how *Shadow Wood* affirmed courts' equitable authority to look into all issues of statutory compliance. Appellant's Opening Br. at 38-42. SFR's brief mystifyingly cites to "366 P.3d at 1100" (a citation that does not correspond to *Shadow Wood*) and describes *Shadow Wood* as "holding the Trustee's Deed contains recitals deemed 'conclusive' as to 'Default' and that 'All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.'" Resp's Br. at 40. *Shadow Wood* clearly wrote that NRS 116.3116 "did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." 366 P.3d at 1112. The holding was not limited only to issues unmentioned by the deed recitals.

SFR then goes on to seek to shift "the burden of production" and "burden of proof" onto BANA to demonstrate flaws in the foreclosure. Resp's Br. at 41. The case cited by SFR actually undercuts its own argument: "In a quiet title action, the

burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 918 P.2d 314, 318 (Nev. 1996) (emphasis added). Since SFR is the plaintiff in this action, *Breliant* affirms SFR has the burden of proof.

Furthermore, the statement in *Breliant* that "there is a presumption in favor of the record titleholder" comes in the context of adverse possession. *Id*. (citing *Biasi v. Leavitt*, 692 P.2d 1301, 1304 (Nev. 1985) for the proposition "adverse possession claimant has the burden of establishing claim 'by clear and competent proof in order to overcome the presumption that possession of the land is under the regular title'"). In the context of two parties with recorded interests, the "record titleholder" presumption does not shift the scales.

Thus, SFR fails to rebut BANA's argument that the district court erred by granting summary judgment on the issue of statutory compliance solely on the basis of deed recitals.

C. Questions remain on compliance with the statutory duty of good faith and commercial reasonableness.

BANA's opening brief pointed out two main areas with material questions of fact pertaining to HOA's compliance with the duty of good faith imposed by NRS 116.1113. SFR's discussions of both areas are inadequate to defend the judgment below.

1. The HOA Trustee's rejection of BANA's check was done in bad faith.

First, the record is unclear as to why the HOA Trustee rejected BANA's superpriority tender check without any explanation. Appellant's Opening Br. at 44. This rejection raises an inference the HOA Trustee had a policy of interfering with lenders' efforts to pay the superpriority lien. When considered with the HOA Trustee's refusal to send a calculation of the superpriority lien (instead, the HOA Trustee sent the entire account balance sheet), it can readily be inferred the HOA sought to coerce lenders into paying the much-larger full amount owed by homeowners, instead of cooperating with their efforts to make payment of the superpriority amount. If further factual development shows this to be the case, the finder of fact could conclude that the statutory duty of good faith was violated.

In response, SFR's brief merely (a) repeats its arguments that the tender was conditional and (b) claims that even if the tender was sufficient, the HOA had a "good faith reason for rejection" because it supposedly believed that the superpriority lien included collection costs. Resp's Br. at 17. It must be noted, once again, these claims are mere speculation—SFR has provided no evidence suggesting that either of these reasons motivated the HOA Trustee's rejection of the check. Furthermore, the claim the tender was "conditional" lacks merit. *See* Sec. II.B.

Finally, SFR's citation for the proposition that a "good faith" mistake justifies rejection of a tender is inapposite. The Oklahoma state court case SFR cites[7] did not apply this rule, but did rely on a previous case where the rule was found applicable, *Orr v. Mallon*, 126 P.2d 83 (Okla. 1942). In *Orr*, the parties disputed the amount due to repair the plaintiff's truck: the plaintiff alleged an agreement of a maximum price to fix his truck, while the defendant denied the agreement and refused tender for the allegedly agreed-upon amount. *Id*. at 84-85. The court held the defendant's rejection on that basis could constitute a "good faith" reason for rejecting the tender. *Id*. at 85 (holding that this question should have been submitted to the jury). However, this was a dispute over a factual issue—the existence of an agreement—not, as SFR speculates in this case, a mistake of law. An inability to understand a statute cannot be a sufficient reason to reject a tender.

2. The commercial reasonableness of the sale is still undetermined.

BANA's opening brief noted in June of 2016, this Court overturned a district court decision that ignored a challenge to the commercial reasonableness of an HOA sale. *See Wells Fargo Bank, N.A., v. SFR Holdings, Inc.*, No. 67873, 2016 WL 3481164 at *2 (Nev. June 22, 2016) (unpublished). Since then, this Court has reversed three more decisions that failed to consider a sale's commercial

[7] *Segars v. Classen Garage & Serv. Co.*, 612 P.2d 293 (Okla. Ct. App. 1980).

reasonableness. In *Nation Star Mortg., LLC v. Messina*, No. 68603, 2016 WL 7105069, at *1 (Nev. Dec. 2, 2016) (unpublished), this Court concluded that "summary judgment . . . was not proper" because the court failed to consider whether "the sales price was inadequate" and "whether the sale contained elements of fraud, unfairness or oppression." Similarly, this Court then reversed two decisions that failed to conduct an equitable balancing that took into account whether there was "a grossly inadequate foreclosure sale price" and "a showing of fraud, unfairness, or oppression leading to the foreclosure sale." *DITECH FINANCIAL LLC v. Kal–Mor–USA, LLC*, No. 68389, 2016 WL 7439354, at *1 (Nev. Dec. 22, 2016) (unpublished); *Ditech Fin. LLC v. Tyrone & In-Ching, LLC*, No. 68388, 2016 WL 7441017, at *1 (Nev. Dec. 22, 2016) (unpublished).

In this case, the district court overlooked evidence supporting both prongs of the commercial reasonableness test. First, BANA submitted an appraisal report by R. Scott Dugan, a licensed appraiser, which concluded the house was worth $98,000 on February 20, 2013, the date of the auction. (JA 218-253). Based on this appraisal, the auction sale price was less than 22% of the Property's true value. SFR criticizes the methodology of Dugan's report. Resp's Br. at 46-47. However, at the summary judgment stage, "the Court must not undertake to decide questions of fact – it is only authorized to decide whether such questions exist, and the

existence of such questions *precludes* the granting of summary judgment." *Tomiyasu v. Golden*, 81 400 P.2d 415, 426 (Nev. 1965) (emphasis in original).

SFR presents no alternative valuation of the Property, instead obtusely insisting "fair market value has no applicability to a forced sale" Resp's Br. at 49, without explaining what benchmark could be used to examine the adequacy of the price. This Court has repeatedly affirmed that a court must consider whether a sale price was "grossly inadequate," *Shadow Wood*, 366 P.3d at 1110. Therefore, there must be some point of comparison for the sale price *other than the sale price*. BANA has given an appraisal, and SFR has not. Summary judgment cannot be given in *SFR's* favor in this scenario.

As to the second prong of the commercial reasonableness test—proof of "oppression, fraud, or unfairness"—BANA presented testimony from SFR's managing member, Christopher Hardin, that SFR had a policy during this period not to bid on a property if it learned the lender had tendered the superpriority lien. *See* (JA 506-507). SFR notes but gives no discussion of this evidence in its response brief. Resp's Br. at 47.

At the summary judgment stage, "any reasonable inference" from the evidence must be drawn in favor of the nonmovant. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). The reasonable inference from Hardin's testimony is the HOA did not notify bidders of BANA's tender: otherwise, SFR would not have

bid on the Property. Thus, BANA provided sufficient factual bases to preclude summary judgment on this issue.

CONCLUSION

For all of the above reasons, the district court's judgment should be reversed, and summary judgment awarded instead to BANA on all claims in this case. In the alternative, the district court's judgment should be vacated and the case remanded for further proceedings.

DATED this 9th day of February, 2017.

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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 reply 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 5,803 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 answering 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.

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 9th day of February, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 9th day of February, 2017, I caused to be served a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF**, in the following manner:

(**ELECTRONIC SERVICE**) The above referenced document was electronically filed on the date hereof with the Clerk of the Court for the Supreme Court of the State of Nevada by using the Court's CM/ECF system and served through the Court's Notice of electronic filing system automatically generated to those parties registered on the Court's Master E-Service List as follows:

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