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SUPREME COURT

STATE OF NEVADA

7510 PERLA DEL MAR AVE TRUST,

Appellant,

vs.

BANK OF AMERICA, N.A.,

Respondent.

No. 75603

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Plaintiff/appellant, 7510 Perla Del Mar Ave Trust, is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 7510 Perla Del Mar Ave Trust.

3. The manager for Resources Group, LLC is Iyad Haddad a/k/a Eddie Haddad.

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SUMMARY OF THE ARGUMENT

Miles Bauer did not make a valid tender of any amount to pay the superpriority portion of the HOA's lien.

Defendant Bank did not prove that the HOA wrongfully prevented Miles Bauer from making a payment to cover the superpriority portion of the HOA's lien.

After the foreclosure agent did not respond to Miles Bauer's letter, defendant Bank failed to keep the alleged tender good.

Defendant Bank's failure to record its claim that the superpriority lien had been discharged makes that claim void as to plaintiff.

Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim of tender.

Defendant Bank did not prove that any element of fraud, unfairness or oppression accounts for or brought about the high bid paid by plaintiff.

Defendant Bank was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale because it had an adequate remedy at law against the HOA and the foreclosure agent.

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ARGUMENT

1. Miles Bauer did not make a valid tender of any amount to pay the superpriority portion of the HOA's lien.

At page 13 of Respondent's Answering Brief, defendant Bank quotes from Bank of America, N.A. v. Ferrell Street Trust, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), but in that case, a check for $150.00 was enclosed with the letter from Miles, Bauer, Bergstrom & Winters, LLP (hereinafter "Miles Bauer") to the foreclosure agent.

In addition, this Court remanded that case to the district court to determine if the second notice of default recorded by the HOA "addressed an entirely new set of defaults, or was intended as a recurring notice for the original default." Id. at *2.

Because Miles Bauer's letter, dated March 16, 2012, demanded that the HOA accept an offer that was less than the amount authorized by the Commission for Common Interest Communities and Condominium Hotels (hereinafter "CCICCH") in Advisory Opinion 2010-01, dated December 8, 2010, the letter was not an unconditional tender, but only a conditional demand that required the HOA to agree with Miles Bauer's formula for calculating the superpriority lien. The second page of Miles Bauer's letter (JA1b, pg. 152) demanded that the HOA make the same admission that the Kansas Supreme Court held to be improper in Smith v. School

Dist. No. 64 Marion County,131 P. 557, 558 (Kan. 1913).

At page 14 of Respondent's Answering Brief, defendant Bank states that "BANA also proved that it had the 'ability of immediate performance' to pay the amount of the lien." This statement is directly contradicted by the following testimony by Rock Jung:

> Q. And how would you get the money to pay the super priority and whatever other portion?
>
> A. My recollection is we would recommend the amount we felt would satisfy any super-priority lien obligations to the client, and they would wire that amount.
>
> Q. And then after the amount was wired, what happened next?
>
> A. We would then convert the wired amount into a check and then hand deliver that check to the HOA trustee in question.
>
> (JA2, pg. 361, ll. 11-21)

Neither Mr. Jung nor any other witness testified that Miles Bauer recommended to defendant Bank that any amount be paid to the HOA, and there is no evidence that any money was wired to Miles Bauer for the assessment lien recorded on January 4, 2012. As a result, defendant Bank cannot dispute that Miles Bauer did not have the "ability of immediate performance" to pay any amount to the HOA or its foreclosure agent when it sent its letter, dated March 16, 2012, to the

foreclosure agent.

At page 14 of Respondent's Answering Brief, defendant Bank states that in Bank of America, N.A. v. SFR Investments Pool 1, LLC, No. 69323, 420 P.3d 559 (Table) (Nev. June 15, 2018) (unpublished disposition)(hereinafter "BANA v. SFR (unpublished)"), and The Bank of New York Mellon v. SFR Investments Pool 1, LLC, No. 68165, 420 P.3d 558 (Table) (Nev. June 15, 2018) (unpublished disposition) (hereinafter "BONY v. SFR (unpublished)"), this Court held that "tender can be effective without payment under some circumstances." No such language appears in either order.

In BANA v. SFR (unpublished), this Court affirmed the entry of summary judgment in favor of the foreclosure sale purchaser and stated that "we are not persuaded that Bank of America's future offer to pay the superpriority lien amount, once that amount was determined, was sufficient to constitute a valid tender." 420 P.3d 559 (Table) at *1.

In BONY v. SFR (unpublished), this Court also affirmed the entry of summary judgment in favor of the foreclosure sale purchaser and stated that "we are not persuaded that BNYM's future offer to pay the superpriority lien amount, once that amount was determined, was sufficient to constitute a valid tender." 420 P.3d

558 (Table) at *1.

In the present case, the second page of Miles Bauer's letter (JA1b, pg. 152) made the same "future" offer to pay that this Court found to be inadequate in both BANA v. SFR (unpublished) and BONY v. SFR (unpublished).

At page 15 of Respondent's Answering Brief, defendant Bank quotes from McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co., 320 P.3d 579 (Ore. Ct. App. 2014), but that portion of the opinion relied on specific language found in ORS 81.010 that "simply dispenses with the necessity of actually producing and offering money at the outset." Id. at 585. (citing Malan v. Tipton, 349 Or. 638, 647, 247 P.3d 1223 (2011)).

The court of appeals also quoted from the Oregon Supreme Court's earlier opinion in McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co., 139 P.3d 9 (Ore. 2008), where the Court stated that "[t]he prospect * * * that payment might occur at some point in the future is not sufficient to defeat plaintiff's claim for prejudgment interest." Id. at 20.

Defendant Bank also cites Cochran v. Griffith Energy Serv., Inc., 993 A.2d 153 (Md. Ct. Spec. App. 2010), but defendant Bank does not address the language stating that the offer must be "coupled with the **present** ability of **immediate**

performance." Id. at 168. (emphasis added) As quoted at page 3 above, Rock Jung testified that there were several steps that must be followed before defendant Bank would wire monies to Miles Bauer, and Miles Bauer would issue a check payable to the HOA from Miles Bauer's trust account. (JA2, pg. 361, ll. 11-21)

Defendant Bank also quotes from Graff v. Burnett, 414 N.W.2d 271 (Neb. 1987), which plaintiff quoted at pages 11 and 12 of Appellant's Opening Brief. Because defendant Bank did not allege or prove that Miles Bauer instructed defendant Bank to wire any monies to the Miles Bauer trust account to cover a payment for the HOA's superpriority lien, defendant Bank did not produce the required "evidence that he [Miles Bauer] had sufficient funds deposited in his checking account to cover the check he would have delivered to Graffs [the HOA]." 414 N.W. 2d at 276.

In footnote 3 at page 15 of Respondent's Answering Brief, defendant Bank attempts to distinguish the present case from Southfork Investment Group, Inc. v. Williams, 706 So. 2d 75 (Fla. Dist. Ct. App. 1998), by stating that "Miles Bauer made no demand that there be a judicial determination of the amount due before it would send payment." On the other hand, Miles Bauer did demand that the HOA agree with Miles Bauer's formula for calculating the amount of the superpriority

lien, and no check for any amount was ever tendered by Miles Bauer.

In the last paragraph at page 15 of Respondent's Answering Brief, defendant Bank states that "BANA's offer to pay met the requirements for a non-payment tender," but there is no such thing. Defendant Bank cites Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113 (2018), but in that case, "[b]ased on the HOA's representations, Bank of America tendered payment of $720 – nine months' worth of assessment fees – to the HOA." 427 P.3d at 116.

Neither defendant Bank nor Miles Bauer made any such tender in the present case.

At page 16 of Respondent's Answering Brief, defendant Bank states that "as soon as NAS provided it with a statement of account . . . is the **earliest possible point** at which BANA could have written a check." (emphasis added) Defendant Bank did not make this argument or cite any authority for this argument in its trial brief. (JA1b, pgs. 179-195)

At page 17 of Respondent's Answering Brief, defendant Bank cites the district court's conclusion of law that "Miles Bauer was ready, willing, and able to provide payment for a super-priority tender" (JA1c , pg. 229, ¶9), but the testimony by Rock

Jung (JA2, pg. 361, ll. 11-21) proved that this conclusion of law is not true. The record on appeal does not contain any evidence that Miles Bauer ever directed defendant Bank to wire any amount to Miles Bauer's trust account to make a payment for the assessment lien foreclosed on February 1, 2013.

Defendant Bank states that "[t]he testimony of Mr. Jung and Mr. Woodbridge proved that BANA had the 'ability of immediate performance,'" but the testimony proved exactly the opposite.

Defendant Bank also states that "Appellant does not even attempt to argue that this conclusion was clearly erroneous or not supported by substantial evidence," but defendant Bank's failure to prove that Miles Bauer had "the present ability of immediate performance" was the exact focus of pages 11 to 14 of Appellant's Opening Brief.

Defendant Bank also states that "Appellant merely asserts –with no discussion of the record in this case–that BANA 'did not prove' that Miles Bauer had the ability to pay at the time of the tender." Again, however, it was defendant Bank's burden to prove that a valid tender was made, and the testimony by Mr. Jung and Ms. Woodbridge does not support the conclusion that Miles Bauer had "the present ability of immediate performance" on March 16, 2012 when Miles Bauer demanded

that the HOA agree with Miles Bauer's method of calculating the superpriority lien amount. (JA1b, pgs. 151-152)

2. Defendant Bank did not prove that the HOA wrongfully prevented Miles Bauer from making a payment to cover the superpriority portion of the HOA's lien.

At page 18 of Respondent's Answering Brief, defendant Bank states that even though Miles Bauer did not send a check with its letter, "such a tender would be excused because knowledge of the amount of the superpriority component depended on accounts accessible only to the HOA and NAS, which refused BANA's request for that amount."

Because defendant Bank did not make this argument before the district court, it is "deemed to have been waived and will not be considered on appeal." Schuck v. Signature Flight Support of Nev., Inc., 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

None of the authorities cited by defendant Bank at page 19 of Respondent's Answering Brief, including the authorities cited in footnote 4, were cited in any pleading filed by defendant Bank with the district court.

At page 20 of Appellant's Opening Brief, defendant Bank states that "BANA was prevented from learning the amount due." On the other hand, in paragraph 13

of the stipulated facts (JA1b, pg. 197, ¶13), the parties agreed that "[o]n March 7, 2012, NAS on behalf of Mandolin Phase 3 sent the notice of default and election to sell to the former owner, Bank of America, MERS, and other interested parties by certified mail." In addition, in paragraph 24 of the stipulated facts (JA1b, pg. 199, ¶24), the parties agreed that "NAS, on behalf of Mandolin Phase 3, mailed the Notice of Foreclosure Sale to Bank of America, the former owner, and other interested parties on November 13, 2012."

These notices provided defendant Bank with actual notice of the amount that could be paid to prevent the HOA from going forward with the auction held on February 1, 2013. In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 757, 334 P.3d 408, 418 (2014), this Court stated that the lender in that case could have paid "the entire amount" of the lien and requested "a refund of the balance." The record on appeal does not include any evidence proving that Miles Bauer, or any other person, attempted to tender a check for the amount stated in either of the notices that were mailed to defendant Bank.

Mr. Jung testified that the foreclosure agent would accept a check for the full amount of the lien, but that Miles Bauer would only make a payment for the full amount if it made the tender for "[t]he second, a junior deed of trust." (JA2, pg. 374,

l. 19 to pg. 375, l. 13)

In Bank of America, N.A. v. Saticoy Bay LLC Series 716 Fiesta Del Rey, Case No. 73623 (Jan. 17, 2019)(unpublished disposition), this Court stated:

> To the extent appellant is arguing that it was generally unfair for NAS not to respond to the letter, we note that appellant had numerous other ways to protect its security interest, including, at bare minimum, following up on the letter.

Id. at 3, n. 4.

In the present case, the record on appeal does not contain any evidence proving that Miles Bauer or defendant Bank took any action to protect the subordinate deed of trust after the foreclosure agent did not respond to the letter, dated March 16, 2012.

At page 21 of Respondent's Answering Brief, defendant Bank states that "[t]he related doctrine of waiver of tender" excused Miles Bauer from actually tendering a check because "it was NAS policy to reject any check from BANA sent through Miles Bauer that was not for the 'full of the entire lien' if it included terms it believed to be 'conditions.' (JA2 409:21-410:14)."

Again, because defendant Bank did not make this argument before the district court, it is "deemed to have been waived and will not be considered on appeal." Schuck v. Signature Flight Support of Nev., Inc., 126 Nev. 434, 436, 245 P.3d 542,

544 (2010).

In addition, the cited portion of the transcript includes the following testimony by Chris Yergensen that contradicts defendant Bank's argument:

> The policy with respect to accepting partial payments was the **partial payment would be accepted and applied to the account if there was no conditions placed upon the acceptance of that payment**. If there was a condition placed upon the partial payment that was agreed upon, like the condition, whatever it was, then it would also be accepted and applied.
>
> If the condition place upon the acceptance of the partial payment was not agreed upon, then the payment would be rejected and sent back.
>
> JA2, pg. 410, ll. 3-14. (emphasis added)

As proved by Mr. Yergensen's testimony, the HOA would accept payments for less than the full amount of an assessment lien if the parties could agree on the conditions placed on the payment. The record on appeal does not contain any evidence proving that Miles Bauer or defendant Bank attempted to reach an agreement with the HOA regarding the conditions placed on the payment that Miles Bauer proposed to make in the future.

At page 23 of Respondent's Answering Brief, defendant Bank states that "it is clear that even if BANA had been able to determine the correct sum of the superpriority portion, the tender would have been rejected." On the other hand, Mr.

Jung only testified that he did not recall NAS "providing and accepting checks unless it was for the full amount, like on a junior deed of trust, as to which I testified earlier." (JA2, pg. 383, l. 25 to pg. 384, l. 4) Mr. Yergensen's testimony proved that a partial payment would be accepted by the foreclosure agent if any conditions placed on the partial payment were agreed upon.

Defendant Bank's argument that tender of the amount due was waived by the foreclosure agent's conduct is not supported by substantial evidence.

At page 25 of Respondent's Answering Brief, defendant Bank states that in Kelley v. Clark, 129 P. 921 (Id. 1912), "the Idaho Supreme Court expressly rejected the notion that a legally sufficient tender could be rendered ineffective by the lienholder's mistaken calculation of the amount due based on a misreading of a statute." That case, however, did not involve a tender made by a subordinate lienholder. Furthermore, the court's determination that the tender discharged the lien was based in part on section 4494 of the Revised Codes of Idaho, which stated that "a tender of the money is equivalent to payment." NRS Chapter 116 does not include any similar language.

In the present case, defendant Bank did not make "a legally sufficient tender" because it did not tender a check for any amount to the HOA.

At page 26 of Respondent's Answering Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 117 (2018), that "the superpriority portion of an HOA's lien includes only charges for maintenance and nuisance abatement, and nine months of assessments." The letter by Miles Bauer excluded "charges for maintenance and nuisance abatement" from its definition of the HOA's superpriority lien. (JA1b, pgs. 151-152)

3. After the foreclosure agent did not respond to Miles Bauer's letter, defendant Bank failed to keep the alleged tender good.

At page 27 of Respondent's Answering Brief, defendant Bank states that "[t]he record demonstrates that BANA remained ready and willing to pay the amount of the superpriority lien, even after its tender was rejected."

As noted above, neither Miles Bauer nor defendant Bank actually tendered a payment for any amount of money to the HOA or its foreclosure agent.

At the bottom of page 27, defendant Bank refers to Miles Bauer's letter (JA1b, pgs. 151-152), but that letter is the claimed tender and not a statement of continued willingness to pay made after defendant Bank claims that the tender was rejected.

At the top of page 28, defendant Bank refers to the testimony by Ms. Woodbridge, but her testimony only confirms that defendant Bank did not make a tender in the present case because no monies were wired to Miles Bauer.

4. Defendant Bank's failure to record its claim that the superpriority lien had been discharged makes that claim void as to plaintiff.

At page 28 of Respondent's Answering Brief, defendant Bank states that this Court has "repeatedly rejected" the argument that a claim of tender must be recorded.

On the other hand, NRS Chapter 116 does not contain any specific language that governs a "tender" or payment offered by a lender like defendant Bank, and NRS Chapter 116 does not contain any language that is inconsistent with Restatement (Third) of Prop.: Mortgages, § 6.4 (1997) that supplements the provisions of NRS Chapter 116 pursuant to NRS 116.1108.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 117 (2018), this Court cited Restatement (Third) of Prop.: Mortgages, § 6.4 (1997), but this Court did not address the distinction made in Sections 6.4 between a tender made by someone primarily liable for performance and a tender made by a party seeking to protect its subordinate interest in the property. The language in subsections 6.4(e) and 6.4(f) is just as much a part of "the law of real property" that supplements NRS Chapter 116 as the language in subsection 6.4(g) of the Restatement regarding keeping a tender "good."

Because defendant Bank was "not primarily responsible for performance" of the former owner's obligation to pay HOA assessments, even if the HOA had

accepted a payment made by Miles Bauer, the payment could not "discharge" or "cure" the former owner's default in payment. It could only "assign" the HOA's superpriority lien rights to the subordinate lienholder making the payment.

In Section II (D) of the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113 (2018), this Court focused only on NRS 111.315 and NRS 106.220 and did not discuss the established principles of real property law in Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

Because Section 6.4(f) of the Restatement provides that a tender made by a subordinate lienholder entitles the person making payment to receive "an appropriate assignment" in "recordable form," such a tender falls within the definition of a "conveyance" in NRS 111.010(1) that must be recorded pursuant to NRS 111.315 or it will be void against a subsequent purchaser pursuant to NRS 111.325. The "appropriate assignment" in "recordable form" is also an "instrument" as defined in Black's Law Dictionary (10th ed. 2014).

At page 28 of Respondent's Answering Brief, defendant Bank cites BAC Home Loans Servicing LP v. Aspinwall Court Trust, 422 P.3d 709 (Table), 2018 WL 3544962 (Nev. July 20, 2018)(unpublished disposition), but in that case, "appellant BAC Home Loans' agent tendered $468 to the HOA's agent, which, although

rejected, undisputedly represented 9 months of assessments and therefore satisfied the superpriority portion of the HOA's lien." Id. at *1. In the present case, neither Miles Bauer nor defendant Bank tendered any amount of money to pay the superpriority lien.

Defendant Bank also cites RJRN Holdings, LLC v. JPMorgan Chase Bank, N.A., 422 P.3d 711 (Table), 2018 WL 3545160 (Nev. July 20, 2018)(unpublished disposition), where this Court stated that "there was no portion of the lien that was in default at the time of the sale." No such evidence exists in the present case.

At page 30 of Respondent's Answering Brief, defendant Bank quotes from Bank of America, N.A. v. SFR Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 121 (2018), that "[a] party's status as a BFP is irrelevant when a defect in a foreclosure proceeding renders the sale void." In the present case, however, because no payment for any amount was tendered to pay the superpriority amount of the HOA's assessment lien, the foreclosure of that portion of the lien on February 1, 2013 was not "void."

At page 30 of Respondent's Answering Brief, defendant Bank describes plaintiff's argument based on Restatement (Third) of Prop.: Mortgages, §6.4 (1997), as "nonsensical," and defendant Bank quotes from Bank of America, N.A. v. SFR

Investments Pool 1, LLC, 134 Nev., Adv. Op. 72, 427 P.3d 113, 119 (2018), that tendering the superpriority portion of an HOA lien "does not create, alienate, assign, or surrender an interest in land." Yet, defendant Bank does not cite any language in NRS Chapter 116 that contradicts "the law of real property" contained in Restatement (Third) of Prop.: Mortgages, §6.4 (f) (1997) that entitles a subordinate lienholder like defendant Bank who makes a payment to receive "an appropriate assignment of the mortgage [superpriority lien] in recordable form ."

At page 31 of Respondent's Answering Brief, defendant Bank cites In re Fontainebleau Las Vegas Holdings, LLC, 128 Nev. Adv. Op. 53, 289 P.3d 1199 (2012), as authority that "equitable subrogation does not apply to statutory liens like NRS 116 liens." In that case, however, this Court responded to a certified question from the United States Bankruptcy Court regarding the doctrine of equitable subrogation and contractors and suppliers with intervening mechanics' liens. 289 P.3d at 1209. This Court held "that the plain and unambiguous language of NRS 108.225 precludes application of the doctrine of equitable subrogation, as it unequivocally places mechanic's lien claimants in an unassailable priority position." 289 P.3d at 1212.

The language in NRS 108.225 does not apply to an HOA assessment lien. The

Fontainebleau opinion did not mention Restatement (Third) of Prop.: Mortgages, §6.4 (1997), and this Court did not discuss the effect of an unrecorded payment made by a subordinate lien holder to a senior lien holder.

At the bottom of page 31 of Respondent's Answering Brief, defendant Bank states that applying equitable subrogation to a payment of only the HOA's superpriority lien would not help the HOA or the lender, but "would create the confusing situation where one part of the same lien would be held by an HOA while the other part was held by the tendering party." On the other hand, defendant Bank has not identified any legitimate purpose that is served by allowing a lender to conceal its claim that a superpriority portion of a lien has been paid until after a property has been sold to an innocent purchaser.

By treating a tender made by a lender as an "assignment" as provided by Restatement (Third) of Prop.: Mortgages, §6.4(e)(1997) and requiring that the "assignment" be recorded as provided by Restatement (Third) of Prop.: Mortgages, §6.4(f)(1997) and NRS 111.315, all purchasers would be alerted that the HOA was only foreclosing the subpriority portion of the assessment lien that would still be held by a lender after a superpriority tender was made. Defendant Bank does not explain how "confusion" is created if all interested parties are advised **before the**

sale of the lender's claim that the superpriority portion of the lien has been paid.

At page 32 of Respondents' Answering Brief, defendant Bank cites NRS 116.3116(1) as authority that "the Legislature intended only the HOA to hold superpriority liens." No language in NRS Chapter 116 prohibits an HOA from assigning its superpriority lien rights to a third party after they have been created.

Defendant Bank also states that equitable subrogation "has nothing to do with whether the default as to the superpriority component was cured (it was), or whether the cure of the default meant that the foreclosure sale was void as to the subpriority component of the lien (it was)."

In the present case, however, because no payment for any amount was actually tendered to the HOA to pay any part of the assessment lien, the default as to the superpriority component was not "cured," and the foreclosure sale that foreclosed the unpaid superpriority component of the lien was not "void."

5. Plaintiff is protected as a bona fide purchaser from defendant Bank's unrecorded claim of tender.

At page 33 of Respondent's Answering Brief, defendant Bank states that "the bona fide purchaser doctrine is irrelevant where a party has tendered **and thus extinguished the superpriority component of the HOA's lien**, as this Court recently affirmed." (emphasis added)

Under the law of real property, a lender with a first deed of trust is not "primarily responsible" for payment of the assessments that comprise the superpriority lien. The lender is instead "one who holds an interest in the real estate subordinate to the mortgage [superpriority lien] but is not primarily responsible for performance" as described in Restatement (Third) of Prop.: Mortgages, § 6.4(e)(1997).

The relationship between the parties is analogous to the relationship between a lender who holds a first deed of trust and a lender who holds a second deed of trust. The lender who holds a second deed of trust is in no way "primarily responsible for performance" of the promissory note secured by the first deed of trust, but the lender holding the second deed of trust is equitably subrogated to the priority of the first deed of trust for any payments made to avoid extinguishment of the second deed of trust.

As amended by this Court's Order entered on November 13, 2018, the opinion in Bank of America, N.A. v. SFR Investments Pool 1, LLC now reads:

> Because Bank of America's valid tender cured the default as to the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a void sale as to the superpriority portion.
>
> 427 P.3d at 121.

Again, no language in NRS Chapter 116 states that a tender made by the holder of a first security interest described in NRS 116.3116(2)(b) "cures the default" of the unit owner for the superpriority portion of the lien

The only way the superpriority lien can be "discharged" or "cured" is if there is "[a]n unconditional tender of performance in full by one who is primarily responsible for the obligation." Restatement (Third) of Prop.: Mortgages, § 6.4(c) (1997). The record on appeal does not contain any such evidence.

Defendant Bank did not produce at trial, and the record on appeal does not contain, any evidence proving that the public auction held on February 1, 2013 void. In the present case, because Miles Bauer did not make a valid tender of any amount of money to the HOA or its foreclosure agent, it was perfectly appropriate for the HOA to foreclose its entire assessment lien, including the superpriority portion of the lien.

At page 34 of Respondent's Answering Brief, defendant Bank cites NRS 111.180 and Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 249 (1979), as authority that plaintiff had a "duty of inquiry" that would have led plaintiff to discover the unrecorded attempt by Miles Bauer to obtain information from the HOA. Even if plaintiff learned of Miles Bauer's letter, however, the letter was not

a valid tender of any amount of money that could have affected the HOA's superpriority lien.

Defendant Bank also cites Telegraph Rd Trust v. Bank of America, N.A., 383 P.3d 754 (Table), 2016 WL 5400134 (Nev. 2016) (unpublished disposition), but in that case, the duty of inquiry was triggered because "a review of the public records pertaining to the subject property would have shown that the homeowners had a history of refinancing their home loan and a history of not timely paying nominal bills, thereby putting appellant on inquiry notice that the property was encumbered by an unrecorded deed of trust." Id. at *1.

In the present case, defendant Bank has not identified any document in the public record that would have alerted plaintiff that defendant Bank had attempted to tender any amount to the HOA or its foreclosure agent.

The mere presence of the language in Paragraph 9 of the deed of trust authorizing the Lender to "do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument. . . ." (JA1 pg. 35, ¶9) and in Paragraph F of the planned unit development rider (JA1, pg. 50, ¶F) does not by itself suggest that the Lender made any such payments.

At page 36 of Respondent's Answering Brief, defendant Bank states that

"Appellant has thus failed to carry its burden of showing that it is a *bona fide* purchaser."

In Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, *11, 405 P.3d 641, 646 (2017), this Court stated that the lender "has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder." This Court also stated in Wells Fargo Bank, N.A. v. Radecki, 134 Nev. Adv. Op. 74, 426 P.3d 593, 596 (2018), that "[w]e agree with the district court that Radecki has no obligation to establish BFP status."

6. Defendant Bank did not prove that any element of fraud, unfairness or oppression accounts for or brought about the high bid paid by plaintiff.

At page 37 of Respondents' Answering Brief, defendant Bank cites paragarph 31 of the Stipulated Facts, where the parties agreed that "[t]he 'Fair Market Value' of the property at the time of the sale was $158,500.00." (JA1b, pg. 200, ¶30)

The California rule adopted by this Court, however, required that defendant Bank prove "'some element of fraud, unfairness, or oppression **as accounts for and brings about** the inadequacy of price.'" Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev., Adv. Op. 91, *2, 405 P.3d 641, 643-644 (2017). (emphasis added)

At page 38 of Respondent's Answering Brief, defendant Bank states that the foreclosure agent's "decision to reject BANA's tender was unfair and/or oppressive" and is analogous to the "irregularities in pre-sale notices" discussed by this Court in Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 405 P.3d at 649-651. This Court held, however, that none of the cited irregularities amounted to fraud, unfairness or oppression.

At the bottom of page 38 of Respondent's Answering Brief, defendant Bank states that "NAS thwarted BANA's attempts to pay the super-priority amount by ignoring BANA's inquiries." In the present case, Miles Bauer made a single request for information on March 16, 2012 (JA1b, pgs. 151-152), and neither Miles Bauer nor defendant Bank took any further action during the ten months that passed before the Property was sold to plaintiff on February 1, 2013.

The California rule requires that defendant Bank prove "some element of fraud, unfairness, or oppression **as accounts for and brings about** the inadequacy of price." 133 Nev., Adv. Op. 91, *2, 405 P.3d at 643-644. (emphasis added)

In First Mortgage Corp. v. Saticoy Bay LLC Series 1828 La Calera, No. 70994, 2018 WL 6617714 (Dec. 11, 2018)(unpublished disposition), this Court stated: "More importantly, appellant did not introduce evidence that it or any

prospective bidders were actually misled by any of these purported shortcomings such that there might be fraud, unfairness, or oppression." Id. at *1.

Because defendant Bank did not allege or prove that any of the "unfair" acts by the HOA or its foreclosure agent were made known to the persons who attended the public auction held on February 1, 2013, it is impossible for any of those undisclosed acts to account for or have brought about the high bid of $14,600.00 made by plaintiff on February 1, 2013.

7. Defendant Bank was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosure sale because it had an adequate remedy at law against the HOA and the foreclosure agent.

As discussed at pages 35 to 38 of Appellant's Opening Brief, defendant Bank was not entitled to equitable relief against plaintiff altering the legal effect of the HOA foreclosing its superpriority lien because defendant Bank had an adequate remedy at law against the HOA and the foreclosure agent if they improperly prevented Miles Bauer from tendering the superpriority portion of the HOA's assessment lien.

Although defendant Bank states at pages 36 to 39 of Respondent's Answering Brief that "equitable grounds" support the district court's judgment holding that "the HOA foreclosed on only the sub-priority portion of its lien," defendant Bank does

not explain why equitable relief should be granted against the innocent purchaser–plaintiff.

Because defendant Bank had an adequate remedy at law against the HOA and the foreclosure agent if they acted wrongfully, defendant Bank was not entitled to the equitable relief requested in its amended answer, counterclaims, and crossclaims, filed on August 10, 2016.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this Court reverse the findings of fact, conclusions of law and judgment entered by the district court in favor of defendant Bank and remand this case to the district court with directions to enter judgment in favor of plaintiff.

DATED this 22nd day of January, 2019.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements

of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X6 14 point Times New Roman.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7), it is proportionately spaced and has a typeface of 14 points and contains 6,225 words.

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

DATED this 22nd day of January, 2019.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 22nd day of January, 2019, a copy of the foregoing **APPELLANT'S REPLY BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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