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SUPREME COURT

STATE OF NEVADA

SATICOY BAY LLC SERIES 133 McCLAREN, Appellant, vs. GREEN TREE SERVICING LLC; THE BANK OF NEW YORK MELLON FKA THE BANK OF NEW YORK, AS SUCCESSOR TRUSTEE TO JPMORGAN CHASE BANK, N.A., AS TRUSTEE FOR THE CERTIFICATE-HOLDERS OF CWABS MASTER TRUST, REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T, Respondent.	No. 78661

APPELLANT'S OPENING 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, Saticoy Bay LLC Series 133 McLaren, is a Nevada limited-liability company.

2. The manager for Saticoy Bay LLC, Series McLaren is Bay Harbor Trust.

3. The trustee for Bay Harbor Trust is Iyad Haddad a/k/a Eddie Haddad.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The judgment following non-jury trial is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The judgment following non-jury trial was filed on March 25, 2019. Notice of entry of the judgment was served and filed on March 25, 2019.

(C) Plaintiff filed its notice of appeal on April 22, 2019.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for plaintiff/appellant therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale extinguished the deed of trust assigned to Green Tree Servicing LLC (hereinafter "defendant Green Tree").

2. Whether the superpriority portion of the assessment lien recorded by Nevada Association Services, Inc. (hereinafter "NAS") on behalf of Hillpointe Park Maintenance (hereinafter "HOA") was paid prior to November 22, 2013.

3. Whether the HOA or NAS wrongfully rejected the conditional tender of $276.75 offered by Miles, Bauer, Bergstrom & Winters, LLP (hereinafter "Miles Bauer") on behalf of Bank of America, N.A. on December 16, 2011.

4. Whether defendant Green Tree was required to record notice of its claim that the HOA's rejection of Miles Bauer's conditional tender discharged the HOA's superpriority lien.

5. Whether the district court improperly granted defendant Green Tree equitable relief from the conclusive recital of default in the foreclosure deed.

6. Whether 12 U.S.C. § 4617(j)(3) applies to the present case and protected the deed of trust from being extinguished by the HOA foreclosure sale.

7. Whether the Federal National Mortgage Association (hereinafter "Fannie Mae") complied with Nevada law to hold an enforceable interest in the real property

commonly known as 133 McLaren Street, Henderson, Nevada (hereinafter "Property") on the date of the HOA foreclosure sale.

8. Whether defendant Green Tree provided a proper foundation to admit the computer screenshots upon which defendant's witnesses based their testimony.

9. Whether defendant Green Tree is bound by the conclusive presumptions created by the recorded deed of trust and corporate assignment of deed of trust.

10. Whether Saticoy Bay LLC Series 133 McLaren (hereinafter "plaintiff") is protected as a bona fide purchaser from the unrecorded claim that Fannie Mae owned the deed of trust that was publicly assigned to defendant Green Tree.

11. Whether defendant Green Tree has standing to assert rights granted only to the Federal Housing Finance Agency (hereinafter "FHFA").

12. Following a trial, questions of law are reviewed de novo. Findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous.

STATEMENT OF THE CASE

On January 2, 2014, plaintiff filed its complaint asserting three claims for relief: 1) entry of an injunction prohibiting defendants from foreclosing a deed of trust recorded on November 23, 2004 against the Property; 2) entry of a judgment

pursuant to NRS 40.010 determining that plaintiff was the rightful owner of the Property and that the defendants had no right, title, interest or claim to the Property; 3) entry of a declaration that title to the Property was vested in plaintiff free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (JA1, pgs. 1-7)

On April 7, 2014, National Default Servicing Corporation (hereinafter "NDSC") filed an answer to plaintiff's complaint. (JA1, pgs. 15-19)

On April 23, 2014, plaintiff and NDSC filed a stipulation for non-monetary relief. (JA1, pgs. 20-22)

On June 25, 2015, defendant Green Tree filed a first amended verified answer and counterclaim. (JA1, pgs. 28-46)

On July 14, 2015, plaintiff filed an answer to defendant Green Tree's counterclaim. (JA1, pgs. 47-51)

On November 16, 2015, The Bank of New York Mellon fka The Bank of New York, as Successor Trustee to JPMorgan Chase Bank, N.A., as Trustee for the Certificateholders of CWABS Master Trust, Revolving Home Equity Loan Asset Backed Notes, Series 2004-T (hereinafter "defendant BONY") filed an answer to plaintiff's complaint. (JA1, pgs. 56-63)

On November 24, 2015, NAS filed an answer to defendant Green Tree's counterclaim. (JA1, pgs. 64-68)

On October 16, 2016, the HOA filed an answer to defendant Green Tree's counterclaim. (JA1, pgs. 69-83)

On December 13, 2018, the parties filed a joint pretrial memorandum that included stipulated facts. (JA1, pgs. 90-106)

On January 29, 2019, plaintiff filed plaintiff's 7.27 pre-trial memorandum. (JA1, pgs. 107-136)

The court conducted a bench trial on January 28, 2019 (JA1, pg.176 to JA2, pg. 317) and January 29, 2019. (JA2, pgs. 318-453)

On January 31, 2019, defendant Green Tree and NAS filed a stipulation and order for dismissal of NAS without prejudice. (JA1, pgs. 137-139)

On February 1, 2019, defendant Green Tree and the HOA filed a stipulation and order for dismissal of the HOA without prejudice. (JA1, pgs. 140-142)

On March 25, 2019, the court entered a judgment following non-jury trial in favor of defendants and against plaintiff. (JA1, pgs. 157-162)

Notice of entry of the judgment following non-jury trial was served and filed on March 25, 2019. (JA1, pgs. 163-170)

On April 22, 2019, plaintiff filed its notice of appeal. (JA1, pgs. 171-172)

On April 22, 2019, plaintiff filed a notice of voluntary dismissal without prejudice of defendants Charles J. Wight and Tara J. Wight (hereinafter "former owners"). (JA1, pgs. 173-175)

STATEMENT OF FACTS

On November 26, 2013, NAS recorded a foreclosure deed stating that it sold the Property to plaintiff for $10,200.00 on November 22, 2013. (JA1, pg. 93, ¶18)

The foreclosure sale arose from a delinquency in assessments due from the former owners to the HOA pursuant to NRS Chapter 116.

Defendant Green Tree is the beneficiary by assignment of a deed of trust recorded against the Property on November 23, 2004. (JA1, pg. 91, ¶4) A corporate assignment of deed of trust by MERS to defendant Green Tree was recorded on May 28, 2013. (JA1, pg. 92, ¶6)

Defendant BONY is the beneficiary by assignment of a second deed of trust recorded against the Property on November 23, 2004. (JA1, pgs. 91-92, ¶5) An assignment of deed of trust by MERS to defendant BONY was recorded on October 29, 2013. (JA1, pg. 92, ¶7)

On January 14, 2011, NAS recorded a notice of delinquent assessment lien as

agent for the HOA. (JA1, pg. 92, ¶9)

On September 9, 2011, NAS recorded a notice of default and election to sell. (JA1, pg. 92, ¶10)

On September 19, 2011, the foreclosure agent mailed copies of the notice of default to the former owners, MERS, Countrywide Home Loans, Inc. and other interested parties. (JA1, pg. 92, ¶11)

On October 29, 2013, the foreclosure agent recorded a notice of foreclosure sale. (JA1, pg. 92, ¶12)

On October 29, 2013, the foreclosure agent mailed copies of the notice of foreclosure sale to the former owners, MERS, defendant Green Tree, Countrywide Home Loans, Inc. and other interested parties. (JA1, pg. 93, ¶13)

On October 29, 2013, a copy of the notice of foreclosure sale was served upon the former owners by posting a copy of the notice in a conspicuous place on the Property on October 29, 2013. (JA1, pg. 93, ¶14)

On October 31, 2013, copies of the notice of foreclosure sale were posted in three public places in Clark County, Nevada. (JA1, pg. 93, ¶15)

On October 31, 2013, copies of the notice of foreclosure sale were posted in three public places in Henderson, Nevada. (JA1, pg. 93, ¶16)

The notice of foreclosure sale was published in the Nevada Legal News on November 1, 2013, November 8, 2013, and November 15, 2013. (JA1, pg. 93, ¶17)

SUMMARY OF THE ARGUMENT

The deed of trust was extinguished by the HOA foreclosure sale held on November 22, 2013.

Defendant Green Tree did not prove that the HOA's superpriority lien was paid prior to the public auction held on November 22, 2013.

Defendant Green Tree did not prove that the HOA or NAS wrongfully rejected the conditional tender of $276.75 offered by Miles Bauer.

Defendant Green Tree's failure to record notice of its claim that the superpriority lien had been discharged made that claim void as to plaintiff.

The district court improperly granted defendant Green Tree equitable relief from the conclusive recital of default in the foreclosure deed.

12 U.S.C. § 4617(j)(3) does not apply to the present case because FHFA did not appear in or act in the case.

Defendant Green Tree did not prove that Fannie Mae complied with Nevada law to hold any interest in the Property on the date of the HOA foreclosure sale.

Defendant Green Tree's witnesses did not provide a proper foundation to

admit the computer screenshots upon which the witnesses based their testimony.

Defendant Green Tree is bound by the conclusive presumptions created by the recorded deed of trust and corporate assignment of deed of trust.

As a bona fide purchaser, plaintiff is protected from defendant Green Tree's unrecorded claim that Fannie Mae owned the deed of trust that was assigned to defendant Green Tree.

Defendant Green Tree did not prove that it had standing to assert rights allegedly held by FHFA.

STANDARD OF REVIEW

Following a trial, questions of law are reviewed de novo. Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 5 P.3d 1043, 1048 (2000).

Findings of fact must be upheld if supported by substantial evidence and may not be set aside unless clearly erroneous. May v. Anderson, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

ARGUMENT

1. The deed of trust was extinguished by the HOA foreclosure sale held on November 22, 2013.

NRS 116.3116 (2) provides that an HOA's assessment lien is "prior to all security interests described in paragraph (b) **to the extent of any charges incurred**

by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien. . . ." (emphasis added)

As recognized by this Court in Horizons at Seven Hills v. Ikon Holdings, 132 Nev., Adv. Op. 35, 373 P.3d 66, 73 (2016), the phrase "to the extent of" in NRS 116.3116(2) means "amount equal to." In other words, the super priority portion of the lien is a sum equal to nine months of common expenses that must be paid by the first security interest holder in order for the first security interest not to be extinguished by foreclosure of the HOA's lien.

The first deed of trust, recorded on November 23, 2004, falls squarely within the description in NRS 116.3116(2)(b).

The second deed of trust, recorded on November 23, 2004, was subordinate to the entire amount of the HOA's lien.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 758, 334 P.3d 408, 419 (2014), this Court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

Because the foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by both of the subordinate deeds of trust, title to the real property therefore vested in plaintiff free of the extinguished deeds of trust.

2. Defendant Green Tree did not prove that the HOA's superpriority lien was paid prior to the public auction held on November 22, 2013 .

At page 16 of the joint pretrial memorandum (JA1, pg. 5), defendant Green Tree stated that Bank of America's payment to the HOA, through NAS, of $276.75 "unconditionally satisfied the superpriority portion of the statutory HOA lien and NAS's rejection of the payment was unjustified."

In Nguyen v. Calhoun, 105 Cal. App. 4th 428, 129 Cal. Rptr. 2d 436 (2003), the court stated:

> "The trustor-mortgagor or the person who alleges that a debt has been paid has the burden of proving payment." (4 Miller & Starr, Cal. Real Estate, supra, Deeds of Trusts and Mortgages, § 10:71, p. 217, fn. omitted.)

Under Nevada law, when "payment" is asserted as a defense, "each element of the defense must be affirmatively proved," and "[t]he burden of proof clearly rests with the defendant." Schwartz v. Schwartz, 95 Nev. 202, 206, n. 2, 591 P.2d 1137, 1140, n. 2 (1979); Rosenbaum v. Rosenbaum, 86 Nev. 550, 552, 471 P.2d 254, 255 (1970).

NRCP 8 (c) provides that "payment" is an affirmative defense that must be "set forth affirmatively" in a party's answer. Defendant Green Tree did not include an affirmative defense of "payment" in its first amended verified answer and counterclaim. (JA1, pgs. 28-46)

At trial defendant Green Tree presented testimony by Rock Jung, Esq. regarding a check for $276.75 drawn payable to NAS from Miles Bauer's trust account (Trial Exhibit 15, pg. 140) that was delivered to NAS with a letter, dated December 16, 2011, signed by Mr. Jung. (Trial Exhibit 15, pgs. 138-139)

Mr. Jung testified that NAS rejected this check, but he did not recall why. (JA1, pg. 224)

Because the check was rejected, the HOA's superpriority lien remained unpaid on the date of the HOA foreclosure sale.

Defendant Green Tree also stated that the former owners made payments after NAS recorded the notice of delinquent assessment lien on January 14, 2011.

Defendant Green Tree, however, did not prove that the HOA applied the payments made by the former owners to pay the superpriority portion of the HOA's assessment lien.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 748, 334

P.3d 408, 413 (2014), this court quoted from the official comments to the Uniform Common Interest Ownership Act (hereinafter "UCIOA"):

> The comments continue: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, *see supra* note 1] months' assessments demanded by the association *rather than having the association foreclose on the unit*." *Id.* (emphasis added). If the superpriority piece of the HOA lien just established a payment priority, the reference to a first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.

Likewise, if payments made by a unit owner can be applied to satisfy the HOA's superpriority lien, then "the reference to a first security holder paying off the superpriority piece of the lien" makes no sense.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this court stated that the superpriority lien is "a specially devised mechanism designed to strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." 130 Nev. at 748, 334 P.3d at 412.

This court quoted from Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995), that "[a]n official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction."

Comment 2 to UCIOA § 3-116 at 189-191 (2014) describes the purpose of

the "specially devised mechanism" as follows:

> The six-month limited priority for association liens constituted a significant departure from pre-existing practice, and was viewed as striking an equitable balance between the need to enforce collection of unpaid assessments and the need to protect the priority of the security interests of lenders in order to facilitate the availability of first mortgage credit to unit owners in common interest communities. **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 assessment (up to six months' worth) to the association to satisfy the association's limited priority lien**. This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale - **a sale that was expected to be completed within six months** (in jurisdictions with non-judicial foreclosure) **or a reasonable period of time thereafter**, thus minimizing the period during which unpaid assessment would accrue for which the association would not have first priority. Likewise, it was expected that in the typical situation a unit would have a value sufficient to produce a sale price high enough for the foreclosing lender to recover both the unpaid mortgage balance and six months assessments.

The Report of the Joint Editorial Board for Uniform Real Property Acts, The Six-Month Limited Priority Lien for Association Fees Under the Uniform Common Interest Ownership Act, dated June 1, 2013, states that the six months of super-priority (later amended to nine months in Nevada) is based on the amount of time that it typically takes a bank to foreclose and strikes "a workable and functional balance between the need to protect the financial integrity of the association and the legitimate expectations of the first mortgage lenders." Id. at pp. 3-4.

It does not matter that a unit owner has made payments on its account either prior to or after proceedings to enforce the lien are instituted because only the holder

of a first security interest can pay the superpriority lien. The superpriority lien does not matter to the unit owner because foreclosing even a nonpriority lien will divest the unit owner of his or her interest in the property. Because the superpriority lien only affects the holder of a first deed of trust, the argument that payments by a unit owner can pay the superpriority portion of a lien is not logical.

The amendments made to NRS 116.31164(2) in 2015 confirm the intent of the Nevada Legislature that "the amount of the association's lien that is prior to its security interest" be paid by "the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116."

In Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 179 P.3d 542 (2008), this court stated that "when a statute's 'doubtful interpretation' is made clear through subsequent legislation, we my consider the subsequent legislation persuasive evidence of what the Legislature originally intended." 124 Nev. at 157, 179 P.3d at 554-555.

In Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, N.A., 408 P.3d 558 (Table), 2017 WL 6597154 (Nev. Dec. 22, 2017)(unpublished disposition), this court stated that "[t]he record contains undisputed evidence that the homeowner made payments sufficient to satisfy the superpriority component of the

HOA's lien **and that the HOA applied those payments to the superpriority component of the former homeowner's outstanding balance**." 408 P.3d 558 (Table) at *1. (emphasis added)

No such evidence exists in the present case.

In SFR Investments Pool 1, LLC v. Wells Fargo Bank, N.A., No. 70471, 2018 WL 6609670 (Table) (Dec. 13, 2018)(unpublished disposition), the lender argued that "because the former homeowners $1,115.79 payment exceeded the defaulted superpriority portion of the HOA's lien, that portion of the lien was satisfied, thereby rendering the ensuing sale a subpriority-only sale." Id. at *1. This court rejected that argument and stated:

> The record does not support affirming on this basis. Assuming a homeowner can satisfy the default as to the superpriority portion of an HOA's lien, the record does not establish that the HOA in this case allocated or had an obligation to allocate the former homeowner's payment in that matter.
>
> Id.

In footnote 2 of its order, this court also stated that the order entered in Saticoy Bay LLC Series 2141 Golden Hill v. JPMorgan Chase Bank, National Association "was premised on this assumption, but the issue was undeveloped in that it had not been timely and coherently briefed." 2018 WL 6609670 (Table) at *1, n. 2.

/ / /

3. Defendant Green Tree did not prove that the HOA or NAS wrongfully rejected the conditional tender of $276.75 offered by Miles Bauer.

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 stated: "A valid tender of payment operates to discharge a lien or cure a default."

This court cited Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13 (Wis. 1972), but the Wisconsin Supreme Court also stated that "an excessive demand does not waive the lien" if the demand is "made in good faith and in belief that the person making the demand is entitled to such sum and that he has a general lien upon the specific goods." Id. at 16.

The law of real property expressly provides that the issue is not whether Miles Bauer tendered an amount that was later determined to be correct, but whether the foreclosure agent "wrongfully rejected" the offer based on the state of the law at the time the tender was made.

In Bank of America, N.A. v. Rugged Oaks Investments, LLC, No. 68504, 383 P.3d 749 (Table), 2016 WL 5219841 (Nev. Sept. 16, 2016) (unpublished disposition), this court quoted from 59 C.J.S. Mortgages § 582 that "[i]t has been held . . . that a good and sufficient tender on the day when payment is due will

relieve the property from the lien on the mortgage, except where the refusal [of payment] was . . . grounded on an honest belief that the tender was insufficient."

In Bank of America, N.A. v. Ferrell Street Trust, No. 70299, 416 P.3d 208 (Table), 2018 WL 2021560 (Nev. Apr. 27, 2018)(unpublished disposition), this court cited Hohn v. Morrison, 870 P.2d 513 (Colo. App. 1993), as authority that "[w]hen rejection of a valid tender is unjustified, the tender effectively discharges the lien." 416 P.3d 208 (Table) at *1.

In Hohn v. Morrison, 870 P.2d 513, 517-518 (Colo. App. 1993), the court stated:

> Although this is an issue of first impression in Colorado, other jurisdictions which have adopted the lien theory of real estate mortgages have also adopted the rule that an unconditional tender of the amount due by the debtor releases the lien of the mortgage **unless the creditor establishes a justifiable and good faith reason for the rejection** of the tender. Moore v. Norman, 43 Minn. 428, 45 N.W. 857 (1890); Renard v. Clink, 91 Mich. 1, 51 N.W. 692 (1892); Easton v. Littooy, 91 Wash. 648, 158 P.531 (1916) (tender of the full amount due operates to discharge the lien of the mortgage **if the tender is refused without adequate excuse**.) (emphasis added)

In First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court stated:

> "To constitute a sufficient tender, it must be unconditional. *Where a larger sum than that tendered is in good faith claimed to be due*, the tender is ineffectual as such if its acceptance involves the admission that no more is due." (Emphasis ours.)

In Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913),

the Kansas Supreme Court stated:

> A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. Moore v. Norman, 52 Minn. 83, 53 N.W. 809, 18 L.R.A. 359, 38 Am. St. Rep. 526, and not page 529; 38 Cyc. 152, and cases cited in note 152, 153.

On December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels (hereinafter "CCICCH") issued Advisory Opinion 2010-01, which stated:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

Id. at 1.

The HOA and the foreclosure agent therefore had a good faith reason to believe that the HOA's superpriority lien was not limited to $276.75 as stated by Miles Bauer in its conditional offer.

In this regard, the Oklahoma Supreme Court stated in First Nat. Bank of Davis v. Britton that:

> **The lien is not released** as a result of a tender **if the creditor in good faith, even though erroneously,** claims a greater amount due than is later found to be actually due and owing, where the acceptance of the lesser amount involves an admission that the amount tendered is sufficient. (emphasis added)

94 P.2d at 898.

This long-established principle of the law of real property supplements NRS Chapter 116 pursuant to NRS 116.1108.

In Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), this court stated that "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication."

Because NRS Chapter 116 does not contain any language that is inconsistent with the long-established principle of real property law that prohibited Miles Bauer from demanding "an admission on the part of the person accepting it that no more is due," and because page two of the letter by Miles Bauer (Trial Exhibit 15, pg. 139) required that plaintiff agree that $276.75 "represents the maximum 9 months worth of delinquent assessments recoverable by an HOA," the conditional offer by Miles Bauer was "not effectual as a tender." Smith v. School Dist. No. 64 Marion County, 131 P. at 558.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this court did not address the "good-faith rejection argument" because "SFR did not present its good-

faith rejection argument to the district court." 427 P.3d at 118. In footnote 1 of the opinion, this court stated that "SFR argues for the first time in its petition for review that Bank of America's tender was insufficient because it did not include collection costs and attorney fees."427 P.3d at 117, n. 1.

As discussed at page 17 of plaintiff's 7.27 pre-trial memorandum (JA1, pg. 123), the conditions imposed by Miles Bauer's letter are inextricably intertwined with the payment instrument. In particular, the letter included an offer to enter into a contract that required as an express condition to the HOA's negotiation of Miles Bauer's check, the HOA must violate NRS 116.1104, which prohibited the HOA from altering or waiving provisions of the statute either through the CC&Rs or through any agreement with another party. One of those non-waivable provisions is the super-priority portion of the HOA's lien under NRS 116.3116(2). *See* SFR Investments Pool I, LLC. v. U.S. Bank, N.A., 130 Nev. 742, 757, 334 P.3d 408, 419 (2014).

NRS 116.1108 varies in its approach and treatment of general bodies of law. For example, the statute incorporates the laws of real property and eminent domain generally. On the other hand, the treatment of concepts either originating or having specific applications under the law governing contracts, such as in rendering a

contract either void or voidable or defeating contract formation entirely, are set forth specifically. For example, NRS 116.1108 expressly includes coercion, fraud, misrepresentation, duress, mistake, or other invalidating cause.

What all of these legal concepts have in common is that they can be relied upon to declare void contractual obligations or defeat contract formation entirely. Perhaps the most notable provision included in NRS 116.1108 in this regard is the reference to "the law relative to capacity to contract."

The most obvious application of this provision is in harmonizing the Nevada Legislature's express inclusion of this concept in NRS 116.1108 with the provision in NRS 116.1104. NRS 116.1104 provides in relevant part as follows:

> Except as expressly provided in this chapter, **its provisions may not be varied by agreement, and rights conferred by it may not be waived**. (emphasis added)

This language barred the HOA from entering into any agreement that varied the provisions of NRS 116 or waived the HOA's rights thereunder unless a specific provision of NRS 116 authorized the agreement or waiver. Simply put, the HOA could not—as a matter of law—enter into Bank of America's proffered contract including the insisted-upon conditions which were presented to the HOA as part of the alleged tender of payment.

This is true regardless of whether any such agreement takes the form of a bilateral contract resulting from negotiation(s) between Bank of America and the HOA, or whether, as here, the alleged "tender" is accompanied by what is essentially an offer by Bank of America to the HOA to enter into a contract with the bank that can only be accepted by the HOA through performance—by negotiating the payment instrument accompanying the Miles Bauer letter.

The Nevada Legislature's express inclusion of several specific legal principles that can be used to void contractual obligations or defeat formation of agreements or contracts altogether in NRS 116.1108 serves as powerful evidence of the Nevada Legislature's express intent that the HOA could not entertain, enter into, or be bound by an agreement or contract like that proposed by Miles Bauer.

Both Bank of America and the HOA were disabled by operation of NRS 116.1104 from even entertaining entering into any sort of agreement—whether bilateral or unilateral—that had the effect of altering or varying in any way the provisions of NRS Chapter 116. By enacting this provision into law as part of NRS Chapter 116, the Nevada Legislature established the only permissible "contractual terms" or "agreement" with respect to NRS Chapter 116: namely, those terms must be found in the express text of the statute itself.

This conclusion is reinforced when the clause prohibiting variations of NRS Chapter 116 by agreement is coupled with the introductory clause of NRS 116.1104, which states: "Except as expressly provided in this chapter. . . " Any entity wishing to vary or alter the provisions of NRS Chapter 116 by agreement, therefore, must be able to identify an express statutory vehicle within NRS Chapter 116 that permits such an agreement or variation.

Adding further support to this conclusion is the last clause of the first sentence in NRS 116.1104. That clause provides in relevant part that "rights conferred by [NRS Chapter 116] may not be waived." This last clause is addressed in the first instance to the HOA and disables it from waiving its rights under NRS Chapter 116, including its priority lien rights. This provision is also addressed to other entities, including defendant Green Tree, and places them on notice that the HOA's conduct, whether express or implied, cannot amount to a waiver of the HOA's statutory rights under NRS Chapter 116.

As discussed at pages 20 and 21 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 126-127), the Miles Bauer letter contained a blatant misrepresentation of what constitutes the superpriority portion of an assessment lien and then required that the HOA accept Miles Bauer's presentation of the law. Specifically, the letter

stated that "[w]hile 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." However, NRS 116.3102(1)(j), as it read on December 16, 2011, stated that the association "[m]ay impose and receive any payments, fees or charges … **for services provided to the units' owners, including, without limitation, any services provided pursuant to NRS 116.310312."** (emphasis added). NRS 116.3116(2) expressly included such charges in the HOA's superpriority lien.

By excluding those charges from the definition of the HOA's superpriority lien, the Miles Bauer letter imposed an inappropriate condition that required the HOA to either vary by agreement or waive the rights granted to the HOA by NRS 116.3116(2).

4. Defendant Green Tree's failure to record notice of its claim that the superpriority lien had been discharged made that claim void as to plaintiff.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this court stated that "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot

extinguish the first deed of trust on the property.'" 427 P.3d at 121.

These statements, however, do not take into account the established principles of equitable subrogation that supplement NRS Chapter 116 pursuant to NRS 116.1108.

As discussed at pages 13 and 14 of plaintiff's 7.27 pre-trial memorandum (JA1, pgs. 119-120), subrogation is an equitable doctrine that operates to accomplish what is just and fair between the parties. AT&T Technologies, Inc. v. Reid, 109 Nev. 592, 855 P.2d 533, 535 (1993). Both Nevada law and common law provide that "equitable subrogation arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." Id. at 535 (*citing* American Surety Co., v. Bethlehem National Bank, 314 U.S. 314, 317 (1941)). This doctrine applies whenever "one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been satisfied by the latter." Han v. United States, 944 F.2d 526, 529 (9th Cir. 1991).

This court first recognized the doctrine of equitable subrogation more than 100 years ago in the matter of Laffranchini v. Clark, 39 Nev. 48, 153 P. 250 (1915). In Laffranchini, this court summarized equitable subrogation as follows:

> Subrogation is, in point of fact, simply a means by which equity works out justice between man and man. Judge Peckham says, in *Pease v. Egan,* 131 NY 262, 30 NE. 102, that it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties'; and the courts incline rather to extend than to restrict the principle, and the doctrine has been steadily growing and expanding in importance.
>
> Laffranchini, 39 Nev. at 52, 153 P. at 252.

In Laffranchini, this court went on to explain that the remedy of equitable subrogation is to be broadly applied to "every instance in which one party pays a debt for which another is primarily liable, and when in equity and good conscience should have been discharged by the latter." Id.

In Houston v. Bank of America Federal Savings Bank, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003), this court clarified the application of equitable subrogation in Nevada, and stated:

> Equitable subrogation permits "a person who pays off an encumbrance to **assume the same priority position** as the holder of the previous encumbrance." (emphasis added)

This court also adopted the rule set forth in Restatement (Third) of Prop.: Mortgages § 7.6 (1997) and held that:

> Under the Restatement, notice of an intervening lien is not necessarily pertinent to whether a party should be subrogated, and a party can be subrogated even if the party possessed actual knowledge of the other lien holder.
>
> 119 Nev. at 490, 78 P.3d at 74.

Equitable subrogation is thus a remedy designed to prevent someone from

receiving an unearned windfall at the expense of another. Id.

As a general rule, the holder of a junior mortgage or encumbrance who pays or advances money to pay the debt secured by the prior mortgage or encumbrance is entitled to be subrogated to the rights of the senior encumbrancer. Dietrich Industries, Inc. v. United States, 988 F.2d 568, 571 (5th Cir. 1993); Strike v. Trans-West Discount Corp., 155 Cal. Rptr. 132 (Cal App. 1979); Trueman Fertilizer Co. v. Allison, 81 So. 2d 734, 737 (Fla. 1955); Hopkins Mfg. Co. v. Ketterer, 84 A. 421 (Pa. 1912); MGIC Financial Corp. v. H.A. Briggs Co., 600 P.2d 573 (Wash. App. 1979). This rule is particularly important since foreclosure of a senior lien will erase the security interest of a junior lien. Restatement (Third) of Prop.: Mortgages, § 7.1 (1997); Streiff v. Darlington, 9 Cal. 2d 42, 45, 68 P.2d 728, 729 (1937).

This is exactly what occurs when a lender, such as Bank of America, purportedly pays the superpriority portion of an HOA's lien. A subrogated claim is not in any way diminished or extinguished by the subrogation; it is merely taken over by another who stands in the place of the original claimant. Pep'e v. McCarthy, 249 A.D.2d 286, 287, 672 N.Y.S.2d 350, 351 (N.Y. App. 1998).

Payment by the guarantor is treated not as creating a new debt and extinguishing the original debt, but as preserving the original debt and merely

substituting the guarantor for the creditor, i.e., the payment operates as an assignment. Putnam v. Commissioner of Internal Revenue, 352 U.S. 82, 85 (1956).

In American Sterling Bank v. Johnny Management LV, Inc., 126 Nev. 423, 429, 245 P.3d 535, 539 (2010), this court explained the practical effect of subrogation as follows:

> The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation and assignment to the payor or subrogee, permitting the subrogee to enforce the seniority of the satisfied lien against junior lien holders.

Because a tender made by a subordinate lienholder creates an "assignment," the tender falls within the definition of the word "conveyance" in NRS 111.010(1).

The rules regarding payment and discharge when a payment is tendered by a person who is "not primarily responsible for performance" of a debt or obligation are also stated in subsections e, f and g of Restatement (Third) of Prop.: Mortgages, § 6.4 (1997), as follows:

> **§ 6.4 Redemption from Mortgage by Performance or Tender**
>
> . . .
>
> (e) A performance in full of the obligation secured by a mortgage, or a performance that is accepted by the mortgagee in lieu of payment in full, **by one who holds an interest in the real estate subordinate to the mortgage but is not primarily responsible for performance, does not extinguish the mortgage**, but redeems the interest of the person performing from the mortgage and entitles the person performing to subrogation to the mortgage under the principles of §7.6. Such performance may not be made until the obligation secured by the mortgage is due, but may be made at or after the time the obligation is due but

prior to foreclosure.

(f) Upon receipt of performance as provided in Subsection (e), the mortgagee has **a duty to provide to the person performing, within a reasonable time, an appropriate assignment of the mortgage in recordable form.** If the mortgagee fails to do so upon reasonable request, the person performing may obtain judicial relief ordering the mortgage assigned and, unless the mortgagee acted in good faith in rejecting the request, awarding against the mortgagee any damages resulting from the delay.

(g) An **unconditional tender of performance in full by a person described in Subsection (e),** even if rejected by the mortgagee**, if kept good** has the effect of performance under Subsections (e) and (f) above. (emphasis added)

Comment a to Section 6.4 of the Restatement (Third) of Prop.: Mortgages explains the distinction between payment or tender by someone primarily liable for the debt and payment or tender by a party seeking to protect its interest in the property. It states in part:

> Equitable redemption is ultimately accomplished by performance in full of the obligation secured by the mortgage. **However, redemption has two quite distinct results, depending on whether the performance is made by a person who is primarily responsible for payment of the mortgage obligation, or by someone else who holds an interest in the land subordinate to the mortgage**. In the first of these situations, the mortgage is simply extinguished, as provided in Subsection (a) of this section. **In the second, the mortgage is not extinguished, but by virtue of Subsection (e) is assigned by operation of law to the payor under the doctrine of subrogation;** see §7.6. Subrogation does not occur in the first situation, since one who is primarily responsible for payment of a debt cannot have subrogation by performing that duty; see §7.6, Comment b. (emphasis added)

NRS 111.315 provides:

> **Every conveyance of real property**, and every instrument of writing setting forth an agreement to convey any real property, or **whereby any real property may be affected**, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, **shall be recorded in the office of the recorder of the county in which the real property is situated** or to the extent permitted by

> NRS 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record. (emphasis added)

NRS 111.325 in turn provides:

> Every **conveyance of real property** within this State hereafter made, which shall not be recorded as provided in this chapter, **shall be void as against any subsequent purchaser**, in good faith and for a valuable consideration, of the same real property, or any portion thereof, **where his or her own conveyance shall be first duly recorded.** (emphasis added)

NRS 111.315 and NRS 111.325 each use the word "shall," which means that recording the assignment created by a valid tender is mandatory. *See* Pasillas v. HSBC Bank USA, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011).

The recording of the tender, which operates as a conveyance in the form of an equitable assignment of the lien, is required because, when the purchaser bids on the property he is justifiably relying on the information contained in the public records when determining whether or not to bid on the property and how much to pay for the property, *see* Firato v. Tuttle, 48 Cal.2d 136, 308 P.2d 333 (1957). The fact that nothing was recorded is the operative fact and is sufficient to protect a subsequent purchaser.

In summary, because a valid tender would result in the superpriority portion of the lien being assigned to Bank of America, it necessarily follows that any tender of the superpriority portion of the lien is an assignment that must be recorded in

order to be effective against subsequent purchasers.

It cannot be the case that the Nevada Supreme Court intended to disrupt more than 150 years of established law and jurisprudence respecting the importance of protecting all rights inherent in real property ownership, including security in and title to property. *See generally* Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008) (*quoting* McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 657, 137 P.3d 1110, 1119 (2006) (explaining that Nevada has recognized that the bundle of property rights includes the right to possess, use, and enjoy property, and includes the right to security in and title to real property).

In Power Transmission Equip. Corp. v. Beloit Corp., 201 N.W. 2d 13, 16 (Wis. 1972), Power Transmission Equipment Corp. was the person "primarily responsible" for payment of the lien asserted by Beloit, so the Supreme Court of Wisconsin did not discuss the effect of a payment offered by a subordinate lienholder like defendant Green Tree.

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this court quoted from NRS 111.315 and italicized the words "in the manner prescribed in this chapter." 427 P.3d at 119. The words "in the manner prescribed in this chapter" in NRS 111.315 refer to how the conveyance or instrument in writing is "proved,

acknowledged and certified." Section 6.4(f) of the Restatement requires that the person accepting payment from a subordinate lienholder provide "the person performing, within a reasonable time, an appropriate assignment of the mortgage [super priority lien] in recordable form." The "assignment" required by the law of real property falls squarely within the language used in NRS 111.315.

This court also quoted the definition of the word "instrument" from Black's Law Dictionary (10th ed. 2014), but the "appropriate assignment in recordable form" provided by Section 6.4(f) of the Restatement falls within the definition of the word "instrument." The "appropriate assignment in recordable form" would also be a "conveyance" as defined in NRS 111.010(1).

In Bank of America, N.A. v. SFR Investments Pool 1, LLC, this court also cited NRS 116.3116 as support for the statement that "Bank of America's tender cured the default and prevented foreclosure as to the superpriority portion of the HOA's lien by operation of law." 427 P.3d at 120. On the other hand, the words "cured the default" do not appear anywhere in NRS 116.3116. As provided by Section 6.4 of the Restatement, a proper tender could at most "assign" the superpriority portion of the HOA's assessment lien.

This court also cited NRS 116.3116(1)-(3) as support for the statement that

"NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder." 427 P.3d at 120. No such language appears anywhere in NRS 116.3116. NRS 116.3116(3) instead provides for the creation of an escrow account or impound account to pay all of the assessments for common expenses.

This court also quoted from the official comments to § 3-116 of the UCIOA, but the official comments do not state that a tender made by a lender "cures" the default or "prevents foreclosure" of the lien "by operation of law." The law of real property instead provides that such a payment, if accepted, "assigns" the superpriority lien rights to the subordinate lienholder. Comments a and g to Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

This court also stated that "[b]ecause the lien is not discharged using an instrument, NRS Chapter 106 does not apply." 427 P.3d at 120. Again, however, the law of real property states that the tender by the subordinate lienholder does not "discharge" the mortgage [superpriority lien] or "cure the default" as to the superpriority lien, but "entitles the person performing to subrogation." Restatement (Third) of Prop.: Mortgages, § 6.4(e)(1997). Section 6.4(f) of the Restatement in turn requires that the assignment be proved by "an appropriate assignment of the

mortgage in recordable form" or that the person performing "obtain judicial relief ordering the mortgage assigned."

The law of real property does not allow the HOA's superpriority lien to be discharged or satisfied by an unrecorded tender made by the holder of a subordinate deed of trust. No language in NRS 116.3116 contradicts the established principles of real property law in Restatement (Third) of Prop.: Mortgages, § 6.4 (1997).

Because the record on appeal does not contain any recorded assignment that provided plaintiff with notice of the alleged tender made by Miles Bauer, that unrecorded claim of tender is void as to plaintiff.

5. The district court improperly granted defendant Green Tree equitable relief from the conclusive recital of default in the foreclosure deed.

As quoted at page 24 of plaintiff's 7.27 pre-trial memorandum (JA1, pg. 130), NRS 116.31166(1)(a) states that the recital of "default" in the foreclosure deed is "conclusive proof of the matters recited." NRS 116.31166(2) in turn states that a deed that contains the recitals listed in NRS 116.31166(1) is "conclusive against the unit's former owner, his or her heirs and assigns, **and all other persons**." (emphasis added).

In Bank of America v. SFR Investments Pool 1, LLC, this court confirmed that

when looking behind the conclusive recital of default, a court sits in equity. 427 P.3d at 120. *See also* Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1110-1112 (2016).

Thus, even assuming that this court finds that Miles Bauer made a valid tender of the superpriority portion of the lien, this court must still weigh the equities.

In Shadow Wood, this court discussed the effect that a conclusive recital of default could have even where no default existed, and in order to avoid what it perceived to be a "breathtakingly broad" reading, this court held that "courts retain the power to grant equitable relief from a defective foreclosure sale when appropriate despite NRS 116.31166." Shadow Wood, 366 P.3d at 1110-1111.

This court also stated that the "Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." Id. at 1112.

In Bank of America v. SFR Investments Pool 1, LLC, this court confirmed that when tender is alleged, the challenge is to the default. In particular, this court stated: "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.

When read together with the Shadow Wood opinion, this means that when a party challenges the conclusive recital of default, the only way for the court to look behind the conclusive recital is to invoke the court's powers of equity. The fact that the court sits in equity when analyzing a tender case is further confirmed by this court's analysis of the "kept good" argument asserted by SFR in that case. This court rejected the argument, not under statute or under common law, but by quoting from the Annotation, *Necessity of Keeping Tender Good in Equity*, 12 A.L.R. 938 (1921): "Generally, there is no fixed rule in equity which requires a tender to he kept good in the sense in which that phrase is used at law." 427 P.3d at 120.

But for invoking the inherent powers of equity, neither this court, nor any other court, could ever look behind the conclusive recital of default. As a result, simply proving the delivery of a valid tender does not end the inquiry because "[w]hen sitting in equity…courts must consider the entirety of the circumstances that bear upon the equities." Shadow Wood, 366 P.3d at 1114 (citations omitted).

In Shadow Wood, this Court stated that "[e]quitable relief will not be granted to the possible detriment of innocent third parties." 366 P.3d at 1115 (*quoting* Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966)).

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court held that a bona fide purchaser was protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption:

> The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. Homestead v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].)

This court has also stated that equitable relief is not available where a party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief. Las Vegas Valley Water District v. Curtis Park Manor Water Users Ass'n, 98 Nev. 275, 278, 646 P.2d 549, 551 (1982); County of Washoe v. City of Reno, 77 Nev. 152, 360 P.2d 602, 604 (1961); State v. Second Judicial District Court, 49 Nev. 145, 241 P. 317, 321-322 (1925); Turley v. Thomas, 31 Nev. 181, 101 P. 568, 574 (1909); Conley v. Chedic, 6 Nev. 222, 224 (1870); Sherman v. Clark, 4 Nev. 138 (1868).

Because defendant Green Tree had an adequate remedy at law against the HOA and its foreclosure agent even if defendant Green Tree could prove that they wrongfully prevented Miles Bauer from tendering the superpriority amount of the

lien, the district court had no jurisdiction to grant defendant Green Tree equitable relief from the conclusive recital of default in the foreclosure deed or the foreclosure sale that extinguished the deed of trust.

6. 12 U.S.C. § 4617(j)(3) does not apply to the present case because FHFA did not appear in or act in the case.

12 U.S.C. § 4617(j)(1) states that "[t]he provisions of this subsection shall apply with respect to the Agency **in any case in which the Agency is acting** as a conservator or a receiver." (emphasis added)

By its express terms, 12 U.S.C. § 4617(j)(3) only protects "property of the Agency."

The word "Agency" is defined by 12 U.S.C. § 4502(2) to be the FHFA. 12 U.S.C. § 4502(20)(A) defines Fannie Mae as a "regulated entity."

FHFA did not appear as a party in the case below, and FHFA is not a party to the appeal.

In Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev., Adv. Op. 34, 396 P.3d 754 (2017), this Court held "that the servicer of a loan owned by a regulated entity has standing to argue that the Federal Foreclosure Bar preempts NRS 116.3116."

The record on appeal does not contain admissible evidence proving that

defendant Green Tree complied with the Fannie Mae Single Family Servicing Guide to be a servicer of the Wight loan for Fannie Mae.

Section 201 of the Fannie Mae Single Family 2012 Servicing Guide (*See* page 263 in Trial Exhibit 25) refers to the "Lender Contract" and the "Mortgage Selling and Servicing Contract" and states in part:

> Once Fannie Mae approves a servicer to do business with it, both parties execute the Lender Contract to establish the terms and conditions of their contractual relationship.
>
> . . . .
>
> The MSSC establishes the basic legal relationship between a lender/servicer and Fannie Mae.

In the present case, the record on appeal does not contain an MSSC or Lender Contract between defendant Green Tree and Fannie Mae for the Wight loan, and no witness stated that he or she had seen these required agreements.

In Saticoy Bay LLC Series 9641 Christine View v. Federal National Mortgage Ass'n, 134 Nev. Adv. Op. 36, 417 P.3d 363 (2018), Fannie Mae was a named party and this Court stated that "Fannie Mae was subsequently assigned the deed of trust." 417 P.3d at 366. In the present case, Fannie Mae did not appear as a party in the case below, and the record on appeal does not contain any written assignment of the Wight deed of trust to Fannie Mae.

7. Defendant Green Tree did not prove that Fannie Mae complied with Nevada law to hold any interest in the Property on the date of the HOA foreclosure sale.

As stated at page 6 of plaintiff's 7.27 pre-trial memorandum (JA1, pg. 112), Nevada law controls whether or not Fannie Mae held an enforceable interest in the Property on November 22, 2013.

In Butner v. United States, 440 U.S. 48, 55 (1979), the Supreme Court stated that "[p]roperty interests are created and defined by state law."

In Berezovsky v. Moniz, the court of appeals acknowledged that its determination of whether Freddie Mac held an interest in the deed of trust was controlled by Nevada law:

> **Here, we look to the Nevada Supreme Court's resolution of these issues**. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state."). (emphasis added)

869 F.3d at 931.

In Blanton v. North Las Vegas Municipal Court, 103 Nev. 623, 748 P.2d 494, 500 (1987), this court stated:

> We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075–76 (7th Cir.1970), *cert. denied*, 402 U.S. 983, 91 S.Ct. 1658, 29 L.Ed.2d 140 (1971). Even an *en banc* decision of a federal circuit court would not bind Nevada to restructure the court system of this state.

This court also stated that the Ninth Circuit's interpretation of Nevada statutes on a matter of state law does not constitute mandatory precedent, but may be construed as persuasive authority. *See* In re Nevada State Engineer Ruling No. 5823, 128 Nev. 232, 242, 277 P.3d 449, 456 (2012); Custom Cabinet Factory of New York, Inc. v. District Ct., 119 Nev. 51, 54, 62 P.3d 741, 742-743 (2003).

In High v. Ignacio, 408 F.3d 585, 590 (9th Cir. 2005), the court stated that "[t]his court accepts a state court ruling on questions of state law." In O'Brien v. Skinner, 414 U.S. 524, 531 (1974), the Supreme Court stated that "[i]t is not our function to construe a state statute contrary to the construction given it by the highest court of a State."

Under Nevada law, a deed of trust and an assignment of a deed of trust are conveyances of land that must comply with the statute of frauds found in NRS 111.205(1). In Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011), this court stated:

> A deed of trust is an instrument that "secure[s] the performance of an obligation or the payment of any debt." NRS 107.020. This court has previously held that a deed of trust "constitutes a conveyance of land as defined by NRS 111.010." Ray v. Hawkins, 76 Nev. 164, 166, 350 P.2d 998, 999 (1960). The **statute of frauds governs** when a conveyance creates **or assigns** an interest in land**:**
>
> > **No estate or interest in lands,** ... nor any trust or power over or concerning lands, or in any manner relating thereto, **shall be** created, granted, **assigned,** surrendered or declared ..., **unless ... by deed or conveyance, in**

> **writing, subscribed by the party** creating, granting**, assigning,** surrendering or declaring **the same**, or by the party's lawful agent thereunto authorized in writing.
>
> NRS 111.205(1) (emphases added).Thus, to prove that MortgageIT properly assigned its interest in land via the deed of trust to Wells Fargo, Wells Fargo **needed to provide a signed writing from MortgageIT demonstrating that transfer of interest**. No such assignment was provided at the mediation or to the district court, and **the statement from Wells Fargo itself is insufficient proof of assignment.** Absent a proper assignment of a deed of trust, Wells Fargo lacks standing to pursue foreclosure proceedings against Leyva. (emphasis added)

The "signed writing" required by NRS 111.205(1) is not limited to a deed of trust or an assignment of deed of trust, but includes every "writing" by which defendant claims that Fannie Mae acquired an interest in the Property before November 22, 2013.

Even if the unidentified "writing" is not an "assignment of the beneficial interest under a deed of trust," the writing would still be a "conveyance" as defined in NRS 111.010(1) because the word "conveyance" includes "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 interest in lands** is **created,** aliened, **assigned** or surrendered." (emphasis added)

In Occhiuto v. Occhiuto 97 Nev. 143, 147, 625 P.2d 568, 570 (1981), this court unequivocally stated:

> The law of this state specifically precludes the creation of any interest in land except by a properly executed written instrument. NRS

111.205(1).

The purpose of the statute of frauds is to prevent fraud. *See* Locken v. Locken 98 Nev. 369, 372, 650 P.2d 803, 804 (1982); Roberts v. Hummel,69 Nev. 154, 158, 243 P.2d 248, 250 (1952).

In In Re Faulkiner, 594 B.R. 426, 436 (Bankr. D. Nev. 2018), Judge Nakagawa reviewed the history and purpose of the statute of frauds and stated that "the primary purpose of the Statute of Frauds is evidentiary."

At page 3 of its judgment following non-jury trial (JA1, pg. 159), the district court made specific findings regarding defendant Green Tree's failure to produce "documentary evidence of Fannie Mae's interest." First, the court found that "Fannie Mae does not have a recorded interest." (JA1, pg. 159, l. 19) Second, the court found that no servicing contract between Fannie Mae and defendant Green Tree was introduced into evidence. (JA1, pg. 159, ll. 19-21) Third, the court found that the "tri-party custodial agreement" between Fannie Mae, the servicer and the custodian of the Wight note was not introduced into evidence. (JA1, pg. 159, ll. 21-24) Fourth, the court found that defendant Green Tree did not introduce "financial records" proving that defendant Green Tree collected mortgage payments, retained a portion for its servicing charge, and submitted the rest to Fannie Mae. (JA1, pg.

159, ll. 24-26) The court also found that defendant Green Tree did not prove that anything prevented defendant Green Tree "from selling or otherwise transferring all interest in the loan to another entity." (JA1, pg. 159, l. 27 to pg. 160, l. 3)

The district court's findings are consistent with comment b to Restatement (Third) of Prop.: Mortgages, § 5.4, pg. 381 (1997), which states:

> Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. **However, assignees are well advised to record.** One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage. If the mortgagee and mortgagor subsequently enter into and record a purported discharge or modification of the mortgage without the assignor's knowledge or involvement, **and the real estate is then transferred to a good faith purchaser for value, the latter is entitled to rely on the record.** (emphasis added)

This court addressed the same issue in Edelstein v. Bank of New York Mellon, 128 Nev. 505, 286 P.3d 249, 259 (2012), when it stated:

> Second, it is prudent to have the recorded beneficiary be the actual beneficiary and not just a shell for the "true" beneficiary. In Nevada, the purpose of recording a beneficial interest under a deed of trust is to provide "constructive notice . . . to all persons." NRS 106.210. **To permit an entity that is not really the beneficiary to record itself as the beneficiary would defeat the purpose of the recording statute and encourage a lack of transparency.** (emphasis added)

The Wight "Loan" is a promissory note secured by a deed of trust. The note has a promisor and a promisee, or payor and payee. No party is designated as "owner." The promissory note also does not create any interest in the Property.

Similarly, the Wight deed of trust has three parties: a trustor, a trustee and a

beneficiary. No party is designated as "owner." The beneficiary of the deed of trust is the party that has the right to enforce the deed of trust.

Statements made by a witness who has never seen the documents that must exist for Fannie Mae to own the Wight loan or for defendant Green Tree to be the servicer of the Wight loan for Fannie Mae are not admissible to prove the existence of the documents.

NRS 50.025(1)(a) states that "[a] witness may not testify to a matter unless . . . [e]vidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

In In re Montierth (Montierth v. Deutsche Bank), 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015), this court stated:

> "[A]n unrecorded deed is valid immediately between the mortgagor and the mortgagee." 59 C.J.S. *Mortgages* § 256 (2009). In Nevada, "perfection of a deed of trust occurs upon proper execution and recordation." *In re Madrid*, 725 F.2d 1197, 1200 (9th Cir.1984), *superseded by statute on other grounds,* Bankr. Amendments & Fed. Judgeship Act of 1984, Pub.L. No. 98–353, 98 Stat. 333, *as recognized in In re Ehring,* 900 F.2d 184, 187 (9th Cir.1990). Thus, a security interest attaches to the property as between the mortgagor and mortgagee upon execution **and as against third parties upon recordation**. (emphasis added)

354 P.3d at 650.

NRS 111.315 state that "[e]very conveyance of real property. . . **shall** be recorded. . . . (emphasis added)

NRS 111.325 in turn provides that even if the "writing" required by NRS 111.205(1) did exist, that "writing" shall be void against plaintiff because the foreclosure deed was "first duly recorded."

In the present case, paragraph (C) on the first page of the first deed of trust (Trial Exhibit 2) identified Countrywide Home Loans, Inc. as the "Lender," and paragraph (E) identified MERS as the beneficiary "acting solely as a nominee for Lender and Lender's successors and assigns." In the corporate assignment of deed of trust that was recorded on May 28, 2013 (Trial Exhibit 11), MERS assigned "the described Deed of Trust together with all interest secured thereby" to defendant Green Tree and not to Fannie Mae. No language in any recorded document identified Fannie Mae as a party to the deed of trust.

Nevada is a race notice state. See Buhecker v. R.B. Petersen & Sons Const. Co., Inc., 112 Nev. 1498, 929 P.2d 937 (1996).

Although 12 U.S.C. § 4617(b)(2)(A)(1) states that the Agency shall immediately succeed to "all rights, titles, powers and privileges of the regulated entity" and "the assets of the regulated entity," no language in 12 U.S.C. § 4617 purports to treat an "unrecorded" interest that is "void" under state law as an "asset" of the regulated entity. No language in 12 U.S.C. § 4617(j)(3) prohibited the

extinguishment of defendant Green Tree's deed of trust recorded against the Property.

Because the record on appeal does not contain any admissible evidence proving that Fannie Mae held any enforceable interest in the Property on November 22, 2013, 12 U.S.C. § 4617(j)(3) did not apply to the public auction held on November 22, 2013.

In Montierth, this court stated: "The note was subsequently transferred to respondent Deutsche Bank." 354 P.3d at 649.

Comment b to Section 5.4 of the Restatement states in part:

> Ownership of a contractual obligation can generally be transferred by a document of assignment; see Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note.

This court has stated that "[t]he proper method of transferring the right to payment under a mortgage note is governed by Article 3 of the Uniform Commercial Code – Negotiable instruments, because a mortgage note is a negotiable instrument." Leyva v. National Default Servicing Corp., 127 Nev. 470, 255 P.3d 1275, 1279 (2011).

In the present case, the district court correctly found that defendant Green Tree

did not prove that the Wight note was ever transferred to Fannie Mae in a way that complied with Nevada law. The district court also correctly found that defendant Green Tree did not prove that it had an agreement to service the Wight loan for Fannie Mae on November 22, 2013.

8. Defendant Green Tree's witnesses did not provide a proper foundation to admit the computer screenshots upon which the witnesses based their testimony.

The business records exception in NRS 51.135 provides:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, **made at or near the time** by, or from information transmitted **by, a person with knowledge,** all in the course of a regularly conducted activity, **as shown by the testimony or affidavit of the custodian or other qualified person**, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. (emphasis added)

In U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co., 576 F.3d 1040 (9th Cir. 2009), the court of appeals stated:

> The important issue is whether the database, not the printout from the database, was compiled in the ordinary course of business.
>
> In this case, the exhibits summarizing loss adjustment expense payments for each claim fit squarely within the business records exception of Rule 803(6). As the district court found (1) the underlying data was entered in the database at or near the time of each payment event; (2) **the persons who entered the data had knowledge of the payment event**; (3) the data was kept in the course of Republic Western's regularly conducted business activity; and (4) **Mr. Matush was qualified and testified as to this information.** (emphasis added)

576 F.3d at 1044.

The court of appeals also stated:

> In this case, **Matush testified regarding the process of inputting data into the computer** and the process of querying the computer to compile the information to create the summaries. **Matush testified that he was familiar with the record keeping practices of the company, testified regarding the computer system used to compile and search the insurance claim records, and testified regarding the process of querying the computer system to create the summaries admitted at trial**. (emphasis added)
>
> 576 F.3d at 1045.

The record on appeal does not contain admissible evidence proving that the unidentified person(s) who entered the data regarding the Wight loan in SIR followed any procedure that required the person(s) to first confirm the existence of the "writing" required by Nevada law before Fannie Mae was identified as the owner of the loan in SIR.

In Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1259 (9th Cir. 1984). the court of appeals stated that "where the only function that the report serves is to assist in litigation or its preparation, many of the normal checks upon the accuracy of business records are not operative." Id. (quoting McCormick on Evidence § 308, at 877 n. 26 (E. Cleary 3d ed. 1984)).

Because the computer records upon which defendants' witnesses based their testimony (*See* pages 248, 250-260, 261, and 263-296 in Trial Exhibit 25) did not exist until January 23, 2018, they do not prove that the "writing" required by Nevada law for Fannie Mae to own the Wight loan existed on November 22, 2013.

Computer screenshots printed years after the HOA foreclosure sale do not prove the existence of a "writing" that none of defendant Green Tree's witnesses had ever seen or that no witness stated must exist before a data entry was made in SIR.

9. Defendant Green Tree is bound by the conclusive presumptions created by the recorded deed of trust and corporate assignment of deed of trust.

As quoted at page 9 of plaintiff's 7.27 pre-trial memorandum (JA1, pg. 115), NRS 47.240 includes two "conclusive presumptions" that provide:

> 2. The truth of the fact recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title, but this rule does not apply to the recital of a consideration.
>
> 3. Whenever a party has, by his or her own declaration, act or omission, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, the party cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it.

In the present case, the recorded deed of trust (Trial Exhibit 2) identified Countrywide Home Loans, Inc. as the "Lender" and MERS as "the beneficiary under this Security Instrument" that was "acting solely as a nominee for Lender and Lender's successors and assigns."

The recorded corporate assignment of deed of trust (Trial Exhibit 11) proved that MERS assigned "the described Deed of Trust together with all interest secured

thereby" to defendant Green Tree and not to Fannie Mae.

Defendant Green Tree is bound by the "conclusive presumptions" created by the recorded corporate assignment of deed of trust that prove Fannie Mae did not own either the Wight note or the Wight deed of trust.

10. As a bona fide purchaser, plaintiff is protected from defendant Green Tree's unrecorded claim that Fannie Mae owned the deed of trust that was assigned to defendant Green Tree.

Under Nevada law, interests in real property must be recorded. An unrecorded interest in real property is void against a subsequent purchaser if the subsequent purchaser's interest is first duly recorded. Tai-Si Kim v. Kearney, 838 F. Supp. 2d 1077, 1087-1088 (D. Nev. 2012).

As stated by the court in Shipman v Wells Fargo Bank, N.A., 2012 WL 642777 (D. Nev. Feb. 24, 2012):

> When a party fails to timely record a conveyance, **the conveyance is void** as to any subsequent bona fide purchaser or mortgagee who lacks knowledge of the previous conveyance, where the purchaser or mortgagee records its conveyance first. NRS 111.325. (emphasis added)

Id. at *1.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the

> convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Section 7:21 from 1 Grant S. Nelson, Dale A. Whitman, Ann M. Burkhart & R. Wilson Freyermuth, *Real Estate Finance Law* (6th ed. 2014), states that "[i]f the defect only renders the sale voidable, the redemption rights can be cut off if a bona fide purchaser for value acquires the land." Id. at 956-957.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016), this court stated:

> A subsequent purchaser is bona fide under common-law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and **without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him**, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); *see also* Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that **the bona fide purchaser of a legal title is not affected by any latent equity** founded either on a trust,

[e]ncumbrance, or otherwise, **of which he has no notice, actual or constructive."**). (emphasis added)

366 P.3d at 1115.

In the present case, no recorded document stated that defendant Green Tree was acting on behalf of Fannie Mae, and no recorded document stated that Fannie Mae claimed to hold any interest in the Property.

Mr. Haddad's knowledge of the subordinate deed of trust did not prevent plaintiff from being a bona fide purchaser because the HOA was foreclosing a prior lien that would extinguish the subordinate deed of trust.

In addition, the words "bona fide purchaser" do not appear in NRS 111.325.

In order for plaintiff to be protected from defendant Green Tree's unrecorded claim that Fannie Mae held an unrecorded interest in the deed of trust, NRS 111.325 only requires that plaintiff be a "subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded."

Claudette Carr testified that SIR showed "an acquisition date of 12/1/2004." (JA2, pg. 343, l. 21 to page. 344, l. 1) Plaintiff is a "subsequent purchaser" to that unrecorded claim of ownership.

/ / /

In Shadow Wood, this court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); see *also* Poole v. Watts, 139 Wash. App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

366 P.3d at 1115.

The $10,200.00 paid by plaintiff was "valuable consideration."

The foreclosure deed was recorded on November 26, 2013. (Trial Exhibit 8)

Applying NRS 111.325 to the facts of the present case, because no "writing" was recorded prior to November 26, 2013 that conveyed any interest in the deed of trust to Fannie Mae, the unrecorded "conveyance" to Fannie Mae is void against plaintiff pursuant to NRS 111.325.

11. Defendant Green Tree did not prove that it has standing to assert rights allegedly held by FHFA.

In Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC, 133 Nev. Adv. Op. 34, 396 P.3d 754, 758 (2017), this court held that "the servicer of a loan owned by a regulated entity has standing to argue that the Federal Foreclosure Bar preempts NRS 116.3116."

In the present case, however, the district court correctly found that defendant

Green Tree did not prove that it complied with the Guide to be a servicer for the Wight loan and have any standing to assert FHFA's rights in the above-captioned action.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this court reverse the judgment entered in favor of defendants and remand this case to the district court with instructions to enter judgment for plaintiff.

DATED this 30th day of August, 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 page or 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 13,428 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 30th day of August, 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 30th day of August, 2019, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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