Case No. 79235

IN THE SUPREME COURT OF NEVADA

U.S. BANK, NATIONAL ASSOCIATION AS TRUSTEE FOR MERRILL LYNCH MORTGAGE INVESTORS TRUST, MORTGAGE LOAN ASSET-BACKED CERTIFICATES, SERIES 2005-A8

Appellant,

vs.

SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY,

Respondent.

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable JOANNA KISHNER, District Judge
District Court Case No. A-16-739867-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

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

Third-Party Defendant-Counter-claimant-Respondent SFR Investments Pool 1, LLC is a privately held limited liability company and there is no publicly held company that owns 10% or more of SFR Investments Pool 1, LLC's stock.

In district court, Third-Party Defendant-Counter-claimant-Respondent SFR Investments Pool 1, LLC was represented by Howard C. Kim, Esq., Jacqueline A. Gilbert, Esq., Diana S. Ebron, Esq., and Karen L. Hanks, Esq., of Kim Gilbert Ebron fka Howard Kim & Associates. Mr. Kim, Ms. Gilbert, and Ms. Ebron of Kim Gilbert Ebron represent Respondent on appeal.

DATED this 14th day of June, 2021.

KIM GILBERT EBRON

/s/Jacqueline A. Gilbert
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ROUTING STATEMENT

Contrary to U.S. Bank's representation, this case does not raise a question of first impression of common law. Instead, this case is one of hundreds of Association foreclosure cases in which the Bank, which lacked standing to challenge the foreclosure in the first instance, nevertheless, at trial, failed to prove it tendered the super-priority portion of the lien. Other than a ruling on the statute of limitations, this appeal challenges the district court's exerice of discretion. Thus, there is nothing novel about this case.

ISSUES PRESENTED

1. Did the District Court correctly rule U.S. Bank failed to establish its standing when it stipulated prior to trial that Universal was both the owner of the Note and recorded beneficiary of the deed of trust at the time of the Association foreclosure sale, and Univrsal was still the recorded beneficiary at the time of filing the complaint?

    a. Did the District Court properly exercise its discretion in excluding Harrison Whitaker as a witness when neither he nor the company who employed him was ever disclosed?

b. Did the District Court properly exercise its discretion in excluding the deposition transcript of Katherine Ortwerth where U.S. Bank failed to designate the transcript as required by the NRCP 16.1 and the District Court's trial order?

2. Did the District properly time-bar U.S. Bank's claim where U.S. Bank did not allege tender until May 5, 2018, or five years and ten months after the foreclosure sale?

3. Did the District Court properly exercise its discretion in excluding documents which were hearsay?

4. Was the District Court's finding that, irrespective of U.S. Bank's failure to prove the super-priority amount, U.S. Bank failed to establish delivery of tender to the Association was based on substantial evidence?

5. Whether this Court should reject U.S. Bank's new issue, raised for the first time on appeal, of futility?

STATEMENT OF RELEVANT FACTS

I. U.S. BANK WAS NOT THE RECORDED BENEFICIARY OF THE DEED OF TRUST AT THE TIME OF THE SALE OR AT THE TIME OF THE AMENDED COMPLAINT

After an Association foreclosure sale of 7868 Marbledoe Court, Las Vegas, Nevada 89149 4348 (the "Property"), which took place on July 25, 2012, U.S. Bank as trustee for Merrill Lynch Mortage Investors Trust ("U.S. Bank") filed a lawuit on July 12, 2016, against SFR Investments Pool 1, LLC ("SFR") challenging the validity of the sale. (JA00002-15.) At the time of the sale (July 25, 2012), the recorded beneficiary was Universal American Mortgage Company, LLC ("Universal").[1] The complaint contains no allegations about how or when U.S. Bank allegedly acquired an interest in the Property. (*Id.*) The complaint is also devoid of any allegations regarding tender. (*Id.*) It was not until May 8, 2018, when U.S. Bank amended its complaint, that it alleged any facts regarding tender. (JA00283-299.) Although the amended complaint alleges U.S. Bank is the assigned beneficiary of the deed of trust, as of May 8, 2018, the public record still reflected Universal as the recorded beneficiary. (JA01212-13.)

II. THE DISTRICT COURT'S DECISION FOLLOWED A BENCH TRIAL, RELYING ON ADMITTED EVIDENCE

[1] Unlike many deeds of trust, Mortgage Electronic Registration System (MERS), is not named as a nominee beneficiary. See *id.*

This appeal follows a six-day bench trial. (12JA_2300.) In its opening brief, U.S. Bank claims Merrill Lynch acquired the loan in 2005 and cites to a pooling and servicing agreement. (Opening Brief, p. 2.) However, no pooling and servicing agreement was ever admitted at trial. U.S. Bank discusses SFR's deposition of Katherine Ortwerth, the NRCP 30(b)(6) witness for U.S. Bank, and then claims SFR questioned Ms. Ortwerth regarding U.S. Bank's alleged interest. (Opening Brief, p. 6.) However, the portion of Ms. Ortwerth's deposition transcript cited was only entered as a Court's exhibit and does not contain any questions or answers about U.S. Bank's alleged interest. (JA01898-1897.) While U.S. Bank cites to the addendum to its opening brief, which includes the full deposition transcript, at trial the deposition transcript of Ms. Ortwerth was never published, and no portions of her deposition testimony were read into the record or admitted into the record.

Additionally, U.S. Bank's inclusion of the collateral file, with a statement it includes the wet-ink note, endorsed in blank, as if this is a fact, equally defies the reality of this trial. The collateral file was never admitted into evidence at trial. In fact, when U.S. Bank attempted to admit it, SFR objected based on lack of foundation, lack of authenticity and hearsay. (JA02126.) In the first instance, SFR highlighted that prior to trial, U.S. Bank had stipulated that at the time of the foreclosure sale (July 25, 2012) Universal was the owner of the note and beneficiary of the deed of trust, and that now U.S. Bank was improperly attempting to refute that

stipulated fact. (JA02122:17-19)

What is more, SFR highlighted multiple contradictions among the documents contained in the collateral file. Specifically, the file contained a lost note affidavit which indicated an entity by the name of Greenpoint was the owner of the note in 2007 and had lost the note. (JA02123:10-12; 2124.) SFR also pointed out the file contained two versions of the note that did not match; an issue that was also addressed the prior day when U.S. Bank attempted to admit proposed exhibit 39 (copy of notes). (JA02125:22-25; JA02101-02105; 02107:10-25.) The District Court sustained SFR's objections. (JA02143-2152.)

At trial, U.S. Bank never proved it was the real party in interest. U.S. Bank did not call a single witness to attest to its alleged interest, nor did it produce any documents proving its interest at either the time of the sale or the time it filed its complaint. Thus, the District Court concluded U.S. Bank lacked standing. (JA02274-2276.)

The District Court further found U.S. Bank's claim was time-barred because U.S. Bank did not plead any facts related to tender until May 5, 2018, or five years and ten months after the foreclosure sale. (JA02276-2778.) At trial, U.S. Bank never proved the amount of the super-priority portion, and even so, also failed to prove it delivered a proper tender. (JA02279-2280.) Thus, the District Court concluded the foreclosure sale extinguished the deed of trust. (JA02280.) At no time during the

trial did U.S. Bank raise the issue of futility of tender.

III. SFR DID NOT AGREE TO INCLUDE EXHIBITS NOT ADMITTED AT TRIAL IN THE JOINT APPENDIX; THOSE EXHIBITS NOT ADMITTED BUT INCLUDED IN THE APPENDIX CANNOT BE CONSIDERED BY THIS COURT

While U.S. Bank titled the appendix "Joint Appendix," SFR only agreed to "trial exhibits" and filed-stamped documents from the docket.[2] SFR did not agree to the proposed trial exhibits that were not admitted at trial. The "joint appendix," however, is it is riddled with documents that were never admitted at trial. In fact, not only were the docouments not admitted, for the majority of them, U.S. Bank never even attempted to have them admitted. Still, for others, only certain portions were admitted, while other parts were excluded. These documents are as follows:

Joint Trial Exhibit[3] 2 - Second Amendment to the Declaration of Covenants, Conditions, and Restrictions for Antelope Homeowners' Association	JA00586-JA00588	Never offered
Joint Trial Exhibit 3 - Grant, Bargain, Sale Deed	JA00589-	Never offered

[2] In an email dated January 30, 2020 to undersigned counsel, counsel for U.S. Bank indicated it planned to include hightlighted documents from the District Court's docket as well as the "trial exhibits" in the joint appendix. Undersigned counsel hereby declares under penalty of perjury that she understood this term to mean only those exhibits actually proffered and admitted at trial.

[3] The reference to "joint trial exhibit" only refers to the parties agreement to include all proposed exhibits in a joint binder for trial. The "joint" title does not reference any agreement to the admission of any exhibit. (JA02056:16-21.)

	JA00592	
Joint Trial Exhibit 6 - Deed of Trust (Second)	JA00617-JA00629	Never offered
Joint Trial Exhibit 10 - Notice of Delinquent Violation Lien	JA00663-JA00664	Never offered
Joint Trial Exhibit 16 - Release of Notice of Delinquent Assessment Lien	JA00671	Never offered
Joint Trial Exhibit 17 - Rescission of Election to Declare Default	JA00672-JA00673	Never offered
Joint Trial Exhibit 18 - Notice of Delinquent Violation Lien	JA00674-JA00675	Never offered
Joint Trial Exhibit 19 - Request for Notice Pursuant to NRS 116.31168	JA00676-JA00678	Never offered
Joint Trial Exhibit 20 - Notice of Lis Pendens	JA00679-JA00682	Never offered
Joint Trial Exhibit 21 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Henry Ivy	JA00683-JA00685	Never offered
Joint Trial Exhibit 22 - Letter from Miles, Bauer, Bergstrom & Winters, LLP to Antelope Homeowners Association	JA00686-JA00687	Not admitted; read into record pursuant to NRS 51.125[4]

[4] JA02617.

Joint Trial Exhibit 23 - Correspondence from Alessi & Koenig to Miles, Bauer, Bergstrom & Winters, LLP	JA00688-JA00694	Only pages JA00688-689 admitted[5]
Joint Trial Exhibit 25 - Correspondence regarding corrected ARM Note	JA00698	Never offered
Joint Trial Exhibit 26 - Affidavit of Lost Note	JA00699-JA00708	Never offered
Joint Trial Exhibit 27 - Affidavit of Lost Note	JA00709-JA00716	Never offered
Joint Trial Exhibit 28 - Correspondence regarding Note	JA00717-JA00718	Never offered
Joint Trial Exhibit 29 - Deed of Trust, Note, and Lost Note Affidavit (Part 1 and 2)	JA00719-JA00984	Never offered
Joint Trial Exhibit 30 - Alessi & Koenig, LLC Collection File	JA00985-JA01160	JA01015-1019; 1024-1028; 1030-1041; 1070-1076; 1096-1130; 1128-1132 excluded;[6] JA01113-1120 only admitted for non-hearsay purposes[7]
Joint Trial Exhibit 31 - Affidavit of Doug Miles and Backup	JA01161-JA01181	SFR's objection sustained[8]

[5] JA02818.
[6] JA02814:22-23.
[7] JA02818:20-25.
[8] JA02628-2630; JA02904-2907.

Joint Trial Exhibit 31a – Excerpt of Affidavit of Doug Miles and Backup	JA01182-JA01183	No such exhibit was ever admitted[9]
Joint Trial Exhibit 32 - Title Insurance Documents – First American Title Insurance Company – NV08000274-11/IVY	JA01184-JA01194	Never offered
Joint Trial Exhibit 33 - Title Insurance Policy – North American Title Insurance Company	JA01195-JA01211	Never offered
Joint Trial Exhibit 35 - Trustee's Sale Guarantee	JA01214-JA01224	Never offered
Joint Trial Exhibit 36 - Bank of America, N.A.'s Payment History	JA01225-JA01237	Never offered
Joint Trial Exhibit 37 - Greenpoint's Payment History	JA01238-JA01248	Never offered
Joint Trial Exhibit 38 - Bank of America, N.A.'s Servicing Notes	JA01249-JA01261	Never offered
Joint Trial Exhibit 39 - Copy of Promissory Note and Allonges	JA01262-JA01277	Never offered
Joint Trial Exhibit 40 - Pooling and Servicing Agreement	JA01278-JA01493	Never offered

[9] JA02616.

Joint Trial Exhibit 41 - Mortgage Loan Schedule for PSA	JA01494-JA01512	Never offered
Joint Trial Exhibit 43 - Acknowledgement of Inspection of the Original Collateral File	JA01515-JA01620	SFR's objection sustained[10]
Joint Trial Exhibit 44 - Antelope Homeowners Association's Initial Disclosures and all Supplements	JA01621-JA01737	SFR's objection sustained.[11]
Joint Trial Exhibit 45 - Exhibit 1 to Deposition of David Alessi – Subpoena for Deposition of N.R.C.P. 30(b)(6) Witness for Alessi & Koenig, LLC	JA01738-JA01746	Never offered
Joint Trial Exhibit 46 - Exhibit 2 to Deposition of David Alessi – Account Ledger	JA01747-JA01751	Never offered
Joint Trial Exhibit 47 - Exhibit 3 to Deposition of David Alessi – Notice of Delinquent Assessment (Lien)	JA01752	Never offered
Joint Trial Exhibit 48 - Exhibit 4 to Deposition of David Alessi – Notice of Delinquent Violation Lien	JA01753-JA01754	Never offered
Joint Trial Exhibit 49 - Exhibit 5 to Deposition of David	JA01755	Never offered; but admitted elsewhere

[10] JA02143-2152.

[11] JA02014:10-11; JA02027:6-16; JA02028:13-25; JA02035; JA02049; JA02062.

Alessi – Notice of Default and Election to Sell Under Homeowners Association Lien		
Joint Trial Exhibit 50 - Exhibit 6 to Deposition of David Alessi – Notice of Trustee's Sale	JA01756	Never offered; but admitted elsewhere
Joint Trial Exhibit 51 - Exhibit 7 to Deposition of David Alessi – Second Notice of Trustee's Sale	JA01757	Never offered; but admitted elsewhere
Joint Trial Exhibit 52 - Exhibit 8 to Deposition of David Alessi – Third Notice of Trustee's Sale	JA01758	Never offered; but admitted elsewhere
Joint Trial Exhibit 53 - Exhibit 9 to Deposition of David Alessi – Request for Payoff by Miles Bauer	JA01759-JA01760	Never offered
Joint Trial Exhibit 54 - Exhibit 10 to Deposition of David Alessi – Response to Miles Bauer Payoff Request	JA01761-JA01767	Never offered
Joint Trial Exhibit 55 - Exhibit 11 to Deposition of David Alessi – Letter by Miles Bauer	JA01768-JA01770	Never offered
Joint Trial Exhibit 56 - Exhibit 12 to Deposition of David Alessi – Trustee's Deed Upon Sale	JA01771-JA01772	Never offered
Joint Trial Exhibit 57 - Exhibit 1 to Deposition of David	JA01773-JA01778	Never offered

Bembas – Notice of Taking Deposition of SFR Investments Pool 1, LLC		
Joint Trial Exhibit 58 - Exhibit 2 to Deposition of David Bembas – Notice of Delinquent Assessment (Lien)	JA01779	Never offered; but admitted elsewhere
Joint Trial Exhibit 59 - Exhibit 3 to Deposition of David Bembas – Notice of Default and Election to Sell Under Homeowners Association Lien	JA01780	Never offered; but admitted elsewhere
Joint Trial Exhibit 60 - Exhibit 4 to Deposition of David Bembas – Notice of Trustee's Sale	JA01781	Never offered; but admitted elsewhere
Joint Trial Exhibit 61 - Exhibit 5 to Deposition of David Bembas – Notice of Trustee's Sale	JA01782	Never offered; but admitted elsewhere
Joint Trial Exhibit 62 - Exhibit 6 to Deposition of David Bembas – Notice of Trustee's Sale	JA01783	Never offered; but admitted elsewhere
Joint Trial Exhibit 63 - Exhibit 7 to Deposition of David Bembas – Letter Dated 10-11-11	JA01784-JA01785	Never offered
Joint Trial Exhibit 64 - Exhibit 8 to Deposition of David Bembas – Letter Dated 12-16-11	JA01786-JA01788	Never offered
Joint Trial Exhibit 65 - Exhibit 9 to Deposition of David	JA01789-	Never offered

Bembas – Trustee's Deed Upon Sale	JA01790	
Joint Trial Exhibit 66 - Antelope Homeowners Association's Answers to Plaintiff U.S. Bank's Interrogatories	JA01791-JA01809	Never offered
Joint Trial Exhibit 67 - Antelope Homeowners Association's Answers To Plaintiff U.S. Bank's Requests for Admission	JA01810-JA01825	Never offered
Joint Trial Exhibit 68 - Antelope Homeowners Association's Answers To Plaintiff U.S. Bank's Request for Production of Documents	JA01826-JA01845	Never offered
Joint Trial Exhibit 69 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Interrogatories	JA01846-JA01857	Never offered
Joint Trial Exhibit 70 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Requests for Admissions	JA01858-JA01870	Never offered
Joint Trial Exhibit 71 - SFR Investments Pool 1, LLC'S Objections And Answers To Plaintiff, U.S. Bank's Request for Production of Documents	JA01871-JA01882	Never offered
Joint Trial Exhibit 72 - Email Re: URGENT WIRE	JA01883-JA01888	Never offered

REQUEST: Status Update re: 10- H1715 (1st) De Vera Relevance, Hearsay, Authenticity, and Foundation		
Joint Trial Exhibit 73 - BANA's Written Policies and Procedures Re: Homeowners Association (HOA) Matters – Pre-Foreclosure Relevance, Hearsay, Authenticity, and Foundation	JA01889-JA01893	Never offered

Every document (or portion thereof) excluded or not made part of the record below, should not have been included in the Joint Appendix and cannot be considered by this Court.

IV. THE ADDENDUM TO THE OPENING BRIEF INCLUDES DOCUMENTS NOT ADMITED AT TRIAL AND CANNOT BE CONSIDERED BY THIS COURT

NRAP 28(f) and 32(a)(7)(C) are the only two rules that reference "addendums" and these rules only permit an addendum to include statutes, rules and regulations, and only if the Court determines the issues presented require a study of these items. In no way do the rules permit a party to use an addendum as a means of attaching documents a party wants the Court to consider. This is particularly true where the documents attached were never made part of the record below.

But this is exactly what U.S. Bank did here. U.S. Bank attached an addendum to its opening brief that consists of (1) David Alessi's deposition transcript; (2) Katherine Ortwerth's deposition transcript (3) U.S. Bank's initital 16.1 disclosures with various documents attached; (4) U.S. Bank's second supplemental 16.1 disclosures with various documents attached; (5) SFR's Pre-trial Disclosures; and (6) U.S. Bank's pre-trial disclosures.

This case involves a trial. David Alessi was called as a witness in this case. His trial testimony is the only relevant testimony before this Court. Ms. Ortwerth's deposition transcript was never published nor were any portions of her transcript read into evidence or admitted. The documents attached to both U.S. Bank's initial and second supplental 16.1 disclosures are riddled with documents that either the District Court excluded based on SFR's hearsay and lack of authentication objections or were never offered by U.S. Bank at trial. Lastly, U.S. Bank includes SFR's and its own pre-trial disclosures, but SFR filed its pre-trial disclosures whereas U.S. Bank did not.

The Court cannot consider any portion of the addendum, save SFR's filed pre-trial disclosures, which were part of the record below, which U.S. Bank could have included in its appendix.

STANDARD OF REVIEW

Questions of law are reviewed *de novo* by this Court. *Century Steel, Inc. v. State, Div. of Indus. Relations, Occupational Safety & Health Section*, 122 Nev. 584, 588, 137 P.3d 1155, 1158 (2006). "We review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

In equitable actions, as in cases at law, the standard of review "is that this court will not disturb the finding of the lower court when supported by substantial evidence." *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562, 598 P.2d 1147, 1149 (1979) *citing Close v. Flanary*, 77 Nev. 87, 360 P.2d 259 (1961). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support the conclusion." *State Emp't Sec Dep't v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986) (superseded by statute on other grounds). Thus, the question is whether the trial court based its decision on substantial evidence; if based on substantial evidence this Court may not substitute its judgment for the lower court's determination. *Leeson v. Basic Refractories*, 101 Nev. 384, 705 P.2d 127, 138 (1985); *see also, Ogawa v Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) ("The district court's factual findings ... are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence.")

The substantial evidence review "does not permit this court to pass on

credibility or to reverse [a lower court's] decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it." *Robertson Transp. Co. v. P.S.C.*, 39 Wis.2d 653, 159 N.W.2d 636, 638 (1968) cited by *Hilton Hotels*, *supra.*

SUMMARY OF ARGUMENT

After a full trial on the merits, held over the course of six days, the District Court correctly granted judgment in favor of SFR. Prior to trial, U.S. Bank stipulated another entity (Universal) owned the loan and was beneficiary of the deed of trust at the time of the Association foreclosure sale. Universal was still the beneficiary of record at the time U.S. Bank filed its complaint. At trial, U.S. Bank failed to establish it was the real party in interest, thus the District Court properly found U.S. Bank lacked standing. The District Court appropriately exercised its discretion in excluding witnesses U.S. Bank failed to disclose. The District Court likewise properly exercised its discretion in prohibiting deposition testimony in lieu of live testimony where U.S. Bank failed to designate such testimony prior to trial as required by both the Rules and the District Court's trial order. And all documents included in the Joint Appendix but never entered at trial, as referenced above, are improperly before the Court and cannot be considered.

Irrespective of the lack of standing finding, the District Court properly found

U.S. Bank's claim was time-barred finding that a three-year statute of limitations applied to the claim, and properly finding that U.S. Bank's allegations of tender, made for the first time in May 2018, did not relate back to the original complaint.

At trial, U.S. Bank failed to establish the super-priority amount and that it delivered a proper tender prior to the sale. The District Court properly exercised its discretion in sustaining SFR's objections to various documents U.S. Bank attempted to admit based on lack of authenticity and hearsay. But even before this, U.S. Bank failed to preserve its appellate record on this issue by failing to make an offer of proof at trial regarding the documents excluded by the District Court. Thus, the issue of admissibily is not even properly before this Court. Additionally, the District Court's conclusion as to no proof of delivery was based on substantial evidence.

Finally, U.S. Bank never raised the issue of futility below, raising it for the first time on appeal. It waived the issue and should not be considered by this Court. For these reasons, this Court should affirm the District Court's judgment in favor of SFR.

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ARGUMENT

I. U.S. BANK DID NOT ESTABLISH ITS STANDING TO CHALLENGE THE SALE AT THE TIME IT FILED ITS COMPLAINT.

The District Court correctly ruled U.S. Bank, at the time it filed its complaint on July 12, 2016, was not the real party in interest and therefore lacked standing. Thus, the District Court properly dismissed U.S. Bank's complaint under NRCP 12(h)(3).

Under NRCP 17(a), "[a]n action must be prosecuted in the name of the real party in interest." As this Court recognized, "[a] real party in interest is one who possesses the right to enforce the claim and has a significant interest in the litigation." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011) (internal quotations omitted). In short, the determination is whether the plaintiff is the correct party to bring the suit. *See Elley v. Stephens*, 104 Nev. 413, 416-17, 760 P.2d 768, 771 (1988) ("appellants are asserting someone else's potential legal problem; they are not the proper party to assert [this claim]"); *see also Hammes v. Brumley*, 659 N.E.2d 1021, 1030 (Ind. 1995) (citing *Bowen v. Metro Bd. Of Zoning Appeals*, 317 N.E.2d 193 (Ind. App. 1974)) (a real party in interest is the person who is the true owner of the right sought to be enforced).

In the present case, **U.S. Bank** conveniently glosses over the fact it **stipulated that at the time of the Association sale, Universal was owner of the Ivy Note and**

beneficiary of record of the Deed of Trust. (SA_0016 at ¶ 16.) Also, at the time U.S. Bank filed its complaint on July 12, 2016, **Universal was still the recorded beneficiary of the Deed of Trust.** (SA_0016 at ¶ 18.) As such, at the time of trial, it was unrefuted Universal was the real party in interest on July 12, 2016, not U.S. Bank. "The inquiry into whether a party is a real party in interest overlaps with the question of standing." *Arguello,* 252 P.3d at 208. The question of standing "focuses on the party seeking adjudication rather than on the issues sought to be adjudicated." *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983). In order to have standing, the party must also have suffered a legally redressable harm and the suit must be "ripe" and not "moot" (at least as to the particular plaintiff) at the time of the lawsuit. *See Schwartz v. Lopez*, 132 Nev. 732, 742, 382 P.3d 886, 894 (Nev. 2016) (to establish standing, a party must show the occurrence of an injury that **is personal to him** and not merely a generalized grievance.) (emphasis added). Whether a party has standing is a question that goes to the court's jurisdiction. *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 964-65, 194 P.3d 96, 105 (2008); *Vaile v. Eighth Jud. Dist. Ct.,* 118 Nev. 262, 276, 44 P.3d 506, 515–16 (2002). A court lacks the power to grant relief when (1) an indispensable party is absent; or (2) the dispute is moot or not yet ripe, or a party does not have the legal right to seek or receive the requested relief. *See State Indus. Ins. Sys. v. Sleeper,* 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter

jurisdiction renders a judgment void"). *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing,* 42 Duke L.J. 1219, 1230 (1993); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers,* 17 Suffolk U.L.Rev. 881, 881 (1983).

"Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief" i.e. standing. *In re Amerco Derivative Litig.*, 127 Nev. 196, 213, 252 P.3d 681, 694 (2011) (internal quotations omitted) (citing Doe v. Bryan, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986)). Further, "a justiciable controversy [is] a preliminary hurdle to an award of declaratory relief." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986) citing *Southern Pacific Co. v. Dickerson*, 80 Nev. 572, 576, 397 P.3d 187, 190 (1964)). What constitutes a justiciable controversy is defined in *Kress v. Corey*, 65 Nev. 1, 25, 189 P.2d 352, 364 (1948) as:

> (1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectable interest; and (4) the issue involved in the controversy must be ripe for judicial determination.

Id. at 364.

Here, U.S. Bank fell short of these requirements. First, U.S. Bank had no claim of right at the time of filing the complaint because it did not become the recorded

beneficiary until July 2, 2018, nearly two years after the filing of the complaint. (JA01513-1514.) Second, in order for U.S. Bank's interest to be adverse to SFR's, U.S. Bank would actually have to have an interest in the first place. But at the time of filing the complaint, U.S. Bank had no interest in the Deed of Trust. Third, because U.S. Bank had no interest at the time it sued SFR, it follows that U.S. Bank did not have a legally protectable interest at the time of filing. Finally, because U.S. Bank had no interest at the time it sued SFR, all claims U.S. Bank asserted against SFR were not ripe for judicial determination.

Based on the above, the District Court correctly concluded U.S. Bank failed to show a justiciable controversy and failed to show any injury. As such, U.S. Bank lacked standing at the time the claims were filed against SFR. Nor can the later assignment to U.S Bank in July 2018, while this case was pending, cure the lack of subject matter jurisdiction at the outset. This is so because subject matter jurisdiction "cannot be conferred by the parties." *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). Under NRCP 12(h)(3), "[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." The District Court properly found U.S. Bank was neither the real party in interest, nor did it have standing at the time it filed its complaint, and thus the Court lacked subject matter jurisdiction from the outset. As such, under NRCP 12(h)(3), the District Court properly dismissed U.S. Bank's action.

II. THE DISTRICT COURT PROPERLY FORBID U.S. BANK FROM AMBUSHING SFR AT TRIAL TO CONTRADICT A STIPULATED FACT.

U.S. Bank admits it needed either Mr. Whittaker or Ms. Orweth's (the NRCP 30(b)(6) witness for U.S Bank) deposition testimony to prove standing. Specifically, U.S. Bank acknowledges it intended to use these witneses to authenticate the pooling and servicing agreement, which in turn, U.S. Bank claims would prove the Merrill Lynch Investors Trust owned the loan in question on the date of the Association sale and on the date U.S. Bank filed its complaint. But what U.S. Bank asks this Court to ignore, is U.S. Bank stipulated, prior to trial, that Universal was the owner of the Ivy Note and beneficiary of record at the time of the Association foreclosure sale. (SA_0016 at ¶ 16.) Likewise, at the time U.S. Bank filed its complaint, Universal was still the beneficiay of record. (SA_0016.)

This Court has recognized that "[s]tipulations are of an inestimable value in the administration of justice, and valid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008) *quoting Second Bapt. Ch. v. Mt. Zion Bapt. Ch.*, 86 Nev. 164, 172, 466 P.2d 212, 217 (1970) (citation omitted).

III. THE DISTRICT COURT CORRECTLY PROHIBITED U.S. BANK FROM CALLING AN UNDISCLOSED WITNESS AND USING NON-DESIGNATED DEPOSITION TESTIMONY.

U.S. Bank's inability to call Harrison Whittaker as a witness at trial was of its own making. U.S. Bank failed to comply with NRCP 16.1's disclosure requirements. All the District Court did was enforce the mandate of NRCP 16.1(e)(3). Further, U.S. Bank has no one but itself to blame for its inability to use depositon testimony from Katherine Ortwerth because again, U.S. Bank failed to comply with NRCP 16.1 and the District Court's trial order. U.S. Bank never designated any testimony it intended to offer at trial, and thefore the District Court properly enforced the Rules and its own order.

A. NRCP 16.1(e)(3) Mandated the District Cout's Prohibition of Harrison Whittaker, a Witness U.S. Bank Never Disclosed.

NRCP 16.1(a)(1)(A)(i)[12] provides a party is required, as part of its initial disclosures, to disclose the "name…of each individual likely to have information discoverable under Rule 26(b)…" NRCP 16.1(a)(3)(A)(i) similarly provides a party, as part of its pre-trial disclosures, is required to disclose "the name, and…the address

[12] For purposes of this appeal, any reference to NRCP 16.1 refers to the pre March 1, 2019 amendments to the rule, as the pre-amended version was the one in play at the time the disclosures were made.

and telephone number of each witness…" Most importantly, NRCP 16.1(e)(3) mandates the court prohibit the use of a non-disclosed witness:

> If an attorney fails to reasonably comply with any provision of this rule…the court **shall** impose upon a party…appropriate sanctions in regard to the failure(s) as are just, **including** the following:…**an order prohibiting the use of any witness**…that should have been disclosed…under Rule 16.1(a).

NRCP 16.1(e)(3).

Here, U.S. Bank admits it never disclosed Mr. Whittaker, by name, in either its intial disclosures or its pre-trial disclosures. Contary to U.S. Bank's contention, the analysis is not one under NRCP 37(c)(1) because NRCP 16.1(e)(3) mandates the Court prohibit any witness not named. Equally unavailing is U.S. Bank's reliance on a March 27, 2020 unpublished order of affirmance. *See SFR Investments Pool 1, LLC v. Bank of America, N.A.,* No. 77898 (March 27, 2020) (unpublished disposition). For one, in that case, SFR never argued NRCP 16.1(e)(3) like it does here and like it did below. (JA02844-2845; JA02503.)

Second, in the unpublished case, while Adam Kendis was not identified separately as a witness, the affidavit he signed was disclosed. The same cannot be said here. No document referencing or signed by Mr. Whittaker was ever disclosed. Couple this with U.S. Bank's failure to identify him by name, he was a complete surprise witness to SFR at trial, which SFR thoroughly explained in its objection. (JA02849-2851.) In fact, U.S. Bank also never disclosed the name of the company

who employed Mr. Whittaker, Ocwen Financial Corporaton. (JA02847.) The District Court took all this into account when making its proper ruling to exclude Mr. Whittaker as a witness. (JA02854-2855; JA02870-2871.) Finally, if it is not an abuse of discretion to allow a witness not specifically disclosed, it is equally not an abuse to discretion to disallow a witness not disclosed.

Despite the fact NRCP 37(c)(1) is not in play, SFR explained how it would be prejudiced and the District Court found SFR established it would be prejudiced. (JA02858; JA02872.) This Court cannot disturb this finding simply because it might disagree. *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 562, 598 P.2d 1147, 1149 (1979) *citing Close v. Flanary*, 77 Nev. 87, 360 P.2d 259 (1961).

B. The District Court Correctly Prohibited U.S. Bank From Using Non-Designated Deposition Testimony.

U.S. Bank failed to follow NRCP 16.1(a)(3)(A)(ii) which **mandates** that a party designate any witness whose testimony will be presented by deposition as part of its pre-trial disclosures. Contrary to U.S. Bank's contention, it did not disclose Ms. Ortwerth as a witness whose testimony would be presented via deposition. Instead, under the heading "U.S. Bank Expects to Use the Depositions as Allowed Under Nevada Law," it stated, "None at this time." (SA_0006.) In fact, at trial U.S. Bank's counsel had to concede Ms. Ortwerth's name appeared nowhere when prompted by the Court:

> THE COURT: And the Court did not see Ms. Ortwerth, O-R-T-W-E-R-T-H, named anywhere listed there on. Is she anywhere in there?
>
> MR. NITZ: No. It didn't say on there.

(JA02083:15-17.)

Additionally, the Distirct Court's trial order required parties to submit page and line desigations of any intended deposition testimony two judicial days prior to calendar call, and serve the same on all parties. (JA02086:11-17.) Any counter-designations were due one judicial day prior to calendar call. (*Id.*) U.S. Bank, however, failed to follow this rule too; it never made any page and line desingations. (JA02087-02088.)

It is axiomatic that a Court's enforcement of both the Nevada Rules of Civil Procedure and its own orders is not an abuse of discretion; particularly when the civil rule in play, like here, mandates disclosure and does not afford the Court discretion to excuse compliance. Nevertheless, U.S. Bank made no offer of proof at trial, nor does it cite to any such offer in its brief of how Ms. Ortwerth's testimony would have refuted the previously stipulated fact that at the time of the Association sale Universal owned the Ivy Note or that at the time of filing its complaint Merrill Lynch was really the beneficiary of the deed of trust despite the public record still reflecting Universal as the beneficiary. *See Lisser v. Kelly*, 88 Nev. 563, 566, 503 P.2d 108, 110 (1972) (refusing to consider error of trial court't refusal to admit

certain proffered testimony, where record did not contain an offer of proof reflecting what the testimony would have been.)

All told, the District Court did not abuse its discretion. U.S. Bank failed to follow the rules.

IV. U.S. BANK'S CLAIM IS TIME-BARRED.

The District Court's findings as to the statute of limations was made on two-fronts. First, the District Court found U.S. Bank's quiet title claim was governed by the three-year statute of limitations under NRS 11.190(3)(a). Second, the District Court found U.S. Bank's allegations of tender, made for the first time in its amended complaint filed on May 8, 2018, did not relate back to the original complaint. On both fronts the District Court got it right.[13]

A. U.S. Bank's Quiet Title Claim is Governed by NRS 11.190(3)(a).

U.S. Bank's reliance on *Arbor Park*[14] is unavailing. This Court should not follow *Arbor Park* because the analysis in this unpublished disposition is incorrect.

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[13] At the time of drafting this brief, this Court set oral argument in *U.S. Bank v. Thunder Properties, Inc*., Case No. 81129, which is the certified question from the Ninth Circuit as to the applicable statute of limitations on a quiet title claim filed by a lender, like U.S. Bank here. Depending on the outcome of that case, SFR reserves its right to request additional briefing on the statute of limitations issue.

[14] *U.S. Bank, N.A. v. SFR Investments Pool 1, LLC*, 461 P.3d 159 (Nev. 2020) (unpublished disposition) ("*Arbor Park*").

In every case where a bank, as lienholder, challenges an NRS 116 sale, whether the allegations sound in tender, fraud, unfairness or oppression, lack of compliance or constitutionality, all the allegations challenge how the Association conducted the foreclosure.

NRS 11.190(3)(a) provides that an "action upon a liability created by statute, other than a penalty or forfeiture" must be commenced within three years. "The phrase 'liability created by statute' means a liability which *would not exist but for the statute*." *Torrealba v. Kesmetis*, 124 Nev. 95, 102, 178 P.3d 716, 722 (2008). Regardless of how the allegations and causes of action are labeled, "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action." *Id*. at 723. *See also, Stalk v. Mushkin,* 125 Nev. 21, 25, 199 P.3d 838, 841 (2009) (noting that the nature of the claim, not its label, determines what statute of limitations applies).

1. An NRS 116 sale is a statutory foreclosure.

There is a presumption an association sale was properly conducted, and a properly conducted association foreclosure sale extinguishes all junior interests, including deeds of trust. *Nationstar Mortgage, LLC v. Saticoy Bay Series 2227 Shadow Canyon*, 133 Nev. 740, 745, 405 P.3d 641, 646 (2017). Thus, any challenge to the presumptive extinguishment of the deed of trust is, by its very nature, a

challenge to an association's actions under the statute in conducting the foreclosure. And this is evident by the countless complaints banks have filed, including both the initial and amended complaint filed by U.S. Bank here. All of the allegations involve complaints as to how the association failed to comply with NRS 116 or failed to conduct the foreclosure in a way that was consistent with NRS 116. This is true even after U.S. Bank alleged tender in May 2018 because any allegation that the super-priority portion was paid, is challenging the fact that a default of that portion of the lien existed thereby challenging the association's authority to foreclose on the deed of trust. *SFR Investments Pool 1, LLC v. Bank of America*, 134 Nev. 604, 605, 427 P.3d 113, 117 (2018) ("*Diamond Spur*") (noting a trustee has no power to convey an interest in land where the obligation is not in default). This is consistent with other opinions from this Court on wrongful foreclosure. *See Collins v. Union Fed. Sav. & Loan A''m*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale."). *See also, McKnight Family, LLP v. Adept Management Services, Inc*., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) ("A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.").

Because U.S. Bank's challenge to the sale in this case challenged the conduct of the Association under NRS 116, its claim, no matter how titled, is an "action upon a liability created by statute," and therefore carries a three-year statute of limitations.

2. Declaratory relief is a form of liability

Black's Law Dictionary defines "liability" as "legally accountable" and "legal responsibility to another…enforceable by a civil remedy." Liability, Black's Law Dictionary (11 ed. 2019). While U.S. Bank may attempt to distinguish declaratory relief as relief not holding SFR liable, this is a misnomer. By seeking to set aside the sale or void a portion of it, i.e. the portion that foreclosed the deed of trust, by way of an NRS 40.010 claim, rest assured a purchaser, like SFR, is held accountable for the association's failure to comply with NRS 116. Whether a purchaser like SFR loses its fee simple ownership or takes the property subject to a six figure plus deed of trust, SFR becomes legally responsible for an association's breach of NRS 116. In fact, where the property remains subject to the deed of trust, the title holder becomes legally responsible to pay the debt underlying the deed of trust or face enforcement via a foreclosure. Calling this just a declaration of rights as opposed to liability is a distinction without a difference.

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B. It is Untenable Claims Challenging the Sale Against the Association Carry a Three-Year Statute of Limitations, But When Alleged Against a Purchaser, Would Not Carry the Same Three-Year Statute of Limitations.

In *Arbor Park*, a panel of this Court found a bank's claims for wrongful foreclosure and breach of statutory duty, pled against an association, carry a three-year statute of limitations pursuant to NRS 11.190(3)(a). 461 P.3d 159. The same should hold true for U.S. Bank's NRS 40.010 claim asserted against SFR. To be clear, the statute in question is not NRS 40.010, but rather NRS 116. Specifically, the very same allegations that form the basis for the claims against an association are the same allegations that form the basis for the quiet title claim against SFR. This is so because what drives the "adverse claim" against SFR is not found in NRS 40.010 (this is just the vehicle); instead, the engine that drives the "adverse claim" is U.S. Bank's challenge to the validity of the association sale, either in whole, or in part. And the only way U.S. Bank invalidates the sale—in whole or in part— is to attack an association's compliance with NRS 116 or authority to even act under NRS 116.

This is why when quiet title is pled, it becomes imperative to analyze the underlying basis for the "adverse claim," as opposed to focusing on the label of the claim, and this is exactly what the District Court did here. In order to determine this, the Court must look at the nature of the grievance to determine the character of the

action, rather than the labels in the pleadings. *Torrealba*, 124 Nev. at 102, 178 P.3d at 723; *Stalk*, 125 Nev. at 25, 199 P.3d at 841. In that regard, depending on what gives rise to the "adverse claim" under NRS 40.010, the statute of limitations can vary. For instance, if the premise of the "adverse claim" under NRS 40.010 is fraud, this would carry a three-year statute of limitations. *See* NRS 11.190(4)(c).

When a lienholder's "adverse claim," like U.S. Bank's here, is contingent upon challenging the validity of the sale—in whole or in part—then at most, this type of quiet title claim carries a three-year statute of limitations because the claim attacks an association's compliance with NRS 116. Thus, it makes absolutely no sense NRS 11.190(3)(a) governs claims against an association, but does not equally govern the quiet title claim against SFR. The claims are all the same; they just carry different labels. As this Court held, "[t]he general rule for determining which statute of limitations should apply by analogy to a suit in equity is that the applicable statute of limitations should be applied as a bar in those cases which fall within that field of equity jurisdiction which is concurrent with analogous suits at law." *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 771, 383 P.3d 257, 260 (2016) *quoting Whittington v. Dragon Grp., LLC*, 991 A.2d 1, 9 (Del. 2009). *See also, In re Hoopiiaina Tr.*, 144 P.3d 1129, 1137 (Utah 2006) (holding that where a purported quiet title claim actually depended on the resolution of an underlying claim, the statute of limitations for the underlying claim was applicable).

Thus, this Court should hold NRS 11.190(3)(a) governs U.S. Bank's quiet title claim against SFR. Here, the sale occurred on July 25, 2012, but U.S. Bank did not file its complaint until July 12, 2016 or four years and 11 months after the sale.

SFR notes that in *Thunder Properties*, a statute of limtiations of four years is being argued. This too was argued below by SFR as an alternative. (JA00520.) Should this Court rule that a four-year statute of limitiatoins governs a lienholder's quiet title claim, this Court can still affirm the District Court's finding that U.S. Bank's claim was time-barred because the amended complaint was filed four years and 11 months after the sale.

C. Relation Back Neither Applies Nor Saves U.S. Bank's Late Claim.

Contrary to U.S. Bank's contentions, the District Court made no findings as to defenses; instead, the District Court rejected U.S. Bank's argument that its amended complaint (filed on May 8, 2018), which was amended to allege tender, did not relate back to U.S. Bank's original complaint (filed July 12, 2016), which had no allegations of tender. (JA02278-79.) The only way relation back saves U.S. Bank is if a longer statute of limitations applies i.e. something longer than four years. Because the District Court found a three-year statute of limitations, it also found relation-back, even if applicable, did not cure the late complaint. (JA002278.) This

Court should affirm, and can affirm if it finds a statute of limitations between three and four years.

But the District Court did not stop the analysis there. It also found even under the relation-back doctrine, U.S. Bank's amended complaint did not relate back to its original complaint. (JA002278-79.) NRCP 15(c) states that, "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading." (emphasis added). However, "where the original pleading does not give a defendant 'fair notice of what the plaintiff's [amended] claim is and the grounds upon which it rests,' the purpose of the statute of limitations has not been satisfied and it is 'not an original pleading that [can] be rehabilitated by invoking Rule 15(c).'" B*aldwin County Welcome Center v. Brown*, 466 U.S. 147, 149 n. 3, 104 S.Ct. 1723 (internal marks and citation omitted). See also, Glover v. F.D.I.C., 698 F.3d 139, 146 (3d Cir. 2012). In other words, the analysis under NRCP 15(c) is "whether the original complaint adequately notified the defendants of the basis for liability the plaintiffs would later advance in the amended complaint." *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 866 (D.C. Cir. 2008) (emphasis added). Similarly, Nevada law will not allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under

NRCP 15(c) after the statute of limitations has run. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556–57, 665 P.2d 1141, 1146 (1983).

Here, U.S. Bank did not allege tender until its amended complaint on May 8, 2018. The original complaint, filed on July 12, 2016, never alleged tender. It made no allegations whatsoever that the super-priority portion was cured. Simply put, anyone reading the original complaint would have no idea U.S. Bank would later claim it tendered the super-priority portion of the lien. Compare this to U.S. Bank's amended complaint, U.S. Bank completely changed the basis for which it was challenging the sale i.e. tender. Because of this, the District Court properly found U.S. Bank's amendment did not relate back to its original complaint. (JA02279 *citing Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 357 P.3d 966 (Nev. 2015).

D. NRS 11.070 Does Not Provide a Five-Year Statute of Limitations for U.S. Bank.

1. NRS 11.070 is a standing statute.

Under Nevada rules of statutory interpretation, the Court must first look to the statute's plain language. *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 451, 305 P.3d 898, 902 (2013). If the statute's, "language is clear and unambiguous," the Court must enforce it "as written." *Id.* (quotation omitted). The Court must "avoid[] statutory interpretation that renders language meaningless or superfluous," and

"interpret a rule or statute in harmony with other rules and statutes." *Id.* (quotation omitted).

Rather than define a time-period in which a party must file suit, "founded upon title to real property," NRS 11.070 sets a condition precedent which gives a party standing to bring an action **or** defend an action, and that condition is the party must have been seized i.e. ownership in fee[15] or possessed of the real property in question, five years prior to bringing the action **or** defending the action. Both the title of the statute and the language within, namely "no cause of action…unless" make it clear that the statute is a standing statute. The fact that the statute also limits the **defense** of such an action "unless" the condition precedent exists also makes it clear that NRS 11.070 is not a time-bar statute, but rather a standing statute. This Court, in interpreting the identical predecessor to NRS 11.070, stated that the statute, "imposes a general inability to sue or defend upon any right claimed in real estate, unless the party suing or defending shall have been in possession of the real estate within five years last past." *Chollar-Potosi Mining Co. v. Kennedy & Keating*, 3 Nev. 365, 369 (1867).

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[15] *South End Minding Co. v. Tinney*, 22 Nev. 19, 35 P. 89, 92 (1894) ("the word 'seised' means something different from simple possession of a claim…If so, it must mean, as it would naturally import, an ownership in fee, for this is the only other kind of ownership known to the law.")

In this regard, NRS 11.070, can never bar a claim or a defense by a party who is currently record title holder or who had title within the preceding five years of bringing the claim or asserting the defense. This is so because such party meets the condition precedent of NRS 11.070 in that the party is seized of the property. Even if the party was not seized, so long as the party currently has possession or had possession of the property within the preceding five years of the claim or defense, that party also cannot be barred from its claim or defense. By way of example, party A becomes record title holder and takes possession of Blackacre on January 1, 2000. Then on January 2, 2000, party B records a fraudulent deed transferring title to Blackacre to himself. In that scenario, party A has possession, and party B has title. Nothing under NRS 11.070 requires that party A or party B file an action against one another five years from January 2, 2000. Instead, both party A and party B have standing under NRS 11.070 to bring a claim or maintain a defense because party A has possession and party B is seized. If this scenario stayed the same, and we fast forward to today, some 18 years later, both parties would still have **standing** under NRS 11.070 to bring a claim or maintain a defense to an action "founded upon title to real property." Neither would be barred from bringing such a claim or asserting such a defense. The statute of limitations would be determined by the actual claim asserted in the complaint.

NRS 11.070 makes no mention of an accrual of a claim "founded upon title;"

instead, it only discusses the necessary condition a party must have in order to have standing to assert a claim or defense. In this regard, while NRS 11.070 may bar a claim/defense, it will not be because of any time-limitation; it will be because the party was not seized or possessed of the property i.e. the party lacks standing.

2. NRS 11.070 does not apply to U.S. Bank.

NRS 11.070 states in relevant part

> No cause of action…founded upon the **title to real property**,…shall be effectual, unless it appears that **the person prosecuting the action…was seized or possessed of the premises in question within 5 years before the committing of the act** in respect to which said action is prosecuted…

NRS 11.070 (emphasis added.)

In the present case, U.S. Bank sought a declaration that the deed of trust remains a valid lien on the property. Simply because U.S. Bank uses the slang term "quiet title" or that it claims the deed of trust still clouds title does not morph the claim into one "founded upon title to real property." *See e.g. Bank of America, N.A. v. Country Garden Owners Association*, Case No. 2:17-cv-01850-APG-CWH, 2018 WL 4305761 (D. Nev. March 14, 2018) (finding NRS 11.070 does not apply to bank's claim); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, Case No. 2:17-cv-01757-JAD-VCF, 2018 WL 2292807 (D. Nev. May 18, 2018) (finding neither NRS 11.070 nor 11.080 apply to the bank's claim).

As this Court has held, while **a lien** is a monetary encumbrance on property which clouds title, "it **exists separately from that title**," and therefore an action involving the lien does not relate to title. *Hamm v. Arrowcreek Homeowners Ass'n*, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008). In *Hamm*, the Court noted "a lien right alone does not give the lienholder right and title to the property." *Id.*, quoting *In re Marino*, 205 B.R. 897, 899 (Bankr.N.D.Ill.1997). Rather, "title 'which constitutes the legal right to control and dispose of property' remains with the property owner until the lien is enforced through foreclosure proceedings."' *Id.* quoting BLACK'S LAW DICTIONARY 1522 (8th ed.2004).

With this principle in mind, NRS 11.070 does not apply to U.S. Bank's claim because the claim is not one "founded upon title to real property." U.S. Bank, as mere lienholder, claims a lien right, and nothing more. The claim is an attempt to obtain a determination that the lien survived the sale; it is not a claim founded upon title. If that was not enough, as discussed above, NRS 11.070 is not a time-bar statute, it is a standing statute; U.S. Bank as mere lienholder would never have standing to assert a claim or defend a claim founded upon title to real property because it was neither seized nor possessed of the property. Thus, a plain reading of NRS 11.070 shows that this statute has no application whatsoever to U.S. Bank.

This District Court agreed with this analysis and this Court should affirm.

E. NRS 11.080 Does Not Provide a Five-Year Statute of Limitations for U.S. Bank.

1. NRS 11.080 is a standing statute.

NRS 11.080 sets the same condition precedent for actions for the "recovery of real property" or the "recovery of the possession thereof." Again, the statute does not state the action must be filed within five years; instead, the statute states that "no action for the recovery of real property, or for the recovery of the possession thereof… shall be maintained, unless…" the party bringing the action was seized or possessed of the premises five years before commencing the action. The terms "maintained" and "unless" make it clear, that NRS 11.080 is a standing statute.

By way of example, party A acquires 100 acres of real property on January 1, 2000. Party B takes possession of 10 acres of that same property on January 2, 2000. Nothing in NRS 11.080 requires party A to file an action against party B within five years of January 2, 2000. Instead, party A, so long as he maintains title to the property (i.e. seisin), can bring an action against party B even today, some 18 years past the date party B took possession. Party A will not be barred merely because he filed his action greater than five years; this is not the analysis under NRS 11.080. Instead, the analysis is did party A have title or possession of the property within five years prior to bringing the action. In this scenario, because party A persistently maintained title, it is inconsequential how many years have passed since party B

took possession (in the example above 18 years ago). The question is not when the claim accrued, as NRS 11.080 makes no mention of accrual of a claim; instead, the sole focus is standing—whether party A had title or possession within five years of filing the action, not whether he filed his action within five years of party B taking possession.

While U.S. Bank relies on *Gray Eagle*,[16] which noted in dicta that NRS 11.080 is a five-year statute of limitations which runs from the date of the association sale, this was still only noted in the context of a person who was both seised and possessed of the property i.e. the NRS 116 purchaser. As such, *Gray Eagle* does not run afoul of SFR's interpretation, and does nothing to aid U.S. Bank. But most importantly, when this statute was used as a sword by a bank against a purchaser, this Court took a closer look at the language of NRS 11.080 and corrected its earlier mistake that it provided a five-year statute of limitations running from the association foreclosure sale. *See Berberich v. Bank of America, N.A.*, 136 Nev. 93, 96, 460 P.3d 440, 442 (2020) ("Now taking a closer look at the statute's plain language, we clarify that the limitations period provided by NRS 11.080 only starts to run when the plaintiff has been deprived of ownership or possession of the property.")

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[16] *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP Morgan Chase Bank, N.A.*, 388 P.3d 226 (Nev. 2017).

2. NRS 11.080 does not apply to U.S. Bank.

NRS 11.080 states in relevant part

> No action for the **recovery** of real property, or for the **recovery** of the possession thereof . . . shall be maintained, unless it appears that the plaintiff . . . **was seized or possessed of the premises in question**, within 5 years before the commencement.

NRS 11.080 (Emphasis added.)

Again, U.S. Bank, as a lienholder, sought a declaration that the deed of trust remains a valid lien on the property. By way of this claim, U.S. Bank does not seek "recovery" or "recovery of possession" of the property.

Even if the Bank succeeded on its claim, and SFR had taken subject to the deed of trust, U.S. Bank would still have to foreclose on the deed of trust to get possession of the property. *Hamm*, 124 Nev. at 298, 183 P.3d at 902. Also, just like NRS 11.070, NRS 11.080 likewise requires that before a party can maintain an action to recover real property it must have been seized or possessed of the property. In the context of challenging an NRS 116 sale as a lienholder, U.S. Bank does not have standing to assert a claim because it cannot establish it was seized or possessed of the property. As such, NRS 11.080 has no application whatsoever to U.S. Bank.

This District Court agreed with this analysis and this Court should affirm.

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V. THE DISTRICT COURT PROPERLY EXCLUDED VARIOUS DOCUMENTS FOR LACK OF AUTHENTICATION AND HEARSAY.

As this Court noted, "[w]e review a district court's decision to admit or exclude evidence for an abuse of discretion." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Further, where the evidence excluded does not appear in the record, the question as to admissibility is not properly before the Court. *Springer v. Pritchard*, 22 Nev. 313, 313, 39 P. 1009, 1009 (1895). *See also*, *Foreman v. Ver Brugghen*, 81 Nev. 86, 89-90, 398 P.2d 993, 995 (1965) (court could not review exclusion of medical texts for abuse of discretion where texts were not made part of record via an offer of proof.)

Here, while U.S. Bank included the excluded documents as part of its appendix, these documents were not made part of the trial record via an offer of proof, and therefore U.S. Bank should not have included them in the appendix in the first instance. *See* NRAP 10 and 11. The excluded documents are not part of the record, and therefore whether the trial court abused its discretion cannot be reviewed by this Court.

While this ends the inquiry, the District Court did in fact properly exercise its discretion in excluding the various documents based on lack of authentication and hearsay.

A. None of the Witnesses Proffered Court Authenticate the Documents.

The first step in admitting business records is through authentication which is governed by NRS 52.260. NRS 52.260(1) requires first that a business record be authenticated by "a custodian of the record or other qualified person." NRS 52.260(6)(a) defines "custodian of record" as "an employee or agent of an employer who has the care, custody and control of the records of the regularly conducted activity of the employer." In short, the custodian must be an agent/employee of the entity whose documents the custodian seeks to authenticate. In other words, the custodian of company A, who is not an agent/employee of company B, cannot authenticate the records of company B.

While NRS 52.260 does not define "other qualified person" the 9th Circuit has defined it as "a witness who understands the record-keeping system." *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir.1990). Other courts have similarly held that the person must be familiar with and have knowledge of how the data is produced and created. *See Sanchez v. Suntrust Bank*, 179 So.3d 538, 541 (Fla. 4th DCA 2015) (holding person must be familiar with and have knowledge of how the "company's data [is] produced."); *Cayea v. CitiMortgage, Inc.*, 138 So.3d 1214, 1217 (Fla. 4th DCA 2014) (holding the witness must be "well enough acquainted with the activity to provide testimony."); *Glarum v. LaSalle Bank Nat. Ass'n*, 83 So.3d 780, 783 (Fla.App. 4 Dist. 2016) (finding an employee not qualified to

authenticate data entries in a computer system of his own company because employee was not familiar with how his own company produced such data.); *H & E Equipment v. Floyd*, 959 So.2d 578, 581 (Miss. App. 2007) (trial court properly excluded invoices because custodian failed to explain how the invoices, many of which were reprints, were created, or that the invoices relied on were created at the time the charges were incurred.); *Bower v. Bower*, 758 So.2d 405, 414-415 (Miss. 2000) (finding husband could not authenticate his monthly internet bills to prove wife's internet usage); *In re K.C.P.,* 142 S.W.3d 574, 578 (Tex.App.-Texarkana 2004, no pet.) (witness must have personal knowledge of the manner in which the records were prepared.)

Secondly, the custodian or other qualified person **must** verify that the record was:

- Made at or near the time of the act;
- By or from information transmitted by a person with knowledge; and
- In the course of the regularly conducted activity.

NRS 52.260(2)(a) & (b).

Regarding the ledger attached to the payoff demand, JA00690-94, and despite U.S. Bank's assertion otherwise, this was never made part of the record.[17] But the District Court properly found the document was not a Miles Bauer record, and thus Rock Jung, a former employee of Miles Bauer could not authenticate the record. (JA02602:18-22; JA02603:11-12.)[18] The District Court likewise correctly found the ledger was not an Alessi & Koenig document and therefore could not be authenticated by Mr. Alessi. (JA02723-2724; 02726-02728; 02731-2732.) The same is true of Mr. Miles. The very same document was attached to Mr. Miles' affidavit (proposed exhibt 31; also not part of the record), but like Mr. Alessi and Mr. Jung, Mr. Miles could not authenticate the document. (JA02628-2630; JA02904-2907.) The same is also true for the HOA account ledgers found in Alessi & Koenig's collection file. Documents marked JA0113-20 were only admitted for non-hearsay purposes. (JA02818:20-25.) The District Court found Mr. Alessi could not authenticate the documents. (JA02814:22-23.)

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[17] On page 28 of U.S. Bank's opening brief, it states the ledger "was admitted into the trial record as Exhibit 23" but this is not true. The District Court sustained SFR's objection, which U.S. Bank acknowledges in the reaminder of that sentence in its brief. *See* Page 28 of Opening Brief *citing* JA02603:11-12.

[18] The District Court also sustained the objection based on hearsay, which is discussed in more detail in Section V. B.

Nothing in Mr. Alessi's testimony, Mr. Jung's testimony or Mr. Miles affidavit established that these gentlemen were the custodian for Antelope HOA. Additionally, neither Mr. Alessi, Mr. Jung nor Mr. Miles met the definition of "other qualified person" because they never testified/attested they were familiar with any of the third-party entities' record-keeping system. They did not know how any of the information contained in the statement of accounts or ledgers was created or maintained.

Finally, with respect to the HOA ledgers produced by the HOA, (proposed ex. 44, also not part of the record), SFR objected on the basis that under the business records exception, for computerized records the focus is not on how the records are maintained, but rather how the computer system is maintained to ensure the trustworthiness of the information contained within the document, and in support of this objection cited *In re Vee Vinhnee*, 336 BR 437 (9th Cir. 2013). (JA0216-2017.) SFR further objected because based on the testimony of Ms. Sauceda it became clear she had only reviewed a copy of a copy. (JA02025.) The District Court ultimately sustained SFR's objections. (JA02028-2029; JA02036; JA02049; JA02062.)

In short, the Distrtict Court properly sustained SFR's lack of authenticaton objections to these documents.

B. The Documents Constituted Inadmissible Hearsay.

The District Court properly excluded the documents based on hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *See* NRS 51.035 generally. Hearsay is inadmissible unless it meets various exceptions or exemptions. *See* NRS 51.065. When dealing with double hearsay, or hearsay within hearsay, the general rule of inadmissibility applies unless each part of the combined hearsay conforms to an exception to the hearsay rule. *See* NRS 51.067.

The business record exception rule (NRS 51.135) tracks the same requirements of authentication for business records, with the most important part being that the witness must be the custodian or other qualified person. Simply put, documents received from another entity are not admissible under the business exception rule if the witness is not qualified to testify about the originating entity's record keeping. *See Powell v. Vavro, McDonald, & Assoc., L.L.C.*, 136 S.W.3d 762, 765 (Tex.App.-Dallas 2004, no pet.) (custodian of records for travel agency was not qualified to testify as to records received from third-party company, showing credits to customers' credit card account). What is more, "when a business record contains a hearsay statement, the admissibility of the record depends on whether the hearsay statement in the record would itself be admissible under some exception to the hearsay rule." *Van Zant v. State,* 372 So.2d 502, 503 (Fla. 1st DCA 1979).

Additionally, "if the person who prepared the record [can] not testify in court concerning the recorded information, the information does not become admissible as evidence merely because it has been recorded in the regular course of business." *Id.*

For example, in *Landmark American Ins. Co. v. Pin-Pon Corp.*,[19] the appellate court found the trial court erred in admitting a third-party's breakdown of costs for code upgrades prepared by a contractor because the witness proffered by Pin-Pon, the architect, could not testify as to when the documents were made or whether they were made by a person with knowledge. *Id.* at 440-442.

The Court reasoned that while it was not necessary for Pin–Pon to call the person who actually prepared the business records, because Pin-Pon could not establish the architect was either in charge of the activity constituting the usual business practice or was well enough acquainted with the activity to give the testimony, the record was inadmissible hearsay. *Id.* The Court stated, "[a]lthough the documents in Exhibit 98 might have qualified as the general contractor's business records, the mere fact that these documents were incorporated into the architect's file did not bring those documents within the business records exception. *Id. See also, Nat'l Car Rental Sys., Inc. v. Holland*, 269 So.2d 407, 413 (Fla. 4th DCA 1972) (fact

[19] 155 So.3d 432 (Fla. 4th DCA 2015).

that a document is incorporated into a business's records does not automatically bring the document within the business records exception to the hearsay rule.) In *Holland*, the court noted that to hold otherwise, would mean "every letter which plaintiff's employer received in connection with the operation of his business and which was subsequently retained as part of his business records ipso facto would be fully competent to prove the truth of its contents." *Id.* And this is simply not the law.

In the present case, the documents U.S. Bank sought admission of was the Association's account ledgers (just produced duplicatively in the various proposed exhibits). U.S. Bank sought admission of these ledgers to prove the monthly common assessment amount, to then prove the amount they paid constituted the super-priority portion. This is hearsay. In its brief U.S. Bank attempts to dance around the hearsay by claiming it only sought to offer the ledgers to show Mr. Jung's reliance on them, but then negates this when it claims had the District Court admitted the ledger it "would have been able to show that tender was properly made." (Opening Brief, at p. 30.) But the only way to do this is to accept as true the figures listed in the ledgers; this is hearsay.

While U.S. Bank argued the business exception rule, none of the proffered witnesses testified they were familiar with how the records were created, how the information contained in the records was maintained or that the records were created by someone with knowledge. This is exactly what SFR argued to the District Court,

and the District Court agreed with SFR. (JA02608-2609; JA02723-2724; 02726-02728; 02731-2732; JA02723-2724; 02726-02728; 02731-2732; JA02014:10-11; JA02027:6-16; JA02028:13-25; JA02035; JA02049; JA02062.) All told, U.S. Bank sought to side-step the business exception rule by merely relying on the fact that the documents happned to be located in Alessi & Koenig's records, Miles Bauer's records or Camco Management's records. But as the cases cited above highlight, this is insufficient.

Because the District Court did not abuse its discretion, this Court should affirm the judgment in favor of SFR.

VI. PROOF OF DELIVERY OF TENDER IS REQUIRED UNDER NEVADA LAW.

Contrary to U.S. Bank's contention, the District Court did not err in requiring U.S. Bank to prove delivery of tender. Proof of delivery is required under Nevada law. In Nevada, "[v]alid tender requires payment in full." *Diamond Spur*, *supra*. In order to prevent extinguishment, a first deed of trust beneficiary must deliver payment, prior to the sale, of the full amount of both the super-priority portion. Failure to do so before the sale will result in extinguishment of the deed of trust. *SFR Investments Pool 1, LLC v. U.S. Bank*, 130 Nev. 742, 757, 334 P.3d 408, 419 (2014). Most importantly, "[t]he burden of demonstrating that the delinquency was cured presale, rendering the sale void, [is] on the party challenging the foreclosure..."

Resources Group, LLC v. Nevada Association Services, Inc., 437 P.3d 154, 156 (Nev. 2019).

U.S. Bank claims Nevada law does not require proof of delivery, and bases this argument on the fact the *Diamond Spur* decision never addressed delivery. Just because delivery was not an issue in *Diamond Spur* does not mean Nevada law does not require proof of delivery. In fact, in making this argument, U.S. Bank completely ignores *Resources Group*, which issued *after Diamond Spur* and dealt directly with delivery.

Specifically, in *Resources Group*, the issue was not even valid tender, it was whether the tender was delivered prior to the sale. *Resources Group*, 437 P.3d at 156-57. Because the tendering party did not prove its tender arrived prior to the sale, it was divested of title to the property, and title passed to the third-party purchaser. *Id.* at 159. Thus, not only was delivery an issue, the *timing* of delivery became paramount. Thus, it can hardly be said delivery is not a burden of proof in Nevada. In fact, by U.S. Bank's logic, it would need only show it wrote a check and automatically get the benefit of tender. But inherent in the definition of tender is payment that is actually presented.

At trial, U.S. Bank offered a letter with a check written from Miles Bauer's Trust Account in the amount of $405.00, dated December 16, 2011 (JA000695-697) ("Trial Ex. 24"), but there was no evidence the check was in fact delivered to Alessi.

Mr. Jung only testified about general practices of the firm in terms of delivering similar checks like the one at Trial Ex. 24, but had no personal knowledge about Trial Ex. 24, and therefore offered no specific testimony about Trial Ex. 24. (JA2556-2557.) Mr. Jung was asked if he recalled sending a tender check in this case, and his answer was, "[i]dependently, I don't." (JA02557:23-25.)

U.S. Bank offered no run slip or testimony from any runner that Trial Ex. 24 was in fact delivered to Alessi prior to the sale. The District Court commented in its conclusions, this was particularly compelling in light of Mr. Jung's testimony that the practice of Miles Bauer was to deliver said letters *via runner/hand delivery*. (JA02557:12-14; 2558:19-23.) This also comports with Mr. Alessi's testimony. (JA02829.)

Likewise, U.S. Bank offered no receipt of copy to show delivery. Again, the District Court found this was compelling in light of Mr. Alessi's testimony that delivery of said letters were accompanied by a receipt of copy which Alessi signed when it accepted the letter. (JA02829:11-18.) Further, Mr. Alessi testified it was the practice of Alessi to maintain a copy of letters like Trial Ex. 24 in the file and/or notate its status report of receipt of such a letter. (JA02829-2830.) The letter was absent from Alessi's file and the status report does not notate receipt of Trial Ex. 24. (JA02827:23-25-2828:1; JA01159-1160.)

NRS 51.145 provides that "[e]vidence that a matter is not included in the

records in any form, of a regularly conducted activity, can be used to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which was regularly made and preserved."

The District Court further found, "[w]hat is included in the status report, in addition to what is not, also convinces the Court that [Trial] Ex. 24 was not delivered." Specifically, on June 8, 2012 and July 3, 2012, nearly a year after Trial Ex. 24 was dated, Alessi received two payoff requests from Miles Bauer. Had Miles Bauer delivered Trial Ex. 24, these payoff requests make little sense. (JA01159-1160.) Additionally, Ocwen, the servicer of the loan inquired of Alessi about excess proceeds on September 24, 2014. (*Id.*) As the District Court found, "had U.S. believed it tendered the super-priority amount, its servicer would not have sought out excess proceeds as these monies are only available to junior, extinguished lienholders. (JA02296:12-16 *citing* NRS 116.31164.)

The District Court's reliance on these facts, and the weight it gave to these facts cannot be disturbed by this Court even if this Court would not weigh the evidence the same. As this Court's precedent dictates, "[i]f the judgment…is sustained by findings and evidence, **it is our duty to affirm it**, for in so doing we do not have to lend approval to the mental processes of the trial court." *Goldsworthy v. Johnson*, 45 Nev. 355, 204 P. 505, 507 (1922) (emphasis added.)

But U.S. Bank ignores this standard and instead asks this Court to consider

different evidence, and substitute its judgment in the place of the District Court's judgment. Again, under the substantial evidence standard, the only question before this Court is whether the trial court based its decision on substantial evidence; if based on substantial evidence this Court may not substitute its judgment for the lower court's determination. *Leeson and Ogawa, supra.*

Here, the District Court's judgment in favor of SFR was supported by substantial evidence, thus, this Court must affirm.

VII. U.S. BANK NEVER RAISED FUTILITY BELOW, AND THEREFORE THIS ISSUE IS WAIVED.

This Court should reject U.S. Bank's argument regarding futility as this issue was never raised below. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

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CONCLUSION

This Court should affirm the District Court's judgment in favor of SFR.

DATED this 14th day of June, 2021.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type-style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word with 14 point, double-spaced Times New Roman font.
2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the pages of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, is 57 pages long, and contains 12609 words.
3. I hereby certify that I have read this 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), 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.

…

…

4. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 14th day of June, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 14th day of June, 2021. Electronic service of the foregoing **Respondent's Answering Brief and Respondent's Supplemental Appendix** shall be made in accordance with the Master Service List.

Dated this 14th day of June, 2021.

/s/Jacqueline A. Gilbert
An employee of KIM GILBERT EBRON