IN THE SUPREME COURT OF THE STATE 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, Respondent.	CASE NO. 79235 Appeal from Eighth Judicial District Court, Case No.: A-16-735867-C (Dept. XXXI)

APPELLANT'S REPLY BRIEF

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RULE 26.1 DISCLOSURE

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

Appellant U.S. Bank, National Association As Trustee For Merrill Lynch Mortgage Investors Trust, Mortgage Loan Asset-Backed Certificates, Series 2005-A8 (the "Trustee") is a wholly-owned subsidiary of U.S. Bancorp and there are currently no owners holding in excess of 10% of the outstanding stock.

The following attorneys appeared on behalf of the Trustee before the district court or in this Court on this matter: Christina V. Miller, Esq., Lindsay D. Robbins, Esq., and Aaron D. Lancaster, Esq., and formerly with Wright, Finlay & Zak, LLP, Dana Jonathan Nitz, Esq., Natalie C. Lehman, Esq., Regina A. Habermas, Esq., Jamie S. Hendrickson, Esq., Edgar C. Smith, Esq., and Victoria L. Hightower, Esq.

DATED this 9th day of August, 2021.

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LEGAL ARGUMENT

A. THE TRUSTEE HAS A LEGAL RIGHT TO SEEK RELIEF AGAINST SFR.

The Trustee submits that the District Court abused its discretion by refusing to allow the Trustee to present testimony to establish its standing to pursue relief against SFR. SFR objects, arguing that the Trustee had stipulated that Universal was the owner of the Note and beneficiary of the Deed of Trust at the time of the HOA Sale, and the Trustee must be the beneficiary of the Deed of Trust in order to have a legally cognizable interest and standing to pursue claims against SFR.[1] Answering Brief ("AOB") at 19-22.

SFR's position is incorrect. A recorded assignment is neither essential nor even a prerequisite to establishing standing to pursue an action other than to enforce a note and deed of trust. *See Edelstein v. Bank of New York Mellon,* 128 Nev. 505, 522-24, 286 P.3d 249, 261 (2012). SFR failed to acknowledge or address this authority and argument set forth in the Trustee's Opening Brief. Regardless, whether or not the Trustee was assigned the Deed of Trust before or after initiation of the subject action is irrelevant, the Trustee owned the underlying loan and possessed the Note endorsed in blank at the time of the filing of the Complaint in this action. Joint Trial Exhibit 43, IX:JA001521-1527. Counsel for SFR

[1] Defined terms have the meaning ascribed to them in the Trustee's Opening Brief, filed on June 15, 2020.

acknowledged its review of the original collateral file containing the original Note, endorsed in blank, on October 24, 2018, months prior to trial. *Id*. at IX:JA001515.

While status as beneficiary of a deed of trust and holder of a promissory note may be required to pursue foreclosure (*id*.), there is no such requirement for standing to pursue declaratory relief against SFR. Subject matter is conferred where a party has the legal right to seek or receive the requested relief. *See* AOB at 20 (citing *State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). Here, the Deed of Trust, Joint Trial Exhibit 5 (III:JA00595-616) expressly contemplates that "[t]he Note or a partial interest in the Note (together with the Security Instrument) can be sold one or more times without prior notice to Borrower." III:JA00605, ¶20. As such, there was constructive notice, at a minimum, to SFR that an entity other than Universal may own the loan reflected in the Note. Although SFR focused its objection at trial, and continued in its Answering Brief, that the Trustee must be the beneficiary of record of the Deed of Trust in order to be the real party in interest, this position ignores other interests in the loan and Note and the actual standing requirement under Nevada law.

"'To have standing, the party seeking relief [must have] a sufficient interest in the litigation, so as to ensure the litigant will vigorously and effectively present his or her case against an adverse party.' *Nationstar Mortg., LLC v. SFR Ivest. Pool I, LLC*, 133 Nev., Adv. Op. 34, 396 P.3d 754, 756 (2017)." *Saticoy Bay LLC*

Series 9641 Christine View v. Fannie Mae, No. 69419, 2018 WL 1448731 (Nev. Mar. 21, 2018). Certainly holding the note and owning the Loan and being the beneficiary of record on the Deed of Trust, reflected in a later-recorded Assignment, threatened with extinguishment should qualify for such a sufficient interest.

The Note is a negotiable instrument within the meaning of NRS 104.3102(1). The Trustee has owned the Loan at all relevant times and is entitled to enforce it as a negotiable instrument because the Note bears a chain of endorsements from the former holder, Universal, resulting in an allonge endorsed in blank. NRS 104.3301(1)(a), 104.3109, 104.3201. In *Leyva v. National Default Servicing Corp.*, 127 Nev. 470, 255 P.3d 1275 (2011), this Court described in detail how a promissory note may be enforced by someone other than the payee named on the note, and consistent with Nevada's version of the Uniform Commercial Code. 127 Nev. at 479, 255 P.3d at 1280-81.

Regardless of the subsequent Assignment to the Trustee, the Trustee has been the holder of the original Note at all relevant times since filing of the Complaint. The Trustee had standing to assert its rights in this matter because of the imminent and irreparable injury it stands to suffer as a direct result of SFR asserting a superior title interest to the Property.

At the time of the trial, the Trustee's NRCP 30(b)(6) witness, Harrison Whittaker, was prepared to testify concerning the Trustee's ownership and possession of the Note from the time the Complaint was filed. At a minimum, the deposition testimony of Katherine Ortwerth, an earlier NRCP 30(b)(6) witness for the Trustee and deposed by SFR during discovery, was designated by SFR and available to the Court. Had the district court not abused its discretion in failing to admit testimony from either Mr. Whittaker or Ms. Ortwerth (*see* Opening Brief at 12-17), the Trustee would have been able to move to admit proposed Exhibits 40 (the Pooling and Servicing Agreement with the associated Schedule of Loans for the Trustee ("PSA") and 41 (a copy of the original Note), to establish that the Trustee was the real party in interest with standing at the time of filing the Complaint.

While not required, the Trustee also moved to introduce proposed Exhibit 43, the collateral file containing the original wet-ink Note that was reviewed by SFR in the course of discovery. XI:JA02106. However, due to the district court's erroneous decision not to allow the Trustee to present a witness at trial, it was not allowed to authenticate the collateral file and original Note, thereby preventing

their admission into the record. *Id*. The district court's errors prevented the Trustee from presenting the evidence that would have established its standing.[2]

1. Standing is determined at the time of filing the Complaint.

SFR contends that it was "ambushed" at trial because the Trustee had previously stipulated to the fact that Universal was the owner of the Note and beneficiary of record of the Deed of Trust at the time of the HOA Sale. SA_0016. But this is a fatal flaw in SFR's argument. Ownership of the Note and beneficial interest in the Deed of Trust at the time of the HOA Sale are irrelevant to standing. Standing is determined at the time of filing a complaint. *See Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016) ("The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation."); *Harman v. City & Cty. Of San Francisco*, 7 Cal.3d 150, 496 P.2d 1248, 1254 (Cal. 1972) ("The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a…court.")).

The Trustee had standing at the time of filing the Complaint in 2016 because it was the owner of the Loan. Testimony from Mr. Whitaker or publication of Ms. Ortwerth's deposition transcript at trial would have proven the Trustee's standing.

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[2] It should be noted that the Trustee's standing is irrelevant to SFR's Counterclaim to quiet title, where it sued the Trustee.

2. The district court abused its discretion by improperly imposing the harshest penalty on the Trustee when it refused to allow Harrison Whitaker to testify.

The district court's refusal to permit Harrison Whitaker to testify on behalf of the Trustee was an abuse of its discretion. SFR insists that the district court reached the correct conclusion because technical noncompliance with NRCP 16.1 is fatal to the Trustee's ability to call Mr. Whitaker as a witness. AOB at 24-26. But NRCP 16.1 does not impose such mandatory, draconian penalty as SFR would have this Court believe.

First, NRCP 16.1(e)(3) requires *reasonable compliance* with the provisions of NRCP 16.1. The Trustee met this requirement by disclosing the NRCP 30(b)(6) witness for the Trustee during discovery and in its pre-trial disclosures. The Trustee also identified Katherine Ortwerth as its corporate designee on behalf of the Trustee, a business entity. It was only in February 2019 that the Trustee learned Ms. Ortwerth was no longer employed by the Trustee's loan servicer and, therefore, unavailable for trial. XV:JA02845-46. As such, the failure to name Mr. Whitaker at an earlier time was substantially justified. *See Order of Affirmance, SFR Investments Pool 1, LLC v. Bank of America, N.A.,* Case No. 77898 (unpublished disposition) (Nev. March 27, 2020).

Second, the failure to name Mr. Whitaker specifically as a trial witness was harmless to SFR. Although SFR claims that it would suffer prejudice (AOB at 26)

such feigned prejudice was merely hypothetical. The record reflects that no prejudice would have befallen SFR because other sources of information to prevent surprise or advantage to the Trustee were in place. Specifically, Mr. Whitaker was not a percipient witness, but simply the NRCP 30(b)(6) designee for the Trustee. He was tasked with the knowledge of the Trustee only, which would not change regardless of the individual designated to testify. Further, SFR could impeach Mr. Whitaker with Ms. Ortwerth's deposition testimony if Mr. Whitaker's testimony on behalf of the Trustee was inconsistent. XV:JA02859-60.

Lastly, NRCP 16.1(e)(3) does not mandate that the district court enter an order prohibiting the use of a witness as the sole required sanction. Rather, the rule permits an "appropriate sanction[] in regard to the failure(s) **as are just**". SFR's insistence that the prohibition of the witness is the required sanction misreads the statute – a tactic that SFR frequently employs before the courts in this state. Unfortunately for SFR, this rule simply requires that the sanction must be "just." The record reflects that SFR knew the information that Mr. Whitaker would testify concerning based on SFR's deposition of the prior corporate designee for the Trustee, Ms. Ortwerth, as well as SFR's counsel review of the original collateral file, well in advance of trial. SFR would have a full and fair opportunity to cross-examine Mr. Whitaker during trial and use Ms. Ortwerth's deposition testimony to impeach Mr. Whitaker, if necessary. There was simply no evidence of prejudice to

SFR or intentional act by the Trustee to gain an unfair advantage at trial. The Trustee simply designated Mr. Whitaker to testify on its behalf because Ms. Ortwerth was no longer employed by its loan servicer and, therefore, unavailable to testify at trial. It was an abuse of discretion for the district court to refuse to allow Mr. Whitaker to testify on behalf of the Trustee thereby imposing the harshest penalty on the Trustee, especially where the penalty had the effect of a case terminating sanction by preventing the Trustee from proving its standing at trial. The district court's Trial Order must be reversed.

3. SFR designated the use of Ms. Ortwerth's deposition transcript and the Trustee reserved the right to use any transcript designated by SFR.

The district court also abused its discretion by refusing to allow the Trustee to offer Ms. Ortwerth's deposition transcript into evidence, in lieu of Mr. Whittaker's live testimony,[3] on the sole ground that the deposition transcript was not designated in the Trustee's pre-trial disclosure for its case-in-chief.[4] Once again, SFR's only response is to insist that NRCP 16.1(e)(3) requires the harshest penalty upon the Trustee. AOB at 26-27. The record does not support the district court's refusal to admit the deposition transcript.

[3] XI:JA02088:13-JA02092:7, JA02094:24-JS02099:1.
[4] *Id.*

The record reflects that the Trustee "reserve[ed] its right to use any deposition designated by any other party related to this matter." XI:JA02083 at lines 4-6. Although the Trustee admitted at trial that it did not specifically identify Ms. Ortwerth's deposition transcript, its designation of all transcripts so designated by other parties was sufficient, especially where SFR expressly identified Ms. Ortwerth's deposition transcript and the Trustee's counsel set forth the legal basis to use the deposition transcript where Ms. Ortwerth had become unavailable to testify at trial. XI:JA02069, line 7 – XI:JA02060, line 9.

Once again, the record reflects that there was simply no sufficient justification to impose the harshest penalty on the Trustee which resulted in the equivalent of a case terminating sanction by prohibiting the Trustee from proving its standing at trial. Ms. Ortwerth's deposition testimony would have set forth the grounds for the Trustee's standing and confirmed that at the time of filing the Complaint, the Trustee was a real party in interest to the mortgage loan and further explaining the stipulated fact that the originating Lender was also an interested party at the time of filing of the Complaint.

The district court's Trial Order prohibiting the use of Ms. Ortwerth's deposition transcript resulting in the Trustee's ability to prove its standing was an abuse of discretion and must be reversed.

B. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE TRUSTEE'S CLAIMS ARE SUBJECT TO A THREE-YEAR STATUTE OF LIMITATION.

The district court ruled that the Trustee's claims are based on a liability created by statute and, therefore, time-barred based the three-year statute of limitations under NRS 11.190(3)(a). XII:JA02333:9-JA02336:10. SFR contends in its Answering Brief that this was the correct conclusion despite this Court's rejection of the three-year statute of limitations in a similar quiet title action last year, after trial in this matter. *See U.S. Bank Trust, N.A. v. SFR Investments Pool 1, LLC,* 2020 LEXIS 404, 461 P.3d 159 (Nev. 2020) (unpublished disposition) ("*Arbor Park*") (applying NRS 11.190(1)(a) to appellant's quiet title claims was error and explaining that "a quiet title action does not seek to hold anyone liable, but instead simply seeks a determination regarding the parties' respective rights with regard to the subject property.") (citing *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (quoting NRS 40.010); *Liability*, Black's Law Dictionary (11th ed. 2019).

1. A quiet title claim is not a liability created by statute, under NRS 11.190(3)(a).

SFR contends that an NRS 116 sale is a statutory foreclosure subject to the three-year statute of limitations as a liability created by statute. AOB at 28-31. SFR's position relies heavily on its interpretation of the word "liability," arguing that SFR is legally responsible to pay the debt underlying the deed of trust and,

therefore, declaratory relief is not simply a declaration of rights. *Id*. at 31. But SFR's position ignores the fact that the Trustee's claims are based on both pre-foreclosure tender and equitable doctrines which predate NRS Chapter 116.

The Trustee's claims of a valid pre-foreclosure tender and futility of tender, in the alternative, do not depend on any breach of NRS 116.3116 et seq. *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) ("*Diamond Spur*") (explaining the requirements and effect of tender based on common law rather than NRS 116); *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 458 P.3d 348, 351-52 (Nev. 2020) (explaining futility of tender based on common law rather than NRS 116). Moreover, the Trustee's claim for equitable relief is based on equitable doctrines that predate NRS Chapter 116. *See Golden v. Tomiyasu*, 387 P.2d 989, 995-96 (Nev. 1963) (acknowledging the possibility of equitable relief from inequitable foreclosure sale almost thirty years before NRS 116 was enacted).

Further, SFR has no personal liability for anything. The purpose of a quiet title suit post-HOA foreclosure sale is to determine the parties' rights in real property, not a suit to determine payment of the Deed of Trust and any monetary damages to redress the delinquency due thereunder. But even if the instant action is considered a suit upon a liability, the liability is not "created by statute." Any "liability" related to payment of the Deed of Trust or foreclosure thereunder

sounds in contract; it is created by contract between the borrower/homeowner and the lender and its successors and assigns. The repayment "liability" exists regardless of whether NRS Chapter 116 contained any lien or foreclosure provisions and this suit merely seeks a declaration that NRS Chapter 116 failed to extinguish the Deed of Trust.

2. SFR miscalculates the time between the HOA Sale and filing of the Complaint and is related arguments must be disregarded.

SFR also argues that the Complaint is untimely because it was filed four years and 11 months after the HOA Sale occurred. But this argument is premised on a miscalculation by SFR. The HOA Sale occurred on July 25, 2012. IV:JA00669-70. The initial Complaint was filed on July 12, 2016. I:JA00001-62. That is a period of **three years and 11 months**. Accordingly, SFR's arguments that the Complaint was nonetheless untimely before it was filed more than four years after the HOA Sale is mistaken and should be disregarded by the Court. A three-year limitations period for post-HOA foreclosure quiet title actions has already been rejected by this Court. *Arbor Park*, 461 P.3d 159. Therefore, whether this Court determines that a four or five-year limitations period applies, or even no limitations period, the Trustee timely filed this action and the District Court erred in its ruling to the contrary.[5]

[5] A certified question from the United States District Court, District of Nevada, is currently before this Court concerning the applicable statute of limitations

3. The Deed of Trust affects title to the Property that passed to SFR and is, therefore, within governed by NRS 11.070.

SFR argues that NRS 11.070 is a standing statute and that U.S. Bank uses the "slang term "quiet title"" to intentionally "morph" its claim into one "founded upon title to real property." AOB at 36-40. SFR's attempt to inflame and mislead this Court should be immediately disregarded.

NRS 11.070 is not a "standing" statute. If that the Legislature's intent, this statute would not be included in NRS Chapter 11 entitled "Limitation of Actions". The plain language of this statute governs actions "founded upon…title" to the Property. The Trustee does not seek title in its name or to divest SFR of title as the record owner of the Property. However, a determination of the quality of title that passed to SFR necessarily includes consideration of an encumbrance on title such as the Trustee's Deed of Trust interest. As SFR acknowledges, a mortgage lien is a monetary encumbrance on property which clouds title to the property even though "it exists separately from that title." *See* AOB at 40 (citing *Hamm v. Arrowcreek Homeowners Ass'n*¸ 124 Nev. 290, 298, 183 P.3d 895, 902 (2008). As such, even if not directly founded on *title*, it affects the quality of title that passed to SFR and stems from the borrower's/homeowner's prior possessory interest and legal right to

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applicable to a post-HOA foreclosure quiet title action. *See U.S. Bank v. Thunder Properties, Inc.*, Case No. 81129. The Trustee reserves its right to move for and submit supplemental briefing concerning the applicable statute of limitations in this appeal upon entry of this Court's decision in *U.S. Bank v. Thunder Properties, Inc.*, Case No. 81129.

control the Property up until the date of the HOA Sale. The United States District Court, District of Nevada, facing a similar inquiry, concluded that NRS 11.070 provides a five-year limitations period for quiet title claims to allow "anyone with an interest in the property to sue to determine adverse claims," "even if that person does not have title to or possession of the property." *Nationstar Mortg. LLC v. Amber Hills II Homeowners Ass'n*, No. 2:!5-cv-01433-APG-CHW, 2016 WL 1298108, at *3-4 (D. Nev. Mar 31, 2016). That reasoning is sound and the Trustee respectfully submits that this Court should affirm the *Amber Hills* court's conclusion thereby applying the five-year limitations period set forth in NRS 11.070 here.

4. NRS 11.080 applies because the Trustee's grantor under the Deed of Trust, the borrower, was seized or possessed of the Property.

SFR similarly argues that NRS 11.080 is a standing statute, despite the plain language of the statute clearly falling within NRS Chapter 11 "Limitations of Actions". AOB at 41. SFR also argues that NRS 11.080 is inapplicable to this action because the Trustee was not seized or possessed of the Property. *Id*. at 41-43. But the Trustee does not seek to apply NRS 11.080 because the Trustee itself was seized or possessed of the Property. Rather, as set forth in the Trustee's Opening Brief (*see* 21-23), the Trustee's grantor under the Deed of Trust, the

borrower, was seized or possessed of his ownership of the Property by the HOA Sale.

SFR also argues that the Trustee's reliance on *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP organ Chase Bank, N.A.*, 133 Nev. 21, 388 P.3d 226 (2017) is incorrect based on this Court's subsequent ruling in *Berberich*, 136 Nev. at 96, 460 P.3d at 442. AOB at 42. But *Berberich* does not overrule this Court's ruling in *Gray Eagle*, it simply clarifies that the party seeking redress must be deprived of ownership or possession of the property in order to trigger the statute of limitations to run. 460 P.3d at 442 (confirming that the crucial inquiry is not when plaintiff acquired the subject property at the foreclosure sale but rather "the statute of limitations ran from the time [plaintiff's] ownership or possession of the property was disputed"). The *Berberich* court confirmed its conclusion in *Gray Eagle* that NRS 11.080 "provides for a five year statute of limitations for a quiet title action *beginning* from the time the "plaintiff **or the plaintiffs ancestor, predecessor or grantor was seized or possessed of the premises in question**." 460 P.3d at 442 (emphasis added). The *Berberich* court clarified when the limitations period begins to run. It did not overrule its ruling in *Gray Eagle* that the limitation period is triggered when the "plaintiff **or the plaintiffs ancestor, predecessor or grantor was seized or possessed of the premises**[.]" *Id.* Accordingly, NRS 11.080 still applies to the Trustee's action because it is founded on the time when the Trustee's

grantor was seized or possessed of his ownership interest; i.e. the date of the HOA Sale when ownership of the Property transferred to SFR. The Trustee filed this action within five years of the HOA Sale and, therefore, timely brought its claims against SFR and the district court committed an error of law in ruling to the contrary. The Trial Order must be reversed.

5. Nevada law confirms that the tender defense, a legal theory, relates back to the original Complaint.

Based on the foregoing, because the district court erred in concluding that the Trustee's action was subject to a three-year statute of limitation and, therefore, untimely, the district court further erred in concluding that the tender defense did not relate back to the original Complaint.

SFR argues that the district court's ruling denying relation back of the tender defense was nonetheless correct because under Nevada law the tender defense was "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." AOB at 35-36 (citing *Nelson v. City of Las Vegas*, 99 Nev. 548, 556-57, 665 P.2d 1141, 1146 (1983)).[6] *Nelson* does not lend any support to SFR's position.

[6] SFR's Answering Brief fails to address the majority of the Trustee's arguments raised in the Opening Brief. Specifically, SFR fails to address the argument that the tender defense is a legal theory and not a cause of action. Under Nevada law, only claims are subject to limitations periods, legal theories are not. *Liston v. Las Vegas Metro Police Dep't*, 111 Nev. 1575, 1578, 908 P.2d 720, 723 (1995); *see also Nationstar Mortg., LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 396 P.3d

In *Nelson*, this Court found that "where an amendment states a new cause of action that describes a new and entirely different source of damages, the amendment does not relate back, as the opposing party has not been put on notice concerning the facts in issue." 99 Nev. at 556, 665 P.2d at 1146. But in this action, the source of damages – a judicial declaration declaring the parties' rights, title and interest in the Property – remained consistent from the original Complaint to the Amended Complaint.[7] The Trustee did not seek to add a claim for monetary damages but simply sought to add a new legal theory to support the same claim for declaratory relief and defend SFR's competing claim for identical relief in its favor.

The legal theory of tender arises out of the same transaction and occurrence of the HOA Sale process that formed the basis for relief set forth in the original Complaint. As such, the district court erred in finding that the defense was not timely raised. Reversal of the Trial Order is necessary.

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754 (2017) (rejecting SFR's argument that the Federal Foreclosure Bar must be asserted as a standalone claim). SFR also failed to respond to the Trustee's argument that Nevada is a notice-pleading state and NRCP 15(a) requires simply a short and plan statement regarding the nature of the claim. SFR does not dispute that the facts giving rise to tender of the superpriority portion of the HOA's lien arose out of the same conduct, transaction and occurrence set out in the Trustee's original complaint. *See* Opening Brief at 25-26.

[7] *Compare* the prayer for relief in the original Complaint (I:JA00001-62) with the prayer for relief in the First Amended Complaint (II:JA00283-585).

C. THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ADMITTING BUSINESS RECORDS ESTABLISHING TENDER.

During trial, the district court admitted the Tender; but refused to admit supporting business records and witness testimony confirming the Tender amount was sufficient to satisfy the superpriority portion of the HOA's lien and delivery of the Tender to A&K. SFR argues this was the correct conclusion because the testimony of Mr. Alessi and Mr. Jung at trial and the affidavit of Doug Miles did not establish that they were the custodian of the HOA's records. AOB at 48. But there were other means for these witnesses to authenticate the Tender records and requiring a custodian for the HOA as the *only* method of authentication was an abuse of discretion and incorrect under the applicable rules of evidence.

However, as set forth in the Opening Brief, the business records of MBBW and A&K, adopted and relied upon the HOA's records, such that they became the records of MBBW and A&K. The testimony of Mr. Jung for MBBW confirms that Mr. Jung was a "qualified person" to testify concerning MBBW's business records (*see* NRS 51.135; *Thomas v. State*, 114 Nev. 1127, 1147–48, 967 P.2d 1111, 1124–25 (1998); *Cager v. State*, 124 Nev. 1455, 238 P.3d 799 (2008)) and did testify to MBBW's pattern and practice to save all written communications

with the various HOA trustees to MBBW's file for each individual property.[8] *See* additional pertinent testimony set forth in the Opening Brief at 33-34.

The foundational requirements for admission of the HOA Ledger as a business record were met through Mr. Jung's testimony. SFR does not address any of this trial testimony or the Trustee's argument that Mr. Jung is a "qualified person" with knowledge of the record-keeping procedures of MBBW sufficient to authenticate the Tender records within MBBW's records and relief thereon by MBBW in its day-to-day operations. The district court abused its discretion in not concluding that Mr. Jung authenticated the HOA's account ledger contained within MBBW's records and relied on by MBBW.

Similarly, SFR does not dispute or address the trial testimony of Mr. Alessi, custodian of records and corporate designee for A&K, foreclosure agent for the HOA, who similarly testified at trial to the authenticity of the HOA's account ledger as a part of A&K's business records. *See* Opening Brief at 36-38 setting forth Mr. Alessi's testimony confirming his authentication of the HOA's account ledger.

It is further undisputed by SFR that the district court erred in concluding that a complete HOA account ledger was not contained in A&K's collection file. The trial record confirms that the HOA account ledger was contained in A&K's

[8] XIV:JA02591 at 15-25.

collection under a different bates number.[9] Mr. Alessi further confirmed on his second day of trial testimony that the Payoff Demand was maintained in an electronic file which is why it was not originally disclosed in A&K's collection file (Exhibit 30).[10]

Accordingly, the district court abused its discretion when it refused to admit the HOA account ledger[11] attached to the Payoff Demand (Exhibit 23) into evidence during trial.

1. The Trustee clearly established through trial testimony of Mr. Jung Mr. Alessi and Ms. Sauceda that the HOA account ledger falls within the business records or catch-all exceptions to hearsay.

The district court refused to admit the following evidence offered by the Trustee at trial: (1) the HOA's account ledger[12], attached to the Payoff Demand sent by A&K to MBBW (Exhibit 23); (2) the records attached to the Affidavit of Doug Miles (proposed Exhibit 31); (3) the HOA account ledger[13] contained in A&K's collection file (Exhibit 30); (4) the HOA complete account ledger[14] contained in the HOA's initial NRCP 16.1 disclosures (proposed Exhibit 44) while the HOA was still a party to the litigation; and (5) the testimony of David Alessi,

[9] XIV:JA02720:1-JA0272:15.
[10] XV:JA02747:17-JA02753:8.
[11] IV:JA00690-94.
[12] IV:JA00690-94.
[13] VI:JA01113-20.
[14] IX:JA01720-25.

on behalf of A&K, concerning the amount of monthly assessments. The district court abused its discretion in concluding that the foregoing evidence was inadmissible hearsay. SFR fails to address most of the evidence and argument presented by the Trustee in its Opening Brief and has, therefore, conceded that the Trustee's arguments for reversal have merit. *See Colton v. Murphy*¸ 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955) ("lack of challenge cannot be regarded as unwitting and…constitutes a clear concession…that there is merit[.]").

In its Answering Brief, SFR argues that the district court reached the correct conclusion in refusing to admit these documents because the records were not authenticated by Mr. Jung, Mr. Alessi or Mr. Miles, adopting its same arguments against authentication. AOB at 49. SFR also argues that the aforementioned documents offered by the Trustee at trial do not fall within the business records exception to hearsay just because the documents are incorporated into a business's records. *Id*. at 50-52. But here, the record reflects that these documents proving up the Tender were more than simply incorporated into the records of MBBW and A&K. These documents were incorporated and *relied upon* by MBBW and A&K in conducting their business.

As set forth in the Opening Brief, Mr. Jung testified to his pattern and practice of preparing tender letters, calculating the superpriority portion of the HOA's lien, and delivery of the Tender to A&K. *See* Opening Brief at 33-34, 38,

46-47. Had the district court admitted the HOA account ledger not for the purpose of establishing the *amount* of the HOA's monthly assessment, but for the purpose of showing that the account statement was made and Mr. Jung relied upon it in calculating the Tender, the Trustee would have been able to show that tender was valid. Indeed, the Tender was admitted into evidence at trial.[15]

SFR argues that the Trustee was required to prove the amount of assessments through authentication by the HOA to fall within the business records exception to hearsay and prove the Tender was for a correct amount to constitute the superpriority portion of the HOA's lien. AOB at 51-52. But whether or not the actual amount of assessments set forth in the HOA's account ledger is correct is irrelevant. The HOA held out the account ledger to MBBW and A&K as correct and MBBW relief thereon in calculating the amount of the superpriority lien in its Tender and A&K relied thereon in creating the foreclosure notices to record and mail to interested parties. Both A&K and MBBW were entitled to rely on that ledger and incorporate the same into their business records. Moreover, SFR did not present any evidence at trial to rebut the HOA's account ledger or set forth evidence to indicate that the information therein lacked trustworthiness or was incorrect. SFR itself could have called the HOA as a witness to rebut the

[15] Exhibit 24, IV:JA00695-97.

information in the account ledger or indicate that the Tender was for an incorrect amount. It did not.

While the district court admitted the account ledger for the non-hearsay purpose of establishing that A&K relied on the ledger in preparing the recorded foreclosure notices and payoff demands to MBBW, the district court refused to admit the ledger to establish the amount of the HOA's lien.[16] The district court reached this conclusion after inferring that the HOA account ledger indicated a lack of trustworthiness because Ms. Alessi testified regarding inconsistencies between this ledger and the Payoff Demand (Exhibit 23).[17] SFR does not provide any response to this evidence in its Answering Brief. The district court also found it troubling that once A&K obtained the account ledger from the HOA, which only provided a statement of account through July 2012, A&K added the July 2012 late fee and August 2012 monthly assessment into its July 11, 2012 demand to MBBW.[18] However, this was explained by A&K's pattern and practice of automatically adding unpaid monthly assessments.[19] Again, SFR presented no competing evidence at trial to rebut Mr. Alessi's testimony and does not address this testimony in its Answering Brief.

[16] XV:JA02818:20-JA0219:17.
[17] XV:JA02801:1-JA02802:21.
[18] XV:JA02794:16-JA02795:8.
[19] XIV:JA02729:2-8.

Mr. Alessi also stated that in order to generate the Payoff Demand, A&K relied on the truth and accuracy of the HOA account ledger in its collection file.[20] Additionally, A&K's collection file was produced under Mr. Alessi's Custodian of Records Affidavit, of which Mr. Alessi testified that he would not have executed had he not verified the accuracy of the statements in his declaration, that all documents produced with the Affidavit, including VI:JA01113-1120, are true and exact copies.[21] Once again, SFR presented no competing evidence at trial and did not address this evidence in its Answering Brief.

During trial, the Trustee also moved to admit a complete account ledger for the Property from 2005 through 2012,[22] disclosed by the HOA during discovery (proposed Exhibit 44), through the testimony of the Custodian of Records for the HOA, as well as the HOA's community manager ("CAMCO"), Yvette Sauceda.[23] A summary of Ms. Sauceda's testimony was set forth in the Trustee's Opening Brief. *See* 43-44. SFR failed to present any evidence at trial to rebut Ms. Sauceda's trial testimony and failed to even address this evidence and argument in its Answering Brief. It's failure to address this portion of the Trustee's Opening Brief is a concession of its merit.

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[20] XV:JA02775:21-JA02776:4, JA02793:4-JA02795:8.
[21] XIV:JA02672 at 5-17.
[22] *Id.*
[23] XI:JA02012 at 9-11, JA02016 at 8-10, JA02024 at 5-6, JA02034 at 7-8, JA02038 at 10-11, and JA02056 at 4-5.

The overwhelming evidence presented to the district court at trial confirms that the Trustee presented sufficient evidence to authenticate the HOA's account ledger and confirm that it falls within the business records exception to hearsay to prove up the sufficiency of the Tender. Accordingly, the district court abused its discretion in refusing to admit the HOA's account ledger into evidence at trial and reversal of the Trial Order is warranted.

2. A preponderance of the evidence presented at trial confirms that the Trustee did prove delivery of the Tender.

The district court erred in concluding that the Trustee did not prove the specific details of delivery of the Tender to A&K in order to successfully assert the defense of tender.[24] SFR argues in its Answering Brief that *Resources Group, LLC v. Nevada Association Services*, 135 Nev. Adv. Op. 8, 437 P.3d 154 (2019) requires the Trustee to prove delivery of the Tender to A&K. As an initial matter, *Resources Group* is distinguishable because it involved a homeowner tender requiring the full amount of the HOA's lien to be tendered to the HOA's foreclosure agent in order to be valid and avoid foreclosure. This action concerns simply Tender of the superpriority portion of the HOA's lien which preserves the original deed of trust by operation of law. *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018). None of the opinions issued by this Court concerning a lender or loan servicer's tender of the

[24] XII:JA02336 at 21-24.

superpriority portion of the HOA's lien have required proof of delivery and receipt in order to conclude a valid tender was made. But even if this Court invokes such requirement here, a preponderance of the undisputed evidence presented at trial confirms that the Tender was delivered to and rejected by A&K.

SFR focused on the absence of a receipt of copy or other notation in A&K's collection file as proof that the Tender was not delivered. AOB at 53-54. But SFR ignores the actual trial testimony of Mr. Alessi clarifying that a receipt of copy would *only* be included in its collection file if it *accepted* a pre-foreclosure tender (XII:JA02337 at 11-15) and that A&K would not always include a copy of a tender letter or a status note in the collection file.

The evidence from trial set forth in the Trustee's Opening Brief proving delivery of the Tender by a preponderance of the evidence (*see* Opening Brief at 46-50) was ***not disputed or rebutted with contrary evidence by SFR at trial or in its Answering Brief***.

Further, as argued in the Opening Brief at 49-50, pursuant to NRS 47.250, where a letter is duly directed and mailed, there is an inference that it was received in the regular course of the mail. *See* NRS 47.250(13). This inference can also be applied to sending of a letter via runner's service. There is also a presumption that the ordinary course of business has been followed. NRS 47.250(18)(c). SFR does not dispute or even address this legal presumption in its Answering Brief. The trial

record is devoid of any evidence presented by SFR challenging MBBW's normal course of business or A&K's mailing address. Nor did SFR present any evidence to show that the mailing or runner service was not actually made.

Lastly, SFR argues that the district court correctly concluded that MBBW's subsequent attempt to tender the superpriority portion of the HOA's lien before the HOA Sale established that tender was never delivered. However, A&K recorded several additional notices of sale after the Tender. It was logical for MBBW to submit subsequent payoff inquiries after its Tender was rejected. Additionally, the district court found that an entry in A&K's status notes wherein Ocwen Loan Servicing, LLC ("Ocwen"), inquired about excess proceeds was conclusive that tender was not delivered.[25] A subsequent loan servicer would logically seek payoff information if a foreclosing HOA continued to record new notices of sale identifying the full lien amount. SFR claims this is evidence of no tender, but once again relies solely on argument of its counsel without any presenting any competing evidence at trial to meet its evidentiary burden.

Accordingly, the district court erred in concluding that the Trustee had not met its burden of proof by a preponderance of evidence and erred in quieting title to SFR when SFR cannot establish that superior title passed to it following the pre-sale Tender.

[25] VI:JA01159-60.

D. FUTILITY OF TENDER IS NOT INCONSISTENT WITH ANY THEORY BEFORE THE DISTRICT COURT.

SFR's only argument in response to the Trustee's futility of tender argument is that it was not raised below. AOB at 56. SFR does not address the merits of this argument or dispute its application to the record here. This Court may consider the futility of tender defense because it is based on an intervening change in law after the trial was conducted. The futility of tender defense is based on identical evidence presented to the district court during trial and does not present this Court with a new claim or different relief from that set forth in the Trustee's original pleadings. Moreover, the futility of tender defense is a subcategory of the tender defense and does not present a theory inconsistent or different from the tender defense raised below. *See Dermody v. City of Reno*, 113 Nev. 207, 210, 931 P.2d 1354, 1357 (1997) (quoting *Powers v. Powers*, 105 Nev. 514, 516, 779 P.2d 91, 92 (1989) (parties "may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below.")). Accordingly, this Court may consider the futility of tender defense on appeal.

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CONCLUSION

The Trustee respectfully requests that the Court reverse the judgment in favor of SFR and remand for entry of judgment in favor of the Trustee pursuant to the pre-foreclosure Tender.

DATED this 9th day of August, 2021.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point, Times New Roman style. 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)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 6,826 words. I further 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. Finally, I certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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

DATED this 9th day of August, 2021.

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PROOF OF SERVICE

I certify that I electronically filed on the 9th day of August, 2021, the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

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[X] (Nevada) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

/s/ Faith Harris
An Employee of WRIGHT, FINLAY & ZAK, LLP