IN THE SUPREME COURT OF NEVADA

DANIEL LAKES, an individual, Appellant, v. U.S. BANK TRUST, TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST, Respondent.	Supreme Court No. 79324

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable RONALD J. ISRAEL, District Judge
District Court Case No. A-17-759016-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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 in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent U.S. Bank Trust, Trustee for LSF9 Master Participation Trust is wholly owned by U.S. Bancorp. No publicly held company owns 10% or more of Appellee U.S. Bank, N.A. is 100% owned by U.S. Bancorp. U.S. Bancorp is a publicly held company. No publicly held company owns 10% or more of U.S. Bancorp's shares.

Dated: May 21, 2020.

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By: /s/ Joseph Sakai
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JURISDICTIONAL STATEMENT

This Court has jurisdiction over this matter pursuant to NRAP 3A(b)(1). The district court entered its Findings of Fact, Conclusions of Law and Judgment ("Judgment") on July 18, 2019, finally resolving all issues in this matter. (JA0460-JA0472). Appellant Daniel Lakes ("Lakes") filed a notice of appeal from the Judgment on July 29, 2019. (JA0474).

ROUTING STATEMENT

The Nevada Supreme Court has recognized that a first lien holder's tender of the superpriority portion of a homeowners association's lien, prior to the foreclosure sale based on that homeowner's association's lien, results in the buyer at that foreclosure sale taking the property subject to the first priority deed of trust. *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) ("*Diamond Spur*"). *Diamond Spur* is dispositive of this appeal because the superpriority portion of the homeowners association's lien was tendered prior to the sale and, thus, the first priority deed of trust was not extinguished by the sale. Therefore, this appeal should be heard and decided by the Court of Appeals who can dispose of this case in an expeditious manner.

INTRODUCTION

The appeal is about whether the tender of the superpriority portion of a homeowners association's lien by the holder of the first priority lien preserves the first priority lien. The district court granted summary judgment to Respondent U.S. Bank Trust, Trustee for LSF9 Master Participation Trust ("U.S. Bank") finding that the tender of the superpriority portion of the homeowners associations lien prior to the sale meant that all subsequent purchasers take title subject to the first priority lien. Lakes' argument is that he was a bona fide purchaser for value and that the District Court wrongly found that his status as a bona fide purchaser was irrelevant. Lakes also argues that he was not on notice of the U.S. Bank's interest in the property because U.S. Bank did not record the Assignment of the Deed of Trust until after he purchased the property.

Lakes is incorrect and this Court can affirm because this case is controlled by *Diamond Spur*, which found that a purchaser's status as a bona fide purchaser was irrelevant where the homeowners association foreclosed on only the subpriority portion of its lien. There is no genuine issue of material fact as to whether U.S. Bank's predecessor in interest tendered an amount sufficient to satisfy the superpriority portion of the homeowners association's lien prior to the sale. Additionally, even if his bona fide purchaser status was relevant, Appellant did not submit evidence establishing that he was a bona fide purchaser for value. Instead,

Appellant's evidence demonstrates that he failed to conduct a title search or to review the recorded documents prior to purchasing the property. As such, he was on inquiry notice of the first lien deed of trust recorded on the property, regardless of when U.S. Bank's assignment of the deed of trust was recorded.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court properly determine that U.S. Bank's predecessor in interest paid the superpriority portion of the Liberty at Huntington Homeowners' Association ("HOA") lien prior to the HOA's foreclosure sale based on its lien?

2. Did the District Court properly determine that, whether or not Lakes was a bona fide purchaser for value at the sale based on the HOA lien, the HOA foreclosure sale did not extinguish the first priority deed of trust and all subsequent purchasers took title to the property subject to that deed of trust?

3. Whether Lakes established that he was a bona fide purchaser for value when he was on notice of the deed of trust recorded with regard to the property?

STATEMENT OF THE CASE

This is a quiet title action that follows from a non-judicial foreclosure of an HOA's lien pursuant to NRS 116.3116[1] et *seq*., relating to property in Clark County, Nevada. Prior to the sale, the holder of the first priority lien tendered the superpriority portion of the HOA's lien and the check was negotiated by the HOA. After that payment, the property was purchased by a third-party at the sale and subsequently changed hands a number of times. The current owner of the Property, Lakes, brought a quiet title action against U.S. Bank, the current holder of the first priority lien. U.S. Bank filed an answer and counterclaims, including a claim to quiet title against Lakes. U.S Bank also filed a cross-claim against the HOA. U.S. Bank and the HOA filed motions for summary judgment. The District Court granted summary judgment to U.S. Bank against Lakes and denied both U.S. Bank's motion against the HOA and the HOA's motion against U.S. Bank as moot. The District Court certified the Order and Judgment in the case as final under Nevada Rule of Civil Procedure 34(b). Lakes appealed the grant of summary judgment in favor of U.S. Bank.

[1] Because the HOA sale here took place on August 25, 2015, this case is governed by the version of NRS 116.3116 in effect from October 1, 2013 to September 30, 2015. All references in this Brief to NRS 116.3116 shall be to that version of the statute.

STATEMENT OF THE FACTS

A. Factual Background

On April 12, 2007, Rogelio Cedillo ("Cedillo"), the previous property owner, executed a deed of trust naming Countrywide KB Home Loans, a Countrywide Mortgage Ventures, LLC series as the lender ("Lender") and MERS, as beneficiary solely as nominee for Lender and Lender's successors and assigns. The deed of trust ("Deed of Trust") was recorded on April 16, 2007 and granted the Lender and its successors and assigns a security interest in the real property located at 548 Primrose Hill Ave., Las Vegas, Nevada, 89178 ("Property") to secure the repayment of the loan ("Loan") in the original amount of $213,121.00 borrowed by Cedillo. (JA0003; JA00464).

On August 19, 2009, MERS, as nominee for Lender and Lender's successors and assigns, recorded an assignment of the Deed of Trust to Ocwen Loan Servicing, LLC ("Ocwen"). (JA0365). U.S. Bank acquired the Loan on December 6, 2015. (JA0410). An assignment of the Deed of Trust from Ocwen to U.S. Bank was recorded in the Clark County Recorder's Office on May 27, 2016. (JA0369).

B. The HOA's Non Judicial Foreclosure Sale And Subsequent Transfers

The Property is subject to the Declaration of Covenants, Conditions, Restrictions and Reservations of Easements for the HOA. (JA0072). Cedillo failed to pay the HOA assessments due under the HOA's governing documents. (JA0072).

As a result of Cedillo's failure to pay assessments, on July 9, 2008, the HOA recorded a Notice of Delinquent Assessments against the Property with the Clark County Recorder's Office (JA0080) ("Delinquent Assessments Notice"). That Notice was mailed to the Property and Cedillo via regular and certified mail on July 10, 2009. (JA0082-JA0083). The Delinquent Assessments Notice recited that the amount owed was $625.04. (JA0080, JA0373).

On August 29, 2008, the HOA, through its agent Red Rock Financial Services ("Red Rock"), recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments. (JA0376-JA0377). The Notice of Default listed the amount owed as $1,668.57. (*Id.*). Finally, on April 24, 2015, a Notice of Foreclosure Sale was recorded showing the amount due as $7,161.36. (JA0380). The Notice of Foreclosure Sale recited that it would be held pursuant to the Lien for Delinquent Assessments recorded on July 9, 2008. (JA0379). The foreclosure sale was set for May 20, 2015. (JA0379).

In response to the Notice of Foreclosure Sale, Ocwen tendered a check to the HOA, through its agent Red Rock, in the amount of $3,241.52 on May 13, 2015. (JA0410, JA0415). The check was accepted and negotiated on May 19, 2015. (JA0415). The check satisfied the default on the superpriority portion of the HOA's lien. (JA0167).

Thereafter, on August 25, 2015, the HOA foreclosed on its lien and sold the Property to Parcelnomics, LLC, which paid $4,470.00 according to the Foreclosure Deed recorded on September 1, 2015. (JA0383). The Foreclosure Deed recites that the Property was conveyed "without warranty expressed or implied." (JA0383).

On September 1, 2015, Parcelnomics recorded a Grant, Bargain, Sale Deed conveying its interest in the property to Investment Deals, a fictitious firm name with the same owner. (JA0390-JA0393). On October 23, 2015, Investment Deals recorded a Grant, Bargain, Sale Deed conveying its interest in the property to Noune Graeff. (JA0396-JA0399). The Deed to Graeff specified that, the "Grantee will take title to the property subject to any claims, liens, and other encumbrances, if any. The sale will be made without covenant or warranty expressed or implied regarding, but not limited to, title or possession, encumbrances, obligations to satisfy any secured or unsecured liens or against all right, title and interest of the owner, without equity or right of redemption." (JA0397). On January 20, 2016, Noune Graeff recorded a Grant, Bargain, Sale Deed conveying her interest in the property to Daniel Lakes without express or implied warranty and subject to all liens and encumbrances. (JA0403).

C. Procedural History

On July 27, 2017, Lakes filed a Complaint against U.S. Bank, Bank of America, N.A. (as successor-by-merger to Countrywide Mortgage Ventures, LLC),

Cedillo, Parcelnomics, LLC, Investment Deals, and Graeff seeking to quiet title to the Property. (JA0001-JA0009). On December 13, 2017, U.S. Bank filed its Answer and asserted a Counterclaim and Cross-Claim seeking a declaration of quiet title. U.S. Bank also named the HOA as a cross-claim defendant. (JA0010-JA0024). U.S. Bank filed an Amended Answer and Amended Counterclaims/Cross-Claims ("Counterclaims") on November 26, 2018. (JA0035-JA0055). U.S. Bank asserted three causes of action: (1) declaratory relief that the Deed of Trust was not extinguished by the HOA foreclosure sale; (2) quiet title and declaratory relief against all defendants; and (3) injunctive relief against Lakes. (*Id.*) The HOA answered the Counterclaims on December 21, 2018. (JA0056-JA0070).

The HOA moved for summary judgment on April 10, 2019. (JA0071-JA0143). U.S. Bank also moved for summary judgment on April 10, 2019. (JA0144-JA0415). Lakes opposed U.S. Bank's motion on April 25, 2019. (JA0416-JA0434).

The District Court heard both motions on June 4, 2019. (JA0441-JA0459). At the hearing, the Court ruled in favor of U.S. Bank on its quiet title claim finding that Ocwen's tender of the superpriority portion of the HOA lien preserved the Deed of Trust and that all subsequent purchasers took subject to the Deed of Trust. (JA0458). The Court also determined that BFP status was irrelevant where tender

has been made. (JA0454). In light of the ruling, the HOA's motion for summary judgment was denied as moot. (JA0459).

The District Court entered its Findings of Fact and Conclusions of Law on July 17, 2019. (JA0460-0472). The District Court determined that Ocwen's tender satisfied the superpriority portion of the HOA's lien prior to sale being conducted. (JA0467). Thus, the HOA's sale was solely on the subpriority portion of its lien so Lakes took subject to the Deed of Trust. (JA0468-JA0469).

Lakes filed his Notice of Appeal on July 29, 2019.

SUMMARY OF ARGUMENT

The case is controlled by the Nevada Supreme Court's 2018 *Diamond Spur* decision. In *Diamond Spur*, the Nevada Supreme Court held that the tender of the superpriority portion of a homeowner's association's lien, made by the holder of the first lien Deed of Trust prior to the association's foreclosure sale based on that lien, satisfies the superpriority portion of the lien and leaves intact an existing deed trust after a foreclosure sale. Thus, in this case, because the superpriority portion of the HOA lien was paid by U.S. Bank prior to the foreclosure sale (JA 0167, 410, 415), that sale did not convey to the foreclosure sale purchaser title to the Property free and clear of the Deed of Trust held by U.S. Bank. Rather, it conveyed title to the Property which was subject to the Deed of Trust.

Diamond Spur specified that the tendering first trust deed holder was not required to record its tender for it to be effective. Moreover, *Diamond Spur* determined that after payment of the superpriority portion of the homeowner's association's lien, the claimed status of the purchaser, at a later sale under that lien, as a bona fide purchaser ("BFP"), is "irrelevant" because there could be no sale of the paid superpriority protion of the lien.

The situation here comes squarely within the holding in *Diamond Spur*. The holder of the first lien Deed of Trust at the time of the sale tendered the superpriority portion of the lien to the HOA. The tender was accepted and negotiated. The HOA

foreclosure sale was conducted three months later in regards to the subpriority portion of the HOA lien only. The property was subsequently conveyed two times before it was purchased by Lakes. Each time, the Property was conveyed without warranty. When Lakes took title to the Property, he took it subsequent to the recorded Deed of Trust.

There is no genuine issue of material fact in regards to the tender of the superpriority portion of the lien. The amount of the superpriority portion of the lien is the amount of assessments in the nine months prior to the HOA's institution of its action to collect on its lien. The HOA's institution of its action to collect is marked by its issuance of the Delinquent Assessments Notice. Here, that Notice was recorded in July 2008 in the amount of $625.04. Thus, the superpriority portion of the lien could not be greater than that amount; however, U.S. Bank paid roughly five times that amount to the HOA. NRS 116.3116(2).

Additionally, Lakes' claimed status as a BFP is irrelevant because the HOA could not foreclose on the previously paid superpriority portion of its lien and, as a matter of law, the sale on the subpriority debt secured by the lien was subject to the first priority Deed of Trust. That being the case, the HOA and the subsequent purchasers could only convey the title to the Property that they acquired through the sale, which was subject to the previously recorded Deed of Trust.

Lakes does not discuss *Diamond Spur* in his Opening Brief and, instead, asserts that he was a BFP because he took title to the Property prior to U.S. Bank recording its assignment of the Deed of Trust. Although Lakes entitlement to BFP status is irrelevant under *Diamond Spur*, the facts presented by Lakes do not establish that he was a BFP. As discussed below, a purchaser can only claim BFP status if he takes title without notice of competing claims. A purchaser is charged with knowledge that a diligent inquiry would have indicated, even if he failed to make such inquiry. In this case, it is undisputed the Deed of Trust was recorded long before the HOA sale and was never released. Lakes failed to conduct a title search or to examine the recorded documents. Had he done so, he would have been alerted to the existence of the Deed of Trust and his need to investigate further. Lakes is charged with this knowledge even though he failed to investigate and so he does not qualify as a BFP.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, "without deference to the findings of the lower court." *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (citing *GES, Inc. v. Corbitt,* 117 Nev. 265, 268, 21 P.3d 11, 13 (2001). "Summary judgment is appropriate . . . when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Wood,* 121 Nev. at 731, 121 P.3d at 1031.

The primary purpose of a summary judgment procedure is to secure a "just, speedy, and inexpensive determination of any action." *Albatross Shipping Corp. v. Stewart*, 326 F.2d 208, 211 (5th Cir. 1964). "Summary judgment is appropriate if, when viewed in the light most favorable to the nonmoving party, the record reveals there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *DTJ Design, Inc. v. First Republic Bank*, 130 Nev. 35, 37, 318 P.3d 709,710 (2014) (*citing Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)).

"While the pleadings and other evidence must be construed in the light most favorable to the nonmoving party, that party has the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts to defeat a

motion for summary judgment." *Wood*, 121 Nev. at 731, 121 P.3d at 1031 (quoting *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The governing law determines which "factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Wood,* 121 Nev. at 731, 121 P.3d at 1031.

ARGUMENT

A. There Were No Genuine Issues Of Material Fact Regarding The Tender Of The Superpriority Portion Of The HOA Lien.

In his Opening Brief ("Appellant's Opening Brief" or "AOB"), Lakes argues that there was a genuine issue of material fact regarding whether the superpriority portion of the HOA's lien was tendered prior to the HOA sale. (AOB, pp. 12-14). Lakes asserts that there was no evidence of the actual amount of the HOA's superpriority lien. (AOB, p. 12). Lakes further claims that, because he was required to pay HOA fees after purchasing the Property, that the superpriority portion of the HOA lien was not satisfied. (AOB, pp. 12-13). Lakes' arguments are incorrect because the amount of the HOA's superpriority lien is defined by the then current version of NRS 116.31162(2) and case law interpreting it. Additionally, there is no dispute that tender was made. Finally, whether the HOA requested fees from Lakes after his purchase of the Property is of no consequence to the determination that the superpriority portion of the HOA lien was tendered prior to the HOA sale.

"NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust." *SFR Investments Pool 1 v. U.S. Bank,* 130 Nev. 742, 758, 334 P.3d 408, 419 (2014), *superceded by statute.* "NRS 116.3116(1) confers to an HOA a lien on a homeowner's unit for unpaid assessments, construction penalties, and fines levied against the unit. NRS 116.3116(2) establishes the priority of that lien, splitting the lien into two pieces—a

superpriority piece and a subpriority piece." *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 366, 373 P.3d 66, 69 (2016) (internal citations and quotation marks omitted). The superpriority portion of the lien is "prior to all security interests…to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien." NRS 116.3116(2). The superpriority portion of the lien "does not include an additional amount for the collection of fees and foreclosure costs that an HOA incurs preceding a foreclosure sale; rather, it is limited to an amount equal to nine months of common expense assessments." *Ikon Holdings*, 132 Nev. at 373, 373 P.3d at 73. The beneficiary of record of a deed of trust can preserve its interest by "determining the precise superpriority amount" and tendering it "in advance of the sale." *SFR Investments Pool 1*, 130 Nev. at 757, 334 P.3d at 41.

An HOA's lien is perfected when its notice of delinquent assessments is served and "[n]o further recordation of any claim of lien for assessment…is required." NRS 116.3116(5); *see Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 25, 388 P.3d 226, 231 (2017) ("Gray Eagle") (interpreting the pre-October 2015 version of NRS 116.3116). The

superpriority portion of the lien includes maintenance and nuisance abatement charges and assessments "which would have become due in the absence of acceleration during *the 9 months immediately preceding institution of an action to enforce the lien.*" NRS 116.3116(2) (emphasis added). A party has instituted "an action to enforce the lien" for purposes of NRS 116.3116(6) when it provides the notice of delinquent assessment. *See Gray Eagle*, 133 Nev. at 26, 338 P.3d at 231.

The Nevada Supreme Court has also implicitly recognized that an HOA cannot enforce two superpriority liens on the same property at the same time. *See Prop. Plus Invs., LLC v. Mortg. Elec. Registration Sys., Inc.*, 133 Nev. 462, 466, 401 P.3d 728, 731 (2017) (holding that " NRS 116.3116 does not limit an HOA to one lien enforcement action or one superpriority lien per property *forever*" (emphasis added)); *see also JPMorgan Chase Bank, N.A. v. SFR Invs. Pool 1, LLC*, 200 F. Supp. 3d 1141, 1167-68 (D. Nev. 2016) (recognizing that an HOA can assert a second superpriority lien after a previous superpriority lien has been satisfied); *SFR Inves. Pool 1, LLC, v. Marchai B.T.*, 459 P.3d 236, 2020 WL 1328985, at *1 (Mar. 18, 2020) (unpublished disposition).[2] The HOA's notice of delinquent assessments is effective until it is rescinded or the action is completed. Accordingly, the superpriority portion of the HOA's lien in this case was comprised of the nine

[2] Nevada Rule of Appellate Procedure provides "[a] party may cite for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016."

months of assessments incurred before the 2008 Notice of Delinquent Assessment was issued, as that is the notice that instituted the action to enforce the lien in this case. *See Marchai B.T.*

The evidence submitted by U.S. Bank in support of its motion for summary judgment established that Owen, its predecessor in interest, tendered the superpriority portion of the HOA lien prior to the HOA sale. On July 9, 2008, the HOA recorded a Notice of Delinquent Assessments against the Property in the amount of $625.04 including assessments, late fees, fines/violations, collection fees and costs. (JA0373). The notice was mailed to the Property and to Cedillo via regular and certified mail on July 10, 2008. (JA0073, JA0080-JA0084). On August 29, 2008, the HOA recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments noting that the amount owed was $1,668.57. (JA0376-0377). Thereafter, on April 24, 2015, Red Rock, as agent for the HOA, recorded a Notice of Foreclosure Sale Under the Lien for Delinquent Assessments ("Notice of Foreclosure Sale") setting the date of sale for May 20, 2015. (JA0379-JA0380). The Notice of Foreclosure Sale provided that the total unpaid balance and reasonably estimated costs, expenses, and advancements totaled $7,161.36. (JA0380).

The HOA never rescinded the Lien For Delinquent Assessments and, in fact, the Notice of Foreclosure Sale specifies that it was made pursuant to the Lien for

Delinquent Assessments that was recorded on July 9, 2008. (JA0138). Therefore, in accordance with *Gray Eagle,* 133 Nev. at 26, 388 P.3d at 231, the superpriority portion of the lien could not be greater than $625.04, the amount listed in the Delinquent Assessments Notice. (JA0080) On May 13, 2015, in response to the Notice of Foreclosure Sale, Ocwen, U.S. Bank's predecessor in interest, forwarded a check in the amount of $3,241.52 to Red Rock Financial Services. (JA0410, JA0415). The check was negotiated on May 19, 2015. (*Id.*) The HOA does not dispute that tender was made and accepted. (JA0455).

The amount tendered to the HOA was more than the amount stated in the Delinquent Assessments Notice. (JA0080). In accordance with NRS 111.3116(2), Ocwen actually tendered more than the full amount of the delinquent assessments that encumbered the property when the Lien was recorded on July 9, 2008. Thus, there can be no question that Ocwen satisfied the superpriority portion of the lien through its tender of $3,241.52. In fact, the amount tendered was far in excess of the superpriority amount and roughly 45% of the total balance on the HOA lien, which was outstanding at the time the sale occurred on August 25, 2015. (JA0383).

In light of the amount paid by Ocwen and the HOA's acceptance of the check, there can be no genuine dispute that the amount tendered was more than sufficient to satisfy the superpriority portion of the HOA lien prior to the foreclosure sale. Additionally, the payment was tendered and negotiated well in advance of the HOA

foreclosure sale so there can be no question that the payment was timely made. Thus, this Court should determine that the District Court properly found that U.S. Bank's predecessor in interest tendered an amount in excess of the superpriority portion of the HOA lien prior to the HOA foreclosure sale and that amount was paid prior to the foreclosure sale of the HOA's lien.

In his AOB, Lakes argues that the superpriority portion of the HOA lien could not have been paid because he paid the HOA for past due fees and assessments relating dead plants and overgrown grass in the yard and paint for the exterior of the house on March 14, 2016. (AOB, p. 13). Lakes' payment of additional fees and assessments following his purchase of the Property, long after payment of the superpriority amount in 2015, has no bearing upon whether the amount paid by Ocwen was sufficient to satisfy the superpriority portion of the HOA lien prior to the foreclosure sale. Moreover, Lakes failed to provide any information regarding what the assessments were for or when they accrued; thus, there is no genuine issue of material fact regarding the tender of the superpriority portion of the HOA lien.

B. Because The HOA Sale Did Not Extinguish The First Lien Deed Of Trust, Whether Or Not Lakes Was A Bona Fide Purchaser For Value Is Irrelevant.

In his AOB, Lakes argues the District Court erred in failing to consider whether he qualified as a bona fide purchaser ("BFP") in regards to the Deed of Trust because the assignment of the Deed of Trust was not recorded until May 2016, after

he purchased the Property. (AOB, pp. 10-12). Lakes asserts that he took the Property without notice of U.S. Bank's security interest and thus, the District Court should have determined that the security interest was unenforceable against him. Lakes offers no case law in support of his argument that the District Court should have considered his BFP status in making its decision. Moreover, Lakes fails to discuss *Diamond Spur*, which is dispositive here.

Diamond Spur confirms that when the holder of the first lien deed of trust tenders the superpriority potion of the lien, an amount sufficient to pay at least nine months' worth of HOA assessments, prior to that HOA foreclosing on its lien, the holder's deed of trust remains on the property and the purchaser at the foreclosure sale obtains the property subject to that deed of trust. *Diamond Spur*, 134 Nev. at 612-613, 427 P.3d at 121 ("[W]hen a bank pays the superpriority portion of an HOA lien, the subsequent foreclosure sale 'will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject to Bank's mortgage lien."'); *see also Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 43, 435 P.3d 1217, 1217–18 (2019) ("[A] deed of trust beneficiary can preserve its deed of trust by tendering the superpriority portion of the HOA's lien before the foreclosure sale is held."). Thus, "[i]t follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority

portion, because it cannot extinguish the first deed of trust on the property." *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121.

"A void sale, in contrast to a voidable sale, defeats the competing title of even a bona fide purchaser for value." *U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC,* 135 Nev. 199, 205, 444 P.3d 442, 448 (2019). "A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." *Diamond Spur* at 121. "Because a trustee has no power to convey an interest in land securing a note or other obligation that is not in default, a purchaser at a foreclosure sale of that lien does not acquire title to that property interest." *Id.*

This interpretation has been further reinforced by the Nevada Supreme Court in its recent unpublished decisions. *See Renfroe v. Carrington Mortgage Services, LLC,* 456 P.3d 1055, 2020 WL 762638, at *2 (Feb. 14, 2020) (unpublished disposition) ("[W]e have already held that a deed of trust holder need not record notice of its tender and that a subsequent property owner is not protected as the transferee of a bona fide purchaser after a valid tender."); *see also Noonan v. Bayview Loan Servicing, LLC,* 438 P.3d 335, 2019 WL 1552690, at *1 (April 8, 2019) (unpublished disposition) ("The Noonans' purported status as a bona fide purchaser (BFP) is also inconsequential because, 'after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion,' and '[a] party's status as a BFP is irrelevant when a

defect in the foreclosure proceeding renders the sale void.'"); *Saticoy Bay LLC v. JPMorgan Chase Bank*, 408 P.3d 558, 2017 WL 6597154, at n.1 (December 22, 2017) ("Although appellant argues it was a bona fide purchaser, appellant has not explained how its putative BFP status could have revived the already-satisfied superpriority component of the HOA's lien.").

Here, Ocwen, U.S. Bank's predecessor in interest, tendered more than the amount of the superpriority portion of the HOA lien prior to the HOA foreclosure sale. (*See* Section B *supra.*). Consequently, the HOA could only foreclose on the subpriority portion of the HOA lien. Because the superpriority portion of the HOA's lien was no longer in default following the tender, the ensuing foreclosure sale was void as to the superpriority portion of the lien and there could be no BFP resulting from that sale as against the first priority Deed of Trust. The HOA could not transfer any greater interest than it possessed, so Parcelnomics, the purchaser at the sale, acquired only the subpriority portion of the HOA lien and took the property subject to the Deed of Trust. By extension, Parcelnomics (and its successors, Investment Deals and Noune Graeff) conveyed their interest in the Property to Lakes subject to the Deed of Trust. Therefore, because there was no valid foreclosure sale of the superpriority portion of the lien, Lakes' status as a bona fide purchaser for value is irrelevant.

The District Court correctly determined that U.S. Bank's Deed of Trust was not extinguished by the HOA foreclosure sale and so it did not matter whether or not Lakes was a bona fide purchaser. Therefore, its decision should be affirmed.

C. Even If Lakes' Alleged Bona Fide Purchaser Status Were Relevant, He Was Not A Bona Fide Purchaser For Value.

Lakes argues that the District Court erred in failing to consider his status as a BFP. (AOB, pp. 10-12). Lakes argues that, because he took title to the Property prior to U.S. Bank recording the Assignment of the Deed of Trust, he took the Property free and clear of the Deed of Trust. Lakes argues that this result is mandated by NRS 111.325 and NRS 111.315. Lakes, however, is mistaken because he does not meet the requirements to be considered a BFP, even if his BFP status were relevant here.

NRS 111.325 is a race-notice statute. *See* NRS 111.325 ("Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly recorded."). "In other words, a later-obtained interest can prevail over an earlier obtained interest in Nevada where the later purchaser has no knowledge of the previous interest and records his interest first." *US Bank NA v. SFR Inves. Pool 1, LLC*, 2016 WL

4473427, at *9 (D. Nev. Aug. 24, 2016). A party asserting bona fide purchaser status bears the burden of establishing that status. *Berge v. Fredericks*, 95 Nev. 183, 187, 591 P.2d 246, 248 (1979).

A bona fide purchaser is one who takes a property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." *Shadow Wood Homeowners Ass'n, Inc. v. N. Y. Cmty. Bancorp*, 132 Nev. 49, 64, 366 P.3d 1105, 1115 (2016) (quotation marks omitted) (*citing Bailey v. Butner*, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947)). Nevada imparts constructive notice on a person upon strictly legal inference of matters which he necessarily ought to know or might know upon the exercise of ordinary diligence. *Shadow Wood*, 132 Nev. at 65, 366 P.3d at 1115-1116. "Under [Nevada's] recording act, it is not enough that a subsequent purchaser record his conveyance first, he must also be a purchaser 'in good faith.' A subsequent purchaser with notice, actual or constructive, of an interest in the land superior to that which he is purchasing is not a purchaser in good faith, and not entitled to the protection of the recording act." *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 499, 471 P.2d 666, 669 (1970)

If a party fails to discharge his duty inquiry, he cannot qualify as a bona fide purchaser. *Berge*, 95 Nev. at 189, 591 P.2d at 249. The *Berge* Court stated a duty of inquiry arises:

> [W]hen the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose.

Id. (emphasis added).

"[A] recital in an instrument of record charges subsequent purchasers with notice of all material facts which an inquiry suggested by that recital would have disclosed." *Allison Steel*, 86 Nev. at 498, 471 P.2d at 668. If a purchaser fails to make inquiry, he is presumed to have actual knowledge of what the inquiry would have disclosed. *Id.*; *see also Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp.*, 124 Nev. 770, 779, 191 P.3d 1189, 1195 (2008) ("Whether or not a purchaser of real property performs this search, he or she is charged with constructive notice of, and takes ownership of the property subject to, any interest such a title search would reveal.") The purchaser may rebut this presumption of notice by showing he made an investigation and did not discover the prior right or title he was presumed to have investigated. *Berge*, 95 Nev. at 189, 591 P.2d at 249.

Here, it is undisputed that the Deed of Trust was properly recorded in 2007. There is nothing in the record that reflects a satisfaction of the Deed of Trust. That being the case, Lakes was on inquiry notice of the existence of the Deed of Trust when he purchased the Property, even though he failed to conduct an investigation. In his brief, Lakes argues that he was a bona fide purchaser for value because he was unaware of the assignment of the Deed of Trust from Ocwen to U.S. Bank; however, he fails to address that the recorded Deed of Trust put him on notice of the fact that there was an existing lien on the Property.

Moreover, it is apparent from the evidence submitted by Lakes in his opposition to U.S. Bank's summary judgment motion that he did not make an inquiry or investigation into the recorded documents. (JA0427-JA0429). After being informed of the listing for the Property on Zillow from his son, Lakes spoke to Graeff and scheduled an appointment to see the Property. (JA0427). After seeing the Property, Lakes made Graeff an offer to purchase the Property. (JA0428). He then went to the Clark County Recorder's Office with Graeff to verify that "Graeff owned the Property outright." (*Id.*) Lakes later returned to the Recorder's Office and asked the clerk what the language in the Grant, Bargain, Sale Deed that Graeff proposed meant regarding "liens and encumbrances." (*Id.*) The Clerk informed Lakes that he could do a record search on the computers available in the office. (*Id.*) When Lakes informed the Clerk that he did not know how to research on the computers, the Clerk

offered to perform the search for him. (*Id.*) After performing the search, the Clerk informed Lakes that there was a lien regarding trash pickup on the Property and informed him of the amount. (*Id.*)

Lakes did not perform a proper title search regarding the Property, nor did he ever review the recorded documents leading to Graeff's possession of the Property. Had Lakes performed such a search he would have discovered the Deed of Trust that was duly recorded on the Property in 2007 and the subsequent assignment of the Deed of Trust from MERS to Ocwen. He would have learned that the Foreclosure Deed to Parcelnomics stated that the Property was conveyed "without warranty expressed or implied." (JA0383). Lakes would also have learned that the Property was purchased for $4,470.00 when it had an assessed value of $147,543.00. (JA0383-JA0385). Lakes would have also discovered that the Property was transferred from Parcelnomics to Investment Deals, a fictitious firm name with the same owners as Parcelnomics, by a Grant, Bargain, Sale Deed. (JA0390-JA0393). Lakes would have been aware that the Property was transferred from Investment Deals to Noune Graeff through a Grant, Bargain, Sale Deed which stated, "Grantee will take title to the property subject to any claims, liens, and other encumbrances, if any. The sale will be made without covenant or warranty, expressed or implied regarding, but not limited to, title or possession, encumbrances, obligations to satisfy

any secured or unsecured liens or against all right, title and interest of the owner." (JA0396-JA0399).

Even though Lakes did not conduct an investigation, he is charged with the knowledge he would have gained had he done so. Lakes would have learned of the Deed of Trust and the subsequent HOA foreclosure sale. This information was sufficient to put Lakes on inquiry notice that a pre-existing lien might still encumber the Property. Thus, he could not have been a bona fide purchaser under NRS 111.315.

Additionally, *Diamond Spur* confirms that the holder of a first deed of trust is not required to record the tender of the superpriority portion of the HOA lien under NRS 111.315. *Diamond Spur*, 134 Nev. at 609, 427 P.3d at 119. This is so because, "[t]endering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land. Rather it *preserves* a pre-existing interest…." *Id.* (emphasis in original). Additionally, recording is not required under NRS 106.220, which provides that, "[a]ny instrument by which any mortgage or deed of trust of, lien upon interest in real property is subordinated or waived as to priority, must…be recorded…" Because the tender of the superpriority portion of the lien preserves the deed of trust as a matter of law, there is no discharge or change in priority through a document as defined by NRS 106.220. *See id.* at 609-610, 427 P.3d at 119.

A federal court in the District of Nevada has found "[e]ven assuming the issue were whether [the subsequent purchaser] had notice not only of the [Deed of Trust] but also of the legal possibility that the [Deed of Trust] might survive the HOA foreclosure sale (whether due to the pre-sale tender of the superpriority piece in particular or the legal possibility that the sale might not extinguish the DOT under NRS 116.3116 in general), [the subsequent purchaser] was not an innocent purchaser. [The subsequent purchaser] was on inquiry notice of the continuing vitality of the [Deed of Trust], especially considering that the sale price was a small fraction of the value of the Property and it knew the winning bidder was to take a foreclosure deed without warranty." *U.S. Bank, Nat'l Association v. NV Eagles, LLC*, 2017 WL 2259768, at *6 (D. Nev. May 23, 2017). "A buyer who takes title without warranty does not qualify as a BFP, because a grantor's refusal to issue standard warranties of title puts a reasonable and prudent person on inquiry notice of any competing interests." *Id.* In a separate case, the same court also stated that "[t]he law was not clear at the time of the foreclosure sale that the sale would extinguish the [Deed of Trust] at all, superpriority tender or not, and a reasonable purchaser therefore would have perceived a serious risk that it would not." *Bank of America, N.A. v. Toscano River Townhomes Association, Inc.*, 2017 WL 2259985, at *4 (D. Nev. May 23, 2017).

In consideration of the circumstances here, it is apparent that Lakes was not a BFP, even if his status was relevant to the determination in this case.

CONCLUSION

In light of the foregoing, it is apparent that the District Court did not commit an error of law in granting U.S. Bank's motion for summary judgment. Therefore, U.S. Bank respectfully requests that this Court affirm the District Court's Order.

Dated: May 21, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in normal Times New Roman 14 point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it is proportionately spaced, has a typeface of 14 points or more, and contains 7,044 words excluding the parts of the brief exempted by NRAP 32(a)(7)(C).

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

Dated: May 21, 2020.

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CERTIFICATE OF SERVICE

I certify that on May 21, 2020, I filed **Respondent's Answering Brief**. Service will be made to the following through the Court's electronic filing system:

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