IN THE SUPREME COURT OF NEVADA

AIRMOTIVE INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY Appellant, vs. BANK OF AMERICA, N.A., Respondent.	Case No. 80373

APPEAL
from the Eighth Judicial District Court, Department XXIII
The Honorable Stefany A. Miley, District Judge
District Court Case No. A-12-654840-C

RESPONDENT'S ANSWERING BRIEF

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134
Telephone: (702) 634-5000

Attorneys for Bank of America, N.A.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

Bank of America, N.A.

BAC North America Holding Company

NB Holdings Corporation

Bank of America Corporation

Berkshire Hathaway Inc.

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED March 22, 2021.

AKERMAN LLP

/s/ Scott R. Lachman
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Bank of America, N.A.

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JURISDICTIONAL STATEMENT

The district court entered an order granting Bank of America, N.A. (**BANA**) summary judgment motion and denying Airmotive Investments, LLC's summary judgment motion based on the Federal Foreclosure Bar on October 25, 2019. 6 JA 633-64. The district court dismissed the remaining claims on December 18, 2019. 6 JA 657. Airmotive timely appealed on January 2, 2020. 6 JA 664-65; *see* NRAP 4(a)(1). This court has jurisdiction under NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal does not fall within the category of cases identified in NRAP 17, and may therefore be properly assigned to the Court of Appeals.

ISSUES

Whether the district court abused its discretion by considering BANA's evidence, which established Fannie Mae's property interest and Fannie Mae's relationship with BANA.

Whether BANA's disclosures complied with the Nevada Rules of Civil Procedure, including whether BANA's initial disclosure properly disclosed all required documents and information, and whether BANA's supplemental disclosure was timely. Even if BANA's disclosures are assumed to be somehow deficient, whether the district court abused its discretion in considering BANA's evidence because the alleged deficiencies were harmless.

STATEMENT OF THE CASE

This appeal involves a familiar fact pattern: A subsequent purchaser of property sold at a homeowners' association foreclosure sale contends that it acquired free-and-clear title because, under NRS 116.3116 (the **State Foreclosure Statute**), the sale purportedly extinguished a deed of trust encumbering the property at the time of the foreclosure.

But because the Federal National Mortgage Association (**Fannie Mae**) owned the deed of trust at the time of the HOA sale, a federal statute precludes that result here. Specifically, the Housing and Economic Recovery Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.), provides that property, including lien interests, of Fannie Mae and the Federal Home Loan Mortgage Corporation (**Freddie Mac**, and together with Fannie Mae, the **enterprises**) cannot be extinguished by any foreclosure process without the consent of the Federal Housing Finance Agency (**FHFA** or the **conservator**) while the enterprises are under FHFA's conservatorship. *See* 12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**).

The district court granted BANA's summary judgment motion, holding BANA's assertion of the Federal Foreclosure Bar was timely, and "the Federal Foreclosure Bar precluded [Airmotive] from acquiring title to the property free and clear of Fannie Mae's property interest." 5 JA 542-48.

Airmotive does not contest the district court's conclusion that BANA timely asserted the Federal Foreclosure Bar or its finding that the evidence presented established the application of the Federal Foreclosure Bar to the deed of trust. Rather, Airmotive argues the district court incorrectly entered summary judgment for BANA because BANA's evidence of Fannie Mae's interest in the deed of trust supposedly was not timely and properly disclosed, and thus is purportedly inadmissible. Airmotive's evidentiary arguments fail. BANA's evidence was properly disclosed, and Airmotive was not prejudiced by the timing of the contested disclosures in any event. The district court did not abuse its discretion in admitting BANA's evidence. This court should affirm.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Fannie Mae's charter authorizes it to purchase and deal only in secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1717(b), 1719. Fannie Mae does not directly manage many practical aspects of mortgage relationships, such as handling day-to-day interactions with the borrowers. Instead, Fannie Mae contracts with servicers, like BANA, to act on its behalf.

II. Statutory Background

HERA established FHFA as the enterprises' regulator, authorized FHFA to place the enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as conservator. In September 2008—at the height of the financial crisis—FHFA placed the enterprises into conservatorships, where they remain today. *See Nationstar Mortgage, LLC v. SFR Investments Pool 1, LLC*, 133 Nev. 247, 247-48, 396 P.3d 754, 755 (2017).

Under HERA, when FHFA placed the enterprises into conservatorships, it succeeded immediately and by operation of law to "all rights, titles, powers, and privileges" of the enterprises "with respect to [their] assets," thereby making all enterprise assets "property of the agency" for the duration of the conservatorship. *See* 12 U.S.C. § 4617(b)(2)(A). The Federal Foreclosure Bar—a broad statutory "exemption," captioned "property protection"—provides that when the enterprises are under FHFA conservatorship, "[n]o property of the agency shall be subject to ... foreclosure ... without the consent of the agency." 12 U.S.C. § 4617(j)(3). These statutory provisions exist to protect the conservatorships. This court has held the Federal Foreclosure Bar preempts the State Foreclosure Statute to the extent a foreclosure sale would otherwise extinguish an enterprise's deed of trust. *See, e.g.*, *Daisy Trust v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 445 P.3d 846 (2019); *Saticoy Bay LLC Series 9641 Christine View*, 134 Nev. 270, 417 P.3d 363 (2018).

III. Facts Specific to the Property at Issue

This case involves a deed of trust securing a $360,000.00 promissory note (the **note**) (together with the deed of trust, the **loan**) on property located at 6279 Downpour Court in Las Vegas. 4 JA 247-68. The deed of trust, recorded on June 30, 2006, lists Genevieve Uniza-Enriquez as the borrower, Utah Financial, Inc. as the lender (**lender**), and Mortgage Electronic Registration Systems, Inc. (**MERS**) as beneficiary solely as nominee for lender and lender's successors and assigns. *Id*. Fannie Mae purchased the loan in August 2006, thereby acquiring ownership of the deed of trust. 4 JA 271, 275. On June 30, 2010, MERS, as nominee for lender and lender's successors and assigns, recorded an assignment of the deed of trust to BAC Home Loans Servicing, LP (fka Countrywide Home Loans Servicing LP, and predecessor by merger to BANA), Fannie Mae's Loan servicer. 4 JA 272, 378.

According to a trustee's deed upon sale recorded on April 13, 2011, the property was sold at a public auction to Las Vegas Development Group, LLC (**LVDG**) for $4,001.00 on April 12, 2011. 4 JA 390-93. At the time of the sale, Fannie Mae owned the loan and BANA served as record beneficiary of the deed of trust in its capacity as Fannie Mae's servicer. *See* 4 JA 272, 378.

According to a grant deed recorded on January 5, 2017 and rerecorded on March 7, 2017, LVDG assigned any interest it had in the property to Airmotive for consideration of $1.00. 4 JA 397-402.

LVDG and Airmotive share a managing member (Jon Jentz) according to the Nevada Secretary of State's website. Public records on a government website are subject to judicial notice; these records are generally known within Nevada and their accuracy are not subject to reasonable dispute. *See* NRS 47.130; *Yellow Cab of Reno, Inc. v. Second Judicial Dist. Court*, 127 Nev. 583, 591, 262 P.3d 699, 704 & n.4 (2011); *Mack v. Estate of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106 (2009).

IV. Procedural History

LVDG, Airmotive's predecessor in interest, filed a complaint on January 17, 2012, seeking a declaration it had free-and-clear title to the property. 1 JA 6-9. That complaint was amended two times. 1 JA 10-13; 3 JA 177-190. BANA first asserted the Federal Foreclosure Bar as an affirmative defense on March 26, 2015, in responding to the second amended complaint from LVDG. 1 JA 18. The operative complaint, the third amended complaint, was filed by LVDG in February 2016. 3 JA 177-90. BANA timely filed an answer and counterclaim in May 2016 responding to the third amended complaint, and again raised the Federal Foreclosure Bar as an affirmative defense on the basis of Fannie Mae's ownership of the deed of trust. 3 JA 191-213.

Prior to disclosure of its first supplemental disclosures on March 6, 2019, BANA previously served its initial disclosures containing over 430 pages of documentary evidence, including "Bank of America's business records showing

Fannie Mae ownership of loan." 5 JA 498.[1] BANA also provided a list of witnesses in that disclosure, including a "corporate representative of Federal National Mortgage Association" who was "expected to testify regarding Fannie Mae's ownership of the note and deed of trust associated with the purchase of the property at issue in this litigation." 5 JA 496.

In March 2018, the parties agreed to waive NRCP 41(e)'s requirement that a case be brought to trial within five years of its filing. 3 JA 216. On September 24, 2018, LVDG and BANA filed a stipulation and order to reopen and extend discovery deadlines, which extended the discovery cut-off date to March 6, 2019. 3 JA 214-217. BANA served its first supplemental disclosures on March 6, 2019, within the new discovery period set by the order. 5 JA 494–549. Throughout this entire time period, LVDG did nothing to seek any discovery from BANA—it did not notice depositions of any of the witnesses BANA disclosed in its initial disclosures, did not serve any requests for production or interrogatories, did not note any objections to BANA's productions, and did not move to extend discovery beyond the stipulated deadline. *See* 3 JA 223; 5 JA 422-23.

On April 6, 2019, BANA moved for summary judgment on its counterclaims and LVDG's claims for quiet title and declaratory relief. 3 JA 226-45, 4 JA 246-404.

[1] Although the record does not contain BANA's initial disclosures of documents and witnesses, BANA's first supplemental disclosures designates newly disclosed documents and witnesses in bold font. 5 JA 494-502.

Three days later, LVDG and BANA filed a stipulation and order to substitute Airmotive for LVDG. 4 JA 405-07. On July 17, 2019, in its opposition to BANA's summary judgment motion, Airmotive asserted for the first time that BANA's disclosure of the evidence was improper. 5 JA 422–23. Airmotive did not, however, raise NRCP 56(d) or otherwise assert it could not present facts essential to its opposition. *See id.*

On October 17, 2019, the district court granted BANA's summary judgment motion. 5 JA 540-49. The district court ruled BANA's Federal Foreclosure Bar defense was not barred by a statute of limitations, BANA's counterclaim based on the Federal Foreclosure Bar was timely, and "the Federal Foreclosure Bar precluded [Airmotive] from acquiring title to the property free and clear of Fannie Mae's property interest." 5 JA 548. Airmotive and BANA subsequently stipulated to dismiss their remaining claims. 6 JA 661-63. The district court awarded costs to BANA on November 27, 2019. 6 JA 648-53. The district court entered a final judgment on December 18, 2019. 6 JA 657. Airmotive appealed. 6 JA 664-65.

STANDARD OF REVIEW

The court reviews a district court's decision to enter summary judgment and its conclusions of law de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

A district court's decision to admit evidence is reviewed under an abuse of discretion standard. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008).[2]

ARGUMENT

The district court held BANA timely asserted the Federal Foreclosure Bar and found Fannie Mae owned the deed of trust encumbering the subject property. Applying the same reasoning this court has endorsed in several decisions—including *Daisy Trust* and *Christine View*—the district court held that because the Federal Foreclosure Bar protected Fannie Mae's deed of trust from extinguishment, Airmotive and its predecessor in interest took title subject to the deed of trust.

Rather than re-argue this court's Federal Foreclosure Bar precedent, Airmotive argues BANA did not timely disclose the Bar. But Airmotive never directly asserts BANA failed to meet the discovery deadlines laid out by the Nevada Rules of Civil Procedure and the district court. BANA's initial disclosures, served in 2017, were timely, and its supplemental disclosures were also timely served on March 6, 2019, which was the date the parties agreed to stipulate would be the cut-off date for discovery. All of the disclosures were timely.

[2] Airmotive suggests this court must determine whether the district court "erred" in considering BANA's evidence, *see, e.g.*, AOB 7, 12, while also arguing this court's review is for abuse of discretion, AOB 14-15. To the extent Airmotive argues anything less than abuse of discretion is the proper standard, such an argument is in conflict with this court's precedent.

Airmotive takes issue with the substance of both of those disclosures. Airmotive contends BANA's initial disclosures did not comply with NRCP 16.1, because Airmotive claims BANA was required to include additional documents beyond those it included in its initial disclosures, *see, e.g.*, AOB 15-16, and because BANA allegedly should have "include[d] the identity of witnesses" instead of simply referring to the titles of corporate witnesses. *See, e.g.*, AOB 8. Airmotive also claims BANA's supplemental disclosures did not comply with NRCP 26(e), which requires timely supplementing of those disclosures, because Airmotive believes BANA should have supplemented its disclosures sooner than it did. *See, e.g.*, AOB 11.

Airmotive's arguments lack merit. NRCP 16.1 did not require any documents beyond those BANA disclosed, as BANA produced all the documents it had in its possession, nor did it require BANA to identify Fannie Mae's corporate witness by name in the initial disclosure. Airmotive also does not provide any compelling justification for its claim that NRCP 26(e) compelled BANA to update its disclosures sooner than it did.[3] And, even if either of BANA's disclosures were somehow

[3] While it is not dispositive to the issue at hand, Airmotive repeatedly misrepresents the timing of BANA's supplemental disclosure by stating it was served "31 minutes prior to the close of discovery." AOB 7; *see also* AOB 5, 10, 11, 12, 14-15. The discovery was, by Airmotive's own admission, served at 4:29 PM, AOB 11, and the discovery period closed just before midnight on March 6, 2019. *See* NRCP 6(a)(4) (setting 11:59 PM in the court's local time as the time that a day ends for the purposes

Footnote continued on next page.

deficient, the district court properly exercised its discretion to consider the evidence under NRCP 37(c)(1) because the deficiencies were harmless and Airmotive did not take any action to alleviate any alleged prejudice. Most notably, Airmotive did not serve any discovery or deposition requests, did not move to reopen discovery, and did not move for 56(d) relief. This court should affirm.

I. BANA's Initial Disclosures Complied with the Relevant Rules.

A. The Initial Disclosures Satisfied NRCP 16.1

BANA fully complied with NRCP 16.1 through its initial disclosures of evidence, which contained ample evidence that BANA intended to assert the Federal Foreclosure Bar as a defense. *See* 5 JA 494-502. Rule 16.1(a)(1)(A) provides parties "must, without awaiting discovery requests, provide to the other parties" both "the name and, if known, the address and telephone number of each individual likely to have information discoverable under Rule 26(b), including for impeachment or rebuttal, identifying the subject of the information;" and "a copy … of all documents,

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of electronic filings). Airmotive's claim is therefore incorrect. Airmotive does not cite to any rule that requires a party to provide materials a certain time before a deadline, and implying such a requirement would undermine the whole idea of a deadline. Furthermore, even if BANA's supplemental disclosure was to be deemed noncompliant due to when it was produced, it would still be improper to exclude the evidence because the alleged deficiency was harmless in light of the notice provided by the initial disclosure and Airmotive's decision not to take any action to alleviate potential prejudice. *See* discussion *infra* Section III.

electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses."

BANA's initial disclosures complied with those requirements. Those disclosures included hundreds of pages of evidence, including the recorded documents in this case and BANA's own business records that showed Fannie Mae's ownership of the loan. *5* JA 494-502. The disclosure also included a copy of Fannie Mae's lender letter, which instructed servicers to assert the Federal Foreclosure Bar on its behalf, multiple statements made by FHFA relating to the Federal Foreclosure Bar, and a link to Fannie Mae's servicing guide. 5 JA 499-500. The initial disclosure also included a witness list stating a "corporate representative of Federal National Mortgage Association" was "expected to testify regarding Fannie Mae's ownership of the note and deed of trust associated with the purchase of the property at issue in this litigation." 5 JA 496.

Airmotive seems to claim BANA's initial disclosures were improper because BANA should have disclosed Fannie Mae's business records in its initial disclosures. *See, e.g.*, AOB 12, 15-16. Yet NRCP 16.1 only requires parties to disclose documents "in its possession." NRCP 16.1(a)(1)(A)(ii). Airmotive focuses on BANA's alleged failure to disclose Fannie Mae business records, but Airmotive did not assert (let alone establish) that BANA had them in its possession.

Airmotive also suggests BANA did not comply with NRCP 16.1 because the initial disclosure listed Fannie Mae's corporate representative rather than providing the actual name of Fannie Mae's corporate representative. *See* AOB 12-13. Yet NRCP only requires the names of "individual[s] likely to have information discoverable under Rule 26(b)," as opposed to the identity of corporate representatives who are simply authenticating relevant documents; BANA's disclosure was therefore in compliance with that Rule. And, despite Airmotive's assertions to the contrary, *see, e.g.*, AOB 13, BANA's initial disclosure put Airmotive on notice that BANA intended to include testimony from a Fannie Mae representative. Airmotive was on sufficient notice that it could depose a Fannie Mae representative. Airmotive cannot blame BANA for Airmotive's own failure to act on that knowledge and its decision not to depose a Fannie Mae representative.

B. BANA's Supplemental Disclosures Complied with NRCP 26 and 37

Airmotive claims BANA's supplemental disclosures did not comply with NRCP 26(e) because the information provided in the disclosures should have been provided sooner. *See, e.g.*, AOB 11. Airmotive points to the fact that some of the documents included in the supplemental production were generated "approximately 2 months" before they were disclosed. AOB 10. Yet Airmotive does not provide any legal citation for the contention that a two-month delay in production is not timely under NRCP 26(e). The only cases Airmotive cites in support of its

contention that Rule 26(e) required supplementation to occur sooner, *see* AOB 12–13, involve instances where the declaration or expert report was not filed until *after* the close of discovery. *See Luke v. Family Care & Urgent Med. Clinics*, 323 F. App'x 496, 498–99 (9th Cir. 2009); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105 (9th Cir. 2001); *Medina v. Multaler, Inc.*, 547 F. Sup. 2d 1099, 1105 n.8 (C.D. Cal. 2007).

The declarations in question, on the other hand, were served before discovery closed. And in the two cases Airmotive cites that discuss summary judgment motions—*Luke* and *Medina*—the declarations in question were disclosed *after* the summary judgment motion was filed. *See Luke*, 323 F. App'x at 498; *Medina*, 547 F. Supp. 2d at 1105 n.8. None of the three cases provide any specific timeline for how soon supplementation must occur under Rule 26(e). Airmotive has not met its burden to show the district court abused its discretion in considering evidence included in the supplemental disclosure.

II. The District Court Could Consider the Evidence Because Any Alleged Deficiencies Were Harmless and Airmotive Did Not Seek to Alleviate Any Alleged Prejudice

Even if the initial or supplemental disclosures were considered untimely because more information should have been disclosed sooner, NRCP 37(c)(1) establishes parties may rely on that evidence if the failure to disclose sooner "is

harmless." Any failure to disclose sooner was harmless, as Airmotive's and its predecessor's own behavior confirms.

Airmotive and its predecessor, LVDG—a related corporation with the same managing member—have been on notice since, at the very latest, May 2016 that BANA would assert the Federal Foreclosure Bar and would contend Fannie Mae owned the deed of trust at the time of the sale. In its initial disclosures, BANA disclosed that a Fannie Mae corporate representative would provide evidence supporting that contention. 5 JA 496. Had LVDG (represented by the same counsel as Airmotive) been concerned about the adequacy of the disclosures, it could have raised the issue with BANA's counsel and requested additional information. It could have propounded discovery requests or sought to take a Rule 30(b)(6) deposition of Fannie Mae. Or it could have moved for a discovery conference with the district court or the discovery commissioner. But Airmotive's predecessor did none of those things; instead, it sat on its hands.

Airmotive and its predecessor continued to sit on their hands after BANA served its supplemental disclosures, on March 6, 2019—two months after Airmotive acquired its interest in the property from LVDG (a related corporation). At that time, Airmotive and LVDG knew, based on the stipulated scheduling order, that a motion for summary judgment was coming. 3 JA 216. Again, if either Airmotive or LVDG were concerned about the adequacy of BANA's disclosures, they could have raised

the issue with counsel and requested additional information. Or they could have requested an extension of discovery. Or they could have moved for a status conference with the district court or the discovery commissioner. But again, neither LVDG nor Airmotive (which substituted into the case shortly after BANA filed the motion for summary judgment, despite having acquired its interest in the property months earlier) did any of those things; they simply waited for the summary judgment motion.

And when BANA filed the summary judgment motion—attaching the evidence to which Airmotive now objects—Airmotive again failed to take any action indicating any legitimate concern with the disclosures or the evidence. Airmotive did not move to strike the evidence. Airmotive did not request Rule 56(d) relief. Airmotive did not move to extend the briefing schedule. Instead, Airmotive inserted a perfunctory, record-making objection in its opposition brief. 5 JA 422-23. Neither Airmotive nor its predecessor/affiliate ever took the actions a reasonable party truly surprised by undisclosed or unexpected evidence would have taken.

This court has relied on NRCP 37(c)(1) in rejecting similar discovery arguments in the Federal Foreclosure Bar context where the HOA sale purchaser suffered no prejudice or failed to alleviate any prejudice despite an opportunity to do so. For instance, this court has twice relied on Rule 37(c) in rejecting the argument that a party violates NRCP 16.1 when an initial disclosure simply "listed a corporate

representative" and the representative's affidavit and identity "was produced during the course of discovery." *SFR Invs. Pool 1, LLC v. Bank of America, N.A.*, No. 77898, 2020 WL 1670746, at *1 (Nev. Mar. 27, 2020) (unpublished); *SFR Invs Pool 1, LLC v. Fed. Nat'l Mortg. Ass'n*, No. 77544, 2020 WL 1328987, at *1 (Nev. Mar. 18, 2020) (unpublished). In both cases, the court found that even if such a disclosure constituted "technical noncompliance with NRCP 16.1," any such noncompliance could be deemed "harmless." *SFR v. Bank of Am.*, 2020 WL 1670746, at *1; *SFR v. Fannie Mae*, 2020 WL 1328987, at *1.

The court took a similar approach in *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, No. 79306, 2020 WL 6742959 (Nev. Nov. 13, 2020) (unpublished). In that case, the HOA sale purchaser argued the enterprise and its servicer failed to comply with NRCP 16.1(a)(1)(A) because the enterprise declarant was not formally disclosed as a witness and the evidence was disclosed after the enterprise's motion for summary judgment; according to the purchaser, the relevant evidence should therefore have been stricken under NRCP 16.1(e)(3)(B). Respondent's Ans. Br. at 54, *Residential Credit Sols., Inc. v. SFR Invs. Pool 1, LLC*, No. 79306 (Nev. Nov. 13, 2020), 2020 WL 1033626, at *54. The court rejected the HOA sale purchaser's evidentiary assertions, concluding the purchaser "could have alleviated any alleged prejudice" by taking actions such as asking to reopen discovery or requesting supplemental briefing. *Residential Credit Sols.*, 2020 WL 6742959, at *1.

This court has also rejected the argument that a party is prejudiced by the submission of enterprise documents in support of a summary judgment motion even where such documents were disclosed *after* the close of discovery. In *SFR Invs. Pool 1, LLC v. Green Tree Servicing, LLC,* the district court denied the majority of appellant's motion to exclude Fannie Mae's purportedly late disclosure of witnesses and documents and granted judgment in favor of Fannie Mae based on that same evidence. *See* Appellant's Opening Br. at 11-12, No. 72010 (Nev. July 5, 2017), 2017 WL 3670692. On appeal, appellant challenged the district court's admission of evidence after the close of discovery. *SFR Investments Pool 1, LLC v. Green Tree Tree Servicing, LLC*, No. 72010, 2018 WL 6721370, at *3 (Dec. 17, 2018) (unpublished). The court held "the district court did not abuse its discretion in admitting Fannie Mae's evidence because the late disclosures were not overly prejudicial to SFR and because SFR did nothing to challenge that evidence or reduce any alleged prejudice." *Id.*

So too here, as Airmotive was not harmed by the delay in production and failed to act to alleviate prejudice. BANA's supplemental disclosures were in no way necessary to put Airmotive on notice of the Federal Foreclosure Bar's relevance to this case; BANA had already pled the Federal Foreclosure Bar and provided BANA's business records, which stated Fannie Mae owned the loan while BANA serviced it. 5 JA 494-502. Airmotive overstates the quantity of the disclosure and

claims "over 300 pages of newly disclosed documents [that] had never been previously disclosed," AOB 8, including "approximately 100 pages of purported business records from Fannie Mae and Freddie Mac," were included in the disclosure. AOB 12. In fact, most of BANA's disclosure of Fannie Mae's documents consisted of Fannie Mae's Guide, which had previously been disclosed to Airmotive in BANA's initial disclosures, albeit in the form of internet links rather than hardcopies. 5 JA 494–502. Airmotive should not act surprised these the Guide is disclosed in virtually every Federal Foreclosure Bar case, and this is not Airmotive's first rodeo. BANA's supplemental disclosure included very few substantive, new documents related to Fannie Mae's ownership of the loan. *See id.*

Airmotive also failed to take any reasonable steps—including requesting a deposition of Fannie Mae's disclosed corporate representative, making any discovery requests of BANA, moving to reopen discovery, or making a 56(d) motion—that "could have alleviated any alleged prejudice." *Residential Credit Sols*, 2020 WL 6742959, at *1. Airmotive suggests it was prevented from conducting any discovery regarding Fannie Mae's business records and "could not have deposed" Fannie Mae's corporate representative as a result of the timing of BANA's disclosures, AOB 13, but offers no explanation for why it did not attempt to conduct such depositions in the years after BANA provided its initial disclosures and witness list. Between the time the motion-to-dismiss order was vacated in February 2015

and the stipulated close of discovery in March 2019, Airmotive had plenty of opportunity to serve requests for production of documents, propound interrogatories, issue requests for admission, or notice a 30(b)(6) deposition of a Fannie Mae witness. Airmotive did none of those things, instead passively waiting for BANA to provide whatever evidence Airmotive hoped to secure.[4]

Airmotive's contention it was "ambush[ed]" by BANA's Federal Foreclosure Bar argument therefore rings hollow. *E.g.*, AOB 14. BANA cannot be blamed for Airmotive's failure to take advantage of civil discovery procedures to prosecute its case, and BANA's timely disclosure of materials on the discovery cut-off date can hardly be deemed an "ambush." Furthermore, Airmotive and its counsel are repeat players in quiet-title actions following HOA sales such as the one here, where an enterprise's ownership of the deed of trust is a central fact to be proved. *See, e.g.*, *Nationstar Mortg. LLC v. Airmotive Invs., LLC*, 787 F. App'x 446 (9th Cir. 2019); *Nationstar Mortg. LLC v. Airmotive Invs., LLC*, No. 19-16275, 2019 WL 1977415 (9th Cir. Feb. 25, 2019). As a repeat party in virtually identical actions, Airmotive is comfortably familiar with the evidence necessary to establish the Federal

[4] Airmotive's claim that it had no obligation to "build BANA's case for it," falls flat. AOB 17. BANA has not asked Airmotive to do anything of the sort, and disclosed all evidence necessary to prove its case. Those disclosures offered Airmotive, a repeat litigant in Federal Foreclosure Bar matters, an opportunity to ask for discovery it may have wanted or depose witnesses as it may have seen fit. Yet Airmotive chose to do nothing.

Foreclosure Bar's application and the type of evidence it could expect to be produced in these sorts of cases. Airmotive's dispute arises not from any real surprise or actual prejudice—there was none—but with the operation of the Federal Foreclosure Bar.

CONCLUSION

BANA respectfully requests this court affirm the district court's judgment. BANA also requests this court affirm the district court's costs award.[5]

DATED March 22, 2021.

AKERMAN LLP

/s/ Scott R. Lachman
ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

Attorneys for Bank of America, N.A.

[5] BANA incorporates all arguments from its May 9, 2021 opposition to Airmotive's motion to stay, including but not limited to the fact Airmotive failed to address statute of limitations in its opening brief.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY 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 in Times New Roman and 14 point font size.

I FURTHER CERTIFY this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the answer exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 4,643 words.

FINALLY, I 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 opening brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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

DATED this 22nd day of March, 2021.

AKERMAN LLP

/s/ Scott R. Lachman

ARIEL E. STERN, ESQ.
Nevada Bar No. 8276
SCOTT R. LACHMAN, ESQ.
Nevada Bar No. 12016
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89144

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I certify that I electronically filed on March 22, 2021, the foregoing **RESPONDENT'S ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of Akerman LLP