IN THE SUPREME COURT OF THE STATE OF NEVADA

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AIRMOTIVE INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY, Appellant, vs. BANK OF AMERICA, N.A., Respondent.	Electronically Filed Aug 23 2021 06:00 p.m. Elizabeth A. Brown Clerk of Supreme Court Supreme Court No. 80373

APPEAL

From the Eighth Judicial District Court,
The Honorable Stefany A. Miley, District Judge
District Court Case No. A-12-654840-C

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE

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

Airmotive Investments, LLC (*"Airmotive"*) is a Nevada limited liability company. Its sole member is Jon Jentz and no publicly held corporation owns 10% or more of its ownership interest. Appellant is represented by Roger P. Croteau and Timothy E. Rhoda of Roger P. Croteau & Associates, Ltd.

STATEMENT OF THE CASE AND FACTUAL BACKGROUND

The facts surrounding this matter have been set forth in Appellant's Opening Brief. Appellant shall utilize the defined terms identified in the Opening Brief herein.

ARGUMENT

1. THE BANK FAILED TO TIMELY SUPPLEMENT ITS DISCLOSURES

NRCP 16.1(a)(1) specifically requires that "a party must, without awaiting a discovery request, provide to other parties" information, including the identity of witnesses and copies of documents. NRCP 16.1. NRCP 26(e) provides that a party "is under a duty to **timely** supplement or correct [its disclosure] to include information thereafter acquired if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." NRCP 26(e) (Emphasis added).

As discussed in Appellant's Opening Brief, the Bank effectively served the documents it relied upon in conjunction with its Motion for Summary Judgment 31 minutes prior to the close of business on the day that discovery closed. This

was the case although the Bank's counsel had possessed the evidence for at least approximately 2 months.

The Declaration of Graham Babin disclosed by the Bank in association with its supplemental disclosures was dated January 10, 2019 – approximately 2 months before the date on which discovery closed. JA 0273. Moreover, the screen shots attached to Mr. Babin's declaration were generated on January 7, 2019. JA 0275-0292. Under such circumstances, it is clear that the Bank failed to "timely" supplement its disclosures.

Unlike the Bank, Airmotive possessed no knowledge whatsoever regarding the ownership of the loan secured by the Property. On the contrary, Airmotive possessed no privity with either the Bank or the Former Owner of the Property. The Bank, on the other hand, possessed all of the information related to the loan from the time this action was filed nearly a decade ago. It is equally clear that the Bank generated the evidence that it intended to utilize to support its Motion for Summary Judgment approximately 2 months before it was actually supplemented.

Pursuant to NRCP 26(e), the Bank was under an obligation to "**timely**" supplement its disclosures. It failed to do so although it is patently obvious based upon the dates on which the evidence was printed that it possessed the documents relied upon in its Motion for Summary Judgment for *at least* approximately 2

months before they were disclosed in the last hours minutes of the discovery period. Pursuant to NRCP 37(c)(1), the Bank was "not allowed to use that information or witness to supply evidence on a motion, at a hearing."

2. THE BANK'S UNTIMELY DISCLOSED EVIDENCE SHOULD NOT HAVE BEEN CONSIDERED

NRCP 16.1(e)(3)(b) provides as follows:

> If an attorney fails to reasonably comply with any provision of this rule, or if an attorney or a party fails to comply with an order entered pursuant to subsection (d) of this rule, the court, upon motion or upon its own initiative, shall impose upon a party or a party's attorney, or both, appropriate sanctions in regard to the failure(s) as are just, including the following:
> . . .
> An order prohibiting the use of any witness, document or tangible thing which should have been disclosed, produced, exhibited, or exchanged pursuant to Rule 16.1(a).

NRCP 16.1(3). Moreover, NRCP 37(c) provides as follows:

> (c) **Failure to Disclose, to Supplement an Earlier Response, or to Admit.**
> (1) **Failure to Disclose or Supplement.** **If a party fails to provide information or identify a witness as required by Rule 16.1(a)(1), 16.2(d) or (e), 16.205(d) or (e), or 26(e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless**. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> (A) may order payment of the reasonable expenses, including attorney fees, caused by the failure;
> (B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(1).

As discussed above, it is clear that the Bank failed to timely supplement its document and witness disclosures as required by Rule 26(e). On the contrary, the Bank delayed providing these supplemental disclosures for a period of at least 2 months after they became available. Under such circumstances, Rule 37(c) provides that the Bank "[was] not allowed to use that information or witness to supply evidence on [its Motion for Summary Judgment], unless the failure was substantially justified or is harmless."

3. PUBLIC POLICY AND JUDICIAL ECONOMY REQUIRE THAT A PARTY NOT BE ALLOWED TO "SIT" ON ITS EVIDENCE UNTIL THE CLOSE OF DISCOVERY

A trial court is vested with broad discretion in determining the admissibility of evidence. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). A district court's decision to admit or exclude evidence is reviewed for abuse of discretion. *Frei v. Goodsell*, 129 Nev. 403, 408, 305 P.3d 70, 73 (2013). As discussed above, it is readily clear that the Bank possessed all of the evidence related to this matter. To the extent that the Bank did not physically possess information that may have been in the hands of Fannie Mae, it

is clear that it possessed this information at least approximately 2 months prior to the date on which the information was finally disclosed.

Affirming the district court's Order in this matter would indicate (1) that a litigant may hide and fail to disclose evidence that is solely in its possession until the time of trial or other dispositive ruling only to then spring it upon the opposing litigant and cause significant prejudice; and (2) that such a litigant may then place the burden of extending discovery upon the non-disclosing party.

The Bank possessed or at least had access to all of the evidence related to the Property and the First Deed of Trust for the entirety of this litigation. For reasons that are not known, it delayed disclosing the evidence that it asserts proves that the First Deed of Trust was owned by Fannie Mae until the final hours of the discovery period after approximately 7 years of litigation. While the evidence and identity of its additional witnesses was undisputably filed within the discovery period, the Bank nonetheless failed to comply with the spirit and letter of the applicable rules of civil procedure. Under such circumstances, the district court abused its discretion by considering this evidence.

The Bank argues at various points that Airmotive did not seek to extend discovery or take other action in response to the Bank's delayed disclosures. The burden of doing so should not fall upon Airmotive where the Bank determined that

it desired to hide information that was within its custody and control until the waning hours of the discovery period. Indeed, allowing such conduct would result in litigants drawing cases out in perpetuity by refusing to disclose evidence until the last possible minute. The burden of re-opening or continuing discovery should not fall upon the shoulders upon the ambushed party. This is especially true where the rules of civil procedure specifically provide that late-disclosed evidence should not be allowed in support a motion.

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CONCLUSION

For the reasons set forth herein the district court erred. The Bank wholly failed to *timely* disclose evidence supporting its claims and defenses. Under such circumstances, the late-disclosed evidence should have been excluded by the district court. Appellant respectfully requests that the district court's Orders be reversed and that this matter be remanded with instructions consistent with this Court's opinion.

DATED this 23rd day of August, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X9 with 14 point, double spaced Times New Roman font.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the 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 1306 words. Counsel has relied upon the word count application of the word processing program in this regard.

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 this 23rd day of August, 2021.

ROGER P. CROTEAU & ASSOCIATES, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 23rd day of August, 2021, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

__X__ VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's eflex e-file and serve system.

____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

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____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda
An employee or agent of ROGER P. CROTEAU & ASSOCIATES, LTD.