IN THE SUPREME COURT OF THE STATE OF NEVADA

MARC E. RADOW; AND KELLEY L. RADOW, HUSBAND AND WIFE,

Appellants,

vs.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, SUCCESSOR IN INTEREST TO WACHOVIA BANK, NATIONAL ASSOCIATION, AS TRUSTEE FOR WELLS FARGO ASSET SECURITIES CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2005-AR1,

Respondent.

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Case No. 81021

District Court No. CV19-01604

APPEAL
From the Eighth Judicial District Court
The Honorable Kathleen Drakulich

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 so the Judges or Justices of this Court may evaluate possible disqualification or recusal.

U.S. Bank National Association is a wholly owned subsidiary of U.S. Bancorp, in which no entity owns 10% or more of its stock.

There are no other known interested parties.

Snell & Wilmer L.L.P. has represented U.S. Bank on appeal. It was previously represented by Tiffany & Bosco P.A.

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Introduction

This Court should affirm the district court's plainly correct decision to issue a certificate of foreclosure. The district court was right that U.S. Bank did not violate Foreclosure Mediation Rule ("FMR") 13(7)(a), which requires presentation of each assignment of a deed of trust to the mediator. Here, U.S. Bank presented the recorded July 2011 assignment of the deed of trust to the mediator. Meanwhile, homeowners Marc and Kelley Radow placed the identical, unrecorded March 2011 version of that same assignment before the mediator. The Radows' quibble that they and not U.S. Bank presented the March 2011 documentation is a distinction without a difference. *See Einhorn v. BAC Home Loans Servicing*, 128 Nev. 689, 697, 290 P.3d 249, 254 (2012) ("Here, Einhorn brought the missing assignment needed to complete BAC's chain of title."). And the purpose of foreclosure mediation was manifestly fulfilled here, where the mediator found that that the parties "participated in good faith with [U.S. Bank] offering [the Radows] alternatives to foreclosure . . . ." I APP 032. All assignment documents were before the mediator, and it is undisputed that ***for over a decade*** the Radows made no payment whatsoever on their home loan. This Court should affirm.

Statement of the Issues

1. Did U.S. Bank provide "each assignment" of the Deed of Trust during the mediation given that it provided the recorded July 2011 Assignment, which (a) transferred the same interest between the same parties as the "missing" March 2011 Assignment but merely corrected a typographical error in the earlier unrecorded instrument and (b) superseded and invalidated the March 2011 Assignment?

2. Alternatively, was the requirement of presenting "each assignment" satisfied – as in *Einhorn* – by the fact that the Radows provided the March 2011 Assignment during the mediation and that instrument – like that in *Einhorn* – included a notary public's certificate of acknowledgment, making it self-authenticating?

Statement of the Case

I. Nature of the Case

This appeal stems from a petition for foreclosure mediation under Nevada's Foreclosure Mediation Program filed in the Second Judicial District Court in August 2019, involving real property in Washoe County, Nevada.

II. Factual Background

A. The Radows purchase their home, and Wells Fargo eventually transfers its interest in the Deed of Trust to U.S. Bank.

The Radows purchased their home in Reno, Nevada in 2004 ("the Property") with a home loan secured by a deed of trust (the "Deed of Trust"). *See* I APP 052. They eventually fell into arrears on their loan and filed for bankruptcy in 2010 in the District of Nevada. *See* I APP 200. On March 24, 2011, Wells Fargo Bank, N.A. signed before a notary public a "Corporate Assignment of Deed of Trust" transferring its interest as beneficiary to the Deed of Trust to U.S. Bank (the "March 2011 Assignment"[1]). I APP 191. However, this assignment ***was never recorded***. *See id*.

Just over a month later, on April 29, 2011, the bankruptcy court granted U.S. Bank's motion vacating the automatic bankruptcy stay as to itself. I APP 200. Although that underlying motion is not part of the

[1] The briefing below and the district court refer to this instrument as the "Invalid Assignment," while the Radows' opening brief uses the term "Missing Assignment." Because the relative dates of the two instruments at issue are relevant to this appeal, U.S. Bank will use the term "March 2011 Assignment."

record in this case, it is undisputed that U.S. Bank provided a copy of the March 2011 Assignment as an exhibit. *E.g.*, I APP 077 ¶ 7.

Almost three months later, on July 28, 2011, Wells Fargo executed a second Corporation Assignment of Deed of Trust conveying its interest in the Deed of Trust to U.S. Bank ("July 2011 Assignment"). I APP 052. The *typewritten* language in this assignment is identical to the March 2011 Assignment. However, in the July 2011 Assignment, someone manually crossed out the misspelled word "Securites" in "Wells Fargo Asset Securites [sic] Corporation" and, using an asterisk, added the word "Securit**i**es" under the operative paragraph to correct the typographical error. *Compare id.* (emphasis added), *with* I APP 191.

The only other differences between the documents are that they were signed by different Wells Fargo executives and witnessed by different notary publics. They are otherwise identical transferences of the same property interest between the same entities. However, unlike the March 2011 Assignment, the July 2011 Assignment was subsequently recorded with the Washoe County Recorder. I APP 052 (noting in the top-right corner that the document was recorded on July 24, 2012).

B. The Radows petition for foreclosure mediation, ultimately leading to the mediation at issue.

Not long after the automatic stay was lifted, foreclosure proceedings were initiated against the Radows, who then petitioned for foreclosure mediation. See I APP 081–86. The first mediation was held in November 2011, but the parties did not reach a settlement, and the mediator ultimately did not issue the foreclosure certificate because U.S. Bank had neglected to provide certain documents during the mediation. I APP 052. This same cycle continued for several years until the sixth and final mediation, the one at issue in this appeal.

The Radows initiated that final mediation by filing a petition for foreclosure mediation assistance in August 2019 in the Second Judicial District. I APP 001. The parties were assigned a mediator, and the mediation took place in November 2019. I APP 026. Despite the fact that the parties once again did not arrive at a settlement agreement and "although both parties did not produce all documents," the mediator expressly found that both U.S. Bank and the Radows "participated in good faith with [U.S. Bank] offering alternatives to foreclosure . . . ." I APP 032.

Despite that important favorable finding, the mediator concluded that U.S. Bank had failed to comply with the FMRs by not providing a copy of *each* assignment of the deed of trust because it provided only the recorded July 2011 Assignment and not the earlier unrecorded March 2011 Assignment that the later instrument replaced. I APP 032–33. The mediator thus "recommend[ed] imposition of a sanction that a certificate [of foreclosure] shall not issue and that [U.S. Bank] shall pay for the [Radows'] costs as they relate to this mediation, along with the fee of $200 as and for the filing fee for any further mediation." I APP 033. The mediator issued her statement on December 5, 2019, and it was served the following day. I APP 034, 58; Op. Br. 18.

III. Proceedings Below

On December 16, 2019, the Radows filed a Motion for Relief asking the district court to impose sanctions based on the mediator's statement and her finding that U.S. Bank had failed to provide all the required documents during mediation. I APP 058. U.S. Bank filed an opposition and countermotion for relief arguing that it did comply with the Foreclosure Mediation Rules because (1) the March 2011 Assignment did not need to be included given that U.S. Bank provided the July 2011

Assignment and (2) even if that were not the case, the Radows themselves provided the March 2011 Assignment. II APP 206. U.S. Bank therefore requested that the court not impose sanctions and instead issue the certificate of foreclosure. II APP 210.

The district court subsequently issued its "Order Denying Motion for Relief (FMR 20(2))" (the "Order"), which agreed with both of U.S. Bank's arguments. II APP 278–85. The Order thus denied the Radows' motion and "further ordered that a certificate of foreclosure issue for the Property." II APP 285 (capitalization omitted).

The Radows now appeal from the Order.

Summary of the Argument

First, Wells Fargo complied with the "each assignment" provision of the FMRs by providing the July 2011 Assignment because that instrument and the March 2011 Assignment are a single assignment of the Deed of Trust. The two instruments transferred ***the same property interest*** – the beneficial interest in the Deed of Trust encumbering the Property – between the same parties – Wells Fargo and U.S. Bank. The July 2011 Assignment merely corrected a typographical error in the earlier instrument and was thus the version recorded. Moreover, the

July 2011 Assignment legally ***superseded*** and invalidated the March 2011 Assignment because the later-executed instrument operated in the same fashion as a "corrective" deed. *See* 26A C.J.S. *Deeds* § 40 (2021 update) (stating that the "new deed may constitute ***a single instrument*** and operate as a ***destruction*** of the original conveyance by consent" (emphasis added)).

Second, the district court correctly rejected the Radows' judicial-estoppel argument, which stems from the fact that U.S. Bank presented the March 2011 Assignment to the bankruptcy court to prove its title as part of a motion for relief from the automatic stay. U.S. Bank's argument is not inconsistent. Contrary to the Radows' portrayal of that point, U.S. Bank does *not* contend that the March 2011 Assignment was invalid *upon execution* due to its typo or for any other reasons. It only became invalid four months later when the July 2011 Assignment was executed and superseded the March 2011 Assignment. Critically, the bankruptcy motion and order both occurred in the span *between* the execution of those two instruments. *Compare* I APP 191–93, *with* I APP 200. And more fundamentally, the disparate contexts in which these issues have been raised nearly eight years apart do not even hint at an attempt by U.S.

Bank to gain an "unfair advantage" or erode the integrity of the judicial system.

Third, even if the March 2011 Assignment did need to be presented during the mediation, under *Einhorn*, that requirement was satisfied by the fact that ***the Radows provided that same instrument*** during the mediation, and it was self-authenticated under NRS 52.165 by the fact that it included an acknowledgment from a notary public. Attempting to avoid *Einhorn*'s controlling effect, the Radows highlight the fact that the missing assignment in *Einhorn* was also recorded. But the fact that a document is recorded is ***a second, independent basis*** for self-authentication under NRS 52.085. Neither *Einhorn* nor either of the two self-authentication statutes require two separate forms of self-authentication.

Fourth, there is no basis to the Radows' contention that U.S. Bank's request for the foreclosure certificate to issue was untimely under the FMRs. There is no dispute that U.S. Bank filed a timely opposition to their motion for relief, and all the issues in that opposition and its embedded "countermotion" were intertwined. In other words, the only basis for both withholding the certificate of foreclosure and imposing

monetary sanctions on U.S. Bank was the mediator's erroneous conclusion that U.S. Bank had not satisfied the FMRs. Thus, regardless of how U.S. Bank styled its brief, by successfully opposing the Radows' motion for relief, there was no reason for the district court not to issue the certificate of foreclosure.

Argument

I. U.S. Bank Satisfied the FMRs Because the July 2011 Assignment Effectuated the Same Assignment of Interest Between the Same Parties as the March 2011 Assignment and Also Superseded the Earlier Assignment.

The Radows primarily argue that U.S. Bank failed to satisfy the FMRs because, by not providing the March 2011 Assignment during the mediation, it did not provide "each assignment of the deed of trust." NRS 107.086(5). Op. Br 11–16. As the addressed in a later section, that argument wholly ignores the fact that the Radows themselves provided a copy of the March 2011 Assignment that was self-authenticated by virtue of its acknowledgment before a notary public. *See infra* § III. But even placing that dispositive point aside, the Radows' leading argument fails to apprehend that, despite the existence of two written instruments, there was only one assignment of interest in the Deed of Trust. Indeed, both the March 2011 Assignment and the July 2011 Assignment

transferred ***the same property interest*** – the beneficial interest in the Deed of Trust encumbering the Property – ***between the same parties*** – Wells Fargo and U.S. Bank.

On its face, the "each assignment" requirement of the Foreclosure Mediation Rules applies to the common scenario in which a deed of trust is conveyed between subsequent, new beneficiaries. The purpose of that requirement is, of course, to confirm the chain of title. *See Einhorn v. BAC Home Loans Servicing, LP*, 128 Nev. 689, 697, 290 P.3d 249, 254 (2012). Here, by contrast, the March 2011 and July 2011 Assignments are simply duplicative instruments evincing the same assignment between the same parties. This is thus not the case of the "wild deed," in which an unrecorded transfer of interest results in an untraceable branch off the chain of title to a third party. And the Radows provide no authority or even rationale supporting their assertion that the type of duplicative instruments at issue constitute separate assignments for purposes of the Foreclosure Mediation Rules. Thus, by providing a copy of the July 2011 Assignment (along with other assignments not at issue in this appeal), U.S. Bank provided a copy of each assignment of the Deed of Trust.

This conclusion is also underscored by the fact that the July 2011 Assignment legally ***superseded*** or invalidated the March 2011 Assignment as a written instrument. Although U.S. Bank has not located any authority addressing this principle as applied to deeds of trust specifically, it is well established in the highly analogous realm of deeds – i.e., the transference of the land itself. Indeed, the use of "corrective" deeds is commonplace and often "used to correct some facial imperfection in the title," or "under specified circumstances[,] to make both material and nonmaterial corrections to a deed." 26A C.J.S. *Deeds* § 40 (2021 update). Such subsequent deeds are, however, "more typically used to correct mistakes such as typographical errors in an original deed." *Gonzales v. Gonzales*, 867 P.2d 1220, 1227 (N.M. Ct. App. 1993) (citing 26A C.J.S. *Deeds* § 40 [2]). But regardless of its specific use, the "new deed may constitute ***a single instrument*** and operate as a ***destruction*** of the original conveyance by consent." 26A C.J.S. *Deeds* § 40 (emphasis added); *see also Gonzales*, 867 P.2d at 1227 (discussing the equitable principles "underlying the use of a correction deed to

[2] *Gonzales* cites Section 31 of the 1956 version of this treatise, which is now located in Section 40 of the modern edition.

negate a prior conveyance" (emphasis added)). And "[o]rdinarily, a correction deed relates back to the date of the document that it purports to express more accurately" – thus further evincing that the subsequent deed supersedes and takes the place of the prior deed. 26A C.J.S. *Deeds* § 40; *see also, e.g.*, *Sartain v. Fid. Fin. Servs., Inc.*, 775 P.2d 161, 164 (Idaho Ct. App. 1989) ("The doctrine of relation back permits a party to a conveyance of real property to correct an erroneous legal description in the original deed by filing a subsequent or 'correction' deed; the correction then becomes effective as of the date of the original deed.").

Likewise, it is evident that Wells Fargo and U.S. Bank as transferor and transferee intended for the July 2011 Assignment to supersede and replace the March 2011 Assignment given that (1) the two instruments were materially identical but for the later assignment's correction of the typographical error and (2) only the operative July 2011 Assignment was subsequently recorded. And because a deed of trust is a security interest encumbering real property, the same principles regarding deeds should apply here: the March 2011 and July 2011 Assignments became one instrument with the terms of the later assignment governing the transfer – in this case, only the correct spelling of a party – and that assignment

relating back to the date of the original assignment. For this reason, the March 2011 Assignment was an invalid assignment of the Deed of Trust that U.S. Bank therefore did not need to produce during the mediation.

But to be clear, contrary to the Radows' portrayal of this argument, it is *not* U.S. Bank's position that the March 2011 Assignment was invalid *upon its execution*. The typo in that instrument did not affect its validity. *See* Op. Br. 13 (arguing that "Respondent provided no analysis as to why a misspelling of the word 'securities' would render the assignment invalid"). Rather, the subsequent execution of a superseding assignment of the Deed of Trust between the same parties nearly four months later rendered the March 2011 Assignment invalid *at that point*. *See* 26A C.J.S. *Deeds* § 40 (contrasting the corrective deed to the circumstance in which the original deed was void *at execution*).

Accordingly, by the time the mediation at issue occurred over eight year later in November 2019, the March 2011 Assignment was no longer valid. The district court thus correctly concluded that U.S. Bank did not violate the Foreclosure Mediation Rules by not producing that invalid assignment.

II. Judicial Estoppel Does Not Apply Because, Among Other Reasons, U.S. Bank's Argument Regarding the March 2011 Assignment Has Been Consistent over Time.

The Radows next contend that U.S. Bank should be judicially estopped from arguing that March 2011 Assignment is invalid because U.S. Bank previously produced that instrument in 2011 during the Radows' bankruptcy proceedings. Op. Br. 14–16. As the Radows acknowledge, that equitable doctrine is dependent on a party taking two "totally inconsistent" positions during different proceedings. *Id.* at 14 (citing *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468–69 (2007)). But their contention that U.S. Bank has taken inconsistent positions is based on a misapprehension of its "invalidity" argument and the timeline of events.

As discussed immediately above, U.S. Bank's position is that the March 2011 Assignment became invalid once the superseding July 2011 Assignment was executed on July 28, 2011 – *not* because of the earlier instrument's typo or any other reason. The March 2011 Assignment was thus valid *upon execution* and remained valid for just over four months. U.S. Bank was thus the beneficiary of the Deed of Trust during that period. And critically, U.S. Bank both moved for and obtained stay relief

from the bankruptcy court during that four-month span. *See* I APP 200 (the bankruptcy court granting the stay motion[3] on May 11, 2011). In other words, ***the July 2011 Assignment did not exist during the relevant bankruptcy proceedings*** and could not have invalidated the March 2011 Assignment. There was thus nothing inconsistent or unusual about U.S. Bank producing that March 2011 Assignment to the bankruptcy court as part of its relief request as evidence of its title to the Deed of Trust.

Moreover, even if U.S. Bank is incorrect about its invalidation argument, judicial estoppel is unwarranted. The Nevada Supreme Court has cautioned that judicial estoppel is an "extraordinary remedy." *Delgado v. Am. Fam. Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009). And it is similarly well-established that this equitable principle should only "be invoked when a party's inconsistent behavior will otherwise result in a miscarriage of justice." *Ryan Operations G.P. v.*

[3] Although not specified in the record, U.S. Bank filed its relief-from-stay motion on March 29, 2011, just after the March 2011 Assignment was executed. *See In re Radow*, 10-52176-gwz, ECF No. 43 (Bankr. D. Nev. 2010). And even without examining that docket, it is evident that the motion was filed *after* execution of the March 2011 Assignment because the motion includes a copy of that instrument. I APP 077 ¶ 7.

Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996) (citation omitted). "It is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts." *Id.*; *accord Siegel v. Time Warner Inc.*, 496 F. Supp. 2d 1111, 1123 (C.D. Cal. 2007) (quoting this same principle); *see also Johnson v. State*, 141 F.3d 1361, 1369 (9th Cir. 1998) ("If incompatible positions are based not on chicanery, but only on inadvertence or mistake, judicial estoppel does not apply.").

Here, U.S. Bank asserted the two different instruments in two very different contexts: the first, to simply prove its title as a beneficiary of the Deed of Trust (***before the later instrument even existed***) and the second, to establish chain-of-title during a foreclosure mediation *eight years later* and to argue that it has complied with Nevada's Foreclosure Mediation Rules. These disparate contexts do not even hint at an attempt to gain an "unfair advantage" or erode the integrity of the judicial system. *See Delgado*, 125 Nev. at 570, 217 P.3d at 563, 567.

Accordingly, the district court correctly declined to apply judicial estoppel to U.S. Bank's invalidation argument.

III. Alternatively, *Einhorn* Establishes That Any Requirement to Produce the March 2011 Assignment Was Satisfied by the Radows' Bringing the Assignment to the Mediation.

Regardless of the foregoing, there can be no doubt that the Foreclosure Mediation Rules were satisfied because it is undisputed that the Radows brought a copy of the March 2011 Assignment to the mediation. *See* I APP 032. It is thus misleading for them to refer to that instrument as a "Missing Assignment" when it was before the mediator. And, more importantly, under binding Nevada Supreme Court precedent, the obligation to produce "each assignment" is satisfied regardless of which party provides it.

In *Einhorn*, the current beneficiary, BAC, produced the assignment in which it received its interest in the deed of trust from Deutsche Bank but failed to provide the preceding assignment in which Deutsche Bank had received its interest. 128 Nev. at 692–93, 290 P.3d at 251–52. "Without this assignment, Deutsche Bank had nothing to assign to BAC." *Id.* at 693, 290 P.3d at 252. The Supreme Court nonetheless found that BAC satisfied the FMRs because Einhorn, the homeowner, "brought the missing assignment needed to complete BAC's chain of title" to the mediation. *Id.* at 697, 290 P.3d at 254. The Court reasoned that, "***[o]nly***

if a specified document is missing does it matter who had the burden of providing it." *Id.* at 696, 290 P.3d at 254 (emphasis added). And because the assignment at issue "include[d] a certificate of acknowledgment before a notary public, it carrie[d] a presumption of authenticity, NRS 52.165, that [made] it self-authenticating." *Id.* (internal quotation marks and citation omitted). The Court thus "conclude[d] that the district court did not abuse its discretion in denying sanctions and allowing the [foreclosure] certificate to issue." *Id.* It further cautioned that, while the Foreclosure Mediation Rules are subject to a "strict compliance" standard, "strict compliance does not mean absurd compliance." *Id.* at 696, 290 P.3d at 254. So it should be here.

The district court here correctly concluded that *Einhorn* requires the same outcome for this mediation. As in that case, the petitioners (here the Radows) provided the "missing" assignment. And *Einhorn* applies with even greater force in this instance because, in that case, the petitioner's production of the assignment was needed to bridge a missing link in the beneficiary's chain of title. *Id.* at 693, 290 P.3d at 252 ("Without this assignment, Deutsche Bank had nothing to assign to BAC."). Here, by contrast, there was no question as to U.S. Bank's chain

of title. By bringing the March 2011 Assignment, the Radows simply provided a duplicative instrument that, as discussed above, was superseded by the July 2011 Assignment that U.S. Bank did provide during the mediation. Additionally, because the March 2011 Assignment included the same type of acknowledgment by a notary public as the assignment in *Einhorn*, I APP 191, it too is self-authenticating. *Id.* at 693, 290 P.3d at 252 ("The assignment is signed by an 'assistant secretary' of MERS, Angela Nava. Her signature is acknowledged and notarized."); NRS 52.165 ("Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic."); *see also* Op. Br. 17 (acknowledging that the March 2011 Assigment "has a notary acknowledgment").

Attempting to elude this binding precedent, the Radows contended below (as they do on appeal) that, unlike the missing assignment in *Einhorn*, the March 2011 Assignment was unrecorded and therefore does "not carry the same assumptions of authenticity . . . ." II APP 253; Op. Br. 16. But the court below correctly rejected this argument, which misconstrues *Einhorn*'s authentication analysis. The Supreme Court

first cited the notary's acknowledgment as the basis for self-authenticating the missing assignment under NRS 52.165 and *then* cited the fact that the document was recorded ***as a second, independent source*** of authentication under NRS 52.085. *Einhorn*, 128 Nev. at 697, 290 P.3d at 254 ("Furthermore, as Einhorn's attorney advised the district court, he obtained his copy of the assignment from the county recorder's office, which 'is sufficient to authenticate the writing.'" (quoting NRS 52.085)). Neither *Einhorn* nor either of the two self-authentication statutes require two separate forms of self-authentication.

Moreover, even though the Radows themselves provided the March 2011 Assignment, they faintly attempt to intimate potential issues with its authenticity. Op. Br. 17. But they merely raise a series of rhetorical questions regarding the purpose of the dual instruments. There is no credible basis, however, for even suspecting that there are any issues with the chain of title simply because the beneficiaries executed a second instrument to correct a typographical error in the March 2011 Assignment. As addressed above, that is the common purpose of corrective deeds and was clearly the purpose of the July 2011 Assignment. And most importantly, any specter of doubt that the

Radows attempt to conjure is wholly inapposite to whether their production of the March 2011 Assignment satisfied the FMRs pursuant to *Einhorn* – which it did.

IV. The Radows' Timeliness Argument Fails to Apprehend That Any Relief Granted to U.S. Bank Was Intertwined with Its Timely Opposition to Their Motion.

Finally, the Radows contend that any "affirmative" relief requested by U.S. Bank in its combined opposition brief (to their motion for relief) and countermotion was untimely. Op. Br. 18. To be clear, they do not contend that the brief itself was untimely in relation to their own motion – only that the "countermotion" component exceeded the 10-day window for seeking relief under the Foreclosure Mediation Rules. But this argument is premised on a false dichotomy between "affirmative" and non-affirmative relief and fails to recognize that all the issues raised were intertwined.

As described above, the mediator recommended imposing two forms of sanctions: (1) not issuing the foreclosure certificate and (2) assessing monetary penalties against U.S. Bank. I APP 033. In their subsequent "Motion for Relief," the Radows cited these facts and requested that the district court impose the sanctions. I APP 064. Although that brief

discussed monetary sanctions, there is no doubt that it sought to prevent the foreclosure certificate from issuing. And because the only basis for imposing any form of sanctions was the mediator's finding that U.S. Bank had failed to provide "each assignment," U.S. Bank's opposition primarily argued why that conclusion was wrong. In other words, U.S. Bank styling its brief as an opposition *and* countermotion was a matter of form, not substance; the issues were all intertwined.

Seen another way, even if U.S. Bank had only referred to its brief as an opposition, the district court still had to decide whether U.S. Bank complied with the Foreclosure Mediation Rules based on the same issues presented on appeal. This is also evident from the fact that the district court's resulting Order did not even refer to U.S. Bank's countermotion in the relief that the court granted. II APP 285. It denied the Radows' motion and, ***as a result***, ordered the certificate of foreclosure to issue. *Id*. In other words, the only thing preventing the certificate from issuing – what the Radows describe as affirmative relief – was the mediator's conclusion that U.S. Bank had not complied with the Foreclosure Mediation Rules. Thus, by denying the Radows' motion, the district court removed that impediment.

Moreover, taken to its logical conclusion, the Radows' argument is untenable. They essentially contend that, even if this Court ultimately agrees that U.S. Bank complied with the Foreclosure Mediation Rules and that there is thus no basis for sanctioning it, the certificate of foreclosure should still not issue. That simply does not track, especially given that the issue was timely presented to the district court by the Radows' own motion.

As a last point, the Radows also argue that the time limitations under the Foreclosure Mediation Rules are jurisdictional. Op Br. 19. But that argument is irrelevant because, as described immediately above, there was nothing untimely about U.S. Bank's opposition. Additionally, the Radows have waived this argument because they failed to assert it below. II APP 256; *Dolores v. Emp. Sec. Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal." (internal quotation marks and citation omitted)). Whether a district court has jurisdiction to rule on an issue is too distinct and foundational a question to attempt to shoehorn in on appeal under the auspices of a timeliness argument.

And finally, the argument fails on its merits because the comparison to the former structure of the Foreclosure Mediation Rules is inapt. Under the rules that applied at the time of the mediation at issue, the Radows had to file a petition in state court to even initiate the mediation process. I APP 001. And the later briefing was brought through a "motion for relief," not a petition for judicial review. The district court therefore had jurisdiction over the matter throughout the entire proceeding. There is thus no basis for overturning its correct conclusion that U.S. Bank satisfied the FMRs and that the foreclosure certificate should therefore issue.

[*continued on following page(s)*]

Conclusion

For the foregoing reasons, this Court should affirm the district court's order denying the Appellants' motion for relief and issuing the certificate of foreclosure.

DATED: August 18, 2021

SNELL & WILMER L.L.P.

/s/ Kelly H. Dove

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **Respondent's Answering Brief** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 4,970 words.

Finally, I hereby certify that I have read the **Respondent's Answering 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.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On August 18, 2021, I caused to be served a true and correct copy of the foregoing **Respondent's Answering Brief** upon the following by the method indicated:

☐ **BY E-MAIL:** by transmitting via e-mail the document(s) listed above to the e-mail addresses set forth below and/or included on the Court's Service List for the above-referenced case.

☒ **BY ELECTRONIC SUBMISSION:** submitted to the above-entitled Court for electronic filing and service upon the Court's Service List for the above-referenced case.

☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below:

/s/ Maricris Williams
An Employee of SNELL & WILMER L.L.P.

4830-6644-2998