

NEVADA SUPREME COURT

DANIEL LAKES,

Appellant,

v.

U.S. BANK TRUST, Trustee for LSF9  
Master Participation Trust,

Respondent.

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APPELLANT'S OPENING BRIEF

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**NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that there are no persons and/or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

**Law firms:** The following law firms have appeared in the district court on behalf of Appellant Daniel Lakes:

Southern Nevada Senior Law Program  
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## **JURISDICTIONAL STATEMENT**

The court has jurisdiction pursuant to NRAP 4(a)(1). Daniel Lakes appeals from a final judgment for which Notice of Entry of Judgment was filed on July 18, 2019. Lakes filed a timely Notice of Appeal on July 29, 2019.

## **ROUTING STATEMENT**

This case is retained by the Nevada Supreme Court pursuant to NRAP 17 (a) (12) as a case that involves a question of statewide public importance.

## **STATEMENT OF THE CASE**

This is an appeal from the district court's granting U.S. Bank Trust's motion for summary judgment on the parties' respective quiet title claims arising from U.S. Bank's failure to comply with Nevada's recording statute meant to protect subsequent bona fide purchasers. U.S. Bank Trust purchased a loan secured by a deed of trust but failed to record its interest for months after the purchase. Appellant subsequently purchased the subject property from a third party without notice of U.S. Bank's interest. U.S. Bank argued that appellant took the property subject to its security interest despite U.S. Bank's failure to record same because of the Federal Foreclosure Bar. U.S. Bank purchased its interest from Ocwen Loan Servicing Corporation after a prior HOA foreclosure sale but before Lakes' subsequent purchase.

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The district court found that US Bank did not have to record its newly acquired security interest in the subject property despite the plain language of N.R.S. §111.315. The district court further ruled that U.S. Bank's security interest was enforceable against Appellant in total disregard of his status as a bona fide purchaser pursuant to N.R.S. §111.325. Lakes appeals from the Findings of Fact and Conclusions of Law on Motions for Summary Judgment entered on July 17, 2019.

## STATEMENT OF ISSUES

1. The district court erred as a matter of law in granting summary judgment in favor of U.S. Bank Trust, Trustee for LSF9 Master Participation Trust, while ignoring U.S. Bank's failure to record its security interest in violation of N.R.S. § 111.315 and N.R.S. § 111.325 to the detriment of subsequent bona fide purchaser Daniel Lakes.

2. The district court erred as a matter of law in finding that U.S. Bank's predecessor Ocwen Loan Servicing Corporation satisfied the HOA's superpriority lien under N.R.S. § 116.31162 despite no evidence in the record regarding the amount of the superpriority portion of the lien or the timeliness of the alleged payment.

## STATEMENT OF FACTS

Daniel Lakes brought a quiet title action relating to the real property located at 548 Primrose Hill Ave., Las Vegas, NV, 89138 (the "Property") which he purchased on January 20, 2016, without actual or constructive knowledge of U.S. Bank Trust's alleged security interest in same. [Complaint, **Vol. 1, JA0001**; Declaration of Daniel Lakes in Support of Opposition to Motion for Summary Judgment ("Lakes Decl.") at ¶ 24, **Vol. 2, JA0428**; and 1/20/16 Grant Bargain Sale Deed, **Vol. 2, JA0402-06**.] Mr. Lakes learned of the Property from his son who saw a for sale by owner advertisement on Zillow listing the Property for \$115,000.



[Lakes Decl. at ¶ 5, **Vol. 2, JA0427.**]

The Property was originally purchased in 2007 by Roger Cedillo. [4/16/07 Grant Bargain Sale Deed, **Vol. 1, JA0175-185.**] Countrywide sold the loan secured by a deed of trust to Freddie Mac in May 2007. [Declaration of Federal Home Loan Corporation in Support of MSJ (“Freddie Mac Decl.”) at ¶5 (d), **Vol. 1, JA0188.**] At some point, Mr. Cedillo abandoned the Property and Liberty at Huntington Homeowners’ Association (the “HOA”) conducted a foreclosure sale on August 25, 2015. [9/1/15 Foreclosure Deed, **Vol. 2, JA0383-86.**] The Notice of Default and Intent to Sale identified over \$7161.36 in past due fees without any distinction between super priority versus non-super priority past due fees. [4/29/15 Notice of Foreclosure Sale, **Vol. 2, JA0379-80.**] According to U.S. Bank Trust, Freddie Mac, through its loan servicing agent Ocwen, sent the HOA a check dated May 13, 2015 in the amount of \$3241.52, that allegedly represented the super priority portion of the past due fees. [5/13/15 Ocwen Check, **Vol. 2, JA0415.**] However, the check did not identify the Subject Property and nothing in the records identified the super priority lien amount. [*Id.*, **Vol. 2, JA0415.**] The HOA went forward with the foreclosure and the Property was purchased by Parcelnomics. [9/1/15 Foreclosure Deed, **Vol. 2, JA0383-86.**] Parcelnomics transferred title to the Property to one of its subsidiaries, Investment Deals, who then sold the property to Nouné Graeff on October 23, 2015. [9/1/15 Grant Bargain Sale Deed-Investment Deals, **Vol. 2,**

**JA0390-94; 10/23/15 Grant Bargain Sale Deed-Graeff, Vol. 2, JA0396-400.]**

On November 12, 2015, U.S. Bank purchased the Cedillo Loan secured by a Deed of Trust on the Property from Freddie Mac's agent, Ocwen Loan Servicing. [Freddie Mac Decl. at ¶ 5 (e), **Vol. 1, JA0189**; Declaration of Ryan Bennett of Caliber Homes at ¶7, ("Bennett Decl."), **Vol. 2, JA0408, JA0413.**] Ocwen completed the transfer of the 11/12/15 loan purchase on December 6, 2015. [Ryan Decl. at ¶ 7, **Vol. 2, JA0408, JA0413.**] US Bank Trust then waited over six months before recording the Assignment of its interest on May 27, 2016. [5/27/16 Recording of Assignment, **Vol. 1, JA0365-367.**]

In January 2016, Lakes learned of the Subject Property from his son who saw a Zillow advertisement for sale by the owner, Nouné Graeff. [Lakes Decl. at ¶5, **Vol. 2, JA0427.**] The house was vacant and had appeared to have been for some years. [*Id.* at ¶¶ 8-9, **Vol. 2, JA0427.**] After meeting with Ms. Graeff, Lakes went to the Clark County Recorder's Office to verify Nouné Graeff's ownership of the Property. [*Id.* at ¶¶ 3-19, **Vol. 2, JA0427-28.**] The clerk at the Recorder's Office informed Lakes that Graeff owned the Subject Property outright based on the recorded documents. *Id.*

Lakes returned to the Clark County Recorder's Office prior to purchasing the Property with questions about the language contained in the Grant, Bargain Sale Deed. [*Id.*, ¶¶ 13-18, **Vol. 2, JA0428.**] After performing the search for liens and

encumbrances, the clerk informed Mr. Lakes that Republic Services had a trash lien and provided Mr. Lakes with the outstanding amount. [*Id.*] Lakes purchased the Property for \$112,000 cash and paid off all of the outstanding liens. [Lakes Decl., ¶¶ 21-23, **Vol. 2, JA0428**; 1/19/16 Cashier Check, **Vol. 2, JA0431-32**, 1/20/16 Grant, Bargain Sale Deed, **Vol. 2, JA0402-06.**] Lakes immediately began repairs on the Property and moved into the house in February 2016. [Lakes Decl. at ¶¶ 8, 20, **Vol. 2, JA0427-28.**]

On May 27, 2016, U.S. Bank Trust recorded its 11/12/15 Assignment of Deed of Trust that was drafted and signed by U.S. Bank's loan servicing company Caliber Homes as attorney in fact for Ocwen. [5/27/16 Caliber Recording of Assignment, **Vol. 2, JA0369**; Freddie Mac Decl. at ¶ 5(e), (j), (k), (l) and (n), **Vol. 1, JA0187-91.**] In July 2016, U.S. Bank Trust sent a Notice of Default and Intent to Sell addressed to Mr. Lakes stating that over \$213,000 was past due and owing on the original promissory note to Mr. Cedillo that was secured by the Property. [7/8/2016 Notice of Default and Election to Sell, **Vol. 2, JA0477-79.**]

Meanwhile, Mr. Lakes had brought all outstanding HOA dues current, remedied all of the HOA maintenance violations, and had made substantial repairs to the Property using the remainder of his savings. [Lakes Decl. at ¶¶ 9-10, 20-22, **Vol. 2, JA0427-28.**] Mr. Lakes purchased the Property in good faith with the intent to live in the house throughout his retirement. [*Id.* at ¶¶ 23-24] On July 27, 2017,

Mr. Lakes brought this quiet title claim seeking a declaration from the court that U.S. Bank is forever enjoined from asserting any right, title or interest in the Property. [7/27/17 Complaint at ¶ 41, **JA0001-9**.]

### **Procedural History**

U.S. Bank Trust filed a counterclaim for quiet title on November 26, 2018. [Amended Answer and Amended Counterclaim, filed 11/26/18, **JA0041-55**]. U.S. Bank Trust then brought a motion for summary judgment on its quiet title claim alleging:

1. The Federal Foreclosure Bar preempts the State Foreclosure Statute and that the Foreclosure Sale did not extinguish Freddie Mac's interest;<sup>1</sup> and
2. The HOA conducted a subpriority foreclosure because Ocwen Loan Servicing, the agent for Freddie Mac, paid the superpriority component of past due assessments prior to the HOA sale thereby causing Lakes to purchase the Property subject to the Deed of Trust. [US Bank Trust's Motion for Summary Judgment, filed 4/10/19 ("MSJ") at pp. 3-4, **Vol. 1, JA0146-47**.]

Mr. Lakes opposed U.S. Bank's motion arguing that the Federal Foreclosure Bar was not applicable to the quiet title claims because Freddie Mac did not have an

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<sup>1</sup> U.S. Bank abandoned its Federal Foreclosure Bar argument acknowledging that it was not applicable based on the chronology of the events. [Notice of Entry of Findings of Fact, Conclusions of Law on Motions for Summary Judgment filed 7/18/19 ("FFCL") at ¶ 11, p. 5, **Vol. 2, JA0468**.]

interest in the Subject Property when Mr. Lakes purchased it on January 20, 2016. [Lakes' Opposition to MSJ at pp. 1-2, **Vol. 2, JA0416-19**] Lakes purchased the Property from Nounne Graeff more than two months *after* U.S. Bank completed the purchase of its security interest in the Property from Freddie Mac. [1/20/16 Grant, Bargain Sale Deed, **Vol. 2, JA0402-406**; Freddie Mac Decl. at ¶ 5(e), (j), (k), (l) and (n), **Vol. 1, JA0187-91**.] However, U.S. Bank waited until May 27, 2016 to record its security interest. [5/27/16 Recorded Assignment, **Vol. 2, JA0365-67**.] Mr. Lakes' argued that U.S. Bank's failure to record its security interest in the Subject Property made its Deed of Trust void and unenforceable as to Mr. Lakes, a subsequent bona fide purchaser pursuant to N.R.S. §111.325. [Lakes' Opposition at p. 2, **Vol. 2, JA0419**.] Finally, Mr. Lakes argued that U.S. Bank failed to establish either the amount or full satisfaction of Liberty at Huntington Homeowners' Association's (the "HOA") superpriority lien prior to the foreclosure sale. *Id.*, **Vol. 2, JA0423-24**; MSJ Hearing Transcript, **Vol. 2, JA0455-57**.]

The district court found that:

11. Lakes argument that U.S. Bank's interest in the Deed of Trust is void and unenforceable as to him pursuant to N.R.S. § 111.325 is without merit because the timing of the Assignment is immaterial to the HOA Sale not extinguishing the Deed of Trust.

\* \* \*

16. The Deed of Trust remains a valid, secured encumbrance against the Property."

[FFCL at ¶¶ 11, 16-17, Vol. 2, JA0468-69.] On July 29, 2019, Lakes filed a notice of appeal. [Vol. 2, JA0479.]

### SUMMARY OF THE ARGUMENTS

1. The district court erred as a matter of law by ignoring the plain language of N.R.S. §111.315 and N.R.S. §111.325 when ruling that U.S. Bank Trust's unrecorded purchase of a security interest from Ocwen Loan Services was enforceable against Mr. Lakes, a subsequent bona fide purchaser without any actual or implied notice of U.S. Bank's interest.
2. The district court also erred as a matter of law when finding that there were no genuine issues of material fact regarding Ocwen's alleged satisfaction of the HOA's superpriority lien despite no evidence in the record regarding the superpriority portion of the lien.

### ARGUMENT

#### **I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN GRANTING SUMMARY JUDGMENT IN FAVOR OF US BANK ON ITS QUIET TITLE CLAIM WHEN IT FAILED TO RECORD ITS SECURITY INTEREST IN THE SUBJECT PROPERTY TO THE DETRIMENT OF LAKES, A SUBSEQUENT BONA FIDE PURCHASER.**

This Court reviews summary judgment rulings de novo. *See, Anderson v. Mandalay Corp.*, 131 Nev. Adv. Op. 82, 358 P.3d 242, 245 (2015).

Mr. Lakes' quiet title claim against U.S. Bank Trust has resulted from U.S. Bank's failure to timely record its November 12, 2015 purchase of a security interest

in the Subject Property in violation of Nevada law to the detriment of Lakes, a subsequent bona fide purchaser. [Opp. to MSJ, **Vol. 2, JA0419-21.**] Nevada Revised Statute §111.315 states:

Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved acknowledged and certified in the manner prescribed in this chapter ... shall be recorded....

Nevada Rev. Stat. Ann. § 111.325 states:

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.

Here, U.S. Bank Trust violated N.R.S. §111.315 by failing to record its November 12, 2015 assignment of its security interest in the Subject Property prior to Mr. Lakes January 2016 purchase of said property. Clearly, Mr. Lakes would not have purchased the Property from Graeff on January 20, 2016, if U.S. Bank had recorded the Cedillo Loan secured by a Deed of Trust on the Subject Property on or about December 6, 2015, when it completed the purchase of its security interest from Freddie Mac. [Bennett Decl., **Vol. 2, JA0408-13.**] Without U.S. Bank's recording of the 11/12/25 purchase, there was nothing in the chain of title to give Mr. Lakes notice of U.S. Bank's interest prior to his January 20, 2016 purchase of the subject Property from Nouné Graeff. [Lakes Decl. at ¶ 24, **Vol. 2, JA0429.**]

Mr. Lakes' quiet title claim arises from U.S. Bank Trust's failure to record its Deed of Trust in violation of N.R.S. § 111.315 resulting in Lakes purchasing the Subject Property without notice of U.S. Bank's security interest. [Opp. to MSJ, **Vol. 2, JA0419-21.**] The District Court's finding that Mr. Lakes purchased the property subject to the Deed of Trust because of Ocwen's alleged satisfaction of the superpriority portion of the HOA lien has no bearing on U.S. Bank's subsequent failure to record its security interest pursuant to N.R. S. § 111.315. [FFCL at ¶ 11, **Vol. 2, JA0468.**] U.S. Bank was required to record its interest for the protection of future bona fide purchasers just like Mr. Lakes. *See* N.R.S. § 111.315 (stating that every conveyance of real property must be recorded). U.S. Bank's decision to wait over almost six months to record its 11/12/15 assignment made such assignment void and unenforceable against Lakes, a subsequent bona fide purchaser as a matter of law. *See* § 111.325 (making every conveyance of real property void against any subsequent purchaser, in good faith and for a valuable consideration where his or her own conveyance was first duly recorded). For the district court to find that Ocwen's recording of Freddie Mac's purchase of the Cedillo Loan secured by a Deed of Trust satisfies U.S. Bank's obligation to record its subsequent purchase of the Loan ignores the plain language and purpose of the statute. The district court erred as a matter of law requiring its FFCL to be vacated and this matter remanded to district court for the issue of Mr. Lakes status as a bona fide purchaser to be resolved.



## **II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN FAILING TO CONSIDER MR. LAKES STATUS AS A BONA FIDE PURCHASER UNDER NRS § 111.325.**

Mr. Lakes purchased the Property in good faith and for valuable consideration without actual knowledge, constructive notice or cause to know of U.S. Bank Trust's unrecorded security interest. [Lakes Decl. at ¶24, **JA0429**.] Under Nevada law, bona fide purchasers for value and without notice of an unrecorded interest have priority over an earlier unrecorded interest. *See* Nev. Rev. Stat. § 111.325; *see also Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1114 (Nev. 2016) (holding that a subsequent purchaser for value without notice has priority over an earlier unrecorded interest); *Berge v. Fredericks*, 95 Nev. 183, 186, 591 P.2d 246, 247 (1979) (a party claiming title to land by a subsequent conveyance must show that the purchase was made in good faith, for a valuable consideration; and that the conveyance of the legal title was received before notice of any equities of the prior grantee.); *Moore v. De Bernardi*, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive.").

Here, Mr. Lakes was a subsequent purchaser without notice of U.S. Bank Trust's (or Freddie Mac's former) security interest in the Property. [Lakes Decl.

at ¶ 24, **JA0429**.] Mr. Lakes learned of the Subject Property in January 2016, after his son saw an ad on Zillow listing the Property for sale by owner for \$115,000. *Id.* at ¶ 5, **JA0427**.] Lakes investigated the title to the Property by going to the Clark County Recorder's Office in person to verify Nouné Graeff's ownership of the Property. [*Id.* at ¶¶ 3-19, **Vol. 2, JA0427-28**.] The clerk at the Recorder's Office informed Lakes that Graeff owned the Subject Property outright based on the recorded documents. *Id.* Lakes returned to the Clark County Recorder's Office prior to purchasing the Property with questions about the language contained in the Grant, Bargain Sale Deed. *Id.* After performing the search for liens and encumbrances, the clerk informed Lakes that Republic Services had a trash lien and provided Mr. Lakes with the outstanding amount. *Id.* At the time of Lakes research, U.S. Bank Trust had not recorded its security interest in the Subject Property. [5/27/16 Recorded Assignment, **Vol. 2, JA0365-67**.] Lakes had neither constructive nor actual knowledge of U.S. Bank Trusts' alleged security interest when he purchased the Property. [Lakes Decl. at ¶ 24, **Vol. 2, JA0429**.] Lakes lives on a fixed income and has used most his savings-inheritance to purchase the Property. [Lakes Decl. at ¶¶ 3-4, **Vol. 2, JA0427**.] He would not have put most of his money into the house if he had known that U.S. Bank Trust would attempt to foreclose on the Property four months after Mr. Lakes purchased his home, paid past due HOA assessments and made substantial repairs. [Notice of Breach and

Default and Election to Sell dated 7/8/16, **Vol. 2, JA0477-79.**]

**III. GENUINE ISSUES OF MATERIAL FACT EXISTED REGARDING WHETHER U.S. BANK SATISFIED THE PRIORITY LIEN UNDER NRS § 116.31162.**

Summary judgment is improper whenever “a reasonable jury could return a verdict for the non-moving party.” *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249, 849 P.2d 320, 322 (1993). When reviewing the record, “the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party.” *Id.* Meanwhile, the district court improperly found:

5. Here, Ocwen tendered 9 months of monthly assessments - the full superpriority debt - entitled to superpriority protection which totaled \$3241.52. Upon receipt of the check from Ocwen, the HOA, through its agent, Red Rocks, accepted Ocwen's tender and negotiated the check. It cannot be disputed that U.S. Bank's predecessor in interest, Ocwen, did exactly what it was required to under Nevada law to protect the Deed of Trust.

[FFCL at p. 5, ¶ 5, **Vol. 2, JA0467.**]

However, there was no evidence of the actual amount of the HOA's superpriority lien. The superpriority portion of the HOA lien consists of unpaid maintenance assessments, nuisance abatement and master HOA dues. *See* N.R.S. §116.31162(3)(extinguishes first security interest if the appropriate assessment amount is not timely tendered). The 4/24/16 Notice of Foreclosure Sale contained an assessment payoff amount of \$7161.36 without a designation of what the amount

entails. [**Vol. 1, JA0096.**] Meanwhile, U.S. Bank made the conclusory statement that the 5/13/15 Ocwen check for \$3241.52 satisfied the superpriority portion of the lien and nothing more. [MSJ at p. 10:14-19, **Vol. 1, JA0153**; Hearing Transcript, **Vol. 2, JA0455-457.**] The district court accepted the conclusory statement without requiring any evidence of the amount of the superpriority portion of the HOA lien when stating, “...if it’s tendered, that’s it. The superpriority has been satisfied.” [**Vol. 2, JA0450**].

Meanwhile, Lakes produced evidence of the HOA requiring him to pay past due fees and assessments relating to the maintenance of the Subject Property, which included dead plants and overgrown grass in the yard and paint for the exterior of the house. [Lakes Dec. at ¶¶ 21-23, **Vol. 2, JA0429.**] Lakes negotiated with the HOA regarding the unpaid fees and assessments resulting in a payment in the amount of \$2407.04. [Check to Liberty Huntington HOA, dated 3/14/16, **Vol. 2, JA0476.**] Although Lakes argued that the issue of whether the Freddie Mac loan was extinguished by the HOA Foreclosure Sale was irrelevant to his quiet title claim against U.S. Bank, he produced evidence of the genuine issues of material fact regarding the amount of the superpriority lien and whether or not the Ocwen check was in full satisfaction of same. [**Vol. 2, JA0452-459.**]

Therefore, the district court erred as a matter of law in granting summary judgment in favor of U.S. Bank without any evidence as regarding the superpriority portion of the lien.

#### **IV. CONCLUSION**

Daniel Lakes requests that the Findings of Facts, Conclusions of Law on the Motion for Summary Judgment be vacated and this matter be remanded to the district court with instructions to properly apply N.R.S. §111.325 to resolve the issue of whether Lakes is a subsequent bona fide purchaser thereby making U.S. Bank Trust's security interest void and unenforceable against his interest in the Subject Property.

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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 Word 2016 in 14 point font Times New Roman.
  
2. I further certify that this brief complies with the 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 3295 words; and I 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.
  
3. 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 25th day of March 2020.

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## CERTIFICATE OF SERVICE

I certify that on the 25th day of March 2020, I served a copy of Appellant's Opening Brief upon counsel of record:

- ☐ By personally serving it upon him/her; or
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