IN THE SUPREME COURT OF THE STATE OF NEVADA

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

APPEAL

from the Nevada Court of Appeals,
Case No. 79324-COA

APPELLANT'S PETITION FOR REVIEW

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

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

The law firm of Ballard Spahr LLP appeared on appellant's behalf in the district court and court of appeals. Ballard Spahr LLP is expected to appear on appellant's behalf in this Court.

Dated: January 19, 2021

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By: /s/ Joel Tasca

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QUESTION PRESENTED

Whether the Court of Appeals wrongly departed from this Court's precedent by creating a new recording requirement and considering a home-buyer's purported bona fide purchaser ("BFP") status even after the holder of the deed of trust made a full tender of the homeowner's association ("HOA") lien's superpriority portion.

INTRODUCTION

This case is a quiet title action between a downstream home-buyer who bought the property after an HOA foreclosure sale, and the bank that now holds the original deed of trust on the property. Before the HOA foreclosure sale, the original bank that held the deed of trust tendered the full superpriority amount owed to the HOA.

Thus, under *Diamond Spur*, the HOA foreclosure sale was subject to the bank's deed of trust. *Bank of America, N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605 (2018) (en banc) ("*Diamond Spur*") ("a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust"). That the property later changed hands again does not matter. *Id.* at 612 (ruling that there is no exception for a bona-fide purchaser). Nor does it matter that the original bank later transferred its deed of trust to another bank, which did not promptly record that transfer. Because the deed of trust was originally recorded, and survived the HOA foreclosure sale, all later sales were subject to that deed of trust.

The Court of Appeals, however, disagreed. It ruled that the latest home-buyer may be able to quiet title against the current holder of the original deed of trust if he can show that he is a bona-fide purchaser ("BFP"). The court based this on purported "tension" between *Diamond Spur* and Nevada's race-notice statute, adding that "it is not clear" what scope this Court meant *Diamond Spur* to carry. Op. 6.

The Court of Appeals erred. *Diamond Spur* controls here. The Court of Appeals' holding that *Diamond Spur* "does not extend" to the facts here, Op. 6, conflicts with and undermines the rule of *Diamond Spur*, as well as a slew of cases following it. This Court should grant review to clarify *Diamond Spur* and its application to the common circumstances here.

STATEMENT OF THE CASE

Facts: The original owner borrowed $213,000 to purchase a house in Las Vegas ("the property") in 2007. JA3. He executed a note and deed of trust, which Ocwen Loan Servicing held and serviced. Op. 1. The original owner eventually failed to make his HOA payments. The HOA began foreclosure proceedings. To ensure that the superpriority portion of the HOA lien would not jump in front of Ocwen's far larger deed of trust, Ocwen paid the HOA. Ocwen's payment exceeded the amount necessary under Nevada law to extinguish the HOA's superpriority lien, which was for less than $650. Op. 1, 4.

The HOA accepted the full tender for its superpriority lien, but foreclosed

anyway to satisfy the subpriority portion. *Id.* The HOA sold the property in August 2015 for $4,470. JA383. The foreclosure deed recites that the HOA sold the property "without warranty expressed or implied." JA383. After that, the property was transferred three more times in five months, between September 2015 and January 2016. JA390-403. The transfer deeds each specified that they were without warranty and were subject to all liens and encumbrances on the property. JA403; Op. 2 ("the deed also indicated that [Daniel] Lakes would be taking the property subject to any claims, liens, and other encumbrances, and once again with no warranties regarding title").

Meanwhile, in December 2015, Ocwen assigned the deed of trust to U.S. Bank. U.S. Bank recorded the assignment in May 2016. JA410; JA369.

Proceedings: Both Mr. Lakes and U.S. Bank sought to quiet title. *Id.* Lakes argued that he owned the property free and clear of U.S. Bank's deed of trust because he recorded his interest before U.S. Bank did, and that he was a BFP. U.S. Bank contended that Mr. Lakes "took title subject to its deed of trust." Op. 2.

The trial court ruled for U.S. Bank on summary judgment. *Id.* It determined that Ocwen's payment to the HOA satisfied the superpriority portion of the HOA lien before the sale. *Id.* at 3. Therefore, the HOA foreclosure for the HOA lien's subpriority portion could not touch U.S. Bank's Deed of Trust. *See* JA0468 (trial court reciting that "[t]he subpriority piece, consisting of all other HOA fees or

assessments, is subordinate to a first deed of trust" (quoting *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 745, 334 P.3d 408, 411 (2014)). Thus, Mr. Lakes took the Property subject to the Deed of Trust. JA0468–69. In making that determination, the trial court correctly determined that Ocwen's full tender made Mr. Lakes' purported, but unproven, BFP status irrelevant. *See id.*

The Court of Appeals reversed and remanded. According to the Court of Appeals, the trial court "erred" by relying on *Diamond Spur*. Op. 6. The Court of Appeals ruled that Nevada's race-notice statute, NRS 111.325, means that *Diamond Spur* does not apply when the holder of a deed of trust transfers it but does not instantly record that transfer. Op. 6. As the Court of Appeals saw it, there is "tension" between the race-notice statute and *Diamond Spur*. Op. 6 n.3 (adding that "it is not clear that the supreme court intended [*Diamond Spur*] to mean that . . . subsequent purchasers cannot be BFP's under NRS 111.325"). The Court of Appeals concluded that the race-notice statute "governs" over the rule of *Diamond Spur*.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition for two reasons. First, the Court of Appeals' opinion contradicts and undermines *Diamond Spur*. Second, the undermining of *Diamond Spur* will create needless confusion and difficulty surrounding all HOA foreclosures and the future chains of title stretching forward

after HOA foreclosures.

I. The Court of Appeals' opinion conflicts with this Court's precedent.

A. *Diamond Spur* answers the question presented.

In *Diamond Spur*, this Court, en banc, held "that a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject to the deed of trust." 134 Nev. at 605.

In that case, after an owner fell behind on HOA payments, the deed of trust holder tendered payment of the superpriority portion. But the HOA refused to accept it and sold the property in foreclosure. This Court ruled that the bank's deed of trust survived the foreclosure sale. In doing so, this Court clarified several important aspects of Nevada law relevant here.

First, a holder of a deed of trust only need tender the superpriority portion of an HOA lien to maintain its interest in the property. 134 Nev. at 606–08.

Second, the Court did not require the bank to record the tender. *Id*. at 609–10 ("[T]ender of the superpriority portion of an HOA lien satisfies that portion of the lien by operation of law."); *id.* at 609 ("Tendering the superpriority portion of an HOA lien . . . . *preserves* a pre-existing interest, which does not require recording").

Third, "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." *Id.* at 612. In other words, "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is

void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property." *Id*. For that reason, "the HOA could not convey full title to the property." *Id.*

This case is like *Diamond Spur* in every relevant way. U.S. Bank's predecessor-in-interest adequately tendered the HOA lien's superpriority portion before the foreclosure. Op. 1. As a result, its deed of trust survived. JA466–69. Even imagining Mr. Lakes were a BFP, that fact would be irrelevant to displace any deed of trust because the sale was "void" as against the deed of trust. *See U.S. Bank, Nat'l Ass'n ND v. Res. Grp., LLC*, 135 Nev. 199, 205 (2019) ("A void sale . . . defeats the competing title of even a bona fide purchaser for value."); *see also Diamond Spur*, 134 Nev. at 612 ("A party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void.").

B. The Court of Appeals deviated from *Diamond Spur*'s clear rules.

The Court of Appeals tried to distinguish *Diamond Spur* by asserting that the real issue is "whether NRS 111.325 permits U.S. Bank to enforce the deed of trust against Lakes post-foreclosure sale given its failure to promptly record its interest in that instrument or the underlying loan." Op. 6. In doing so, the Court of Appeals erroneously determined that NRS 111.325 is in "tension" with *Diamond Spur*, and limits it so that the statute controls here. Op. 6 n.4. The court determined that because Mr. Lakes recorded his interest before U.S. Bank recorded its interest, the

trial court should have considered whether Mr. Lakes was a BFP. *Id.*

This was error. Properly viewed, the later transfer of the deed of trust among banks is irrelevant. Such a transfer, recorded or not, should not create free and clear ownership for any downstream buyer of an HOA-foreclosed house. There are several problems with the Court of Appeals' analysis.

First, it does not matter whether U.S. Bank recorded its interest in the deed of trust before Mr. Lakes recorded his interest in the property. What matters is only that U.S. Bank's *predecessor-in-interest* recorded the deed of trust. U.S. Bank's predecessor-in-interest recorded its deed of trust about nine years before Mr. Lakes bought the property. *Compare* JA464 ¶ 2, *with* JA465 ¶ 8.

Thus, the deed of trust was valid and on the books years before the HOA foreclosure ever occurred. That deed of trust survived, and was the recorded deed steadily throughout those years. Mr. Lakes bought subject to that deed of trust, as his own deed all but announces on its face. Op. 2 (noting that the deed "indicated that Lakes would be taking the property subject to any claims, liens, and other encumbrances and once again with no warranties regarding the title"). The sheer happenstance that Ocwen transferred that deed of trust *before* Mr. Lakes' purchase, yet recorded that transfer *after* it, changes nothing. There is no role here for the race-notice statute, NRS 111.325, to play. No proper 'race to record' ever existed.

Second, *Diamond Spur* could not be clearer that the HOA sale here "result[ed]

in the buyer at foreclosure taking the property subject to the deed of trust." *Diamond Spur*, 134 Nev. at 605. The HOA foreclosure sale, and all sales after it, were subject to the existing deed of trust. Indeed, the fact that the initial HOA foreclosure sale—selling a house originally bought with a $213,000 mortgage—was for less than $4,500 should itself have reflected that a deed of trust existed. Even several transfers later, Mr. Lakes bought the property for a fraction of its real value. Op. 2 (noting the $112,000 sale price to Lakes).

Third, *Diamond Spur* states that "[a] party's status as a BFP is irrelevant when a defect in the foreclosure proceeding renders the sale void." *Id.* at 612. Here, exactly as in *Diamond Spur*, the "defect" in the foreclosure proceeding is that the superpriority portion of the HOA lien had been extinguished. Thus, the HOA could only foreclose on the subpriority portion of its lien—leaving the deed of trust in place. This is true regardless of Mr. Lakes' alleged BFP status.

C. The Court of Appeals' decision clashes with multiple other recent decisions of this Court.

Even beyond *Diamond Spur*, the Court of Appeals' decision conflicts with multiple recent rulings from this Court.

Several recent cases involve quiet title actions between later home-buyers who claimed to be BFPs and banks that were successors-in-interest to the entity that paid off the HOA's superpriority lien. These cases find the deed of trust valid, regardless of BFP status and regardless of the transfer of the deed of trust.

For instance, in *Saticoy Bay v. Green Tree Servicing*, __ P.3d __, 2020 WL 7866522, at *1-2 (Nev. 2020) (en banc), this Court noted that the tender had been made by "Green Tree's predecessor" in 2011 and that "the deed of trust was assigned in 2013 to respondent Green Tree Servicing." Valid tender by the predecessor in interest preserved the deed of trust, and this Court recognized Green Tree's interest.

Similarly, in *Renfroe v. Carrington Mortgage Servs., LLC*, No. 76450, 456 P.3d 1055 (table), 2020 WL 762638 (Nev. Feb. 14, 2020) (unpublished), neither the buyer nor the deed of trust holder remained the same throughout the relevant time. *Id.* at *1. Yet this Court upheld the deed of trust regardless of its transfer, ruling that "BANA's tender successfully discharged the HOA's superpriority lien and preserved *Carrington's* deed of trust." *Id.* (emphasis added). In *Renfroe*, this Court again rejected the theory that the tender itself had to be recorded in order to preserve the existing deed of trust. *Id.* at *2 (citing *Diamond Spur*, 134 Nev. at 609-10). Evident in the clear holding that a tender of HOA debt need not be recorded is the fact that the tender *preserves* the *existing* recorded deed of trust.

Along the same line, a wave of cases has already rejected what the Court of Appeals did here when it ruled that BFP status would matter. *E.g.*, *Noonan v. Bayview Loan Servicing, LLC*, 2019 WL 1552690, at *1 (Nev. Apr. 8, 2019) (unpublished) (finding the home-buyer's "purported status" as BFPs "inconsequential" and "irrelevant"); *Saticoy Bay LLC v. JPMorgan Chase Bank*,

2017 WL 6597154, at *1 n.1 (Nev. Dec. 22, 2017) (unpublished) ("appellant has not explained how its putative BFP status could have revived the already-satisfied superpriority component of the HOA's lien").

II. This case involves fundamental issues of statewide importance.

HOAs are on the rise. In 2019, about 75% of newly built for sale single-family homes were part of an HOA, and more than 69 million Americans live within an HOA.[1] Nevada HOAs have been zealous in pursuing foreclosures, even during the COVID-19 pandemic.[2]

Thus, HOA superpriority lien litigation presents a major and recurring issue. Within the last two years, this Court alone has ruled on at least 7 cases with similar fact patterns to the one here. Federal courts also look to this Court for guidance on the same issues.[3]

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[1] *Characteristics of New Housing*, U.S. CENSUS BUREAU (accessed on Jan. 9, 2021), https://www.census.gov/construction/chars/; *Why homeowners hate their HOAs*, WASH. POST. (Oct. 25, 2018).

[2] *Despite foreclosure freeze, HOAs sending default notices*, Las Vegas Review-Journal (June 11, 2020), https://www.reviewjournal.com/business/housing/despite-foreclosure-freeze-hoas-sending-default-notices-2050802/.

[3] *E.g.*, *Diamond Spur*, 134 Nev. 604; *7510 Perla Del Mar Ave Trust v. Bank of Am., N.A.*, 136 Nev. 62 (2020) (en banc); *Saticoy Bay LLC Series 133 McLaren*, __ P.3d __, 2020 WL 7866522; *Tyrone & In-Ching, LLC v. Deutsche Bank Nat'l Trust Co.*, No. 77875, 2020 WL 2529028 (Nev. 2020) (unpublished); *SFR Investments Pool 1, LLC*, 2020 WL 5634162; *Renfroe*, 2020 WL 762638; *Noonan*, 2019 WL 1552690; *Saticoy Bay LLC*, 2017 WL 6597154; *Bank of America, N.A.*, 920 F.3d 620; *Nationstar Mortg.*, 812 F. App'x 526; *U.S. Bank as Tr.*, 794 F. App'x 664.

This Court should grant review and reverse.

Dated: January 19, 2021

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