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SUPREME COURT

STATE OF NEVADA

5316 CLOVER BLOSSOM CT TRUST, Appellant, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1, Respondent.	No. 82426

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

Counsel for plaintiff/appellant 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.

1. Plaintiff/appellant, 5316 Clover Blossom Ct Trust, is a Nevada trust.

2. Resources Group, LLC, a Nevada limited-liability company, is the trustee for 5316 Clover Blossom Ct Trust.

3. Iyad Haddad a/k/a Eddie Haddad is the manager for Resources Group, LLC.

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JURISDICTIONAL STATEMENT

(A) Basis for the Supreme Court's Appellate Jurisdiction: The findings of fact,

conclusions of law, and order granting defendant Bank's motion for summary judgment is appealable under NRAP3A(b)(1).

(B) The filing dates establishing the timeliness of the appeal: The findings of fact, conclusions of law, and order granting defendant Bank's motion for summary judgment was entered on December 29, 2020. Notice of entry of the findings of fact, conclusions of law, and order granting defendant Bank's motion for summary judgment was served and filed on December 29, 2020.

(C) The Trust filed its notice of appeal on January 28, 2021.

ROUTING STATEMENT

This case is a quiet title action. Rule 17 does not list quiet title matters as one of the cases retained by the Supreme Court. Counsel for the Trust therefore believes that this appeal should be assigned to the Court of Appeals.

ISSUES PRESENTED ON APPEAL

1. Whether the HOA foreclosure sale held on January 16, 2013 extinguished the deed of trust assigned to U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., Successor by Merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1 (hereinafter "defendant Bank").

2. Whether the conditional tender of only $1,494.50 made by Miles, Bauer, Bergstrom & Winters, LLP (hereinafter "Miles Bauer") on behalf of Bank of America, N.A. (hereinafter "BANA") was sufficient to cure the default as to the superpriority portion of the assessment lien recorded by Country Gardens Owners' Association (hereinafter "HOA").

3. Whether defendant Bank proved that it was excused from tendering the superpriority portion of the HOA's assessment lien.

4. Whether defendant Bank's request for declaratory relief based on the Miles Bauer tender was barred by the applicable statute of limitations in NRS 11.190(3)(a).

5. Whether defendant Bank's request for declaratory relief based on tender was barred by the four year statute of limitations in NRS 11.220.

6. Whether defendant Bank's request for declaratory relief sought "prospective"

relief to prevent a "future" violation of its rights.

7. Whether defendant Bank's request for declaratory relief falls within either NRS 11.070 or NRS 11.080.

8. Whether defendant Bank's claim that the conditional tender made by Miles Bauer on December 6, 2012 cured the default as to the superpriority portion of the assessment lien related back to the filing of defendant Bank's answer.

9. Whether defendant Bank could properly assert its untimely filed claim based on tender as an affirmative defense

10. Whether defendant Bank's untimely filed claim of tender was barred by the doctrines of waiver, estoppel and unclean hands.

11. Whether defendant Bank proved that 5316 Clover Blossom Ct Trust (hereinafter "Trust") had notice of the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured by the conditional tender of $1,494.50 made by Miles, Bauer to Alessi & Koenig (hereinafter "Alessi").

12. An order granting summary judgment is reviewed de novo without deference to the findings of the lower court.

STATEMENT OF THE CASE

On July 25, 2014, Trust commenced the above-captioned action by filing a

complaint asserting three claims for relief: 1) entry of an injunction prohibiting defendant Bank from foreclosing its deed of trust pursuant to NRS 107.080; 2) entry of a judgment pursuant to NRS 40.010 determining that Trust was the rightful owner of the property commonly known as 5316 Clover Blossom Ct, Las Vegas, Nevada (hereinafter "Property") and that defendants had no right, title, interest or claim to the Property; 2) quiet title; and 3) entry of a declaration that title to the Property was vested in Trust free and clear of all liens and that the defendants be forever enjoined from asserting any right, title, interest or claim to the Property. (Appellant's Appendix Volume 1 (hereinafter AA Vo. 1), pgs.AA000001-AA000006)

On September 25, 2014, defendant Bank filed an answer to the complaint, which did not include any factual allegations or any affirmative defense alleging that the superpriority portion of the lien was tendered prior to the HOA foreclosure sale. (AA Vol. 1, pgs. AA000010-AA000015)

On September 30, 2014, Trust and defendant Clear Recon Corp. filed a stipulation and order for non-monetary judgment between Clear Recon Corp. and Trust. (AA Vol. 1, pgs.AA000016-AA000018)

On April 23, 2015, Trust filed an amended complaint that added specific allegations that the HOA foreclosure sale "complied with all requirements of law."

(AA Vol. 1, pgs.AA000019-AA000021)

On May 6, 2015, the court entered an order granting motion to amend complaint. (AA Vol. 1, pgs.AA000022-AA000023)

On May 18, 2015, the Trust filed a motion for summary judgment. (AA Vol. 1, pgs.AA000024-AA000082)

On July 22, 2015, defendant Bank filed an opposition to plaintiff's motion for summary judgment and countermotion for summary judgment, which opposition and countermotion alleged that "[o]n December 6, 2012, Bank of America tenders $1,494.50 – which included $999.50 in 'reasonable collection costs' in addition to the $495.00 for delinquent assessments – to the HOA Trustee to satisfy the super-priority lien." (AA Vol. 1, pg.AA000086)

On July 29, 2015, the Trust filed a reply in support of plaintiff's motion for summary judgment and opposition to countermotion for summary judgment, or alternatively, for Rule 56(F) relief. (AA Vol. 1, pgs.AA000171-AA000191)

On August 13, 2015, defendant Bank filed a supplemental briefing in support of its countermotion for summary judgment and opposition to plaintiff's motion for summary judgment. (AA Vol. 1, pgs.AA000192-AA000205)

On August 13, 2015, the Trust filed a supplemental points and authorities in

support of plaintiff's motion for summary judgment and opposition to defendant's countermotion for summary judgment. (AA Vol. 1, pgs.AA000206-AA000213)

On September 10, 2015, the court entered findings of fact, conclusions of law, and judgment granting quiet title to the Trust. (AA Vol. 1, pgs.AA000214-AA000220)

On September 18, 2015, defendant Bank filed a notice of appeal. (AA Vol. 1, pgs.AA000230-AA000232)

On June 30, 2017, the Court of Appeals of the State of Nevada entered an order vacating the judgment and remanding the case to the district court, and on August 3, 2017, the district court entered an order vacating judgment and setting further proceedings. (AA Vol. 1, pgs.AA000233)

On September 28, 2017, the Trust and defendant Bank filed a stipulation and order to amend pleading and add parties. (AA Vol. 1, pgs.AA000234-AA000235)

On October 10, 2017, defendant Bank filed an answer to the Trust's amended complaint that added a fourth affirmative defense alleging "the doctrines of tender, estoppel, laches, or waiver," a counterclaim for declaratory relief/quiet title and injunctive relief against the Trust, and unjust enrichment, tortious interference with contractual relations, breach of duty of good faith, and wrongful foreclosure against

the HOA. (AA Vol. 2, pgs.AA000256-AA000338)

On October 23, 2017, the Trust filed a motion to dismiss counterclaim. (AA Vol. 2, pgs.AA000339-AA000394)

On November 9, 2017, defendant Bank filed an opposition to the Trust's motion to dismiss counterclaim. (AA Vol. 2, pg.AA000395 to AA Vol. 3, pg. AA000499)

On November 9, 2017, the HOA filed a motion to dismiss defendant Bank's crossclaims. (AA Vol. 3, pgs.AA000500-AA000510)

On November 21, 2017, the Trust filed a reply in support of motion to dismiss counterclaim. (AA Vol. 3, pgs.AA000511-AA000522)

On November 27, 2017, defendant Bank filed an opposition to the HOA's motion to dismiss defendant Bank's crossclaims. (AA Vol. 3, pgs.AA000523-AA000630)

On November 29, 2017, the Trust filed supplemental authority in support of motion to dismiss counterclaim. (AA Vol. 3, pgs.AA000631-AA000657)

On December 7, 2017, the HOA filed a reply in support of motion to dismiss defendant Bank's crossclaims. (AA Vol. 3, pgs.AA000658-AA000674)

On February 7, 2018, the court entered findings of fact, conclusions of law, and

judgment granting judgment in favor of the Trust against defendant Bank.(AA Vol. 3, pgs.AA000675-AA000688)

On February 26, 2018, defendant Bank filed a motion for reconsideration under NRCP 59. (AA Vol. 3, pg.AA000705 to AA Vol. 4, pg. AA000906)

On March 14, 2018, the Trust filed an opposition to defendant Bank's motion for reconsideration. (AA Vol. 4, pgs.AA000907-AA000916)

On April 13, 2018, the court entered an order granting the HOA's motion to dismiss defendant Bank's crossclaims. (AA Vol. 4, pgs.AA000917-AA000931)

On May 1, 2018, the court entered an order denying defendant Bank's motion for reconsideration. (AA Vol. 4, pgs.AA000932-AA000935)

On May 10, 2018, defendant Bank filed a notice of appeal.(AA Vol. 4, pgs.AA000936-AA000938)

On January 7, 2020, the court entered an order that dismissed the HOA as a party pursuant to the order affirming in part, reversing in part and remanding filed by the Nevada Court of Appeals on October 16, 2019. (AA Vol. 4, pgs.AA00039-AA000943)

On February 24, 2020, the Trust filed an answer to defendant Bank's counterclaims. (AA Vol. 4, pgs.AA000952-AA000957)

On October 1, 2020, the Trust filed a motion for summary judgment. (AA Vol. 4, pg.AA000958 to AA Vol. 5, pg. AA000998)

On October 1, 2020, defendant Bank filed a renewed motion for summary judgment. (AA Vol. 5, pgs.AA000999 to AA Vol. 7, pg. AA001433)

On October 15, 2020, the Trust filed an opposition to defendant Bank's motion for summary judgment. (AA Vol. 7, pgs.AA001434-AA001441)

On October 15, 2020, defendant Bank filed an opposition to the Trust's motion for summary judgment. (AA Vol. 7, pgs.AA001442-AA001463)

On December 3, 2020, the Trust filed a reply in support of motion for summary judgment. (AA Vol. 7, pgs.AA001464-AA001474)

On December 3, 2020, defendant Bank filed a reply in support of its renewed motion for summary judgment. (AA Vol. 7, pgs.AA001475-AA001483)

On December 29, 2020, the court entered findings of fact, conclusions of law, and order granting defendant Bank's motion for summary judgment. (AA Vol. 7, pgs.AA001486-AA001496)

On December 29, 2020, defendant Bank served and filed notice of entry of findings of fact, conclusions of law, and order. (AA Vol. 7, pgs.AA001497-AA001511)

On January 28, 2021, the Trust filed its notice of appeal. (AA Vol. 7, pgs.AA001512-AA001513)

STATEMENT OF FACTS

The Trust obtained title to the Property by entering and paying the high bid of $8,200.00 at a public auction held on January 16, 2013. *See* copy of trustee's deed upon sale recorded on January 24, 2013 at AA Vol. 1, pgs.AA000041-AA000042)

The HOA foreclosure sale arose from a delinquency in assessments due from Dennis L. Johnson and Geraldine J. Johnson (hereinafter "former owners") to the HOA pursuant to NRS Chapter 116.

Defendant Bank is the beneficiary by assignment of a deed of trust recorded as an encumbrance against the Property on June 30, 2004. *See* copies of deed of trust at AA Vol. 5, pgs.AA001010-AA001041, and assignment of deed of trust, recorded on June 20, 2011, at AA Vol. 5, pgs.AA001043-AA1044.

On February 22, 2012,Alessi recorded a notice of delinquent assessment (lien). (AA Vol. 1, pg.AA000044)

On April 30, 2012, Alessi mailed a notice of default to the former owners, defendant Bank and other interested parties. (AA Vol. 1, pgs.AA000046-AA000058)

On October 25, 2012,Alessi mailed a notice of trustee's sale to the former

owners, defendant Bank and other interested parties. (AA Vol. 1, pgs.AA000060-AA000066)

On November 21, 2012, Miles, Bauer mailed a letter to Alessi stating its position that "a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment." (AA Vol. 5, pg.AA001177)

On November 27, 2012, Alessi faxed a demand statement for $4,186.00 to Miles Bauer. (AA Vol. 5, pgs.AA001179-AA001181)

On December 6, 2012, Miles Bauer enclosed a check for $1,494.50 drawn payable to Allessi from Miles Bauer's trust account with a cover letter stating that "our client wishes to also make a good-faith tender of your collection costs as part of the super-priority amount." The letter also stated that endorsement of the check "will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 5316 Clover Blossom Court have now been 'paid in full'." (AA Vol. 5, pgs.AA001183-AA001185)

According to his reading of Miles Bauer's business records (AA Vol. 5, pg. AA001187), Douglas Miles stated that Alessi "returned the $1,494.50 check to Miles

Bauer." (AA Vol. 5, pg.AA001173, par. 9)

In his deposition taken by defendant Bank on January 19, 2018, Mr. Alessi responded to the question "Why did Alessi not accept this payment?" as follows:

> A. Because of the restrictive language in the letter. I've always been fascinated with this phrase "paid in full" in quotes, not really sure what the quotation marks indicate. Also if you look at the memo, which was of particular concern, "to cure HOA deficiency." Is that to cure the HOA deficiency going like forward, backwards, vis-a-vis the bank, the homeowner, everyone, all of the deficiency? What if there's fines? So there was some language in these documents that we felt cashing the check would jeopardize the association's rights. You have to remember **at this time there was an advisory opinion that was out from the commission that indicated the super priority lien amount included fees and costs.** So as I testified earlier, we just – **we had discussions with Miles, Bauer, why don't you just pay us what you think you owe, we'll cash the check and let a court decide rather than playing judge and jury.** (emphasis added)

(AA Vol. 5, pg.AA001084-AA001085)

SUMMARY OF THE ARGUMENT

Defendant Bank's deed of trust was extinguished when the Trust paid the high bid at the HOA foreclosure sale held on January 16, 2013.

The conditional tender of only $1,494.50 made by Miles Bauer on behalf of BANA on December 6, 2012 was not sufficient to cure the default as to the superpriority portion of the assessment lien recorded by Alessi for the HOA.

Defendant Bank did not prove that it was excused from tendering the superpriority portion of the HOA's assessment lien.

Defendant Bank's request for declaratory relief based on the Miles Bauer tender was barred by the applicable statute of limitations in NRS 11.190(3)(a).

Defendant Bank's request for declaratory relief was barred by the four year statute of limitations in NRS 11.220.

Defendant Bank's request for declaratory relief did not seek "prospective" relief to prevent a "future" violation of its rights.

Defendant Bank's request for declaratory relief does not fall within either NRS 11.070 or NRS 11.080.

Defendant Bank's claim that the conditional tender made by Miles Bauer on December 6, 2012 cured the default as to the superpriority portion of the assessment lien did not relate back to the filing of defendant Bank's answer.

Defendant Bank did not prove that it was entitled to equitable relief from the conclusive recital of default in the HOA foreclosure deed.

Defendant Bank did not prove that the Trust had notice of the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured by the Miles Bauer tender.

STANDARD OF REVIEW

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), this

Court stated that it "reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court."

ARGUMENT

1. Defendant Bank's deed of trust was extinguished when the Trust paid the high bid at the HOA foreclosure sale held on January 16, 2013.

NRS 116.3116(2) provides that an HOA's assessment lien is "prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association of a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien."

The statute does not state that the superpriority amount is measured by the assessments which "are" past due or unpaid on the date that the action to enforce the lien is instituted. The superpriority amount is instead measured by the assessments "which would have become due" during the nine months prior to the enforcement of the lien. The amount of each of the assessments is measured by the HOA's "periodic budget."

The first deed of trust assigned to defendant Bank falls squarely within the language of paragraph (b). The statutory language does not limit the nature of this priority in any way.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742,758, 334 P.3d 408, 419 (2014), this court stated:

> NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust.

This court also stated that "[t]o initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments." 130 Nev. at 746, 334 P.3d at 411.

In Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A., 133 Nev. 21, 26, 388 P.3d 226, 231 (2017)(hereinafter "Gray Eagle"), this court stated that "a party has instituted 'proceedings to enforce the lien' for purposes of NRS 116.3116(6) when it provides the notice of delinquent assessment."

In the present case, this first step that initiated the foreclosure process took place on February 22, 2012 when Alessi recorded the notice of delinquent assessment (lien). (AA Vol. 1, pg.AA000044)

When the deed of trust was recorded on June 30, 2004, NRS 116.3116(5) stated:

> Recording of the declaration constitutes record notice and perfection of the lien. No recordation of any claim of lien for assessment under this section is required.

Each notice recorded and served by Alessi for the HOA stated "the total amount of the lien" as approved by the Nevada Supreme Court in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. at 757, 334 at 418.

The first page of the trustee's deed upon sale (AA Vol. 1, pg.AA000041) included the following recitals:

> Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of copies of the Notice of Sale have been complied with.

The foreclosure of the HOA's super priority lien extinguished any estate, right, title, interest or claim in the Property created by the subordinate deed of trust assigned to defendant Bank.

Consequently, title to the Property was vested in the Trust free of the extinguished deed of trust.

2. The conditional tender of only $1,494.50 made by Miles Bauer on December 6, 2012 did not cure the default as to the super-priority portion of the HOA's assessment lien.

At pages 5 and 6 of its motion for summary judgment (AA Vol. 5, pgs.AA001003-AA001004), defendant Bank cited Bank of America, N.A. v. SFR

Investments Pool 1, LLC, 134 Nev. 604, 607, 427 P.3d 113, 118 (2018)(hereinafter "Diamond Spur"), as authority that Miles Bauer's tender for only $1,494.50 made on December 6, 2012 cured the default as to the superpriority portion of the HOA's assessment lien.

Defendant Bank also stated that "there is no genuine dispute that Miles Bauer tendered a sufficient amount," and defendant Bank quoted from Diamond Spur that its interpretation of NRS 111.3116(2) was based on "[a] plain reading of this statute." (AA Vol. 5, pg. AA001004)

On the other hand, in the more recent opinion in Anthony S. Noonan IRA, LLC v. U.S. Bank National Association EE, 137 Nev., Adv. Op. 15, 485 P.3d 206, 208 (2021)(hereinafter "Noonan"), this court relied on the commentary to the Uniform Common Interest Ownership Act of 1982, 7 U.L.A., part II (2009)(amended 1994, 2008)(hereinafter "UCIOA") to support its conclusion that "NRS 116.3116(2) presupposes the imposition of monthly assessments."

In Noonan, this court also described the opinion in SFR Investments Pool 1, LLC v. U.S. Bank, N.A., 130 Nev. 742, 334 P.3d 408 (2014), as "relying on the UCIOA's commentary to interpret NRS 116.3116." Noonan, 485 P.3d at 208.

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., this court stated:

> **The HOA lien statute, NRS 116.3116, is a creature of the Uniform Common Interest Ownership Act of 1982**, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991, 1991 Nev. Stat., ch. 245, § 1-128, at 535-79, and codified as NRS Chapter 116. See NRS 116.001. One purpose of adopting a Uniform Act like the UCIOA is "to make uniform the law with respect to [its] subject [matter] among states enacting it." NRS 116.1109(2). Thus, **in addition to the usual tools of statutory construction, we have available the comments of the National Conference of Commissioners on Uniform State Laws, national commentary, and other states' cases to explicate NRS Chapter 116**. 2A Norman J. Singer & Shambie Singer, Sutherland Statutory Construction § 48:11, at 603-08 (7th ed.2014); *see* Casey v. Wells Fargo Bank, N.A., 128 Nev. 713, 717, 290 P.3d 265, 268 (2012).

130 Nev. at 744, 334 P.3d at 410. (emphasis added)

In SFR Investments Pool 1, LLC v. U.S. Bank, N.A., however, the court did not address the commentary to the UCIOA that contradicts the interpretation in that case. 130 Nev. at 744, 334 P.3d at 410. In particular, the court's description of the "superpriority piece" as "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges" is not consistent with the words "to the extent of" and "which would have become due" used by the Legislature. 130 Nev. at 745, 334 P.3d at 410.

In Noonan, the court clarified the meaning of this language by stating that the commentary to the UCIOA refers to "an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." Id.

Comment 2 to UCIOA § 3-116 at 189-191 (2014) describes the "equitable

balance" as follows:

> This equitable balance was premised on the assumption that, if an association took action to enforce its lien and the unit owner failed to cure its assessment default, **the first mortgage lender would promptly institute foreclosure proceedings and pay the unpaid assessment (up to six months' worth) to the association to satisfy the association's limited priority lien.** This was expected to permit the mortgage lender to preserve its first lien and deliver clear title in its foreclosure sale - a sale that was expected to be completed within six months (in jurisdictions with nonjudicial foreclosure) or a reasonable period of time thereafter, **thus minimizing the period during which unpaid assessments would accrue for which the association would not have first priority**. (emphasis added)

Because the "equitable balance" was premised on the first mortgage lender paying the common assessments that accrued after the HOA began to enforce its lien, every assessment lien must necessarily include a superpriority portion that can only be paid by the first mortgage lender.

With respect to the calculation of the HOA's superpriroity lien, UCIOA § 3-116 cmt. 2, illus. 3 (amended 2008), 7 pt. 1B U.L.A. 209 (Supp. 2018) states:

> Based on the association's annual budgets, assessments were $100/month for 2013, and Owner had not paid any assessments for 2013. The unpaid balance of Owner's assessments was thus $1,200, **and the association incurred an additional $1,000 in reasonable attorney fees and costs in enforcing its lien**. Just prior to the scheduled foreclosure sale, however, Bank **paid** the association a total of $1,600, which represents (1) six months of unpaid 2013 assessments (a total of $600) **and (2) $1,000 in the association's attorney fees and costs**. Bank's payment extinguishes the priority that the association's lien would otherwise have had pursuant to subsection (c); therefore, if the association proceeds with its foreclosure sale, the sale will not extinguish Bank's mortgage lien, and the buyer at the sale will take the unit subject of Bank's mortgage lien. (emphasis added)

Applying the logic and reasoning used in Noonan to the present case, the

language in comment 2, illustration 3 of the UCIOA "presupposes" that an "association's attorney fees and costs" are included in the superpriority portion of the HOA's assessment lien.

In the present case, Alessi's facsimile cover letter, dated November 27, 2012 (AA Vol. 5, pg.AA001180) specifically identified $2,850.00 in Attorney and/or Trustee fees and other costs and expenses that are part of the HOA's priority lien as described in illustration 3 to comment 2.

As quoted at page 10 above, David Alessi testified in his deposition that "there was an advisory opinion that was out from the commission that indicated the super priority lien amount included fees and costs." (AA Vol. 5, pg.AA001084)

On December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels (hereinafter "CCICCH") issued Advisory Opinion 2010-01, which concluded that the "costs of collecting" authorized by NRS 116.310313 were "a part of the super priority lien."

First, the answer at page 1 of Advisory Opinion 2010-01 states:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.

Second, the conclusion at page 14 of Advisory Opinion 2010-01 states:

> Accordingly, the following amounts may be included as part of the super priority lien amount, to the extent the same relate to the unpaid 6 or 9 months of super priority assessments: (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration in accordance with NRS 116.3102(1)(k), (c) charges for preparing any statements of unpaid assessments pursuant to NRS 116.3102(1)(n) and (d) the "costs of collecting" authorized by NRS 116.310313.

In the present case, the handwritten calculations that appear on page 3 of Alessi's demand (AA Vol. 5, pg.AA001181) show that in calculating the collection costs to be included with its tender of only $1,494.50, Miles Bauer arbitrarily divided the total collection costs by three and included only $950.00 for collection costs in its offer.

Miles Bauer did not provide Alessi with any authority that empowered defendant Bank to demand that the HOA accept less than the amount that the HOA in good faith believed was owed for the superpriority portion of the lien.

NRS 116.1108 expressly provides that "[t]he principles of law and equity, including . . . the law of real property . . . supplement the provisions of this chapter, except to the extend inconsistent with this chapter."

In Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913), the Kansas Supreme Court held that "[w]here it appears that a larger sum than that tendered is **claimed** to be due, **the offer is not effectual as a tender if** it be coupled with such conditions that **acceptance of it as tendered involves an admission** on the

part of the person accepting it **that no more is due**." (emphasis added)

This is the exact condition imposed by Miles Bauer on its conditional tender of only $1,494.50 made on December 6, 2012. *See* page 2 of Miles Bauer letter at AA Vol. 5, pg.AA001184.

Likewise, in First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court held that the lienholder's "good faith" belief that a greater amount is due controls even where the "good faith" belief is wrong:

> Thus the question of whether the mortgage lien of the bank survived the tender depends on **whether it in good faith believed a greater sum to be due** than was tendered **rather than upon whether such larger amount was actually due**. (emphasis added)

In Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), the court stated that "the legislature will be presumed not to intend to overturn long-established principles of law, and the statute will be so construed unless an intention to do so plainly appears by express declaration or necessary implication."

Applying this presumption to the present case, NRS 116.1108 necessarily incorporated the long-established principles of real property law that made Miles Bauer's tender for only $1,494.50 "not effectual as a tender."

Moreover, in its motion for summary judgment, defendant Bank did not cite

any authority that empowered Miles Bauer to demand that the HOA accept as payment "in full" an amount less than the HOA believed was owed for the HOA's superpriority lien.

In Saticoy Bay LLC Series 133 McLaren v. Green Tree Servicing LLC, 136 Nev. Adv. Op. 85, 478 P.3d 376, 379 (2020)(hereinafter "McLaren"), the court stated that "[t]his case is controlled by *Bank of America*," but the court did not consider at all the commentary to the UCIOA that contradicts the interpretation of NRS 116.3116(2) in Diamond Spur. *See* McLaren, 478 P.3d at 379.

Moreover, unlike the present case, because the amount tendered by Miles Bauer in McLaren was for "nine months of HOA assessments," Miles Bauer did not demand that the HOA compromise the amount owed to it for collection costs. The McLaren opinion was also issued before this court decided in Noonan that the commentary to the UCIOA affects the definition of an HOA's superpriority lien.

Consequently, in the present case, Miles Bauer's letter did not contain "conditions the servicer could insist upon as of right." *See* McLaren, 478 P.3d at 379. The offer by Miles Bauer was instead "impermissibly conditional" because it required that the HOA agree that only one-third of its "costs of collecting" were included in the superpriority lien despite the language in NRS 116.310313(3)(a),

Advisory Opinion 2010-01, and the comments to UCIOA § 3-116 that provide otherwise.

Furthermore, in reaching its conclusion in Diamond Spur that "Bank of America's tender of the superpriority portion of the lien did not carry an improper condition," this court did not consider the established principles of "the law of real property" in Smith v. School Dist. No. 64 Marion County and First Nat. Bank of Davis v. Britton. *See* Diamond Spur, 134 Nev. at 607-608, 427 P.3d at 118.

NRS 116.31166(1)(a) also provides that the recital of "default" in the foreclosure deed is "conclusive proof of the matters recited." As defined in Black's Law Dictionary (10th ed. 2014), the words "conclusive proof" mean "[e]vidence so strong as to overbear any other evidence to the contrary" and "[e]vidence that so preponderates as to oblige a fact-finder to come to a certain conclusion."

In McLaren, the court stated that "[n]othing in the text of NRS 116.31166 rules out the possibility, however, that a default **can subsequently be deemed to have been cured** by a valid pre-sale tender." 478 P.3d at 378. (emphasis added) On the other hand, because the "conclusive" foreclosure deed containing the "conclusive" recital of default is created and recorded **after** the sale, it is logically impossible for any "pre-sale" tender to contradict the "conclusive" recital of default.

To hold otherwise violates the rules of statutory interpretation because such a reading renders the use of the words "conclusive proof" in NRS 116.31166 "meaningless." *See* Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008).

The United States Supreme Court has stated that "[a]ll citizens are presumptively charged with knowledge of the law." Atkins v. Parker, 472 U.S. 115, 130 (1985).

Similarly, in Smith v. State, 38 Nev. 477, 481, 151 P. 512, 512 (1915), the court stated that "[e]veryone is presumed to know the law and this presumption is not even rebuttable."

In the present case, defendant Bank and Miles Bauer were therefore charged with knowledge that the conditions placed by Miles Bauer on its tender of only $1,494.50 made Miles Bauer's offer "not effectual as a tender."

Consequently, the deed of trust assigned to defendant Bank was extinguished by the HOA foreclosure sale "as a matter of law."

3. Defendant Bank did not prove that it was excused from tendering the superpriority portion of the HOA's assessment lien.

At page 6 of its motion for summary judgment (AA Vol. 5, pg. AA001004), defendant Bank cited 7510 Perla Del Mar Avenue Trust v. Bank of America, N.A.,

136 Nev. 62, 63, 458 P.3d 348, 350 (2020), as authority that "Miles Bauer was 'excused' from tendering superpriority payments to collection agents that 'had a known policy of rejecting such payments.'"

In that case, however, the lender presented testimony at trial that "NAS systematically rejected checks if it was for less than the entirety of the lien amount." 136 Nev. at 64, 458 P.3d at 350.

In the present case, on the other hand, Mr. Alessi testified in his deposition that Alessi would accept checks from Miles Bauer as long as there was no restrictive language in the letter that accompanied the check or on the check itself. *See* (038, pgs. 86-87)

At page 8 of its motion (AA Vol. 5, pg. AA001006), defendant Bank cited language in Alessi's motion to dismiss filed on February 22, 2011 in BAC Home Loans Servicing, LP v. Stonefield II Homeowners Association, et al., No. 2:11-cv-00167 (Feb. 22, 2011)(AA Vol. 6, pgs. AA001290-AA001297) and language found in Alessi's Arbitration Brief, filed in NRED 12-58 on September 7, 2012 (AA Vol. 6, pgs. AA001323-AA001336), which relied on the language in NRS 116.310313(3)(a) and Advisory Opinion 2010-01. (AA Vol. 6, pgs. AA001299-1312)

Defendant Bank did not explain how arguments made in a motion to dismiss and in an arbitration brief filed in unrelated cases prove that Alessi had a "known policy" of rejecting tenders made to Alessi in December of 2012.

The authorities cited by Alessi in the motion to dismiss and the arbitration brief instead prove that the HOA and Alessi had a "good faith" reason to believe that "costs of collecting" were included in the HOA's superpriority lien in the present case. *See* Korbel Family Living Trust v. Spring Mountain Ranch Master Ass'n, Eighth Judicial District Court, Case No. A-06-523959-C, Advisory Opinion 2010-01, Elkhorn Community Association v. Mortgage Electronic Systems, Inc., Eighth Judicial District Court, Case No. A607051, JPMorgan Chase Bank v. Countrywide Home Loans Inc. Countrywide Warehouse Lending, et al., Eighth Judicial District Court, Case No. A562678, and Hudson House Condo. v. Brooks, 611 A.2d 862 (Conn. 1992).

Defendant Bank also quoted from the unpublished order in Bank of America, N.A. v. Lakeview Owners' Ass'n, 2020 WL 4586861, at *2 (D. Nev. Aug. 7, 2020), but the district court did not identify in its order any facts or evidence that supported its conclusion that "there is no genuine dispute that Alessi had a known policy that it would not accept a check for only nine months of assessments **that was**

accompanied by a letter containing conditional language identical to that in *Perla*." (emphasis added)

Consequently, the order in Bank of America, N.A. v. Lakeview Owners' Ass'n is not relevant to the present case because Miles Bauer's letter in the present case did not contain "conditional language identical to that in *Perla*."

Defendant Bank also referred to four letters written by Ryan Kerbow in 2010 and 2012 (AA Vol. 6, pgs. AA001248-AA00125) regarding HOA foreclosure sales unrelated to the present case. As confirmed by Mr. Alessi in his deposition, the letters by Ryan Kerbow "do not reflect the position of Alessi Koenig as a firm." (AA Vol. 5, pg. AA1087, ll 15-21) Defendant presented no contrary evidence.

In Wood v. Safeway, Inc., 121 Nev. 724, 121 P.3d 1026, 1029 (2005), the court stated that "when reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party."

Viewed in a light most favorable to the Trust as the nonmoving party, defendant Bank did not prove that Alessi or the HOA had a "known policy" of rejecting payments that complied with the principles of "the law of real property" that govern tenders made by a subordinate lienholder like defendant Bank.

4. Defendant Bank's request for declaratory relief based on the Miles Bauer tender was barred by the applicable statute of limitations in NRS 11.190(3)(a).

At page 2 of its opposition to defendant Bank's motion for summary judgment (AA Vol. 7, pg. AA001435), the Trust incorporated the "the extensive authorities regarding the statute of limitations and the effect of the statute of limitations on the defendants claims and defenses" that were cited in the Trust's motion for summary judgment, filed on October 1, 2020 (AA Vol. 4, pg. AA000961-AA000967)

In the conclusion at page 9 of its motion (AA Vol. 5, pg. AA001007), defendant Bank requested that the court "grant summary judgment in U.S. Bank's favor on Clover Blossom's quiet title and declaratory relief claims and U.S. Bank's quiet title and declaratory relief counterclaims, and enter an order stating that U.S. Bank's deed of trust encumbers the property."

As stated at page 8 of the Trust's motion (AA Vol. 4, pg. AA000965), declaratory relief is not a stand-alone claim. Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989); Nguyen v. JP Morgan Chase Bank, No. SACV 11-01908 DOC (ANx), 2012 WL 294936, at *4 (C.D. Cal. Feb. 1, 2012) ("A claim for declaratory relief is not a stand-alone claim, but rather depends upon whether or not Plaintiff states some other substantive basis

for liability."). For a party to obtain declaratory relief, there must be an independent basis for jurisdiction. Miller–Wohl Co., Inc. v. Commissioner of Labor & Industry, 685 F.2d 1088, 1091 (9th Cir.1982).

Because declaratory relief is not a stand-alone claim and is only derivative of some other substantive claim brought in the action, the statute of limitations that governs a request for declaratory relief is that which applies to the substantive cause of action. "A claim for declaratory relief is subject to a statute of limitations generally applicable to civil claims." Zuill v. Shanahan, 80 F.3d 1366, 1369-70 (9th Cir. 1996).

In Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 688 (9th Cir. 1993), the court quoted from Gilbert v. City of Cambridge, 932 F.2d 51, 58 (5th Cir.1991), that if "a claim for declaratory relief could have been resolved through another form of action which has a specific limitations period, the specific period of time will govern." The statute of limitations for declaratory relief is the one applicable to an ordinary legal or equitable action based on the same claim. Mangini v. Aerojet–General Corp., 230 Cal. App. 3d 1125, 1155, 281 Cal. Rptr. 827, 846 (Cal. Ct. App. 1991).

In Perry v. Terrible Herbst, Inc., 132 Nev. 767, 770, 383 P.3d 257, 260 (2016), this court stated that "[t]he nature of the claim, not its label, determines what statute

of limitations applies." (*citing* Stalk v. Mushkin, 125 Nev. 21, 25, 199 P.3d 838, 841 (2009)) This court also stated that "[w]hen a statute lacks an express limitations period, courts look to analogous causes of action for which an express limitations period is available either by statute or by case law." 383 P.3d at 260. (*quoting* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518 (Tex. 1998))

In Diamond Spur, 134 Nev. at 610, 427 P.3d at 120, this court discussed specific principles that apply to statutory liens:

> Generally, the creation and release of a lien cause priority changes in a property's interests as a result of a written legal document. But Bank of America's tender discharged the superpriority portion of the HOA's lien by operation of law. *See* NRS 116.3116; 53 C.J.S. Liens § 14 (2017) ("A statutory lien is created and defined by the legislature. The character, operation and extent of a statutory lien are ascertained solely from the terms of the statute ."). NRS Chapter 116's statutory scheme allows banks to tender the payment needed to satisfy the superpriority portion of the HOA lien and maintain its senior interest as the first deed of trust holder. NRS 116.3116(l)-(3).

In Diamond Spur, the plaintiff bank asserted its tender claim, and this court decided the issue of satisfaction of the superpriority lien, by tender, solely under the language in NRS 116.3116. In particular, this court stated that "NRS 116.3116 governs liens against units for HOA assessments and details the portion of the lien that has superpriority status." 134 Nev. at 606, 427 P.3d at 117.

In Diamond Spur, the court held that Bank of America's delivery of a check

in the amount of nine months of assessments satisfied the superpriority portion of the lien, and therefore at the time when the HOA foreclosed there was no default as to and no authority to foreclose the superpriority portion of the lien. 129 Nev. at 612, 427 P.3d at 121.

An allegation that the superpriority portion of the lien was satisfied challenges the fact that a default existed and that the HOA had authority to foreclose. *See* Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983) ("An action for the tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale.") *See also*, McKnight Family, LLP v. Adept Management Services, Inc., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013) ("A wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself.")

This is quintessential wrongful foreclosure.

Black's Law Dictionary (10th ed. 2014) defines the word "liability" to be "[t]he quality, state, or condition of being legally obligated or accountable."

The applicable statute of limitations for a wrongful foreclosure claim is the

three-year period in NRS 11.190(3)(a) because the claim is "[a]n action upon a liability created by statute."

Defendant Bank's request for declaratory relief against the Trust was subject to the same three-year statute of limitations.

As stated by in Clark v. Robison, 113 Nev. 949, 951, 944 P.2d 788, 79 (1997), "[i]n determining whether a statute of limitations has run against an action, the time must be computed from the day the cause of action accrued." The court also stated that "[a] cause of action 'accrues' when a suit may be maintained thereon." Id.

The court has also stated that "[e]very one is presumed to know the law and this presumption is not even rebuttable." Smith v. State, 38 Nev. 477, 481, 151 P. 512, 513 (1915).

As a result, defendant Bank is presumed to have known the "fundamental principle of mortgage law" that "[a] valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law." Restatement (Third) of Prop.: Mortgages, § 7.1 (1997).

Defendant Bank is also presumed to have known that this "fundamental principle of mortgage law" supplemented the provisions of NRS Chapter 116

pursuant to NRS 116.1108.

The initial letter mailed by Miles Bauer to Alessi (038, pgs. 178-179) proved that Defendant Bank's servicer, BANA, knew on November 21, 2012 that foreclosure of the HOA's superpriority lien would extinguish the deed of trust.

Because Miles Bauer knew that Alessi and the HOA had rejected the conditional tender of $1,494.50 made by Miles Bauer, defendant Bank had notice on January 16, 2013 that the HOA foreclosure sale had extinguished the deed of trust.

Consequently, defendant Bank needed to file an affirmative claim seeking declaratory relief on or before January 16, 2016. As noted at page 5 of the Trust's motion for summary judgment (AA Vol. 4, pg. AA000962), defendant Bank did not assert its claim based on the Miles Bauer tender until defendant Bank filed its counterclaim on October 10, 2017.

Because defendant Bank's counterclaim was filed more than three (3) years after the HOA foreclosure sale held on January 16, 2013, defendant Bank's ability to obtain declaratory relief based on its unrecorded claim of tender was time-barred.

5. Defendant Bank's request for declaratory relief based on the Miles Bauer tender was barred by the four year statute of limitations in NRS 11.220.

As stated at page 5 of the Trust's motion for summary judgment (AA Vol. 4,

pg. AA000962), even if this court applies the four year statute of limitations in NRS 11.220, defendant Bank needed to file an affirmative claim seeking declaratory relief on or before January 16, 2017. Defendant Bank, however, did not file its claim based on the Miles Bauer tender until defendant Bank filed its counterclaim on October 10, 2017.

Because defendant Bank's counterclaim was filed more than four (4) years after the HOA foreclosure sale held on January 16, 2013, defendant Bank's ability to obtain declaratory relief based on its unrecorded claim of tender was time-barred.

6. Defendant Bank's request for declaratory relief did not seek "prospective" relief to prevent a "future" violation of its rights.

At page 17 of its opposition (AA Vol. 7, pg. AA001458), defendant Bank cited City of Fernley v. State, 132 Nev. 32, 44, 366 P.3d 690, 707-708 (2016), but defendant Bank did not assert a claim seeking "prospective relief in the form of an injunction and declaratory relief from future application of the allegedly unconstitutional statute" like the claim asserted in City of Fernley v. State.

In the present case, defendant Bank's motion for summary judgment only sought declaratory relief regarding the HOA foreclosure sale held on January 16, 2013.

/ / /

7. Defendant Bank's request for declaratory relief does not fall within either NRS 11.070 or NRS 11.080.

At page 18 of its opposition (AA Vol. 7, pg. AA001459), defendant Bank stated that NRS 11.070 applied to its claim based on the Miles Bauer tender. On the other hand, NRS 11.070 expressly provides:

> No cause of action or defense to an action, **founded upon the title to real property**, or to rents or to services out of the same, shall be effectual, **unless** it appears that **the person prosecuting the action** or making the defense, **or under whose title the action is prosecuted** or the defense is made, or the ancestor, predecessor, or grantor of such person, **was seized or possessed of the premises in question** within 5 years before the committing of the act in respect to which said action is prosecuted or defense made. (emphasis added)

In McKnight Family, LLP v. Adept Mgmt., 129 Nev. 610, 616, 310 P.3d 555, 559 (2013), this court stated:

> A quiet title claim requires the court to determine **who holds superior title** to a land parcel. See NRS 40.010. Such a claim directly relates to an individual's right to possess and use his or her property. (emphasis added)

In Hamm v. Arrowcreek Homeowners Ass'n, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008), this court stated that while "a lien is a monetary encumbrance on property, which clouds title," the lien "exists separately from that title."

In Butner v. United States, 440 U.S. 48, 55 (1979), the Supreme Court stated that "[p]roperty interests are created and defined by state law" and that "[t]he justifications for application of state law . . . apply with equal force to security

interests, including the interest of a mortgagee in rents earned by mortgaged property."

Because defendant Bank did not foreclose the deed of trust and obtain title to or possession of the Property before the deed of trust was extinguished by the HOA foreclosure sale held on January 16, 2013, defendant Bank's claim for declaratory relief could not be "founded upon the title to real property."

Defendant Bank also stated that "the borrower, who was the 'grantor' of the deed of trust, was 'seized or possessed of the' property within the last five years." Defendant Bank, however, did not prosecute its claim for declaratory relief based on the title held by the former owners or the title that vested in the Trust pursuant to NRS 116.31166(3).

The broad interpretation of NRS 11.070 asserted by defendant Bank violates the rules of statutory interpretation because such a reading renders the limiting words "founded upon title to the real property" and "seized or possessed of the premises in question" meaningless. Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008); Board of County Commissioners of Clark County v. CMC of Nevada, Inc., 99 Nev. 739, 744, 670 P.2d 102, 105 (1983),

On the same page of its opposition, defendant Bank also cited NRS 11.080, which provides:

> No action **for the recovery of real property**, or **for the recovery of the possession thereof** other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

Defendant Bank's claim for declaratory relief based on the Miles Bauer tender cannot be an action for the "recovery of real property" or the "recovery of the possession thereof" as required by NRS 11.080 because defendant Bank never owned or possessed the Property.

Defendant Bank emphasized the words "other than mining claims" in bold, and defendant Bank stated "[t]hat the Nevada legislature expressly exempted a non-title interest confirms that the limitations period encompasses disputes about a variety of property interests, not just title." On the other hand, such an interpretation violates the rules of statutory construction because it would render the words "founded upon the title to real property" meaningless.

8. Defendant Bank's claim that the conditional tender made by Miles Bauer on December 6, 2012 cured the default as to the superpriority portion of the assessment lien did not relate back to the filing of defendant Bank's answer.

At page 19 of its opposition to to the Trust's motion (AA Vol. 7, pg. AA001460), defendant Bank stated that "the answer and counterclaim filed on

October 10, 2017 should relate back to the filing of its original answer on September 25, 2014, within four years of the HOA's January 16, 2013 foreclosure sale."

NRCP 15 (c)(1) provides that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense **that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out** – in the original pleading." (emphasis added)

On the other hand, the original answer filed by defendant Bank on September 25, 2014 (AA Vol. 1, pgs. AA000010-AA000015) did not include any factual allegations or any affirmative defense alleging that the superpriority portion of the lien was tendered prior to the HOA foreclosure sale.

Because defendant Bank's claim of tender did not arise out of any "conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading" filed by defendant Bank, defendant Bank's affirmative claim based on the conditional tender made by Miles Bauer did not relate back to the filing of defendant Bank's answer on September 25, 2014.

In Santana v. Holiday Inns, Inc., 686 F.2d 736 (9th Cir. 1982), the court stated that "[o]nce the defendant is in court on a claim arising out of a particular transaction or set of facts, he is not prejudiced if another claim, **arising out of the same facts**,

is added." Id. at 739. (emphasis added)

The court in Santana v. Holiday Inns, Inc. also stated that "an amendment which changes the legal theory on which an action initially was brought is of no consequence to the question of relation back **if the factual situation out of which the action arises remains the same** and has been **brought to the defendant's attention by the original pleading**." Id. (emphasis added)

Similarly, 6A Wright, Miller & Kane, Federal Practice and Procedure, § 1497, pgs. 113-114 (3d ed. 2010), states that "[t]he fact that an amendment changes the legal theory on which the action initially was brought is of no consequence if **the factual situation upon which the action depends remains the same** and has been **brought to defendant's attention by the original pleading**." (emphasis added)

As quoted at page 7 of the Trust's reply (AA Vol. 7, pg. AA001470), in In re Markus, 313 F.3d 1146, 1150-51 (9th Cir. 2002), the court discussed when an amended pleading should not relate back to an original pleading:

> "We permit relation-back if the new claim arises from the same `conduct, transaction, or occurrence' as the original claim." Dominguez, 51 F.3d at 1510 (*quoting* Percy v. San Francisco General Hosp., 841 F.2d 975, 978 (9th Cir.1988)). As we explained in Dominguez, "[w]e will find such a link **when `the claim to be added will likely be proved by the "same kind of evidence" offered in support of the original pleadings**.'" *Id*. (*quoting* Rural Fire Prot. Co. v. Hepp, 366 F.2d 355, 362 (9th Cir. 1966)); *see also* Santana v. Holiday Inns, Inc., 686 F.2d 736, 738 (9th Cir.1982) (noting that once the defendant is in court on **a claim arising out of a particular set of facts**, he is not prejudiced if **another claim, arising out of the same facts**, is added). Therefore,

> relation back turns on whether the fraud alleged in the March 29 complaint is the same as the fraud alleged in the motion.
>
> **Gschwend's March 29 complaint alleges a number of specific incidents of fraud by Pinnacle Construction and Albert K. Markus**, Markus's ex-husband and business partner, in performing work for Gschwend that form the basis of the § 523 nondischargeability claim. **However, these are not the same facts set out in the motion**. (emphasis added)

In the present case, defendant Bank did not identify any factual allegations or affirmative defenses in its original answer that even hint that defendant Bank held a claim based on the HOA's rejection of a tender of the superpriority amount of the assessment lien. Defendant Bank also did not identify a single factual allegation in its initial answer that mentioned Miles Bauer or the check for $1,494.50 that Miles Bauer sent to Alessi on December 6, 2012.

9. Defendant Bank could not properly assert its untimely filed claim based on tender as an affirmative defense.

In Nationstar Mortgage, LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon, 133 Nev. 740, 746, 405 P.3d 641, 646 (2017) (hereinafter "Shadow Canyon"), the court stated that NRS 47.250(16) includes a presumption that "the law has been obeyed" and that there is "a presumption in favor of the record titleholder." *(quoting* Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996)).

Nevada law provides that "[a] presumption not only fixes the burden of going

forward with evidence, but it also shifts the burden of proof." Yeager v. Harrah's Club, Inc., 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (*citing* NRS 47.180 and Vancheri v. GNLV Corp., 105 Nev. 417, 421, 777 P.2d 366, 368 (1989)).

In Flangas v. State, 104 Nev. 379, 381, 760 P.2d 112, 113 (1988), the court discussed the difference between the "conclusive" presumptions in NRS 47.240 and the disputable presumptions in NRS 47.250. The "conclusive" presumptions provided by NRS 116.31166 fall within NRS 47.240(6).

The court has also stated that each of the 21 disputable presumptions in NRS 47.250 "impose[s] on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Yeager v. Harrah's Club, Inc., 111 Nev. at 834, n. 3, 897 P.2d at 1095, n. 3 (1995) (*citing* NRS 47.180).

At page 6 of its motion for summary judgment (AA Vol. 5, pg. AA001004), defendant Bank quoted from Diamond Spur, 134 Nev. at 612, 427 P.3d at 121, that Bank of America's tender "cured the default as to the superpriority portion of the HOA's lien,"

In Resources Group, LLC, as Trustee of E. Sunset Road Trust v. Nevada Association Services, Inc., 135 Nev. 48, 437 P.3d 154, 156 (2019), however, the court

stated that "the burden of demonstrating that the delinquency was cured presale, rendering the sale void, was on the party challenging the foreclosure . . . ."

Consequently, in order to obtain declaratory relief from the "conclusive" recital of default in the foreclosure deed, defendant Bank was required to timely file an action seeking that relief.

A lender like defendant Bank cannot rebut the statutory presumptions in its own mind and act as if the presumptions do not exist. The presumptions are true until proven otherwise, and one can only prove otherwise through a court action. The record titleholder does not have any duty to prove the presumptions because that would defeat the whole nature of the presumptions.

At page 10 of its opposition (AA Vol. 7, pg. AA001451), defendant Bank quoted from Dredge Corp. v. Wells Cargo, Inc., 80 Nev. 99, 102, 389 P.2d 394, 396 (1964), that "[l]imitations do not run against defenses." On the other hand, defendant Bank's unrecorded claim that Miles Bauer cured the default as to the HOA's lien is not an affirmative defense like Dredge Corp.'s claim that "Wells had materially breached the agreement, thereby excusing Dredge from its duty to convey." 389 P.2d at 397, n. 4.

Unlike the present case, the plaintiff in Dredge Corp. v. Wells Cargo, Inc.

sought "a court declaration of nonliabiltiy" based upon defendant's alleged breach of a contract between the parties. *See* 80 Nev. at 101, 389 P.2d at 396.

In particular, because Wells Cargo, Inc. had failed to perform the assessment work for 21 of 26 unpatented placer mining claims, Dredge Corp. requested a court determination that it had no obligation to convey a one-half interest in those 21 claims to the defendant.

The court stated:

> Dredge does not contend that it has a 'cause of action' not to convey – rather, its position is that it has a valid reason or defense for not doing so – namely, Wells' breach of its obligation to perform under the contract. **The subject matter of its request, therefore, is in the nature of a defense.**

80 Nev. at 102, 389 P.2d at 396. (emphasis added)

In the present case, on the other hand, defendant Bank did not allege or prove that the Trust, the HOA or Alessi breached any obligation to perform under any contract with defendant Bank. Defendant Bank instead waited more than four (4) years after the HOA foreclosure deed was "first duly recorded" on January 24, 2013 to file its counterclaim seeking affirmative relief based on the conditional tender of only $1,494.50 made by Miles Bauer.

Although NRCP 8 (c)(1)(N) includes "payment" as an affirmative defense, Miles Bauer did not "pay" the superpriority portion of the HOA's assessment lien

because Alessi did not accept the conditional tender. As discussed above, the conditional tender cannot be treated as a "payment" because it was "not effectual as a tender" pursuant to the "law of real property" that supplements NRS Chapter 116. *See* Smith v. School Dist. No. 64 Marion County, 131 P. 557, 558 (Kan. 1913); and First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939).

NRCP 8 (c)(1) also does not list an affirmative claim for declaratory relief from a "conclusive" recital of "default" as an affirmative defense.

At page 11 of its opposition (AA Vol. 7, pg. AA001452), defendant Bank quoted specific language in Nevada State Bank v. Jamison Family Partnership, 106 Nev. 792, 798-99, 801 P.2d 1377, 1381-82 (1990), that "the defendant can nonetheless assert his claim as an affirmative defense of recoupment." Defendant Bank, however, omitted the first sentence from the paragraph, which stated:

> Nonetheless, **equity is also a consideration, and for this reason**, we hold the district court did not err when it ruled the Bank could assert its deficiency claims in an affirmative defense of **equitable recoupment**. (emphasis added)

In the present case, defendant Bank, did not seek "equitable recoupment."

Moreover, as discussed in further detail below, the doctrines of waiver, estoppel and unclean hands prove that it is not "equitable" to allow defendant Bank to wait until November 10, 2017 to include its claim for equitable relief based on the

Miles Bauer tender in defendant Bank's answer to the Trust's amended complaint. (AA Vol. 2, pgs.AA000256-AA000338)

In City of Saint Paul, Alaska v. Evans, 344 F.3d 1029 (9th Cir. 2003), the court discussed the consequences of allowing potential plaintiffs to wait until all available defenses are time barred and then pounce on a "helpless defendant," and the court stated:

> A common thread running through these cases is the emphasis on the respective roles of the parties in the litigation as a whole. **It is important that the party asserting the defense is not, simultaneously or in parallel litigation, seeking affirmative recovery on an identical claim**. Thus, whether affirmative defenses are exempt from statutes of limitations largely hinges on a realistic assessment of the parties' litigation posture. (emphasis added)
>
> 344 F.3d at 1035.

Reviewing the posture of the parties in the present case, on the date that the HOA foreclosure sale was held, *i.e.* January 16, 2013, every recorded document disclosed that the HOA was foreclosing the full amount of its lien and that the foreclosure sale would extinguish the subordinate deed of trust assigned to defendant Bank.

Absolutely no recorded document disclosed that defendant Bank claimed that Miles Bauer's unrecorded tender of only $1,494.00 had cured the default as to the superpriority portion of the lien on December 4, 2012.

As noted above, defendant Bank also did not reveal that unrecorded claim of tender in the original answer filed by defendant Bank on September 25, 2014. (AA Vol. 1, pgs. AA000010-AA000015)

Defendant Bank instead waited until October 10, 2017 to include a fourth affirmative defense alleging that "[t]he super-priority lien was satisfied prior to the homeowners association's foreclosure under the doctrines of tender, estoppel, laches, or waiver." (AA Vol. 2, pgs.AA000260) This is the same date that defendant Bank filed its counterclaim alleging that "[t]he foreclosure sale did not extinguish the senior Deed of Trust because Bank of America tendered the super-priority-plus amount to the HOA Trustee, and the HOA Trustee unjustifiably rejected that tender." (AA Vol. 2, pgs.AA000267, par. 37)

The evidence in the present case therefore proves that defendant Bank waited until its affirmative claim for declaratory relief was time-barred to "pounce" on the Trust.

10. Defendant Bank's untimely filed claim of tender was barred by the doctrines of waiver, estoppel and unclean hands.

As stated at pages 5 to 7 of the Trust's opposition to defendant Bank's motion for summary judgment (AA Vol. 7, pgs. AA001438-AA001440), when evaluating the effect of the conditional tender made by Miles, Bauer, the doctrines of waiver,

estoppel and unclean hands weigh in favor of the Trust and against defendant Bank.

1. Waiver.

Under Nevada law, "[w]aiver requires the intentional relinquishment of a known right." Nevada Yellow Cab Corp. v. Eighth Judicial District Court, 123 Nev. 44, 152 P.3d 737, 740 (2007). To infer intent from a party's conduct, that conduct "must clearly indicate the party's intention." Id. And to infer waiver from conduct, the conduct must be "so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." Id.

In the present case, although Miles Bauer made its conditional tender of $1,494.50 on December 6, 2012 , defendant Bank did not disclose any details of the alleged tender until defendant Bank filed an opposition to plaintiff's motion for summary administration and countermotion for summary judgment on July 22, 2015. (AA Vol. 1, pg. AA000086)

Defendant Bank never explained why it kept the details of the alleged tender concealed from the Trust for more than two and one-half years after the public auction and for ten (10) months after defendant Bank filed its answer on September 25, 2014

2. Estoppel.

"Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." In re Harrison Living Trust, 121 Nev. 217, 223, 112 P.3d 1058, 1061-62 (2005). Equitable estoppel requires proof of four elements: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting estoppel must be ignorant of the true state of facts; and (4) the party asserting estoppel must have relied to his detriment on the conduct of the party to be estopped. Id.

In the present case, defendant Bank claims that Miles Bauer sent a payment for $1,494.50 to Alessi on December 6, 2012. Second, Miles Bauer, by virtue of its letter and check, must have intended to pay what it believed to be the superpriority portion of the lien. Third, defendant Bank did not disclose the details of the claimed tender at any time during the five (5) weeks that passed before the sale was held on January 16, 2013. Fourth, defendant Bank did not prove that the Trust had any knowledge of the Miles Bauer letter or check.

All of these factors combine to estop defendant Bank from claiming that the superpriority portion of the lien was paid prior to the HOA foreclosure sale.

3. Unclean Hands.

"The application of the unclean hands doctrine raises primarily a question of fact." Dollar Systems, Inc. v. Avcar Leasing Systems, Inc., 890 F.2d 165, 173 (9th Cir. 1989). To preclude equitable relief, the party's "connection with the subject-matter or transaction in litigation" must be "unconscientious, unjust, or marked by the want of good faith." Las Vegas Fetish & Fantasy Halloween Ball, Inc v. Ahern Rentals, Inc., 124 Nev. 272, 275, 182 P.3d 764, 766 (2008) (*quoting* Income Investors v. Shelton, 101 P.2d 973, 974 (Wash. 1940)). Two factors are considered when assessing if a party's conduct is sufficiently offensive to bar equitable relief: "(1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct." 124 Nev. at 276, 182 P.3d at 767.

In the present case, despite having actual notice of the public auction scheduled to take place on January 16, 2013, defendant Bank knowingly concealed from every person who attended the auction, including the Trust, defendant Bank's unrecorded claim that Miles Bauer's conditional tender had cured the default as to the superpriority portion of the lien. Defendant Bank's misconduct is even more significant because defendant Bank did not publicly disclose the details of the tender until defendant Bank filed its opposition and countermotion on July 22, 2015. (AA

Vol. 1, pg. AA00086)

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016), the court cited Hardy Cos., Inc. v. SNMARK, LLC, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010), as authority that "[t]he Legislature is 'presumed not to intend to overturn long-established principles of law' when enacting a statute." Shadow Wood, 132 Nev. at 59, 366 P.3d at 1112.

This court also stated that "the foreign precedent cited under which equitable relief may still be available in the face of conclusive recitals, **at least in cases involving fraud**, lead us to the conclusion that the Legislature, through NRS 116.31166's enactment, did not eliminate the equitable authority of the courts to consider quiet title actions when an HOA's foreclosure deed contains conclusive recitals." Shadow Wood, 132 Nev. at 59-60, 366 P.3d at 1112. (emphasis added)

In the present case, defendant Bank did not allege or prove that the HOA foreclosure sale held on January 16, 2013 involved fraud.

In Moeller v. Lien, 25 Cal. App. 4th 822, 831-832, 30 Cal. Rptr. 777 (1994), the court held that a bona fide purchaser is protected from an unrecorded claim that the trustor had been wrongfully deprived of his right of redemption:

> The conclusive presumption precludes an attack by the trustor on a trustee's sale to a bona fide purchaser even though there may have been a failure to comply with some required procedure which deprived the trustor of his right of reinstatement or redemption. (4 Miller & Starr, *supra*, § 9:141, p. 463; cf. Homestead v. Darmiento, *supra*, 230 Cal. App.3d at p. 436.) The conclusive presumption precludes an attack by the trustor on the trustee's sale to a bona fide purchaser even where the trustee wrongfully rejected a proper tender of reinstatement by the trustor. Where the trustor is precluded from suing to set aside the foreclosure sale, the trustor may recover damages from the trustee. (Munger v. Moore (1970) 11 Cal. App.3d 1, 9, 11 [89 Cal. Rptr. 323].)

Although Diamond Spur states that the bona fide purchaser doctrine does not protect the purchaser from a "void" sale, defendant Bank did not prove that the public auction held on January 16, 2013 was "void."

First, because the Wisconsin Supreme Court did not discuss in Power Transmission Equip. Corp. v. Beloit Corp., 55 Wis. 2d 540, 201 N.W.2d 13, 16 (1972), the legal effect of a "conclusive" recital of "default" like the one provided by NRS 116.31166(1)(a), the language quoted by this court in Diamond Spur from that case does not support the conclusion that tendering the correct amount of the superpriority lien automatically supersedes the legal effect of the "conclusive" recital of "default" provided by NRS 116.31166(1)(a).

Similarly, the language quoted by Diamond Spur from Henke v. First Southern Properties, Inc., 586 S.W.2d 617 (Tex. App. 1979), regarding "a defect in the foreclosure proceeding" rendering the sale "void" depended upon the foreclosing lender's agreement to reinstate the loan if $2,156 was paid, and the fact that "the

money was paid by the specified time (September 30, 1974) **and accepted with the advice that Henke's loan had been reinstated**." 586 S.W. 2d at 618. (emphasis added)

No such evidence exists in the present case.

In Diamond Spur, this court cited Baxter Dunaway, *Interests and Conveyances Outside Acts – Recordable Interests*, 2 L. of Distressed Real Est. § 17:16 (2018), as authority that "a trustee has no power to convey an interest in land securing a note or other obligation that is not in default." In the present case, on the other hand, the full amount of the HOA's assessment lien remained in default on January 16, 2013 because "the law of real property" expressly provides that the exact conditions imposed by Miles Bauer on its conditional tender of only $1,494.50 made Miles Bauer's tender "ineffectual" as a tender.

The conclusive recitals in the trustee's deed upon sale (AA Vol. 1, pgs.AA000041) prove that Alessi timely recorded, mailed, posted and published every notice required by NRS 116.31162 to NRS 1116.31168, and by incorporation, NRS 107.090. The first letter by Miles Bauer (AA Vol. 5, pgs.AA001176-AA001177) proves that by November 21, 2012, defendant Bank had actual notice of the notice of trustee's sale that was recorded on October 31, 2012.

Despite this notice, defendant Bank allowed the Property to be sold to the Trust without objection and without notice of defendant Bank's unrecorded claim of tender, and the Property was acquired by an innocent third party without notice of that tender.

Furthermore, to treat a conditional tender that is rejected in good faith the same as if it was an accepted payment violates the rules of statutory construction because that result would render the "conclusive" recital of default in the HOA foreclosure deed "meaningless." Public Employees' Benefits Program v. Las Vegas Metropolitan Police Dep't, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008).

11. Defendant Bank did not prove that the Trust had notice of the unrecorded claim that the default as to the superpriority portion of the HOA's lien was cured by the Miles Bauer tender.

In Shadow Wood, the court stated:

> So, when an association's foreclosure complies with the statutory foreclosure rules, as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary, the purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge, **the basis of which is unknown to that purchaser**.
>
> **That NYCB retained the ability to bring an equitable claim to challenge Shadow Wood's foreclosure sale is not enough in itself to demonstrate that Gogo Way took the property with notice of any potential future dispute as to title**. And NYCB points to no other evidence indicated that Gogo Way had notice before it purchased the property, either actual, constructive, or inquiry, as to NYCB's attempts to pay the lien and prevent the sale. . . .

132 Nev. at 65-66, 366 P.3d at 1116. (emphasis added)

The court also stated that because the lender did not prove that the purchaser,

Gogo Way, "had any notice of the pre-sale dispute between NYCB and Shadow Wood, the potential harm to Gogo Way must be taken into account and further **defeats NYCB's entitlement to judgment as a matter of law**." 132 Nev. at 66, 366 P.3d at 1116. (emphasis added)

In the present case, every document recorded as of the date of the HOA foreclosure sale showed that the deed of trust assigned to defendant Bank was subordinate to the HOA lien being foreclosed.

In Shadow Canyon, this court stated that the lender "has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder."133 Nev. at 746, 405 P.3d at 646.

In Firato v. Tuttle, 48 Cal.2d 136, 139-140, 308 P.2d 333, 335 (1957), the California Supreme Court stated:

> The protection of such purchasers is consistent 'with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business.' Williams v. Jackson, 107 U.S. 478, 484, 2 S.Ct. 814, 819, 27 L.Ed. 529. It also finds support in the better reasoned cases from other jurisdictions which have dealt with similar problems upon general equitable principles and in the absence of statutory provisions. Simpson v. Stern, 63 App.D.C. 161, 70 F.2d 765, certiorari denied 292 U.S. 649, 54 S.Ct. 859, 78 L.Ed. 1499; Williams v. Jackson, supra, 107 U.S. 478, 2 S.Ct. 814; Town of Carbon Hill v. Marks, 204 Ala. 622, 86 So. 903; Lennartz v. Quilty, 191 Ill. 174, 60 N.E. 913; Millick v. O'Malley, 47 Idaho 106, 273 P. 947; Day v. Brenton, 102 Iowa 482, 71 N.W. 538; Willamette Collection & Credit Service v. Gray, 157 Or. 79, 70 P.2d 39; Locke v. Andrasko, 178 Wash. 145, 34 P.2d 444.

The bona fide purchaser doctrine protects a purchaser's title against competing

legal or equitable claims of which the purchaser had no notice at the time of the conveyance. 25 Corp. v. Eisenman Chemical Co., 101 Nev. 664, 709 P.2d 164, 172 (1985); Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246, 247 (1979).

Because every recorded document was consistent with the foreclosure of a delinquent assessment lien that included an unpaid superpriority amount, and because defendant Bank did not record any document stating that the default in payment of the HOA's superpriority lien had been "cured," the Trust's rights were not affected by that unrecorded claim.

NRS 111.180(1) identifies several requirements for a purchaser to be a "bona fide purchaser," but the words "bona fide purchaser" do not appear in NRS 111.325.

NRS 111.325 instead provides that in order to be protected from the unrecorded claim of tender, the Trust need only be a subsequent purchaser, in good faith and for a valuable consideration "where his or her own conveyance shall be first duly recorded."

Moreover, when choosing the language in NRS 111.325, the Nevada Legislature intentionally chose not to include the words "actual knowledge, constructive notice of, or reasonable cause to know" that are included in NRS 111.180(1), but not in NRS 111.325. NRS 111.325 expressly provides that in order

to be protected from the unrecorded claim of tender, the HOA Purchaser need only be a subsequent purchaser, in good faith and for a valuable consideration "where his or her own conveyance shall be first duly recorded."

In Williams v. State Dep't of Corrections, 133 Nev. 594, 598-599, 402 P.3d 1260, 1264 (2017), the court quoted from Loughrin v. United States, 573 U.S. 351, 358, 134 S.Ct. 2384, 2390 (2014), that when the Legislature "includes particular language in one section of a statute but omits it in another. . . this Court presumes that [the Legislature] intended a difference in meaning." The court also quoted from S.E.C. v. McCarthy, 322 F.3d 650, 656 (9th Cir. 2003), that the Legislature's explicit decision to use one word over another in drafting a statute is "material" and "is imbued with legal significance and should not be presumed to be random or devoid of meaning."

Consequently, the Legislature's decision not to include the words "bona fide purchaser" or the words "actual knowledge, constructive notice of, or reasonable cause to know" in NRS 111.325 must be viewed as intentional.

Comment c to Section 6.4 of Restatement (Third) of Prop: Mortgages (1997) requires that a document of discharge be provided when a payment or tender "has extinguished the mortgage [superpriority lien]." Comment d to Section 6.4 explains

the significance of recording notice of a rejected tender:

> The rule extinguishing the mortgage when a tender is rejected has only limited modern significance. The reason is that mortgages are virtually always recorded, and the payor derives little benefit, merely from the theoretical extinction of the mortgage if it is in fact still present, and apparently undischarged in the public records.

According to NRS 116.1108, these established principles of "the law of real property" supplement the provisions of NRS Chapter 116.

Defendant Bank's argument, on the other hand, requires that this court interpret NRS Chapter 116 in a way that permits the expectations of a "good faith" purchaser to be subverted by a lender's intentional choice to ignore "the law of real property" that supplements NRS Chapter 116 and not record a document in the public records that discloses the lender's claim that the default as to the HOA's superpriority lien has been cured.

In Shadow Wood, 132 Nev. at 65, 366 P.3d at 1116 (2016), this court stated:

> Although, as mentioned, NYCB might believe that Gogo Way purchased the property for an amount lower than the property's actual worth, that Gogo Way paid "valuable consideration" cannot be contested. Fair v. Howard, 6 Nev. 304, 308 (1871) ("The question is not whether the consideration is adequate, but whether it is valuable."); *see also* Poole v. Watts, 139 Wash.App. 1018 (2007) (unpublished disposition) (stating that the fact that the foreclosure sale purchaser purchased the property for a "low price" did not in itself put the purchaser on notice that anything was amiss with the sale).

The $8,200.00 paid by the Trust satisfies the requirement that "valuable consideration" be paid.

Because the foreclosure deed was "first duly recorded," the express language in NRS 111.325 provides that the unrecorded claim by defendant Bank that the foreclosure agent's rejection of Miles Bauer's conditional tender extinguished the HOA's superpriority lien was "void" as to the HOA Purchaser.

Defendant Bank's argument assumes that in Diamond Spur, this court intended to disrupt more than 150 years of established law and jurisprudence respecting the importance of protecting all rights inherent in real property ownership, including security in and title to property. *See generally* Hamm v. Arrowcreek Homeowners' Ass'n, 124 Nev. 290, 298, 183 P.3d 895, 902 (2008) (*quoting* McCarran Int'l Airport v. Sisolak, 122 Nev. 645, 657, 137 P.3d 1110,1119 (2006) (explaining that Nevada has recognized that the bundle of property rights includes the right to possess, use, and enjoy property, and includes the right to security in and title to real property)).

The opinion in Diamond Spur should instead be interpreted narrowly to only decide the limited arguments raised by SFR Investments Pool 1, LLC in that case.

In Shadow Wood, 132 Nev. at 66, 366 P.3d at 1116, this court stated:

> "Where the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby," Nussbaumer v. Superior Court in & for Yuma Cty., 107 Ariz. 504, 489 P.2d 843, 846 (Ariz.1971).

Because defendant Bank permitted the HOA to foreclose the entire amount of its lien without objection, defendant Bank is bound by the consequences of its own inaction.

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that this court reverse the findings of fact, conclusions of law and order granting defendant Bank's motion for summary judgment.

DATED this 15th day of July, 2021.

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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)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X9 14 point Times New Roman.

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), it is proportionately spaced and has a typeface of 14 points and contains 13,829 words.

3. 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 of the transcript or appendix where the matter relied on is to be found.

DATED this 15th day of July, 2021.

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CERTIFICATE OF SERVICE

In accordance with N.R.A.P. 25, I hereby certify that I am an employee of the Law Offices of Michael F. Bohn, Esq., Ltd., and that on the 15th day of July, 2021, a copy of the foregoing **APPELLANT'S OPENING BRIEF** was served electronically through the Court's electronic filing system to the following individuals:

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