

IN THE SUPREME COURT OF THE STATE OF NEVADA

SFR INVESTMENTS POOL 1, LLC, A
NEVADA LIMITED LIABILITY
COMPANY,

Appellant,

vs.

MARCHAI, B.T., A NEVADA BUSINESS
TRUST,

Respondent/Cross-Appellant.

vs.

WYETH RANCH COMMUNITY
ASSOCIATION,

Cross-Respondent.

No. 82771

Electronically Filed
Sep 07 2021 04:58 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

MARCHAI, B.T.'S RESPONSE TO ORDER TO SHOW CAUSE

Introduction

In this judicial foreclosure action, Marchai, B.T. proved that a homeowner's partial payments satisfied the association's superpriority lien. Thus, the district court concluded that the third-party purchaser, SFR Investments Pool 1, LLC, acquired its property interest at the association's foreclosure subject to Marchai's deed of trust. The ruling required the district court to dismiss Marchai's alternative claims against Wyeth Ranch Community Association. But SFR appealed. Consequently, Marchai cross-appealed to preserve those claims should this Court reverse.

This Court issued an order to show cause challenging Marchai's standing. Generally, a prevailing party cannot cross-appeal because it can argue any ground

supported by the record. But courts recognize an exception and allow a cross-appeal when a reversal may aggrieve the prevailing party. Marchai is sure this Court will affirm. But if not, the dismissal of Marchai's claims against Wyeth Ranch will aggrieve Marchai. Hence, Marchai asks this Court to conclude that Marchai has standing to cross-appeal the dismissal of its claims against Wyeth Ranch.

Statement of Facts

In 2004, Cristela Perez purchased real property at 7119 Wolf Rivers Avenue, Las Vegas, Nevada 89131. (*See* Findings of Fact & Conclusions of Law (FFCL) ¶ 14, attached as Ex. A.) Perez acquired the property by entering into two loans, which the lender secured with deeds of trust. (*See id.* ¶ 16.) In 2005, Perez refinanced her two loans into one, which the lender secured with a deed of trust. (*Id.* ¶¶ 16–17.) Eventually, after several endorsements and assignments, Marchai became the holder of the note and assignee of the deed of trust. (*Id.* ¶¶ 18, 85, 89, & 98.)

In 2008, Perez fell behind in the payment of Wyeth Ranch's association dues. (*See id.* ¶ 28.) Hence, on October 1, 2008, Wyeth Ranch instituted an action to enforce its lien by sending Perez a notice of delinquent assessment. (*See id.* ¶ 34.)

Wyeth Ranch had an \$840.00 superpriority lien, with the remainder subpriority.

(*See id.* ¶ 115.)

Despite the notice of delinquent assessment, Perez did not abandon the property. (*See id.* ¶¶ 30, 46, 49, 54, 56, 58, 61, 66, 68, 81, 83, 88 & 96.) Instead, she made 13 payments totaling \$3,897.60 towards Wyeth Ranch's assessments. (*See id.* ¶¶ 30, 46, 49, 54, 56, 58, 61, 66, 68, 81, 83, 88 & 96.)

When Wyeth Ranch received payments towards Perez's assessments, it noted the payment on an assessments account ledger.¹ (*See id.* ¶ 30.) Wyeth Ranch did not maintain separate accounts for the superpriority and subpriority amounts of its lien. (*See id.* ¶ 26.)

A report Wyeth Ranch produced conclusively established that it applied partial payments first to the oldest outstanding association dues and any remainder to the next oldest outstanding association dues. (*See id.* ¶ 31 & n.2.) Wyeth Ranch did not apply payments to late fees or interest. (*See id.*) Because Wyeth Ranch applied payments first to the oldest association dues, Perez's payments more than satisfied Wyeth Ranch's superpriority lien. (*See id.* ¶¶ 115–16.)²

¹ Wyeth Ranch maintained two ledgers: one for assessments and one for violations. (*See id.* ¶ 25.) Wyeth Ranch applied no payments to the violation ledger.

² Yvette Saucedo, an employee of Wyeth Ranch's management company, testified that Wyeth Ranch applied partial payments first to current association

In 2013, Wyeth Ranch foreclosed upon its lien. (*See id.* ¶ 111.) SFR submitted a winning bid of \$21,000 for a property with a \$360,000 fair market value. (*See id.* ¶¶ 112 & 121.) Wyeth Ranch applied the sale proceeds to satisfy the remainder of its assessment lien and paid no money to Marchai. (*See id.* ¶ 119.)

Procedural History

In 2013, Marchai sued in district court for judicial foreclosure. (*See id.* ¶ 1.) In 2016, Marchai filed a second action, which included claims against Wyeth Ranch for wrongful foreclosure and bad faith. (*See id.* ¶ 2.) The district court consolidated both cases.

In 2017, the district court (Judge Bell) granted summary judgment for Marchai. (*See id.* ¶ 7.) The district court concluded that Perez's partial payments satisfied the superpriority portion of Wyeth Ranch's lien. (*See id.*) SFR appealed the district court's decision. (*See id.* ¶ 8.)

In 2020, this Court vacated the judgment and remanded to the district court to consider this Court's decision in *9352 Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev. 76, 459 P.3d 227 (2020). (*See id.* ¶ 12.)

dues and the remainder to the oldest association dues. (*See id.* n.3.) The district court chose to believe the document Wyeth Ranch produced rather than Saucedo's unsupported testimony. (*See id.*)

In February 2021, the district court (Judge Gonzalez) conducted a bench trial. (*See id.* at 1:16–17.) The district court granted Marchai’s claim for judicial foreclosure and declaratory relief/quiet title. (*See id.* at 23:9–12.) Specifically, the district court concluded that Perez’s payments satisfied the superpriority portion of Wyeth Ranch’s lien. (*See id.*) Hence, Wyeth Ranch foreclosed upon a subpriority lien that did not extinguish Marchai’s deed of trust. (*See id.*)

Because Wyeth Ranch foreclosed upon a subpriority lien and Perez defaulted on subpriority amounts, the district court understandably dismissed Marchai’s wrongful foreclosure claim against Wyeth Ranch. (*See id.* ¶¶ 155–158.) The district court also dismissed Marchai’s bad faith claim against Wyeth Ranch. (*See id.* ¶¶ 160–170.) Marchai’s bad faith claim consisted of an allegation that if Wyeth Ranch foreclosed upon a superpriority lien, then Wyeth Ranch acted in bad faith by not disbursing funds to Marchai after satisfying the superpriority portion of its lien. (*See id.*) Although the district court’s decision that Wyeth Ranch foreclosed on a subpriority lien mooted Marchai’s bad faith claim (*see id.* ¶¶ 165–170), the district court also concluded that Marchai did not plead a claim challenging Wyeth Ranch’s misapplication of proceeds following the sale. (*See id.* ¶ 162–63.) Marchai disputes the district court’s conclusion.

SFR appealed the district court’s decision and did not include Wyeth Ranch as a party to the appeal. (*See* Notice of Appeal (Apr. 12, 2021); Case Appeal Statement (Apr. 12, 2021).) Although Marchai contends the district court correctly concluded that Wyeth Ranch foreclosed a subpriority deed of trust, which moots Marchai’s claims against Wyeth Ranch for wrongful foreclosure and bad faith, Marchai cross-appealed to add Wyeth Ranch as a party and preserve its claims should this Court conclude the district court erred. (*See* Marchai, B.T.’s Notice of Appeal (Apr. 26, 2021); *see also* Case Appeal Statement (Apr. 26, 2021).)³

Argument

This Court “has jurisdiction to entertain an appeal only where an appeal is authorized by statute or court rule.” *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 444, 874 P.2d 729, 732 (1994). This Court’s rules provide that “[a] party who is aggrieved by an appealable judgment or order may appeal from that judgment or order.” N.R.A.P. 3A(a). “A party is ‘aggrieved’ within the meaning of NRAP 3A(a) ‘when either a personal right or right of property is adversely and substantially affected’ by a district court’s ruling.” *Valley Bank of Nev.*, 110 Nev. at 446, 874 P.2d at 734 (quoting *Est. of Hughes v. First Nat’l Bank*, 97 Nev. 178, 180,

³ The district court entered a final judgment on July 22, 2021, and Marchai filed an amended notice of appeal on July 29, 2021. (*See* Marchai, B.T.’s Am. Notice of Appeal (July 29, 2021).)

605 P.2d 1149, 1150 (1980)). “The general rule is that a party may not appeal from a decree in its favor.” *Port of Seattle, Wash. v. FERC*, 499 F.3d 1016, 1028 (9th Cir. 2007). But there are exceptions to the general rule. *Id.* One such exception exists when the prevailing party “might become aggrieved upon reversal on the direct appeal.” *Id.* (quoting *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975)) (permitting the cross-appeal by a prevailing party when a collateral issue to the appeal could expose the cross-appellant to greater liability).

Here, the district court concluded that Perez’s partial payments satisfied the superpriority portion of Wyeth Ranch’s lien and, thus, SFR acquired its interest subject to Marchai’s deed of trust. The district court’s decision was correct. Marchai has not cross-appealed from any ruling against SFR. And Marchai did not cross-appeal to “advance any argument in support of the judgment even if the district court rejected or did not consider the argument.” *Ford v. Showboat Operating Co.*, 110 Nev. 752, 755, 877 P.2d 546, 548 (1994).

Instead, because the district court concluded that Perez satisfied the superpriority portion of Wyeth Ranch’s lien, it had to dismiss Marchai’s claims against Wyeth Ranch for wrongful foreclosure and bad faith claims. But if this Court disagrees with the district court, Marchai may have a wrongful foreclosure or

bad faith claim against Wyeth Ranch and may seek reversal of the district court's judgment to preserve those claims. *See Port of Seattle*, 499 F.3d at 1028.

This Court's decision in *University of Nevada v. Tarkanian*, 110 Nev. 581, 879 P.2d 1180 (1994), seems to imply that Marchai need not (and cannot) cross-appeal because it is not an aggrieved party. 110 Nev. at 601–02, 879 P.2d at 1193. But *Tarkanian* is distinguishable.

In *Tarkanian*, the UNLV basketball coach sued the university and the NCAA for a due process violation. The district court enjoined UNLV and the NCAA and awarded costs to Tarkanian. The court apportioned 90% of the costs to the NCAA and 10% (totaling \$19,595.19) to UNLV. The NCAA appealed, but UNLV did not. Ultimately, the United States Supreme Court reversed the decision against the NCAA, concluding that the NCAA was not a state actor. Based upon the High Court's decision, this Court remanded the case to vacate the injunction against the NCAA and any award of costs against the NCAA. The district court vacated all orders against the NCAA but retained jurisdiction for determining an award of costs against the remaining defendants. The district court granted Tarkanian's request for costs against UNLV and awarded Tarkanian \$150,725.58. UNLV appealed. This Court affirmed.

UNLV argued that “reversal or modification of a judgment against a defendant who appeals does not affect the judgment against a non-appealing co-defendant, which is final, *res judicata* and cannot be modified.” *Id.* at 601, 879 P.2d 1192. Although this Court recognized this principle, it concluded it did not apply because the Court “did not alter a judgment in favor of an appellee who did not cross-appeal.” *Id.* at 603, 879 P.2d at 1194. Instead, the Court upheld the district court’s injunction against UNLV, “partially reversed the award of fees and remanded for further proceedings, including a calculation of fees.” *Id.*

Here, the facts differ from *Tarkanian*. In *Tarkanian*, UNLV was an aggrieved co-defendant who had a right to appeal the district court’s decision to apportion 10% of Tarkanian’s costs to UNLV. Although the NCAA appealed, UNLV elected not to. But here, Wyeth Ranch is not an aggrieved party on the merits of the district court’s decision. The district court ruled for Wyeth Ranch and against Marchai. Hence, Wyeth Ranch could *not* have appealed the district court’s decision. Further, as this Court noted, *Tarkanian* did not involve the alteration of a judgment for an appellee who did not cross-appeal. But here, if this Court rules for SFR, Marchai asks this Court to modify the judgment to permit it to proceed on its claims against Wyeth Ranch, which the district court dismissed. Because of the unique facts of this case, Marchai contends that it properly cross-

appealed the district court's dismissal of Marchai's alternative claims against Wyeth Ranch.⁴

Conclusion

Under the unique facts of this case, Marchai is an aggrieved party that properly cross-appealed. Although the district court ruled for Marchai against SFR, which mooted Marchai's claims against Wyeth Ranch, if this Court reverses the district court, then Marchai needs this Court to alter the judgment so it may proceed on its claims against Wyeth Ranch.

Dated this 7th day of September 2021.

David J. Merrill, P.C.

By: /s/ David J. Merrill
David J. Merrill
Nevada Bar No. 6060
10161 Park Run Drive, Suite 150
Las Vegas, Nevada 89145
(702) 566-1935
Attorney for Marchai, B.T.

⁴ While Marchai is certain it will prevail on SFR's appeal, if this Court concludes Marchai has no standing to cross-appeal and ultimately reverses the district court, then Marchai would ask this Court to reverse the entire judgment so it may proceed with its claims against Wyeth Ranch. *See Tarkanian*, 110 Nev. at 602, 879 P.2d at 1193 ("Where a non-appealing party's rights under a judgment are dependent upon and interwoven with the parts of a judgment determining the appealing parties' rights, an appellate court can reverse the entire judgment if justice so requires.")

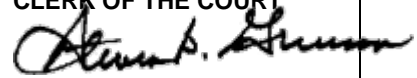
Certificate of Service

On the 7th day of September 2021, I certify that I filed the preceding Marchai, B.T.'s Response to Order to Show Cause via the Court's EFlex system, which shall be served per the Master Service List.

/s/ David J. Merrill

An employee of David J. Merrill, P.C.

Exhibit A



FFCL

DISTRICT COURT
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business trust,

Plaintiff,

v.

CRISTELA PEREZ, an individual; *et al.*

Defendants.

Case No.: A-13-689461-C

Dept. No. XI

Consolidated with: A-16-742327-C

AND ALL RELATED CLAIMS AND
ACTIONS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez on February 22, 2021; Plaintiff Marchai, B.T. (“Marchai”) being represented by its counsel David J. Merrill, Esq. of the law firm David J. Merrill, P.C.; Defendant SFR Investments Pool 1, LLC (“SFR”) being represented by Karen Hanks, Esq. of the law firm Kim Gilbert Ebron; and Defendant Wyeth Ranch Community Association (“Wyeth Ranch”) being represented by David T. Ochoa, Esq. of the law firm of Lipson Neilson P.C.; and Defendant Cristela Perez (“Perez”) having been defaulted; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the testimony of the witnesses called to testify and weighing their credibility; having considered the oral and written arguments of counsel, and with the intent of rendering a decision on all

1 remaining issues before the Court,¹ pursuant to NRCP 52(a) and 58; the Court makes the
2 following findings of fact and conclusions of law:

3 **PROCEDURAL HISTORY**

4 1. In A689461 the Complaint alleges Judicial Foreclosure of Deed of Trust. SFR
5 alleges as Counterclaims & Cross Claims, Declaratory Relief/Quiet Title and Injunctive Relief.

6 2. In A742327 the Complaint alleges Declaratory Relief Under Amendment V of the
7 United States Constitution-Takings Clause; Declaratory Relief Under the Due Process Clause of
8 the United States and Nevada Constitutions; Wrongful Foreclosure; Violation for NRS §
9 116.1113 et seq.; Intentional Interference with Contractual Relations; and Quiet Title.
10

11 3. Default was entered against Perez in A689461 on April 22, 2014.

12 4. In the Order entered March 22, 2016, Judge Bell found that Marchai failed to
13 establish the sale was commercially unreasonable, violated the takings or due process clauses, or
14 that the statute was unconstitutionally vague.

15 5. To the extent Marchai's third through sixth cause of action related to taking, due
16 process, or commercial reasonableness, those portions of those causes of action were resolved by
17 the 2016 Order.
18

19 6. In Judge Bell's Order entered January 24, 2017, Marchai's Quiet Title Claim
20 against Wyeth Ranch was dismissed.

21 7. The October 3, 2017 Order found notice was proper, but found for Marchai based
22 on a determination that Perez's partial payments paid off the superpriority portion of the lien.
23
24

25 ¹ On March 18, 2019, the Nevada Supreme Court remanded this matter to the Court, after vacating this
26 Court's prior Judgment in favor of Marchai B.T. The Nevada Supreme Court found that while Judge Bell correctly
27 determined a homeowner's payments can cure the default of the super-priority portion of an Association's lien, an
28 analysis of the intent of the homeowner and the Association as to whether the payments made by the homeowner in
this case did in fact cure the super-priority default. Further, the Court directed an analysis of the factors outlined in
9352 Cranesbill v. Wells Fargo, 136 NAO 8 (2020).

8. On November 6, 2017, SFR filed its Case Appeal Statement and Notice of Appeal, appealing the determination on the application of Perez's partial payments.

9. Marchai did not appeal the earlier orders or the determination on notice from the October 3, 2017.

10. On March 18, 2020, the Nevada Supreme Court entered its Order Vacating Judgment and Remanding.

11. The Nevada Supreme Court found and affirmed that the 2008 Notice of Delinquent Assessment was the operative notice to review superpriority.

12. The Nevada Supreme Court found that a borrower's payments could satisfy the superpriority portion of an HOA lien. However, the Court remanded on finding that under 9352 *Cranesbill Trust v. Wells Fargo Bank, N.A.*, 136 Nev., Adv. Op. 8 (Mar. 5, 2020), the facts surrounding the payments needed to be analyzed to determine if the payments actually satisfied the superpriority portion of the lien.

FINDINGS OF FACT

13. On October 4, 2002, Wyeth Ranch recorded its Declaration of Covenants, Conditions, and Restrictions (“CC&Rs”) in the Official Records of the Clark County Recorder as Instrument No. 2002100401353. Wyeth Ranch recorded various amendments.

14. On July 21, 2004, a Grant, Bargain, Sale Deed transferring the real property commonly known as 7119 Wolf Rivers Avenue, Las Vegas, Nevada 89131, Parcel No. 125-15-811-013 (“Property”) to Perez was recorded in the Official Records of the Clark County Recorder as Instrument No. 20040721-0003728 (Exhibit 16).

15. The Property is in the Wyeth Ranch community.

16. On October 19, 2005, Perez refinanced her two prior loans by entering into an Interest First Adjustable Rate Note (“Note”) with CMG Mortgage, Inc. for \$442,000.00.

1 17. On November 9, 2005, CMG Mortgage secured the Note by recording a Deed of
2 Trust against the Property as Instrument No. 20051109-0001385 (“DOT”).

3 18. Eventually, the DOT was assigned to Marchai on March 12, 2013, and the
4 assignment was recorded with the Clark County Recorder as Instrument No. 201308120002562.

5 19. For all relevant time periods to this action, Wyeth Ranch collected association
6 dues on the first day of each quarter.

7 20. In 2008, Wyeth Ranch collected \$420.00 per quarter in association dues.

8 21. Complete Association Management Company (“CAMCO”) acted as the
9 community management company for Wyeth Ranch.
10

11 22. Wyeth Ranch retained Alessi & Koenig, LLC (“A&K”) as its collection agent,
12 who collected delinquent assessments from Perez.

13 23. Wyeth Ranch had no written documents outlining procedures for applying
14 payments or partial payments to past due assessments.

15 24. When Perez submitted payments, there is no evidence she directed how she
16 wanted the payments applied.
17

18 25. Wyeth Ranch maintained two accounts for the Property, an assessment account
19 and a violation account.

20 26. Wyeth Ranch did not maintain separate superpriority and subpriority accounts for
21 the Property.

22 27. On January 1, 2008, Wyeth Ranch assessed Perez a \$420.00 quarterly assessment.
23

24 28. On January 30, 2008, Perez became delinquent in the payment of her quarterly
25 assessments.

26 29. On April 1, 2008, Wyeth Ranch assessed Perez a \$420.00 quarterly assessment.

27 30. Exhibit 138 evidences a “running account” statement for the assessments at the
28 Property. On April 16, 2008, Wyeth Ranch applied a \$507.60 payment to Perez’s account.

1 Wyeth Ranch applied \$420.00 of the \$507.60 payment to the past due January 2008's association
2 dues and the remainder (\$87.60) to the current April 2008 association dues.

3 31. Based upon Exhibit 45,² Wyeth Ranch did *not* apply payments first to late fees or
4 interest. Instead, it applied payments first to the oldest outstanding association dues and then any
5 remainder to the next oldest outstanding association dues.³

6 32. On July 1, 2008, Wyeth Ranch assessed Perez a \$420.00 quarterly assessment.

7 33. On October 1, 2008, Wyeth Ranch assessed Perez a \$420.00 quarterly
8 assessment.
9

10 34. On October 2, 2008, Wyeth Ranch instituted an action to enforce its lien by
11 sending Perez a Notice of Delinquent Assessment (Lien) ("NODA").

12 35. According to the NODA, executed September 30, 2008, Perez owed Wyeth
13 Ranch \$1,425.17, including collection costs, attorney's fees, late fees, service charges, and
14 interest. The NODA included the superpriority portion (statutorily permitted 6 months at the
15 time) of the lien (\$840), subpriority portion of the lien, late fees, A&K's attorney's fees (\$370)
16 and costs (\$50).
17

18 36. The NODA was recorded on October 8, 2008.

19 37. In 2009, Wyeth Ranch increased its assessments from \$420.00 per quarter to
20 \$457.50 per quarter.
21

22 ² Exhibit 45 bears a print date of 9/17/2008, a received stamp of 9/17/2008, and handwritten notations related
23 to late fees and what appears to be the file number for this matter (11632) from A & K, *see* Exhibit 109. The Court
24 infers that based upon Exhibit 45, A & K executed the Notice of Delinquent Assessment (Lien) on 9/30/08, in the
25 total amount of \$1425.17 after adding the handwritten late fee entry for 9/08 in the amount of \$11.29. The Notice of
Delinquent Assessment (Lien) recorded on 10/8/08, included the superpriority portion (statutorily permitted 6
months at the time) of the lien (\$840), subpriority portion of the lien, late fees, A & K's attorney's fees (\$370) and
costs (\$50) as reflected in Exhibit 47.

26 ³ The testimony of Yvette Saucedo of CAMCO is inconsistent with Exhibit 45 and outlines an audit process
27 she and her staff follow on behalf of Wyeth Ranch. The Court finds the information contained in Exhibit 45
28 credible as it was prepared at the time of the NODA, rather than an after the fact readjustment as described by Ms.
Saucedo. According to Ms. Saucedo, no more recent version of the report similar to Exhibit 45 was available. As a
result, the Court's analysis is to apply the treatment of the April 16, 2008 payment for all later payments made by
Perez.

1 38. On January 5, 2009, A&K recorded a Notice of Default and Election to Sell
2 Under Homeowners Association Lien (“NOD”) on behalf of Wyeth Ranch in the Official
3 Records of the Clark County Recorder as Instrument No. 20090105-0002988. The NOD stated
4 Perez owed Wyeth Ranch \$3,096.46 as of December 17, 2008.

5 39. On November 5, 2009, Wyeth Ranch executed an Authorization to Conclude
6 Non-Judicial Foreclosure and Conduct Trustee Sale. Wyeth Ranch authorized A&K to proceed
7 with the non-judicial foreclosure of its assessment lien.
8

9 40. According to Wyeth Ranch, Perez owed \$3,330.32 in assessments.

10 41. In 2010, Wyeth Ranch increased its assessments from \$457.50 to \$478.50 per
11 quarter.

12 42. Under Wyeth Ranch’s authorization, on January 14, 2010, A&K recorded a
13 Notice of Trustee’s Sale, which set a foreclosure sale for February 17, 2010.

14 43. The Notice of Trustee’s Sale stated Wyeth Ranch’s intention to foreclose the lien
15 recorded on October 8, 2008.
16

17 44. According to the notice, Perez owed Wyeth Ranch \$6,964.25 for unpaid
18 assessments.

19 45. On February 3, 2010, A&K sent a demand to Perez and her husband, Robert
20 Rose, in which A&K claimed that Perez owed Wyeth Ranch \$6,977.61.

21 46. On February 12, 2010, Perez paid A&K \$900.00. A&K deducted \$309.60 in
22 collection costs from the \$900 payment and disbursed the remainder (\$590.40) to Wyeth Ranch.
23

24 47. On March 2, 2010, Wyeth Ranch applied the \$590.40 disbursement to Perez’s
25 account.

26 48. On March 22, 2010, Perez was provided a payment plan. The payment plan
27 commenced on April 1, 2010, and required monthly payments of \$669.87. Perez never made a
28 payment under the payment plan.

1 49. On May 11, 2010, Perez paid A&K \$300.00. A&K deducted \$95.40 in collection
2 costs from the \$300 payment and disbursed the remainder (\$204.60) to Wyeth Ranch.

3 50. On June 8, 2010, Wyeth Ranch applied the \$204.60 disbursement to Perez's
4 account.

5 51. On July 2, 2010, A&K sent Perez a letter notifying her that it terminated the
6 payment plan.

7 52. On July 13, 2010, A&K sent Perez a Pre-Notice of Trustee Sale Notification
8 based upon the NODA recorded on October 8, 2008, and the NOD recorded on January 5, 2009.
9

10 53. The Pre-Notice of Trustee's Sale demanded payment from Perez for \$19,071.21.

11 54. On August 2, 2010, Perez paid A&K \$250.00. A&K deducted \$77.24 in
12 collection costs from the \$250 payment and disbursed the remainder (\$172.76) to Wyeth Ranch.

13 55. On August 20, 2010, Wyeth Ranch applied the \$172.76 disbursement to Perez's
14 account; \$172.76 for the October 2008 association dues, which left a balance for October 2008
15 of \$204.64.
16

17 56. On September 29, 2010, Perez paid A&K \$220.00. A&K deducted \$67.98 in
18 collection costs from the \$220 payment and disbursed the remainder (\$152.02) to Wyeth Ranch.

19 57. On October 15, 2010, Wyeth Ranch applied the \$152.02 disbursement to Perez's
20 account.

21 58. On November 30, 2010, Perez paid A&K \$175.00. A&K deducted \$48.82 in
22 collection costs from the \$175 payment and disbursed the remainder (\$126.18) to Wyeth Ranch.
23

24 59. On December 16, 2010, Wyeth Ranch applied the \$126.18 disbursement to
25 Perez's account.
26
27
28

1 60. On March 9, 2011, A&K recorded a Rescission of Notice of Trustee's Sale, which
2 rescinded the notice A&K recorded on January 14, 2010.⁴

3 61. On March 10, 2011, Perez paid A&K \$160.00. A&K deducted \$40.48 in
4 collection costs from the \$160 payment and disbursed the remainder (\$119.52) to Wyeth Ranch.

5 62. On March 22, 2011, Wyeth Ranch applied the \$119.52 disbursement to Perez's
6 account.

7 63. On March 29, 2011, A&K recorded another Notice of Trustee's Sale based upon
8 the January 5, 2009 NOD.

9 64. On June 2, 2011, Wyeth Ranch executed another authorization to allow A&K to
10 complete the non-judicial foreclosure and conduct the trustee sale.

11 65. The authorization stated that Perez owed Wyeth Ranch \$4,730.03 in delinquent
12 assessments.

13 66. On May 23, 2011, Perez paid A&K \$160.00. A&K deducted \$35.68 in collection
14 costs from the \$160 payment and disbursed the remainder (\$124.32) to Wyeth Ranch.

15 67. On June 16, 2011, Wyeth Ranch applied the \$124.32 disbursement to Perez's
16 account.

17 68. On August 4, 2011, Perez paid A&K \$165.00.

18 69. A&K deducted \$37.29 in collection costs from the \$165 payment and disbursed
19 the remainder (\$127.71) to Wyeth Ranch.

20 70. On August 18, 2011, Wyeth Ranch applied the \$127.71 disbursement to Perez's
21 account.

22
23
24
25
26
27 ⁴ Although the notice claims to rescind the Notice of Trustee's Sale recorded on January 11, 2010, A&K did
28 not record a Notice of Trustee's Sale on January 11, 2010. It appears that A&K meant it rescinded the notice
recorded on January 14, 2010, as it does refer to Instrument Number 2589, which is the January 14, 2010 Notice of
Trustee's Sale.

1 71. On September 30, 2011, A&K notified Perez that it terminated the payment plan
2 of April 30, 2011.

3 72. On October 1, 2011, Perez defaulted under her loan from CMG Mortgage.

4 73. In 2011, Wyeth Ranch assessed \$448.50 each quarter for assessments.

5 74. On November 29, 2011, A&K sent Perez a lien letter to which A&K attached
6 another Notice of Delinquent Assessment (Lien).

7 75. According to the notice, Perez owed Wyeth Ranch \$9,296.56.

8 76. On December 20, 2011, A&K recorded the second Notice of Delinquent
9 Assessment Lien, but did not release or rescind the NODA it recorded in 2008.

10 77. On January 25, 2012, A&K followed up the second Notice of Delinquent
11 Assessment (Lien) by mailing Perez a Pre-Notice of Default Letter demanding that Perez pay
12 Wyeth Ranch \$9,865.06 in past-due assessments.

13 78. On February 28, 2012, A&K recorded another Notice of Default and Election to
14 Sell Under Homeowners Association Lien, but did not release or rescind the NOD it recorded on
15 January 5, 2009.

16 79. According to the notice, as of February 14, 2012, Perez owed Wyeth Ranch
17 \$10,625.06 in unpaid assessments.

18 80. The February 28, 2012 notice states that Perez first defaulted on her obligations to
19 Wyeth Ranch in January 2008.

20 81. On March 19, 2012, Perez paid A&K \$300.00. A&K deducted \$87.30 in
21 collection costs from the \$300 payment and disbursed the remainder (\$212.70) to Wyeth Ranch.

22 82. On April 3, 2012, Wyeth Ranch applied the \$212.70 disbursement to Perez's
23 account.

24 83. On May 7, 2012, Perez paid A&K \$295.00. A&K deducted \$85.84 in collection
25 costs from the \$295 payment and disbursed the remainder (\$209.16) to Wyeth Ranch.
26
27
28

1 84. On May 23, 2012, Wyeth Ranch applied the \$209.16 disbursement to Perez's
2 account.

3 85. On May 25, 2012, Mortgage Electronic Registration Systems, Inc., as the
4 nominee for CMG Mortgage, assigned CMG Mortgage's deed of trust to CitiMortgage, Inc.
5 CMG Mortgage endorsed the note payable to the order of CitiMortgage. On June 5, 2012,
6 CitiMortgage recorded a Corporate Assignment of Deed of Trust.

7 86. On July 18, 2012, A&K sent Perez a Pre-Notice of Trustee Sale Notification, in
8 which A&K demanded that Perez pay Wyeth Ranch \$11,371.07.
9

10 87. Ostensibly, A&K sent the Pre-Notice of Trustee's Sale Notification according to
11 the Notice of Delinquent Assessment Lien recorded on December 20, 2011, and the Notice of
12 Default and Election to Sell recorded nearly three years earlier on January 5, 2009.

13 88. On July 26, 2012, Perez paid A&K \$165.00. A&K deducted \$43.72 in collection
14 costs from the \$165 payment and disbursed the remainder (\$121.28) to Wyeth Ranch.
15

16 89. On July 26, 2012, CitiMortgage assigned the deed of trust to U.S. Bank, N.A., as
17 trustee for Stanwich Mortgage Loan Trust, Series 2012-6. CitiMortgage also signed an allonge,
18 endorsing the note payable to U.S. Bank. On July 26, 2012, U.S. Bank recorded the Assignment
19 of Mortgage with the Clark County Recorder.

20 90. On August 27, 2012, Wyeth Ranch applied the \$121.28 disbursement to Perez's
21 account.
22

23 91. On October 3, 2012, Carrington Mortgage Services, LLC, the servicer for the loan
24 assigned to U.S. Bank, sent Perez a Notice of Intent to Foreclose.

25 92. According to the notice, Perez defaulted on the loan on October 1, 2011, and
26 owed U.S. Bank \$36,281.60.

27 93. On October 10, 2012, A&K prepared another Notice of Trustee's Sale.
28

1 94. According to the notice, A&K stated its intention to sell the Property at a
2 foreclosure sale on November 28, 2012. The notice claims that A&K will conduct the sale
3 according to the lien recorded on December 20, 2012. According to the notice, Perez owed
4 \$11,656.07.

5 95. On October 31, 2012, A&K recorded the Notice of Trustee's Sale, but did not
6 rescind the Notice of Trustee's Sale it recorded on March 29, 2011.

7 96. On November 13, 2012, Perez made a \$300.00 payment to A&K. A&K deducted
8 \$78.90 in collection costs from the \$300 payment and disbursed the remainder (\$221.10) to
9 Wyeth Ranch.
10

11 97. On December 14, 2012, Wyeth Ranch applied the \$221.10 disbursement to
12 Perez's account.

13 98. On March 12, 2013, U.S. Bank assigned its interest in the deed of trust to
14 Marchai, which it recorded with the Clark County Recorder on August 12, 2013. U.S. Bank
15 executed an allonge endorsing the note to Marchai.
16

17 99. On July 11, 2013, A&K executed another Notice of Trustee's Sale.

18 100. The notice claimed that Perez owed \$14,090.80 in unpaid assessments.

19 101. According to the notice, A&K intended to sell the Property at a foreclosure sale
20 on August 28, 2013.

21 102. On July 31, 2013, A&K recorded the notice with the Clark County Recorder, but
22 again failed to rescind the Notice of Trustee's Sale recorded on October 31, 2012.
23

24 103. On August 27, 2013, less than 24 hours before the foreclosure sale, Peak Loan
25 Servicing, Marchai's servicer, learned about the sale. Peak immediately contacted A&K and
26 asked it to postpone the sale so it could pay the lien.

27 104. On the morning of the day of the sale (August 28, 2013), Naomi Eden at A&K
28 emailed Brittney O'Connor, the accounting clerk at CAMCO, in which she notes that "[t]he

1 mortgage company is asking for an extension so they can get it paid off.” Eden asked O’Connor
2 if A&K could postpone the sale.

3 105. O’Connor responded to the email asking Eden how many oral postponements
4 Wyeth Ranch had remaining.

5 106. Eden advised O’Connor that Wyeth Ranch still had three postponements left.

6 107. O’Connor then emailed Michele Weaver, a CAMCO manager. O’Connor told
7 Weaver that Wyeth Ranch had a foreclosure sale set for that morning, that it could postpone the
8 sale three times, and that “[t]he mortgage company would like an extension so they can pay off
9 the account.”
10

11 108. In her email to Weaver, O’Connor said she “will use all postponements then go to
12 sale on the 3rd sale date set,” “[u]nless otherwise directed by the board.” Unless the association
13 directed otherwise, postponing foreclosure sales until the third sale date was CAMCO’s standard
14 practice.
15

16 109. According to the last email in the chain, Weaver “received confirmation” that
17 Wyeth Ranch did “NOT want to postpone.”

18 110. Wyeth Ranch refused to postpone the sale so Marchai could pay off the account
19 and proceeded with the foreclosure.

20 111. On August 28, 2013, A&K conducted a foreclosure sale.

21 112. The Wyeth Ranch foreclosure sale occurred on August 28, 2013. At the
22 foreclosure sale, SFR Investments Pool 1, LLC, submitted the winning bid of \$21,000.00.
23

24 113. On September 9, 2013, a Trustee’s Deed Upon Sale (“Trustee’s Deed”) was
25 recorded in the Official Records of the Clark County Recorder, conveying the Property to SFR.

26 114. At the time of the foreclosure, Wyeth Ranch’s assessment ledger reflected a
27 \$10,679.12 balance. There is no differentiation between superpriority and subpriority portions of
28 the lien.

115. Based upon the disbursements remitted to Wyeth Ranch by A&K after the NODA, the Court finds that the following amounts were applied to the running account:

Date	Disbursement	Superpriority Balance
9/30/08		840.00
3/2/10	590.40	249.60
6/8/10	204.60	45.00
8/20/10	172.76	(-127.76)

116. The disbursements from A&K extinguished the superpriority portion of the lien in August 2010, well before the foreclosure sale.

117. Even if the Court did not find that Wyeth Ranch applied the disbursements to the oldest outstanding delinquent assessment, the principles of justice and equity in this case weigh in favor of the application of those disbursements to the oldest delinquent assessment and the extinguishment of the superpriority portion of the lien.

118. SFR as a purchaser of over 600 properties at HOA foreclosure sales was aware of the issues related to superpriority HOA liens and the risks associated with purchasing a property at this type of auction.

119. Wyeth Ranch received payment in full (\$10,679.12) of its assessment lien.

120. The Declaration of Value asserts that the Property has a "Transfer Tax Value" of \$307,403.00.

121. The Property's fair market value on August 28, 2013, was \$360,000.00.

122. If any of the preceding findings of fact are more appropriately deemed conclusions of law, then they shall be considered conclusions of law.

CONCLUSIONS OF LAW

123. The analysis made in this bench trial is limited to the matters on remand to the Court which includes:

a. Whether Perez's payments actually cured the superpriority default, based upon the actions and intent of the homeowner and the HOA and, if those cannot be determined, upon the District Court's assessment of justice and equity.

b. SFR's purported status as a bona fide purchaser.

124. Additionally, the Court evaluates the dispute between Wyeth Ranch and Marchai related to the conduct of the foreclosure sale and issues related to application and remittance of the proceeds of the sale.

125. NRS 40.010 provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to the person bringing the action, for the purpose of determining such adverse claim." NRS § 40.010.

126. "In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself." *See Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996).

127. NRS 116.3116 grants an association "a lien on a unit for any construction penalty that is imposed against the unit's owner pursuant to NRS 116.31035, any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due." NRS § 116.3116(1) (2011).⁵

128. An association's lien "is prior to all other liens and encumbrances on a unit except:"

⁵ The Legislature has amended NRS 116 several times in the time between when Wyeth Ranch initiated the foreclosure process and ultimately completed the foreclosure.

1 (a) Liens and encumbrances recorded before the recordation of the declaration . . .;

2 (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent . . .; and

3 (c) Liens for real estate taxes and other governmental assessments or charges against the unit

4 NRS § 116.3116(2) (2011).

5 129. NRS 116.3116(2) also provided:

6
7 The lien is also prior to all security interests described in paragraph (b) 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 6 months *immediately preceding institution of an action to enforce the lien*

8
9
10 NRS § 116.3116 (2003) (emphasis added).⁶

11 130. Although the association’s lien includes all “assessments,” the lien has two parts:
12 a superpriority piece, “consisting of the last nine months of HOA dues,” and a subpriority piece
13 consisting of all other “assessments.” *SFR Invs. Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. 742,
14 745, 334 P.3d 408, 411 (2014).

15
16 131. The “superpriority” piece of the association’s lien has priority over the first deed
17 of trust, but the “subpriority” part is subordinate. *SFR*, 130 Nev. at 745, 334 P.3d at 411.

18 132. In 2008, NRS 116 limited the superpriority portion of an association’s lien to the
19 “6 months immediately preceding institution of an action to enforce the lien.” NRS §
20 116.3116(2).

21
22 133. An association institutes an action to enforce the lien through the service of a
23 notice of delinquent assessment. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v. JP*
24 *Morgan Chase Bank, N.A.*, 133 Nev. 21, 26, 388 P.3d 226, 231 (2017).

25
26
27 ⁶ When Wyeth Ranch sent Perez the NODA in October 2008, the statute granted association’s superpriority
28 of only six, not nine, months of dues. *See* NRS § 116.3116(2) (2003). The Legislature amended the section to grant a superpriority lien of nine months in October 2009. *See* NRS § 116.3116(2) (2009).

1 134. The lien's superpriority portion does not include collection fees, late fees, interest,
2 or foreclosure costs. *Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132
3 Nev. 362, 371, 373 P.3d 66, 70 (2016).

4 135. Wyeth Ranch instituted an action to enforce its lien on October 8, 2008, when it
5 served and recorded the NODA.

6 136. Only those association dues that came due between April 1, 2008, and September
7 30, 2008 - the six months before Wyeth Ranch instituted an action to enforce its lien - had
8 superpriority status.⁷ See NRS § 116.3116(2); *Saticoy Bay LLC Series 2021 Gray Eagle Way*,
9 133 Nev. at 26, 388 P.3d at 231; *Horizons at Seven Hills Homeowners Ass'n*, 132 Nev. at 371,
10 373 P.3d at 70.

11 137. Wyeth Ranch assessed two quarterly charges of \$420.00 in dues during the six
12 months preceding its institution of an action to enforce its lien: April 1, 2008 and July 1, 2008.

13 138. Wyeth Ranch had a superpriority lien for \$840.00.

14 139. After Wyeth Ranch instituted an action to enforce its lien, Perez made payments
15 totaling \$3,390.00.

16 140. Perez did not direct the application of those payments to any particular expenses.

17 141. A&K applied the first fruits of those payments, totaling \$1,008.25, to collection
18 costs.

19 142. A&K then disbursed to Wyeth Ranch the remainder, totaling \$2,381.75. The
20 Court finds that Wyeth Ranch applied those disbursements to the oldest delinquent association
21 dues.

22
23
24
25
26 ⁷ Before Judge Bell and the Nevada Supreme Court, SFR argued that the November 29, 2011 notice of delinquent assessment was the operative notice for the institution of an action to enforce the lien. But Judge Bell previously rejected that argument and the Nevada Supreme Court affirmed that the September 2008 notice of delinquent assessment was the operative notice for the institution of an action to enforce the lien. See *SFR Invs. Pool 1, LLC v. Marchai, B.T.*, No. 74416, Order Vacating J. & Remanding at 1–2 (Mar. 18, 2020).

1 143. The payments by Perez more than satisfied the superpriority portion of Wyeth
2 Ranch's lien prior to foreclosure.

3 144. If the Court were to conduct an analysis of the basic principles of justice and
4 equity so that a fair result can be achieved," *9352 Cranesbill Tr.*, 136 Nev. at 80, 459 P.3d at
5 231, that analysis would militate in favor of the satisfaction of the superpriority portion of the
6 lien through the payments made by Perez.

7 145. Although Wyeth Ranch had one lien, it maintained two accounts: a violation
8 account and an assessment account.

9 146. A&K also maintained an account for collection costs.

10 147. When Perez made a payment to A&K after Wyeth Ranch instituted an action to
11 enforce the lien, it first applied a portion of those payments (totaling \$1,008.25) to its collection
12 account before remitting the balance to Wyeth Ranch. None of the \$2,381.75 A&K disbursed to
13 Wyeth Ranch went to collection costs.

14 148. When Wyeth Ranch received the \$2,381.75 disbursements from A&K, it applied
15 all payments to its assessment account. Wyeth Ranch applied none of those payments to the
16 violation account.

17 149. Wyeth Ranch applied the \$2,381.75 to one running account: the assessment
18 account. Because payments to one running account are applied to the oldest amounts due,
19 Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien.

20 150. This conclusion is also in the interests of justice and equity. Under this analysis,
21 Perez, who did not abandon the Property but for five years made payments to Wyeth Ranch
22 totaling \$3,390.00, receives the benefit of having any deficiency reduced by the fair market value
23 of the Property at the time Marchai forecloses. SFR, who paid a mere \$21,000.00 for its interest
24 in the Property, takes the Property subject to the DOT and has rented the property for the last
25 seven years and may be entitled to excess proceeds of sale.

1 151. As SFR is in the business of purchasing properties at HOA foreclosures it is not a
2 bona fide purchaser but is well aware of the risks associated with superpriority issues.

3 152. When Wyeth Ranch foreclosed, it foreclosed upon a subpriority lien, and
4 Marchai's DOT survived Wyeth Ranch's foreclosure.

5 153. The Court rules for Marchai on its claim for quiet title and against SFR on its
6 claim for declaratory relief/quiet title.

7 154. As SFR's declaratory relief/quiet title claim fails, the Court must also dismiss
8 SFR's request for injunctive relief seeking to enjoin Marchai from foreclosing on its deed of
9 trust.

10 155. A wrongful foreclosure occurs when "no breach of condition or failure of
11 performance existed . . . which would have authorized the foreclosure." *Collins v. Union Fed.*
12 *Sav. & Loan Ass'n*, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983).

13 156. "[T]he material issue of fact in a wrongful foreclosure claim is whether the trustor
14 was in default when the power of sale was exercised." *Id.*

15 157. It is indisputable that Perez defaulted on subpriority amounts of Wyeth Ranch's
16 lien.

17 158. As Wyeth Ranch foreclosed upon a subpriority lien, Marchai has no claim for
18 wrongful foreclosure.

19 159. The only "duties" owed to Marchai are outlined in Sections 116.3116 through
20 116.31168. Wyeth Ranch satisfied these duties by complying with all notice and recording
21 requirements.

22 160. NRS 116.1113 does not impose extra-statutory duties on an HOA; it only governs
23 existing contracts and duties.

24 161. Here, the notice requirements of Sections 116.3116 through 116.31168 have
25 already been reviewed on appeal, and the HOA has complied with the notice requirements.
26
27
28

1 Similarly, it has already been determined on appeal that the HOA was not required to postpone
2 the sale to provide Marchai additional time pay.

3 162. Plaintiff never mentions in its Complaint a misapplication of proceeds, excess
4 proceeds, or NRS 116.31164(3)(c)'s payment breakdown.

5 163. An interpleader action was filed by A&K (A-13-690586-C) regarding excess
6 proceeds. It would be unduly prejudicial to direct a misapplication of proceeds claim against the
7 HOA after A&K has filed bankruptcy and preventing the HOA from seeking any redress it may
8 have against A&K, if A&K misapplied the proceeds from the sale.
9

10 164. Plaintiff did not file an unjust enrichment claim or establish at trial that Wyeth
11 Ranch was unjustly enriched.

12 165. NRS § 116.1113 imposes an obligation of good faith in the performance or
13 enforcement of every contract or duty governed by NRS Chapter 116.

14 166. Wyeth Ranch has not violated NRS 116.1113.\

15 167. Marchai's claim for bad faith against Wyeth Ranch is dismissed.

16 168. Perez defaulted on subpriority amounts of Wyeth Ranch's lien.

17 169. Because Wyeth Ranch foreclosed upon a subpriority lien, Marchai has no claim
18 against Wyeth Ranch for breach of its obligations under NRS § 116.1113.
19

20 170. Marchai's claim under NRS § 116.1113 is dismissed.

21 171. To establish a claim for intentional interference with a contract, a plaintiff must
22 prove it entered into a valid and existing contract, the defendant knew of the contract, the
23 defendant engaged in intentional acts intended or designed to disrupt the contractual relationship,
24 the contract was disrupted, and the plaintiff suffered damages. *J.J. Indus., LLC v. Bennett*, 119
25 Nev. 269, 274, 71 P.3d 1264, 1267 (2003).
26

27 172. The Note and DOT evidenced a valid and existing contract between Marchai and
28 Perez.

1 173. Wyeth Ranch and SFR knew of Marchai's contract with Perez, because the
2 recorded DOT and assignments are matters of public record.

3 174. The foreclosure was not intended to disrupt, nor did it disrupt, the contract that
4 contemplates the foreclosure.

5 175. As Perez's payments satisfied the superpriority portion of Wyeth Ranch's lien,
6 Marchai's contract with Perez was not disrupted, and Marchai suffered no damages.

7 176. Marchai's claim for intentional interference with contractual relations is
8 dismissed.
9

10 177. It is not disputed that a portion of the assessment lien remained after Perez's
11 payments were applied, and Perez was in default at the time of the sale.

12 178. It is irrelevant to the wrongful foreclosure claim whether the remaining portion
13 was superpriority or subpriority, because the HOA never made an affirmative representation at
14 the time of the sale that it was foreclosing on a superpriority portion of lien.
15

16 179. Wyeth Ranch was not required to make an announcement regarding superpriority
17 at the time of the foreclosure sale.

18 180. NRS 40.430 *et seq.* provides the statutory framework for judicial actions for
19 foreclosure of real mortgages in Nevada and "must be construed to permit a secured creditor to
20 realize upon the collateral for a debt or other obligation agreed upon by the debtor and creditor
21 when the debt or other obligation was incurred." NRS § 40.230 (2).
22

23 181. In an action for judicial foreclosure, "the judgment must be rendered for the
24 amount found due the plaintiff, and the court, by its decree or judgment, may direct a sale of the
25 encumbered property, or such part thereof as is necessary, and apply the proceeds of the sale as
26 provided in NRS 40.462." NRS § 40.430(1).
27
28

1 182. “[A] creditor of a note secured by real property must first pursue judicial
2 foreclosure before recovering from the debtor directly.” *McDonald v. D.P. Alexander & Las*
3 *Vegas Boulevard, LLC*, 121 Nev. 812, 816, 123 P.3d 748, 750 (2005).

4 183. To enforce a deed of trust through foreclosure, the same party must hold the deed
5 of trust and underlying promissory note. *Edelstein v. Bank of New York Mellon*, 128 Nev. 505,
6 512, 286 P.3d 249, 254 (2012) (citing *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d
7 1034, 1039 (9th Cir. 2011)).

8 184. Separation of the note and deed of trust does not preclude enforcement when the
9 documents are ultimately unified in the same holder. *Edelstein*, 128 Nev. at 520, 286 P.3d at 259
10 (citing *In re Tucker*, 441 B.R. 638, 644 (Bankr. W.D. Mo. 2010)).

11 185. “To prove that a previous beneficiary properly assigned its beneficial interest in
12 the deed of trust, the new beneficiary can demonstrate the assignment by means of a signed
13 writing.” *Edelstein*, 128 Nev. at 522, 286 P.3d at 260 (citing *Leyva v. Nat’l Default Servicing*
14 *Corp.*, 127 Nev. 470, 255 P.3d 1275, 1279 (2011)).

15 186. This requirement parallels the requirements for assignment of an interest in lands
16 generally, which “must be in writing, subscribed by the party creating, granting, assigning, or
17 declaring the same, or by the party’s lawful agent thereunto authorized in writing.” NRS
18 §111.205(1).

19 187. An assignment of a beneficial interest in a deed of trust must further be recorded
20 in the recorder’s office of the county where the property is located. NRS § 106.210 (2015).

21 188. Through MERS, CMG Mortgage assigned the Deed of Trust to CitiMortgage,
22 who assigned it to U.S. Bank, who ultimately assigned it to Marchai.

23 189. The assignments satisfy the above requirements: they are in writing, subscribed to
24 by the agent of the prior beneficiary, and recorded in Clark County where the Property is located.

25 190. Marchai, as the beneficiary of the DOT, may enforce it.

1 191. For a subsequent lender to establish it may enforce a note, it must “present
2 evidence showing endorsement of the note either in its favor or in favor of [its servicer].”
3 *Edelstein*, 128 Nev. at 522, 286 P.3d at 261 (citing *In re Veal*, 250 B.R. 897, 921 (9th Cir. BAP
4 2011)); *see also Leyva*, 255 P.3d at 1279.

5 192. When a promissory note is endorsed to another party, the UCC permits a note to
6 “be made payable to bearer or payable to order,” depending on the endorsement. *Leyva*, 255 P.3d
7 at 1280 (citing NRS § 104.3109).

8 193. The Note is payable to the order of Marchai. CMG Mortgage endorsed the Note
9 payable to the order of CitiMortgage. CitiMortgage then executed an allonge making the Note
10 payable to U.S. Bank, who then executed another allonge making the Note payable to Marchai.

11 194. Marchai may enforce the Note.

12 195. Perez must pay the principal and interest on the debt evidenced by the Note, and
13 failure to make such payments constitutes default and breach of the Note and DOT.
14

15 196. Upon default, the DOT’s beneficiary must notify Perez of the breach and provide
16 30 days to cure.
17

18 197. If Perez fails to cure, the beneficiary may accelerate the Note’s full payment and
19 invoke the power of sale and any other remedies permitted by law.

20 198. Perez failed to make the October 1, 2011 payment on the Note and all payments
21 due after that, resulting in default under the Note and DOT.

22 199. On October 3, 2012, the loan servicer gave notice of the breach to Perez.

23 200. Perez failed to cure the breach within 30 days, and Marchai elected to accelerate
24 the amounts owed.
25

26 201. Marchai is entitled to a judgment of this Court ordering the Property sold at
27 foreclosure to satisfy the amounts due under the Note.
28

1 202. Based upon the Court's conclusion related to the satisfaction of the superpriority
2 portion of the lien, prior to the sale SFR took subject to the Note and DOT. SFR as a successor
3 in interest to Perez, is entitled to all notices related to any sale of the Property by Marchai.

4 203. If any of the above conclusions of law are more appropriately characterized as
5 findings of fact, then they shall be deemed findings of fact.

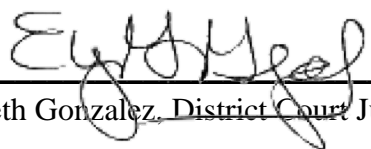
6 Based upon the foregoing Findings of Fact and Conclusions of Law, and other
7 good cause appearing:
8

9 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that as to
10 Plaintiff's Claim for Declaratory Relief/Quiet Title, the Court finds in favor of Marchai that the
11 Deed of Trust was not extinguished by the HOA foreclosure as the superpriority portion of the
12 HOA lien was extinguished by Perez's payments;

13 **IT IS FURTHER ORDERED** that SFR's interest in the Property is subordinate
14 and subject to the interest of Marchai.

15 **IT IS FURTHER ORDERED** that Marchai's claim for judicial foreclosure of
16 the Property is granted.
17

18 Dated this 5th day of March, 2021
19

20
21 
22 Elizabeth Gonzalez, District Court Judge

23 **CERTIFICATE OF SERVICE**

24 I hereby certify that on the date filed, a copy of the foregoing Findings of Fact and Conclusions of
25 Law was electronically served, pursuant to N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judi-
26 cial District Court Electronic Filing Program.

27 /s/ *Dan Kutinac*
28 Dan Kutinac, JEA