

IN THE SUPREME COURT OF THE STATE OF NEVADA

INDICATE FULL CAPTION:

5316 CLOVER BLOSSOM CT TRUST  
Appellant  
vs  
U.S. BANK NATIONAL ASSOCIATION,  
SUCCESSOR TRUSTEE TO BANK OF  
AMERICA,N.A., SUCCESSOR BY MERGER

No. 82426

Electronically Filed  
Feb 23 2021 03:11 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
DOCKETING STATEMENT  
CIVIL APPEALS

GENERAL INFORMATION

Appellants must complete this docketing statement in compliance with NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, identifying issues on appeal, assessing presumptive assignment to the Court of Appeals under NRAP 17, scheduling cases for oral argument and settlement conferences, classifying cases for expedited treatment and assignment to the Court of Appeals, and compiling statistical information.

WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 27 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department 24  
County Clark Judge James Crocket  
District Ct. Case No. A-14-704412-C

**2. Attorney filing this docketing statement:**

Attorney Michael Bohn Telephone 702-642-3113

Firm Law Offices of Michael F Bohn

Address 2260 Corporate Circle # 480  
Henderson, NV 89074

Client(s) 5316 Clover Blossom Ct Trust

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Melanie Morgan Telephone 702-634-5000

Firm Akerman LLP

Address 1635 Village Center Circle # 200  
Las Vegas, NV 89134

Client(s) U.S. Bank National Association

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_

Firm \_\_\_\_\_

Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |                                                             |                                                                         |
|-------------------------------------------------------------|-------------------------------------------------------------------------|
| <input type="checkbox"/> Judgment after bench trial         | <input type="checkbox"/> Dismissal:                                     |
| <input type="checkbox"/> Judgment after jury verdict        | <input type="checkbox"/> Lack of jurisdiction                           |
| <input checked="" type="checkbox"/> Summary judgment        | <input type="checkbox"/> Failure to state a claim                       |
| <input type="checkbox"/> Default judgment                   | <input type="checkbox"/> Failure to prosecute                           |
| <input type="checkbox"/> Grant/Denial of NRCP 60(b) relief  | <input type="checkbox"/> Other (specify): _____                         |
| <input type="checkbox"/> Grant/Denial of injunction         | <input type="checkbox"/> Divorce Decree:                                |
| <input type="checkbox"/> Grant/Denial of declaratory relief | <input type="checkbox"/> Original <input type="checkbox"/> Modification |
| <input type="checkbox"/> Review of agency determination     | <input type="checkbox"/> Other disposition (specify): _____             |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

U.S. Bank v. 5316 Clover Blossom Ct Trust No. 68915

U.S. Bank v. 5316 Clover Blossom Ct Trust No. 75861

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

None

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

Plaintiff filed an action for quiet title and declaratory relief after it purchased a real property at a foreclosure sale conducted pursuant to NRS Chapter 116. It is the plaintiff's position that the foreclosure sale extinguished all outstanding liens on the property. The district court granted U.S. Bank's motion for summary judgment and held that the deed of trust recorded on June 30, 2004 held by U.S. Bank remains a valid and enforceable lien based on a payment tendered to the HOA by Miles, Bauer.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

Whether U.S. Bank's counterclaim filed on October 10, 2017 was barred by the statute of limitations.

Whether U.S. Bank could re-characterize its time-barred claim of tender as an affirmative defense in order to avoid the statute of limitations.

Whether U.S. Bank's claim of tender was barred by the doctrines of waiver, estoppel and unclean hands.

Whether the conditions imposed by Miles Bauer on its tender made the tender ineffectual and not valid.

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

7963 Laurena Avenue Trust v. The Bank of New York Mellon, docket 81240

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☐ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☐ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Assignment to the Court of Appeals or retention in the Supreme Court.** Briefly set forth whether the matter is presumptively retained by the Supreme Court or assigned to the Court of Appeals under NRAP 17, and cite the subparagraph(s) of the Rule under which the matter falls. If appellant believes that the Supreme Court should retain the case despite its presumptive assignment to the Court of Appeals, identify the specific issue(s) or circumstance(s) that warrant retaining the case, and include an explanation of their importance or significance:

This is an appeal from a judgment on an HOA foreclosure matter. The issues in this case do not appear to fit in either the presumptive assignment category of either the Supreme Court or the Court of Appeals.

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**14. Trial.** If this action proceeded to trial, how many days did the trial last? \_\_\_\_\_

Was it a bench or jury trial? \_\_\_\_\_

**15. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?  
No

## TIMELINESS OF NOTICE OF APPEAL

16. Date of entry of written judgment or order appealed from Dec 29, 2020

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

17. Date written notice of entry of judgment or order was served Dec 29, 2020

Was service by:

- ☐ Delivery  
☒ Mail/electronic/fax

18. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

- ☐ NRCP 50(b)      Date of filing \_\_\_\_\_  
☐ NRCP 52(b)      Date of filing \_\_\_\_\_  
☐ NRCP 59          Date of filing \_\_\_\_\_

NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

- ☐ Delivery  
☐ Mail

**19. Date notice of appeal filed** January 28, 2021

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**20. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

---

**SUBSTANTIVE APPEALABILITY**

**21. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |                                                   |                                       |
|---------------------------------------------------|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205   |
| <input type="checkbox"/> NRAP 3A(b)(2)            | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)            | <input type="checkbox"/> NRS 703.376  |
| <input type="checkbox"/> Other (specify) _____    |                                       |

(b) Explain how each authority provides a basis for appeal from the judgment or order:  
Appeal from a final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.



**22. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

5316 Clover Blossom Ct Trust, plaintiff  
U.S. Bank, National Association, defendant  
Clear Recon Corp., defendant

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

Clear Recon Corp. stipulated to non-monetary relief on September 30, 2014

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**23. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

1. Injunctive relief;
2. Quiet title; and
3. Declaratory relief

**24. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**25. If you answered "No" to question 24, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**26. If you answered "No" to any part of question 25, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

**27. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

5316 Clover Blossom Ct Trust

Name of appellant

Michael F Bohn

Name of counsel of record

Feb 23, 2021

Date



Signature of counsel of record

Clark County, Nevada

State and county where signed

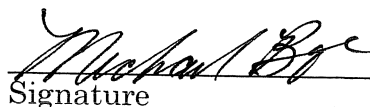
## CERTIFICATE OF SERVICE

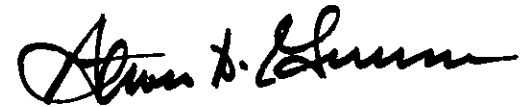
I certify that on the 23rd day of February, 2021, I served a copy of this completed docketing statement upon all counsel of record:

- ☐ By personally serving it upon him/her; or
- ☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

Melanie D. Morgan, Esq.  
AKERMAN LLP  
1635 Village Center Circle, Suite 200  
Las Vegas, Nevada 89134

Dated this 23rd day of February, 2021

  
Signature



CLERK OF THE COURT

1 **SAO**  
2 LAUREL I. HANDLEY (NV Bar # 009576)  
3 KRISTA J. NIELSON (NV Bar # 10698)  
4 **PITE DUNCAN, LLP**  
5 520 South 4th St., Suite 360  
6 Las Vegas, Nevada 89101  
7 Telephone: (702) 991-4630  
8 Facsimile: (702) 685-6342  
9 E-Mail: knielson@piteduncan.com

10 Attorneys for Defendant CLEAR RECON CORP

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 5316 CLOVER BLOSSOM CT TRUST,

14 Plaintiff,

15 v.

16 U.S. BANK, NATIONAL ASSOCIATION,  
17 SUCCESSOR TRUSTEE TO BANK OF  
18 AMERICA, N.A., SUCCESSOR BY  
19 MERGER TO LASALLE BANK, N.A., AS  
20 TRUSTEE TO THE HOLDERS OF THE  
21 ZUNI MORTGAGE LOAN TRUST 2006-  
22 OA1, MORTGAGE LOAN PASS-  
23 THROUGH CERTIFICATES SERIES 2006-  
24 OA1; and CLEAR RECON CORP.,

25 Defendants.

Case No.: A-14-704412-C  
Dept. No.: XVIII

**STIPULATION AND ORDER FOR NON-  
MONETARY JUDGMENT BETWEEN  
CLEAR RECON CORP AND 5316  
CLOVER BLOSSOM CT TRUST**

26 COMES NOW Plaintiff, 5316 CLOVER BLOSSOM CT TRUST ("Plaintiff"), by and  
27 through its counsel of record, Michael F. Bohn, Esq., Ltd., and Defendant, CLEAR RECON  
28 CORP ("CRC"), by and through its counsel of record, Pite Duncan, LLP, and hereby stipulate  
and agree as follows:

1. On July 25, 2014, Plaintiff filed its Complaint concerning real property  
commonly know as 5316 Clover Blossom Court, North Las Vegas, Nevada 89031-0480



1 any other person or entity's rights or obligations under the Deed of Trust.

2 6. This Stipulation shall inure to the benefit of the parties and their successors and/or  
3 assigns.

4 7. The parties to this Stipulation agree and request that the Court issue an Order  
5 consistent with the terms of this Stipulation.

6 DATED this 11 day of September, 2014.

DATED this 9<sup>th</sup> day of September, 2014.

7 PITE DUNCAN, LLP

MICHAEL F. BOHN, ESQ., LTD.

8 



9 LAUREL I. HANDLEY

MICHAEL F. BOHN

10 KRISTA J. NIELSON

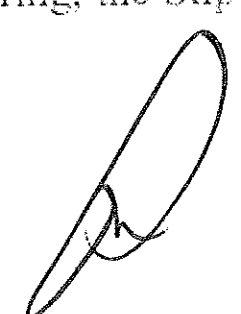
Attorney for Plaintiff

11 Attorneys for Defendant CLEAR RECON  
CORP

12 **ORDER**

13 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Court, having  
14 considered the Stipulation of the parties, and good cause appearing, the Stipulation is adopted as  
15 the order of the Court.

16 DATED this 17<sup>th</sup> day of September, 2014.

17   
18 DISTRICT COURT JUDGE

19 Respectfully Submitted

20 PITE DUNCAN, LLP

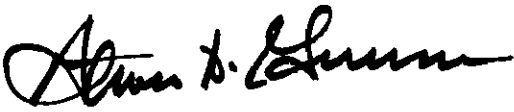
21 

22 LAUREL I. HANDLEY

23 KRISTA J. NIELSON

24 Attorneys for Defendant

25 CLEAR RECON CORP

  
CLERK OF THE COURT

1 **ACOM**  
2 MICHAEL F. BOHN, ESQ.  
3 Nevada Bar No.: 1641  
4 [mbohn@bohnlawfirm.com](mailto:mbohn@bohnlawfirm.com)  
5 LAW OFFICES OF  
6 MICHAEL F. BOHN, ESQ., LTD.  
7 376 East Warm Springs Road, Ste. 140  
8 Las Vegas, Nevada 89119  
9 (702) 642-3113/ (702) 642-9766 FAX  
10 Attorney for plaintiff

DISTRICT COURT  
CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST

Plaintiff,

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; and CLEAR RECON  
CORPS

Defendants.

CASE NO.: A704412  
DEPT NO.: XXIV

**EXEMPTION FROM ARBITRATION:**  
**Title to real property**

**AMENDED COMPLAINT**

Plaintiff, 5316 Clover Blossom Ct Trust, by and through its attorney, Michael F. Bohn, Esq.  
alleges as follows:

1. Plaintiff is the owner of the real property commonly known as 5316 Clover Blossom Ct, North  
Las Vegas, Nevada.

2. Plaintiff obtained title by foreclosure sale conducted on January 16, 2013.

3. The plaintiff's title stems from a foreclosure deed arising from a delinquency in assessments  
due from the former owner to the Country Gardens Owners' Association, pursuant to NRS Chapter 116.

4. U.S. Bank, National Association, Successor Trustee To Bank of America, N.A., Successor by



1 Merger to LaSalle Bank, N.A., as Trustee To The Holders of The Zuni Mortgage Loan Trust 2006-OA1,  
2 Mortgage Loan Pass-Through Certificates, Series 2006-OA1 is the beneficiary of a deed of trust which  
3 was recorded as an encumbrance to the subject property on June 30, 2004.

4 5. Clear Recon Corps is the substituted trustee on the deed of trust.

5 6. The interest of each of the defendants has been extinguished by reason of the foreclosure sale,  
6 which was properly conducted with adequate notice given to all persons and entities claiming an interest  
7 in the subject property, and resulting from a delinquency in assessments due from the former owner, to  
8 Country Gardens Owners' Association, pursuant to NRS Chapter 116.

9 7. The HOA foreclosure sale complied with all requirements of law, including but not limited  
10 to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the  
11 recording, posting and publication of the Notice of Sale.

12 8. Prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the  
13 HOA Lien representing 9 months of assessments for common expenses.

14 9. Nonetheless, defendant U.S. Bank, National Association, Successor Trustee To Bank of  
15 America, N.A., Successor by Merger to LaSalle Bank, N.A., as Trustee To The Holders of The Zuni  
16 Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates, Series 2006-OA1 has  
17 recorded a notice of default and election to sell under its deed of trust pursuant to NRS 107.080.

18 10. Plaintiff is entitled to an injunction prohibiting the foreclosure sale from proceeding.

19 11. The plaintiff is entitled to an award of attorneys fees and costs.

20 **SECOND CLAIM FOR RELIEF**

21 12. Plaintiff repeats the allegations contained in paragraphs 1 through 11.

22 13. Plaintiff is entitled to a determination from this court, pursuant to NRS 40.010 that the  
23 plaintiff is the rightful owner of the property and that the defendants have no right, title, interest or claim  
24 to the subject property.

25 14. The plaintiff is entitled to an award of attorneys fees and costs.

26 **THIRD CLAIM FOR RELIEF**

27 15. Plaintiff repeats the allegations contained in paragraphs 1 through 14.



16. Plaintiff seeks a declaration from this court, pursuant to NRS 40.010, that title in the property is vested in plaintiff free and clear of all liens and encumbrances, that the defendants herein have no estate, right, title or interest in the property, and that defendants are forever enjoined from asserting any estate, title, right, interest, or claim to the subject property adverse to the plaintiff.

17. The plaintiff is entitled to an award of attorneys fees and costs.

WHEREFORE, plaintiff prays for Judgment as follows:

1. For injunctive relief;

2. For a determination and declaration that plaintiff is the rightful holder of title to the property, free and clear of all liens, encumbrances, and claims of the defendants.

3. For a determination and declaration that the defendants have no estate, right, title, interest or claim in the property.

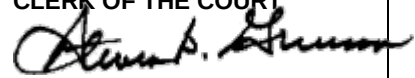
4. For a judgment forever enjoining the defendants from asserting any estate, right, title, interest or claim in the property; and

5. For such other and further relief as the Court may deem just and proper.

DATED this 23rd day of April 2015.

LAW OFFICES OF  
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /  
Michael F. Bohn, Esq.  
376 East Warm Springs Road, Ste. 140  
Las Vegas, Nevada 89119  
Attorney for plaintiff



**AACC**

DARREN T. BRENNER, ESQ.

Nevada Bar No. 8386

REBEKKAH B. BODOFF, ESQ.

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*Attorneys for U.S. Bank, N.A., solely as  
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*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

5316 CLOVER BLOSSOM CT TRUST;

Plaintiff,

v.

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; and CLEAR RECON CORPS,

Defendants.

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;

Counterclaimant,

Case No.: A-14-704412-C

Dept. No.: XXIV

**U.S. BANK, N.A., AS TRUSTEE'S  
ANSWER TO 5316 CLOVER BLOSSOM  
TRUST'S AMENDED COMPLAINT,  
COUNTERCLAIMS, AND CROSS-  
CLAIMS**

v.

5316 CLOVER BLOSSOM CT TRUST;

Counter-defendant.

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;

Cross-claimant,

v.

COUNTRY GARDEN OWNERS'  
ASSOCIATION,

Cross-defendants.

U.S. Bank, N.A., solely as 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 (**U.S. Bank**), by and through its attorneys at the law firm AKERMAN LLP, hereby answers Plaintiff 5316 Clover Blossom CT Trust's (**Plaintiff**) Amended Complaint as follows:

**ANSWER TO AMENDED COMPLAINT**

1. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

2. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or equitable owner of the Property.

3. U.S. Bank admits only that a Trustee's Deed Upon Sale recorded on January 24, 2013 purports to convey the Property to Plaintiff. U.S. Bank specifically denies that its interest in the

1 Property has been extinguished. U.S. Bank further denies that Plaintiff has ever been the legal or  
2 equitable owner of the Property.

3 4. The allegations of Paragraph 4 relate to a recorded document that speaks for itself. To  
4 the extent a response is required, U.S. Bank admits the allegations of Paragraph 4.

5 5. The allegations of Paragraph 5 relate to a recorded document that speaks for itself. To  
6 the extent a response is required, U.S. Bank admits the allegations of Paragraph 5.

7 6. U.S. Bank denies the allegations of Paragraph 6.

8 7. U.S. Bank denies the allegations of Paragraph 7.

9 8. U.S. Bank denies the allegations of Paragraph 8.

10 9. The allegations of Paragraph 9 relate to a recorded document that speaks for itself. To  
11 the extent a response is required, U.S. Bank admits the allegations of Paragraph 9.

12 10. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 10.

13 11. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 11.

#### 14 **SECOND CLAIM FOR RELIEF**

15 12. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though  
16 set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of  
17 Paragraph 12.

18 13. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 13.

19 14. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 14.

#### 20 **THIRD CLAIM FOR RELIEF**

21 15. U.S. Bank adopts and incorporates by reference all the preceding paragraphs as though  
22 set forth fully herein. To the extent a response is required, U.S. Bank denies the allegations of  
23 Paragraph 15.

24 16. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 16.

25 17. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 17.

#### 26 **PRAYER FOR RELIEF**

27 1. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 1 of the  
28 Prayer.

2. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 2 of the Prayer.

3. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 3 of the Prayer.

4. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 4 of the Prayer.

5. U.S. Bank denies that Plaintiff is entitled to the relief requested in Paragraph 5 of the Prayer.

### **AFFIRMATIVE DEFENSES**

U.S. Bank asserts the following additional defenses. Discovery and investigation of this case is not yet complete, and U.S. Bank reserves the right to amend this Answer by adding, deleting, or amending defenses as may be appropriate. In further answer to the Amended Complaint, and by way of additional defenses, U.S. Bank avers as follows:

#### **FIRST AFFIRMATIVE DEFENSE**

##### **(Failure to State a Claim)**

Plaintiff has failed to state facts sufficient to constitute any cause of action against U.S. Bank.

#### **SECOND AFFIRMATIVE DEFENSE**

##### **(Void for Vagueness)**

To the extent that Plaintiff's interpretation of NRS 116.3116 is accurate, the statute, and Chapter 116, are void for vagueness as applied to this matter.

#### **THIRD AFFIRMATIVE DEFENSE**

##### **(Due Process Violations)**

A senior deed of trust beneficiary cannot be deprived of its property interest in violation of the Procedural Due Process Clause of the Fourteenth Amendment of the United States Constitution and Article 1, Sec. 8, of the Nevada Constitution.

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**FOURTH AFFIRMATIVE DEFENSE****(Tender, Estoppel, Laches, and Waiver)**

The super-priority lien was satisfied prior to the homeowners association's foreclosure under the doctrines of tender, estoppel, laches, or waiver.

**FIFTH AFFIRMATIVE DEFENSE****(Commercial Reasonableness and Violation of Good Faith)**

The homeowners association's foreclosure sale was not commercially reasonable, and the circumstances of the sale of the property violated the homeowners association's obligation of good faith and duty to act in a commercially reasonable manner.

**SIXTH AFFIRMATIVE DEFENSE****(Failure to Mitigate Damages)**

Plaintiff's claims are barred in whole or in part because of its failure to take reasonable steps to mitigate its damages, if any.

**SEVENTH AFFIRMATIVE DEFENSE****(No Standing)**

Plaintiff lacks standing to bring some or all of its claims and causes of action.

**EIGHTH AFFIRMATIVE DEFENSE****(Unclean Hands)**

U.S. Bank avers the affirmative defense of unclean hands.

**NINTH AFFIRMATIVE DEFENSE****(Plaintiff is Not Entitled to Relief)**

U.S. Bank denies that Plaintiff is entitled to any relief for which it prays.

**TENTH AFFIRMATIVE DEFENSE****(Failure to Do Equity)**

U.S. Bank avers the affirmative defense of failure to do equity.

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**ELEVENTH AFFIRMATIVE DEFENSE****(Failure to Provide Notice)**

U.S. Bank was not provided proper notice of the “super-priority” assessment amounts and of the homeowners association’s foreclosure sale, and any such notice provided to U.S. Bank failed to comply with the statutory and common law requirements of Nevada and with state and federal constitutional law.

**TWELFTH AFFIRMATIVE DEFENSE****(Void Foreclosure Sale)**

The HOA foreclosure sale is void for failure to comply with the provisions of NRS Chapter 116, and other provisions of law.

**THIRTEENTH AFFIRMATIVE DEFENSE****(Federal Law)**

The homeowners association’s sale is void or otherwise fails to extinguish the applicable deed of trust because it violates provisions of the United States’ Constitution and/or applicable federal law.

**FOURTEENTH AFFIRMATIVE DEFENSE****(SFR Investments Cannot be Applied Retroactively)**

The Deed of Trust cannot be extinguished by the HOA foreclosure sale because the Nevada Supreme Court’s decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (2014) cannot be applied retroactively.

**FIFTEENTH AFFIRMATIVE DEFENSE****(No Super-Priority Sale)**

The Deed of Trust was not extinguished by the HOA foreclosure sale because the HOA foreclosed on the sub-priority portion of its lien.

**SIXTEENTH AFFIRMATIVE DEFENSE****(Additional Affirmative Defenses)**

Pursuant to NRCP 11, U.S. Bank reserves the right to assert additional affirmative defenses in the event discovery and/or investigation disclose the existence of other affirmative defenses.

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## COUNTERCLAIMS AND CROSS-CLAIMS

### GENERAL ALLEGATIONS

1. Under Nevada law, homeowners associations have the right to charge property owners residing within the community assessments to cover the homeowners association's expenses for maintaining or improving the community, among other things.

2. When these assessments are not paid, the homeowners association may both impose and foreclose on a lien.

3. A homeowners association may impose a lien for "any penalties, fees, charges, late charges, fines and interest charged" under NRS 116.3102(1)(j)-(n). NRS 116.3116(1).

4. NRS 116.3116 makes a homeowners association's lien for assessments junior to a first deed of trust beneficiary's secured interest in the property, with one limited exception: a homeowners association's lien is senior to a first deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on 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[.]" NRS 116.3116(2)(c).

5. According to the Nevada Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. Adv. Op. 75, 334 P.3d 408 (2014), if a homeowners association properly forecloses on its super-priority lien, it can extinguish a first deed of trust. However, Country Garden Owners' Association's (**HOA**) foreclosure in this case did not extinguish U.S. Bank's senior deed of trust because the foreclosure did not comply with Nevada law and was commercially unreasonable as a matter of law. To deprive U.S. Bank of its deed of trust under the circumstances of this case would deprive U.S. Bank of its due process rights.

### The Deed of Trust and Assignment

6. On or about June 24, 2004, Dennis Johnson and Geraldine Johnson (**Borrowers**) purchased real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**Property**) via a loan in the amount of \$147,456.00, which was secured by a deed of trust executed in favor of Countrywide Home Loans, Inc. (**Countrywide**) and recorded on June 30, 2004 (**Deed of**



1 **Trust**). A true and correct copy of the Deed of Trust is attached as **Exhibit A**.

2 7. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed  
3 of Trust on June 15, 2011. This Assignment was recorded on June 20, 2011. A true and correct copy  
4 of the Assignment is attached as **Exhibit B**.

5 8. The Borrowers defaulted under the terms of the note and Deed of Trust.

6 9. The Deed of Trust provides that, if the Borrowers default in paying the indebtedness  
7 the Deed of Trust secures, or fail to perform any agreement in the note or Deed of Trust, U.S. Bank  
8 may, upon notice to the Borrowers, declare the amounts owed under the note immediately due and  
9 payable.

10 10. Following the Borrowers' default, U.S. Bank provided Borrowers with notice of its  
11 intent to accelerate the amounts owed under the note.

12 11. The unpaid principal balance due on the loan secured by the Deed of Trust, as of August  
13 15, 2017, exceeds \$147,145.84. This amount has increased and will continue to increase pursuant to  
14 the terms of the note and Deed of Trust.

15 12. Although U.S. Bank has demanded that Borrowers pay the amounts due under the loan,  
16 they have failed and refused to do so, and continue to fail and refuse to do so.

17 **The HOA Lien and Foreclosure**

18 13. Upon information and belief, Borrowers failed to pay the HOA all amounts due to it.  
19 On February 22, 2012, the HOA, through its agent Alessi & Koenig, LLC (**HOA Trustee**), recorded  
20 a Notice of Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was  
21 \$1,095.50, which included assessments, dues, interest, and fees. A true and correct copy of the Lien  
22 is attached as **Exhibit C**. The Lien neither identifies the super-priority amount claimed by the HOA,  
23 nor describes the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

24 14. On the same day, the HOA, through the HOA Trustee, recorded another Notice of  
25 Delinquent Assessment (Lien). This Notice stated the amount due to the HOA was \$1,150.50, which  
26 included assessments, dues, interest, and fees. A true and correct copy of this Lien is attached as  
27 **Exhibit D**. The Lien neither identifies the super-priority amount claimed by the HOA, nor describes  
28 the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

1           15.     On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default  
2 and Election to Sell Under Homeowners Association Lien. This Notice referenced the Notice of  
3 Delinquent Assessment (Lien) attached as **Exhibit C**, and stated the amount due to the HOA was  
4 \$3,396.00, which included assessments, dues, interest, and fees. A true and correct copy of the Notice  
5 of Default is attached as **Exhibit E**. The Notice of Default neither identifies the super-priority amount  
6 claimed by the HOA, nor described the “deficiency in payment” required by NRS 116.31162(1)(b)(1).

7           16.     On October 31, 2012, the HOA, through the HOA Trustee, recorded a Notice of  
8 Trustee’s Sale. This Notice stated the amount due to the HOA was \$4,039.00, which included  
9 assessments, dues, interest, and fees, and set the sale for November 28, 2012. A true and correct copy  
10 of the Notice of Sale is attached as **Exhibit F**. The Notice of Sale neither identifies the super-priority  
11 amount claimed by the HOA, nor described the “deficiency in payment” required by NRS  
12 116.31162(1)(b)(1).

13           17.     In response to the Notice of Trustee’s Sale, Bank of America, who serviced the loan  
14 secured by the Deed of Trust, through counsel at Miles, Bauer, Bergstrom & Winters, LLP (**Miles  
15 Bauer**), contacted the HOA Trustee and requested a payoff ledger detailing the specific super-priority  
16 amount of the HOA’s lien on the Property. A true and correct copy of this Letter is attached as **Exhibit  
17 G-1**.

18           18.     The HOA Trustee provided Miles Bauer with a ledger showing the HOA’s monthly  
19 assessments were \$55.00, meaning nine months of delinquent assessments would equal \$495.00. A  
20 true and correct copy of this Ledger is attached as **Exhibit G-2**.

21           19.     Bank of America nonetheless tendered to the HOA Trustee a check in the amount of  
22 \$1,494.50 – which included \$999.50 in “reasonable collection costs” in addition to the \$495.00  
23 statutory super-priority amount – to satisfy the HOA’s super-priority lien. A true and correct copy of  
24 this Letter is attached as **Exhibit G-3**.

25           20.     The HOA Trustee unjustifiably rejected this tender.

26           21.     The HOA non-judicially foreclosed on its sub-priority lien secured by the Property on  
27 January 16, 2013, selling an encumbered interest in the Property to Plaintiff for \$8,200.00. A true and  
28 correct copy of the Trustee’s Deed Upon Sale is attached as **Exhibit H**.

22. In none of the recorded documents nor in any notice did the HOA specify that U.S. Bank's interest in the Property would be extinguished by the HOA foreclosure.

23. The HOA Trustee's sale of the HOA's interest in the Property for less than 6% of the value of the unpaid principal balance of the note secured by the senior Deed of Trust, and, on information and belief, for a similarly diminutive percentage of the Property's fair market value, is commercially unreasonable and not in good faith as required by NRS 116.1113 to the extent the HOA foreclosed on the super-priority portion of its lien.

24. On information and belief, the HOA and HOA Trustee were not attempting to foreclose on the super-priority portion of the HOA's lien. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA and HOA Trustee did not intend the sale as a super-priority foreclosure, and thus did not conduct the sale in such a way to attract proper prospective purchasers, thus leading, in part, to the grossly inadequate sales price.

25. The HOA Trustee's foreclosure sale was commercially unreasonable because the notices it provided did not describe the "deficiency in payment," as required by NRS 116.31162(1)(b)(1).

26. The HOA Trustee's foreclosure sale was commercially unreasonable because the HOA's covenants, conditions, and restrictions, which were recorded, specifically stated that the HOA's foreclosure sales could not extinguish senior deeds of trust. To the extent the HOA Trustee's foreclosure sale is construed as a super-priority foreclosure, that sale is unfair and oppressive because the HOA publicly recorded documents stating that such a sale could not extinguish a senior deed of trust, which led to the sale not attracting proper prospective purchasers, leading, in part, to the grossly inadequate sales price.

27. This foreclosure sale was commercially unreasonable because the manner in which the HOA Trustee conducted the sale, including the notices it provided and other circumstances surrounding the sale, was not calculated to attract proper perspective purchasers, and thus could not promote an equitable sales price of the Property.

28. The HOA Trustee's foreclosure sale was commercially unreasonable because, in

1 calculating the super-priority amount allegedly owed and rejecting tender as insufficient, the HOA  
2 included amounts in its supposed super-priority lien – including fines, interest, late fees, and costs of  
3 collection – that were not allowed to be included in its super-priority lien under NRS 116.311(c).

4 29. The HOA Trustee's foreclosure sale was invalid and did not extinguish U.S. Bank's  
5 senior Deed of Trust because Bank of America's tender of the super-priority-plus amount extinguished  
6 any super-priority lien held by the HOA.

7 30. The HOA Trustee's foreclosure sale was commercially unreasonable because, even if  
8 Bank of America's tender did not accurately calculate the entire super-priority amount of HOA's lien,  
9 such mistake was caused by the HOA Trustee's refusal to identify or accurately define the amount of  
10 the HOA's super-priority lien.

### 11 **FIRST CAUSE OF ACTION**

#### 12 **(Declaratory Relief / Quiet Title Against Plaintiff)**

13 31. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth  
14 herein and incorporates the same by reference.

15 32. Under NRS 30.010 *et seq.* and NRS 40.010, this Court has the power and authority to  
16 declare U.S. Bank's rights and interests in the Property and to resolve Plaintiff's adverse claim in the  
17 Property.

18 33. The HOA, through the HOA Trustee, foreclosed on the HOA's lien on January 16,  
19 2013.

20 34. Upon information and belief, Plaintiff claims an interest in the Property adverse to U.S.  
21 Bank, in that Plaintiff claims that the HOA's foreclosure sale extinguished U.S. Bank's interest in the  
22 Property. A judicial determination is necessary to ascertain the rights, obligations, and duties of the  
23 various parties.

24 35. U.S. Bank is entitled to a declaration that the HOA's foreclosure sale did not extinguish  
25 U.S. Bank's interest.

26 36. The HOA's foreclosure sale did not extinguish U.S. Bank's senior Deed of Trust  
27 because the recorded notices, even if they were in fact provided, failed to describe the lien in sufficient  
28 detail as required by Nevada law, including, without limitation: whether the deficiency included a

1 “super-priority” component, the amount of the super-priority component, how the super-priority  
2 component was calculated, when payment on the super-priority component was required, where  
3 payment was to be made, or the consequences for failure to pay the super-priority component.

4 37. The foreclosure sale did not extinguish U.S. Bank’s senior Deed of Trust because Bank  
5 of America tendered the super-priority-plus amount to the HOA Trustee, and the HOA Trustee  
6 unjustifiably rejected that tender.

7 38. The foreclosure sale did not extinguish the senior Deed of Trust because the sale was  
8 commercially unreasonable or otherwise failed to comply with the good faith requirement of NRS  
9 116.1113 in several respects, including, without limitation: the lack of sufficient notice, the HOA’s  
10 failure to accept the tender, the sale of the Property for a fraction of the loan balance or actual market  
11 value of the Property, a foreclosure that was not calculated to promote an equitable sales price for the  
12 Property or to attract proper prospective purchasers, and a foreclosure sale that was designed and/or  
13 intended to result in a maximum profit for the HOA and HOA Trustee without regard to the rights and  
14 interests of those who have an interest in the loan and made the purchase of the Property possible in  
15 the first place.

16 39. The foreclosure sale did not extinguish the senior Deed of Trust because NRS 116 is  
17 facially unconstitutional under the Due Process Clause for the reasons set forth in *Bourne Valley v.*  
18 *Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. Aug. 12, 2016).

19 40. Based on the adverse claims being asserted by the parties, a judicial determination is  
20 necessary to ascertain the rights, obligations, and duties of the various parties.

21 41. U.S. Bank is entitled to a declaration that the HOA sale did not extinguish the senior  
22 Deed of Trust, which is superior to any interest acquired by Plaintiff through the HOA foreclosure  
23 sale.

24 42. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore  
25 entitled to collect its reasonable attorney’s fees and costs.

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**SECOND CAUSE OF ACTION****(Injunctive Relief Against Plaintiff)**

43. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

44. U.S. Bank disputes Plaintiff's claim that it owns the Property free and clear of the senior Deed of Trust.

45. Any sale or transfer of the Property by Plaintiff, prior to a judicial determination concerning the respective rights and interests of the parties to this case, may be rendered invalid if the senior Deed of Trust still encumbers the Property in first position and was not extinguished by the HOA sale.

46. U.S. Bank has a substantial likelihood of success on the merits of its claims, for which compensatory damages would not compensate for the irreparable harm of the loss of title to a bona fide purchaser or loss of the first-position priority status secured by the Property.

47. U.S. Bank has no adequate remedy at law due to the uniqueness of the Property and the risk of loss of the senior Deed of Trust.

48. U.S. Bank is entitled to a preliminary injunction prohibiting Plaintiff, or its successors, assigns, or agents, from conducting any sale, transfer, or encumbrance of the Property that is claimed to be superior to the senior Deed of Trust or not subject to the senior Deed of Trust.

49. U.S. Bank is entitled to a preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowners association dues during the pendency of this action.

**THIRD CAUSE OF ACTION****(Unjust Enrichment Against the HOA)**

50. U.S. Bank repeats and re-alleges the preceding paragraphs as though set forth fully herein and incorporates the same by reference.

51. Under NRS 116.3116(2), a homeowners association's lien is split into two portions: one which has super-priority, and another which is subordinate to a senior deed of trust.

52. The portion of the lien with super-priority consists of only the last nine months of assessments for common expenses incurred prior to the institution of an action to enforce the lien. The

1 remainder of a homeowners association's lien is subordinate to a senior deed of trust.

2 53. Bank of America, through Miles Bauer, tendered an amount much greater than the  
3 super-priority amount to the HOA Trustee on December 6, 2012. This amount constituted the last  
4 nine months of HOA assessments—the full amount the HOA could claim had super-priority over the  
5 Deed of Trust – in addition to the HOA's reasonable collection costs.

6 54. The HOA, through the HOA Trustee, unjustifiably rejected this super-priority-plus  
7 tender.

8 55. Rather than accepting this payment, the HOA and HOA Trustee purported to foreclose  
9 on the extinguished super-priority portion of the HOA's lien. This allowed the HOA Trustee to sell  
10 the HOA's interest in the Property at the foreclosure sale for \$8,200.00.

11 56. By purporting to foreclose on the super-priority portion of its lien after rejecting Bank  
12 of America's super-priority-plus tender, the HOA was unjustly enriched in an amount at least equal to  
13 the full value of the proceeds it received from the foreclosure sale.

14 57. Even if the HOA's super-priority foreclosure is held to be proper, on information and  
15 belief, it has still retained a portion of the foreclosure-sale proceeds that should have been distributed  
16 to U.S. Bank, as the Deed of Trust at all times had priority over the vast majority of the HOA's lien.

17 58. U.S. Bank is entitled to a reasonable amount of the benefits obtained by the HOA based  
18 on a theory of unjust enrichment.

19 59. U.S. Bank submitted this claim against the HOA to mediation before the Department  
20 of Business and Industry – Real Estate Division (**NRED**), but it has not yet been mediated.

21 60. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore  
22 entitled to collect its reasonable attorney's fees and costs.

#### 23 **FOURTH CAUSE OF ACTION**

#### 24 **(Tortious Interference with Contractual Relations Against the HOA)**

25 61. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth  
26 herein and incorporates the same by reference.

27 62. On June 24, 2004, Borrowers executed a Deed of Trust in favor of Countrywide Home  
28 Loans, Inc. This Deed of Trust was subsequently assigned to U.S. Bank via an Assignment of Deed

1 of Trust on June 15, 2011.

2 63. On April 20, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default  
3 and Election to Sell Under Homeowners Association Lien.

4 64. After the HOA Trustee recorded the Notice of Default, Bank of America tendered  
5 \$1,494.50 to the HOA Trustee to satisfy the super-priority portion of the HOA's lien. This amount  
6 included the last nine months of delinquent assessments – the maximum amount the HOA could claim  
7 had super-priority over U.S. Bank's senior Deed of Trust – in addition to a significant amount of the  
8 HOA's collection costs.

9 65. Rather than accepting this tender, the HOA, through the HOA Trustee, foreclosed on  
10 the Property. The HOA Trustee sold the Property for \$8,200.00, less than 6% of the outstanding  
11 balance of the loan secured by U.S. Bank's senior Deed of Trust.

12 66. The HOA Trustee's decision on behalf of the HOA to foreclose on the Property rather  
13 than accept Bank of America's super-priority-plus tender – which prevented foreclosure of the HOA's  
14 super-priority lien – was designed to disrupt the contractual relationship between U.S. Bank and  
15 Borrowers by extinguishing the senior Deed of Trust.

16 67. The HOA Trustee's rejection of tender and subsequent foreclosure sale has put in  
17 dispute the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid  
18 principal balance of \$147,145.84.

19 68. U.S. Bank is entitled to an order establishing that its Deed of Trust is the senior lien  
20 encumbering the Property or, in the alternative, monetary damages equal to the value secured by its  
21 Deed of Trust that was purportedly extinguished as a direct result of the HOA Trustee's intentional  
22 acts.

23 69. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has  
24 not yet been mediated.

25 70. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore  
26 entitled to collect its reasonable attorney's fees and costs.

27 ...

28 ...



**FIFTH CAUSE OF ACTION****(Breach of the Duty of Good Faith Against the HOA)**

71. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

72. NRS 116.1113 provides that every duty governed by NRS 116, Nevada's version of the Uniform Common Interest Ownership Act, must be performed in good faith.

73. Before the foreclosure of the Property, U.S. Bank tendered an amount much greater than the super-priority amount to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, refused to accept payment.

74. Rather than accept a payment which would satisfy the HOA's super-priority lien, the HOA Trustee determined in bad faith to foreclose on the Property pursuant to NRS 116.

75. As a result of this bad-faith foreclosure, the first-priority position of U.S. Bank's Deed of Trust, which secures a loan with an unpaid balance of \$147,145.84, is in dispute.

76. U.S. Bank is entitled to an order establishing that its Deed of Trust is the senior lien encumbering the Property or, in the alternative, monetary damages equal to the value secured by its Deed of Trust that was purportedly extinguished as a direct result of the HOA and HOA Trustee's bad-faith foreclosure.

77. U.S. Bank submitted this claim against the HOA to mediation before NRED, but it has not yet been mediated.

78. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

**SIXTH CAUSE OF ACTION****(Wrongful Foreclosure Against the HOA)**

79. U.S. Bank repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

80. Prior to the HOA's foreclosure sale, Bank of America tendered an amount much greater than the full super-priority amount of the HOA's lien to the HOA Trustee. The HOA Trustee, acting on behalf of the HOA, rejected this tender.

85. U.S. Bank was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

## **PRAYER FOR RELIEF**

WHEREFORE, U.S. Bank prays for the following:

5. A preliminary injunction requiring Plaintiff to pay all taxes, insurance, and homeowner's association dues during the pendency of this action;

6. Judgment in U.S. Bank’s favor against the HOA for the damages it caused U.S. Bank in an amount in excess of \$10,000.00;

7. Reasonable attorney’s fees as special damages and the costs of the suit; and

8. For such other and further relief the Court deems proper.

DATED: October 10, 2017

**AKERMAN LLP**

/s/ Karen Whelan

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*Attorneys for U.S. Bank, N.A., solely as 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*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 10<sup>th</sup> day of October, 2017, I caused to be served a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE’S ANSWER TO 5316 CLOVER BLOSSOM TRUST’S AMENDED COMPLAINT, COUNTERCLAIMS, AND CROSS-CLAIMS**, in the following manner:

**(ELECTRONIC SERVICE)** Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

**WRIGHT FINLAY & ZAK, LLP**

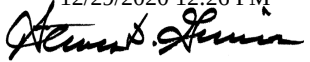
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An employee of AKERMAN LLP

  
CLERK OF THE COURT

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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*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

5316 CLOVER BLOSSOM CT TRUST;

Plaintiff,

v.

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; and CLEAR RECON  
CORPS,

Defendants.

Case No.: A-14-704412-C

Dept. No.: XXIV

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER**

On October 1, 2020, U.S. Bank, N.A., 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 (**U.S. Bank**), filed a renewed motion for summary judgment on 5316 Clover Blossom CT Trust's quiet title and declaratory relief claims and U.S. Bank's counterclaims for quiet title and declaratory relief. Clover Blossom filed a motion for summary judgment against U.S. Bank on the same day. On October 15, 2020, U.S. Bank filed an opposition to Clover Blossom's motion, and Clover Blossom filed an opposition to U.S. Bank's

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1 renewed motion. On December 3, 2020, both parties filed replies in support of their  
2 respective motions.

3 This Court finds it appropriate to decide the cross-motions on the briefs and pleadings without  
4 oral argument. See EDCR 2.23(c-d). Having considered the papers and pleadings herein, the  
5 oppositions thereto, and all exhibits, and good cause appearing, this Court makes the following  
6 findings of fact, conclusions of law, and order.

### 7 FINDINGS OF FACT

8 1. On or about June 24, 2004, borrowers Dennis and Geraldine Johnson executed a  
9 promissory note in the amount of \$147,456.00 to finance their purchase of property located at 5316  
10 Clover Blossom Court, North Las Vegas, Nevada 89031, APN 124-31-220-092 (**property**). The note  
11 is secured by a deed of trust executed in favor of Countrywide Home Loans, Inc. and recorded in the  
12 Clark County Recorder's Office as instrument number 20040630-0002408.

13 2. The deed of trust was assigned to U.S. Bank via an assignment of deed of trust recorded  
14 in the Clark County Recorder's Office as instrument number 20110620-0002747.

15 3. The property is governed by Country Garden Owners Association's (the **HOA**)  
16 declaration of covenants, conditions, and restrictions, which require the property's owner to pay certain  
17 assessments to the HOA. Borrowers defaulted on those obligations. To recover this delinquency and  
18 foreclose if necessary, the HOA retained Alessi & Koenig, LLC.

19 4. On February 22, 2012, Alessi recorded a notice of delinquent assessment (lien) in the  
20 Clark County Recorder's Office as instrument number 20120222-0001651. The notice stated the total  
21 amount of the Borrowers' delinquency was \$1,095.50.

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23 County Recorder's Office as instrument number 20120420-0000428.

24 6. On October 31, 2012, Alessi recorded a notice of trustee's sale in the Clark County  
25 Recorder's Office as instrument number 20121031-0000738, which set the sale for  
26 November 28, 2012.

27 ...

28 ...

1           7.       Upon being notified of the HOA's lien, Bank of America, N.A. (**BANA**) – who serviced  
2 the loan secured by the deed of trust at the time – retained Miles, Bauer, Bergstrom & Winters, LLP  
3 to protect the deed of trust by satisfying the lien's superpriority portion.

4           8.       On November 21, 2012, Miles Bauer sent a letter to Alessi requesting a payoff ledger  
5 showing the superpriority amount and "offer[ing] to pay that sum upon presentation of adequate proof  
6 of the same[.]"

7           9.       Alessi provided Miles Bauer with a payoff ledger on or about November 27, 2012. The  
8 ledger showed the HOA had not incurred any maintenance or nuisance-abatement charges, and its  
9 monthly assessments were \$55.00 each.

10          10.       Nine months of delinquent assessments thus totaled \$495.00. This Court finds \$495.00  
11 was the maximum superpriority amount of the HOA's lien.

12          11.       Miles Bauer tendered a \$1,494.50 check to Alessi on or about December 6, 2012. It  
13 was enclosed by a letter explaining that the tendered amount was composed of the \$495.00 constituting  
14 "9 months' worth of common assessments" in addition to \$999.50 "in reasonable collection costs," and  
15 was meant "to satisfy [U.S. Bank's] obligations to the HOA as a holder of the first deed of trust[.]"

16          12.       Alessi rejected this superpriority-plus tender by refusing delivery and returning the  
17 check to Miles Bauer.

18          13.       On January 16, 2013, Alessi foreclosed on the HOA's lien, selling the property to  
19 Clover Blossom for \$8,200.00, as reflected in the trustee's deed upon sale recorded in the Clark County  
20 Records' Office as instrument number 20130124-0002549.

21          14.       Clover Blossom filed its complaint on July 25, 2014, seeking to quiet title to  
22 the property.

23          15.       U.S. Bank answered the complaint on September 25, 2014, asserting, among others,  
24 the affirmative defense that the HOA's foreclosure sale was void as to the deed of trust.

25          16.       Clover Blossom moved for summary judgment on May 18, 2015, arguing the recitals  
26 contained in the trustee's deed were sufficient to show that it obtained title free and clear through the  
27 HOA's foreclosure sale.

28 ...

17. In its opposition, U.S. Bank argued that Miles Bauer's superpriority-plus tender satisfied that portion of the HOA's lien before the sale, meaning Clover Blossom took title subject to the deed of trust.

18. This Court granted summary judgment in Clover Blossom's favor on September 10, 2015.

19. The Nevada Court of Appeals reversed and remanded on June 30, 2017. The Court of Appeals held that this Court had not considered the effect of Miles Bauer's tender and how the equities bore on the HOA's sale.

20. On remand, U.S. Bank and Clover Blossom filed a stipulation and order that allowed U.S. Bank to amend its pleadings on September 30, 2017.

21. On October 10, 2017, U.S. Bank filed counterclaims against Clover Blossom for quiet title and declaratory relief.

22. Clover Blossom moved to dismiss U.S. Bank's counterclaims on October 23, 2017. It did not argue that U.S. Bank's counterclaims were time barred.

23. At the hearing on Clover Blossom's motion, this Court converted the motion to dismiss into a motion for summary judgment and announced judgment would be entered in Clover Blossom's favor, and entered Findings of Fact, Conclusions of Law, and Judgment to that effect on February 8, 2018.

24. The Nevada Court of Appeals reversed the judgment, finding U.S. Bank had "produced evidence showing that it tendered an amount in excess of the superpriority portion of the HOA's lien to [Alessi] prior to the sale," which, viewed "in the light most favorable to U.S. Bank ... would have extinguished the superpriority lien such that [Clover Blossom] took the property subject to U.S. Bank's deed of trust." The Court of Appeals remanded "for proceedings consistent with [its] order."

### **CONCLUSIONS OF LAW**

1. If any findings of fact are properly conclusions of law, or conclusions of law properly findings of fact, they shall be treated as if properly identified and designated.

2. Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. NRCP 56(c); *see also Wood v. Safeway, Inc.*, 121



1 Nev. 724, 730, 121 P.3d 1026, 1030 (2005). After the movant has carried its burden to identify issues  
2 where there is no genuine issue of material fact, the non-moving party must "set forth specific facts  
3 demonstrating the existence of a genuine issue for trial or have summary judgment entered against  
4 him." *Wood*, 121 Nev. at 732.

5 3. This case is controlled by the Nevada Supreme Court's decision in *Bank of America*,  
6 *N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (***Diamond Spur***). In  
7 *Diamond Spur*, the Supreme Court held that BANA's superpriority payments through Miles Bauer are  
8 effective tenders that "cure[] the default and prevent[] foreclosure as to the superpriority portion of the  
9 HOA's lien by operation of law," meaning the purchaser at the association's subsequent foreclosure  
10 sale takes "the property subject to the deed of trust." *Id.*, at 610.

11 4. The tender facts in *Diamond Spur* are substantively identical to the tender facts here.  
12 Just as it did in *Diamond Spur*, here BANA, through Miles Bauer, tendered payment to the HOA's  
13 collection agent for an amount sufficient to cure the superpriority default before the HOA's  
14 foreclosure sale.

15 5. There is no genuine dispute that the amount Miles Bauer tendered was sufficient to  
16 satisfy the superpriority portion of the HOA's lien. U.S. Bank produced authenticated business records  
17 and testimony from the HOA's corporate representative showing the HOA's monthly assessments were  
18 \$55.00 each during the relevant period and that the HOA had not incurred any maintenance or  
19 nuisance-abatement charges related to the property. Clover Blossom failed to produce any contrary  
20 evidence. Thus, \$495.00 was the maximum superpriority amount of the HOA's lien. *See Diamond*  
21 *Spur*, 134 Nev. at 606 ("[T]he superpriority portion of an HOA lien includes only charges for  
22 maintenance and nuisance abatement, and nine months of unpaid assessments."). Miles Bauer  
23 tendered \$1,494.50 to Alessi.

24 6. Likewise, there is no genuine dispute that the \$1,495.00 tender was delivered to and  
25 rejected by Alessi, as shown by Miles Bauer's authenticated business records. Alessi's unjustified  
26 rejection is irrelevant – the fact that Miles Bauer tendered an amount sufficient to satisfy the  
27 superpriority portion of the HOA's lien renders all other facts immaterial under *Diamond Spur*. *See*  
28 *Wood*, 121 Nev. at 731 ("The substantive law controls which factual disputes are material and will

1 preclude summary judgment; other factual disputes are irrelevant."). Clover Blossom thus purchased  
2 "the property subject to the deed of trust" as a matter of law. *See Diamond Spur*, 134 Nev. at 612.

3 7. While Clover Blossom does not dispute that the tender was delivered and was for more  
4 than the superpriority amount, Clover Blossom contends it is still entitled to a judgment that it owns  
5 the property free and clear for two reasons: (1) equity weighs in its favor; and (2) U.S. Bank's  
6 counterclaims are time barred under NRS 11.220's four-year statute of limitations. Both  
7 arguments fail.

8 8. It is settled law that Miles Bauer's tenders make the equities irrelevant. In *Diamond*  
9 *Spur*, the Supreme Court held that Miles Bauer's tenders cure a superpriority default "by operation of  
10 law," meaning the association's subsequent foreclosure is "void . . . as to the superpriority portion" and  
11 thus cannot "extinguish the first deed of trust." *See Diamond Spur*, 134 Nev. at 612. The Supreme  
12 Court confirmed that a Miles Bauer tender "cure[s] the [superpriority] default ... by operation of law"  
13 such that providing the lender with "equitable relief" from the foreclosure sale is unnecessary in *7510*  
14 *Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev. 62, 65, 458 P.3d 348, 350 n.1 (2020).  
15 The Supreme Court again confirmed equitable considerations are "'irrelevant when a defect in the  
16 foreclosure proceeding renders the sale void,' which is the case when the sale proceeds as to the first  
17 deed of trust despite the superpriority default having been cured," in *9352 Cranesbill Trust v. Wells*  
18 *Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (quoting *Diamond Spur*, 134 Nev.  
19 at 612)).

20 9. Clover Blossom's statute of limitations argument fails for several reasons. First, Miles  
21 Bauer's tender protected the deed of trust by operation of law. *See Diamond Spur*, 134 Nev. at 611.  
22 U.S. Bank was not required to file suit to obtain a judgment that the deed of trust survived. *See Renfroe*  
23 *v. Carrington Mortg. Servs., LLC*, 456 P.3d 1055, 2020 WL 762638, at \*2 (Nev. Feb. 14, 2020)  
24 (unpublished) ("Moreover, we clarify that Carrington had no obligation to prevail in a judicial action  
25 as a condition precedent to enforcing its deed of trust that had already survived the HOA's foreclosure  
26 sale.") (citing *Diamond Spur*, 134 Nev. at 606).

27 10. Second, even if U.S. Bank's counterclaims are governed by a four-year statute of  
28 limitations, as Clover Blossom contends, the counterclaims are timely. U.S. Bank has contended that

1 its deed of trust survived the HOA's foreclosure sale since it appeared in this case by filing its answer  
2 on September 25, 2014. Because the counterclaims "arose out of the conduct, transaction, or  
3 occurrence set out—or attempted to be set out—in the original" answer, the counterclaims relate back  
4 to the original answer. *See* NRCP 15(c)(1). Clover Blossom is put to no disadvantage by U.S. Bank's  
5 counterclaims relating back – the parties have been litigating the effect of Miles Bauer's tender in both  
6 this Court and the Court of Appeals since 2015. *See Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d  
7 631, 634 (2011) ("NRCP 15(c) is to be liberally construed to allow relation back of the amended  
8 pleading where the amended party will be put to no disadvantage.").

9 11. Moreover, even if U.S. Bank's counterclaims do not relate back, they are still timely  
10 because the limitations period was tolled during the pendency of U.S. Bank's first appeal – from  
11 September 28, 2015 to July 31, 2017 – as U.S. Bank was unable to file its counterclaims during that  
12 time. *See Young v. United States*, 535 U.S. 43, 50 (2002) (holding limitations period for claim against  
13 debtor tolled while debtor protected by automatic stay); *see also Irwin v. Dept. of Veterans Affairs*,  
14 498 U.S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has  
15 actively pursued his judicial remedies by filing a defective pleading during the statutory period.").

16 12. Third, even if U.S. Bank's counterclaims were untimely (they are not), U.S. Bank would  
17 still be entitled to an order that its deed of trust encumbers Clover Blossom's title because it asserted  
18 tender as an affirmative defense to Clover Blossom's quiet title and declaratory relief claims. It is  
19 black letter law that "[l]imitations do not run against defenses. The statute is available only as a shield,  
20 not as a sword." *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964). That  
21 is because "statutes of limitations are intended to protect a defendant against the evidentiary problems  
22 associated with defending a stale claim." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792,  
23 798, 801 P.2d 1377, 1381 (1990). "To use the statute of limitations to cut off the consideration of a  
24 particular defense in the case is quite foreign to the policy of preventing the commencement of stale  
25 litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72 (1956). Clover Blossom cannot  
26 obtain a declaratory judgment that it owns the property free and clear of the deed of trust in light of  
27 U.S. Bank's affirmative defense of tender.

28 ...

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the deed of trust recorded in the Clark County Recorder's Office as instrument number 20040630-0002408 was not extinguished by the HOA's foreclosure sale reflected in the trustee's deed upon sale recorded in the Clark County Recorders' Office as instrument number 20130124-0002549.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the HOA's foreclosure sale conveyed to Clover Blossom title to the property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031, APN 124-31-220-092 subject to the deed of trust recorded in the Clark County Recorder's Office as instrument number 20040630-0002408, which remains a valid and enforceable lien following the HOA's foreclosure sale.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that U.S. Bank's renewed motion for summary judgment on Clover Blossom's quiet title and declaratory relief claims and U.S. Bank's quiet title and declaratory relief counterclaims is **GRANTED**. Judgment is entered in favor of U.S. Bank and against Clover Blossom on those claims.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that all remaining claims are **DISMISSED** as moot.

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**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that this order fully resolves all claims asserted by all parties and thus constitutes a final judgment.

DATED \_\_\_\_\_, 2020. Dated this 29th day of December, 2020



Dated: December 28, 2020

CF8 94C 88A7 AF85  
Jim Crockett  
District Court Judge

Submitted by:

**AKERMAN LLP**

/s/ Nicholas E. Belay

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

NICHOLAS E. BELAY, ESQ.

Nevada Bar No. 15175

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Las Vegas, Nevada 89134

*Attorneys for U.S. Bank, N.A., 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*

1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

4  
5  
6 5316 Clover Blossom CT Trust,  
Plaintiff(s)

CASE NO: A-14-704412-C

7 vs.

DEPT. NO. Department 24

8  
9 U S Bank National Association,  
Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12  
13 This automated certificate of service was generated by the Eighth Judicial District  
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the  
court's electronic eFile system to all recipients registered for e-Service on the above entitled  
case as listed below:

15 Service Date: 12/29/2020

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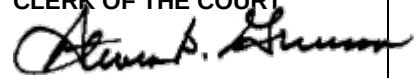
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Nicholas Belay

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13 *Attorneys for U.S. Bank, N.A., Successor Trustee to*  
14 *Bank of America, N.A., Successor by Merger to*  
15 *LaSalle Bank, N.A., as Trustee to the Holders of the*  
16 *Zuni Mortgage Loan Trust 2006-OA1, Mortgage*  
17 *Loan Pass-Through Certificates, Series 2006-OA1*

18 **EIGHTH JUDICIAL DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 5316 CLOVER BLOSSOM CT TRUST;

21 Plaintiff,

22 v.

23 U.S. BANK, NATIONAL ASSOCIATION,  
24 SUCCESSOR TRUSTEE TO BANK OF  
25 AMERICA, N.A., SUCCESSOR BY MERGER  
26 TO LASALLE BANK, N.A., AS TRUSTEE TO  
27 THE HOLDERS OF THE ZUNI MORTGAGE  
28 LOAN TRUST 2006-OA1, MORTGAGE  
LOAN PASS-THROUGH CERTIFICATES  
SERIES 2006-OA1; and CLEAR RECON  
CORPS,

Defendants.

Case No.: A-14-704412-C

Dept. No.: XXIV

**NOTICE OF ENTRY OF FINDINGS OF  
FACT, CONCLUSIONS OF LAW, AND  
ORDER**

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**TO: ALL PARTIES OF RECORD AND THEIR COUNSEL:**

PLEASE TAKE NOTICE that the Findings of Fact, Conclusions of Law, and Order has been entered on December 29, 2020, a copy of which is attached hereto.

DATED December 29, 2020.

**AKERMAN LLP**

/s/ Nicholas E. Belay

MELANIE D. MORGAN, ESQ.

Nevada Bar No. 8215

NICHOLAS E. BELAY, ESQ.

Nevada Bar No. 15175

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*Attorneys for U.S. Bank, N.A., 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*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 29<sup>th</sup> day of December 2020, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**, in the following manner:

**(ELECTRONIC SERVICE)** Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

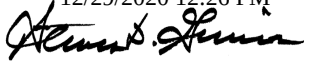
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| Chris Schnider      | cschnider@pengillylawfirm.com |
| Olivia Schulze      | oschulze@pengillylawfirm.com  |

/s/ Patricia Larsen

An employee of AKERMAN LLP

**EXHIBIT A**

**EXHIBIT A**

  
CLERK OF THE COURT

**FFCO**

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NICHOLAS E. BELAY, ESQ.

Nevada Bar No. 15175

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**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

5316 CLOVER BLOSSOM CT TRUST;

Plaintiff,

v.

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  
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LOAN PASS-THROUGH CERTIFICATES  
SERIES 2006-OA1; and CLEAR RECON  
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Defendants.

Case No.: A-14-704412-C

Dept. No.: XXIV

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER**

On October 1, 2020, U.S. Bank, N.A., 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 (**U.S. Bank**), filed a renewed motion for summary judgment on 5316 Clover Blossom CT Trust's quiet title and declaratory relief claims and U.S. Bank's counterclaims for quiet title and declaratory relief. Clover Blossom filed a motion for summary judgment against U.S. Bank on the same day. On October 15, 2020, U.S. Bank filed an opposition to Clover Blossom's motion, and Clover Blossom filed an opposition to U.S. Bank's

**AKERMAN LLP**

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1 renewed motion. On December 3, 2020, both parties filed replies in support of their  
2 respective motions.

3 This Court finds it appropriate to decide the cross-motions on the briefs and pleadings without  
4 oral argument. See EDCR 2.23(c-d). Having considered the papers and pleadings herein, the  
5 oppositions thereto, and all exhibits, and good cause appearing, this Court makes the following  
6 findings of fact, conclusions of law, and order.

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27 HOA's foreclosure sale.

28 ...

17. In its opposition, U.S. Bank argued that Miles Bauer's superpriority-plus tender satisfied that portion of the HOA's lien before the sale, meaning Clover Blossom took title subject to the deed of trust.

18. This Court granted summary judgment in Clover Blossom's favor on September 10, 2015.

19. The Nevada Court of Appeals reversed and remanded on June 30, 2017. The Court of Appeals held that this Court had not considered the effect of Miles Bauer's tender and how the equities bore on the HOA's sale.

20. On remand, U.S. Bank and Clover Blossom filed a stipulation and order that allowed U.S. Bank to amend its pleadings on September 30, 2017.

21. On October 10, 2017, U.S. Bank filed counterclaims against Clover Blossom for quiet title and declaratory relief.

22. Clover Blossom moved to dismiss U.S. Bank's counterclaims on October 23, 2017. It did not argue that U.S. Bank's counterclaims were time barred.

23. At the hearing on Clover Blossom's motion, this Court converted the motion to dismiss into a motion for summary judgment and announced judgment would be entered in Clover Blossom's favor, and entered Findings of Fact, Conclusions of Law, and Judgment to that effect on February 8, 2018.

24. The Nevada Court of Appeals reversed the judgment, finding U.S. Bank had "produced evidence showing that it tendered an amount in excess of the superpriority portion of the HOA's lien to [Alessi] prior to the sale," which, viewed "in the light most favorable to U.S. Bank ... would have extinguished the superpriority lien such that [Clover Blossom] took the property subject to U.S. Bank's deed of trust." The Court of Appeals remanded "for proceedings consistent with [its] order."

### **CONCLUSIONS OF LAW**

1. If any findings of fact are properly conclusions of law, or conclusions of law properly findings of fact, they shall be treated as if properly identified and designated.

2. Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. NRCP 56(c); *see also Wood v. Safeway, Inc.*, 121

1 Nev. 724, 730, 121 P.3d 1026, 1030 (2005). After the movant has carried its burden to identify issues  
2 where there is no genuine issue of material fact, the non-moving party must "set forth specific facts  
3 demonstrating the existence of a genuine issue for trial or have summary judgment entered against  
4 him." *Wood*, 121 Nev. at 732.

5 3. This case is controlled by the Nevada Supreme Court's decision in *Bank of America*,  
6 *N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (***Diamond Spur***). In  
7 *Diamond Spur*, the Supreme Court held that BANA's superpriority payments through Miles Bauer are  
8 effective tenders that "cure[] the default and prevent[] foreclosure as to the superpriority portion of the  
9 HOA's lien by operation of law," meaning the purchaser at the association's subsequent foreclosure  
10 sale takes "the property subject to the deed of trust." *Id.*, at 610.

11 4. The tender facts in *Diamond Spur* are substantively identical to the tender facts here.  
12 Just as it did in *Diamond Spur*, here BANA, through Miles Bauer, tendered payment to the HOA's  
13 collection agent for an amount sufficient to cure the superpriority default before the HOA's  
14 foreclosure sale.

15 5. There is no genuine dispute that the amount Miles Bauer tendered was sufficient to  
16 satisfy the superpriority portion of the HOA's lien. U.S. Bank produced authenticated business records  
17 and testimony from the HOA's corporate representative showing the HOA's monthly assessments were  
18 \$55.00 each during the relevant period and that the HOA had not incurred any maintenance or  
19 nuisance-abatement charges related to the property. Clover Blossom failed to produce any contrary  
20 evidence. Thus, \$495.00 was the maximum superpriority amount of the HOA's lien. *See Diamond*  
21 *Spur*, 134 Nev. at 606 ("[T]he superpriority portion of an HOA lien includes only charges for  
22 maintenance and nuisance abatement, and nine months of unpaid assessments."). Miles Bauer  
23 tendered \$1,494.50 to Alessi.

24 6. Likewise, there is no genuine dispute that the \$1,495.00 tender was delivered to and  
25 rejected by Alessi, as shown by Miles Bauer's authenticated business records. Alessi's unjustified  
26 rejection is irrelevant – the fact that Miles Bauer tendered an amount sufficient to satisfy the  
27 superpriority portion of the HOA's lien renders all other facts immaterial under *Diamond Spur*. *See*  
28 *Wood*, 121 Nev. at 731 ("The substantive law controls which factual disputes are material and will



1 preclude summary judgment; other factual disputes are irrelevant."). Clover Blossom thus purchased  
2 "the property subject to the deed of trust" as a matter of law. *See Diamond Spur*, 134 Nev. at 612.

3 7. While Clover Blossom does not dispute that the tender was delivered and was for more  
4 than the superpriority amount, Clover Blossom contends it is still entitled to a judgment that it owns  
5 the property free and clear for two reasons: (1) equity weighs in its favor; and (2) U.S. Bank's  
6 counterclaims are time barred under NRS 11.220's four-year statute of limitations. Both  
7 arguments fail.

8 8. It is settled law that Miles Bauer's tenders make the equities irrelevant. In *Diamond*  
9 *Spur*, the Supreme Court held that Miles Bauer's tenders cure a superpriority default "by operation of  
10 law," meaning the association's subsequent foreclosure is "void . . . as to the superpriority portion" and  
11 thus cannot "extinguish the first deed of trust." *See Diamond Spur*, 134 Nev. at 612. The Supreme  
12 Court confirmed that a Miles Bauer tender "cure[s] the [superpriority] default ... by operation of law"  
13 such that providing the lender with "equitable relief" from the foreclosure sale is unnecessary in *7510*  
14 *Perla Del Mar Ave. Trust v. Bank of America, N.A.*, 136 Nev. 62, 65, 458 P.3d 348, 350 n.1 (2020).  
15 The Supreme Court again confirmed equitable considerations are "'irrelevant when a defect in the  
16 foreclosure proceeding renders the sale void,' which is the case when the sale proceeds as to the first  
17 deed of trust despite the superpriority default having been cured," in *9352 Cranesbill Trust v. Wells*  
18 *Fargo Bank, N.A.*, 136 Nev. 76, 82, 459 P.3d 227, 232 (2020) (quoting *Diamond Spur*, 134 Nev.  
19 at 612)).

20 9. Clover Blossom's statute of limitations argument fails for several reasons. First, Miles  
21 Bauer's tender protected the deed of trust by operation of law. *See Diamond Spur*, 134 Nev. at 611.  
22 U.S. Bank was not required to file suit to obtain a judgment that the deed of trust survived. *See Renfroe*  
23 *v. Carrington Mortg. Servs., LLC*, 456 P.3d 1055, 2020 WL 762638, at \*2 (Nev. Feb. 14, 2020)  
24 (unpublished) ("Moreover, we clarify that Carrington had no obligation to prevail in a judicial action  
25 as a condition precedent to enforcing its deed of trust that had already survived the HOA's foreclosure  
26 sale.") (citing *Diamond Spur*, 134 Nev. at 606).

27 10. Second, even if U.S. Bank's counterclaims are governed by a four-year statute of  
28 limitations, as Clover Blossom contends, the counterclaims are timely. U.S. Bank has contended that

1 its deed of trust survived the HOA's foreclosure sale since it appeared in this case by filing its answer  
2 on September 25, 2014. Because the counterclaims "arose out of the conduct, transaction, or  
3 occurrence set out—or attempted to be set out—in the original" answer, the counterclaims relate back  
4 to the original answer. *See* NRCP 15(c)(1). Clover Blossom is put to no disadvantage by U.S. Bank's  
5 counterclaims relating back – the parties have been litigating the effect of Miles Bauer's tender in both  
6 this Court and the Court of Appeals since 2015. *See Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d  
7 631, 634 (2011) ("NRCP 15(c) is to be liberally construed to allow relation back of the amended  
8 pleading where the amended party will be put to no disadvantage.").

9 11. Moreover, even if U.S. Bank's counterclaims do not relate back, they are still timely  
10 because the limitations period was tolled during the pendency of U.S. Bank's first appeal – from  
11 September 28, 2015 to July 31, 2017 – as U.S. Bank was unable to file its counterclaims during that  
12 time. *See Young v. United States*, 535 U.S. 43, 50 (2002) (holding limitations period for claim against  
13 debtor tolled while debtor protected by automatic stay); *see also Irwin v. Dept. of Veterans Affairs*,  
14 498 U.S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has  
15 actively pursued his judicial remedies by filing a defective pleading during the statutory period.").

16 12. Third, even if U.S. Bank's counterclaims were untimely (they are not), U.S. Bank would  
17 still be entitled to an order that its deed of trust encumbers Clover Blossom's title because it asserted  
18 tender as an affirmative defense to Clover Blossom's quiet title and declaratory relief claims. It is  
19 black letter law that "[l]imitations do not run against defenses. The statute is available only as a shield,  
20 not as a sword." *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964). That  
21 is because "statutes of limitations are intended to protect a defendant against the evidentiary problems  
22 associated with defending a stale claim." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792,  
23 798, 801 P.2d 1377, 1381 (1990). "To use the statute of limitations to cut off the consideration of a  
24 particular defense in the case is quite foreign to the policy of preventing the commencement of stale  
25 litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72 (1956). Clover Blossom cannot  
26 obtain a declaratory judgment that it owns the property free and clear of the deed of trust in light of  
27 U.S. Bank's affirmative defense of tender.

28 ...

**ORDER**

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the deed of trust recorded in the Clark County Recorder's Office as instrument number 20040630-0002408 was not extinguished by the HOA's foreclosure sale reflected in the trustee's deed upon sale recorded in the Clark County Recorders' Office as instrument number 20130124-0002549.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the HOA's foreclosure sale conveyed to Clover Blossom title to the property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031, APN 124-31-220-092 subject to the deed of trust recorded in the Clark County Recorder's Office as instrument number 20040630-0002408, which remains a valid and enforceable lien following the HOA's foreclosure sale.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that U.S. Bank's renewed motion for summary judgment on Clover Blossom's quiet title and declaratory relief claims and U.S. Bank's quiet title and declaratory relief counterclaims is **GRANTED**. Judgment is entered in favor of U.S. Bank and against Clover Blossom on those claims.

**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that all remaining claims are **DISMISSED** as moot.

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**IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that this order fully resolves all claims asserted by all parties and thus constitutes a final judgment.

DATED \_\_\_\_\_, 2020. Dated this 29th day of December, 2020



Dated: December 28, 2020

CF8 94C 88A7 AF85  
Jim Crockett  
District Court Judge

Submitted by:

**AKERMAN LLP**

/s/ Nicholas E. Belay

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1 **CSERV**

2  
3 DISTRICT COURT  
CLARK COUNTY, NEVADA

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5  
6 5316 Clover Blossom CT Trust,  
Plaintiff(s)

CASE NO: A-14-704412-C

7 vs.

DEPT. NO. Department 24

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9 U S Bank National Association,  
Defendant(s)

10  
11 **AUTOMATED CERTIFICATE OF SERVICE**

12  
13 This automated certificate of service was generated by the Eighth Judicial District  
14 Court. The foregoing Findings of Fact, Conclusions of Law and Order was served via the  
court's electronic eFile system to all recipients registered for e-Service on the above entitled  
case as listed below:

15 Service Date: 12/29/2020

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