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5316 Clover Blossom Ct Trust

SUPREME COURT

STATE OF NEVADA

5316 CLOVER BLOSSOM CT TRUST, Appellant, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Respondents.	CASE NO.: 82426

APPELLANT'S APPENDIX VOLUME 7

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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.

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,

vs.

5316 CLOVER BLOSSOM CT TRUST

Counterdefendant.

CASE NO.: A-14-704412-C
DEPT NO.: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Date of Hearing: December 12, 2017
Time of Hearing: 9:00 a.m.

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,

vs.

5316 CLOVER BLOSSOM CT TRUST

Cross-defendant.

Plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss having come before the court on the 12th day of December, 2017, at 9:00 a.m., Adam R. Trippiedi, Esq. appearing on behalf of plaintiff; Scott Lachman, Esq. appearing on behalf of 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 ("US Bank"); and Elizabeth B. Lowell, Esq. appearing on behalf of cross-defendant Country Garden Owners' Association, and the court, having reviewed plaintiff's motion and defendant's opposition, and having heard the arguments of counsel, makes its findings of fact, conclusion of law and judgment as follows.

FINDINGS OF FACT

1. 5316 Clover Blossom Ct Trust is the owner of real property commonly known as 5316 Clover Blossom Court, North Las Vegas, Nevada (hereinafter referred to as "the Property").

2. The property is encumbered by a Declaration of Covenants, Conditions, and Restrictions for Country Garden (Arbor Gate) (hereinafter referred to as the "CC&Rs").

3. 5316 Clover Blossom Ct Trust acquired the Property from Country Garden Owners' Association (hereinafter the "HOA") at a foreclosure sale conducted on January 16, 2013.

4. The foreclosure sale arose from a delinquency in assessments due from the former owners to the HOA pursuant to NRS Chapter 116.

5. US Bank is the beneficiary of a deed of trust that was originally recorded as an encumbrance against the Property on June 30, 2004.

6. On June 20, 2011, an assignment of the deed of trust was recorded which assigned the beneficial interest in the deed of trust to US Bank.

7. At some point, the former owner of the property became delinquent in paying assessments and the HOA and its foreclosure agent, Alessi & Koenig, LLC (hereinafter "the foreclosure agent"), began foreclosure proceedings based on the delinquent assessments.

8. On January 30, 2012, and again on February 6, 2012, the foreclosure agent served a Notice of Delinquent Assessment Lien on the former owners of the property via regular and certified mail.

9. On February 22, 2012, the foreclosure agent recorded a Notice of Delinquent Assessment Lien against the property.

10. On April 20, 2012, the foreclosure agent recorded a Notice of Default and Election to Sell under homeowners association lien against the property.

11. On April 30, 2012, the foreclosure agent mailed copies of the notice of default to the former owner, to MERS, to US Bank, and to other interested parties.

12. On October 31, 2012, a Notice of Foreclosure Sale was recorded against the property.

13. On October 25, 2012, the foreclosure agent mailed copies of the notice of foreclosure sale to the former owner, US Bank, and other interested parties.

14. The foreclosure agent also served the notice of foreclosure sale on the former owners by posting a copy of the notice in a conspicuous place on the Property, and also posted copies of the notice in three public locations throughout Clark County.

15. The foreclosure agent also published the notice of sale in the Nevada Legal News.

16. As reflected by the conclusive recitals in the foreclosure deed, 5316 Clover Blossom Ct Trust entered the high bid of $8,200.00 at the public auction conducted on January 16, 2013, to purchase the Property.

17. The foreclosure agent issued a deed upon sale, which was recorded on January 24, 2013, and contains the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on January 16, 2013 at the place indicated on the Notice of Trustee's Sale.

18. US Bank alleges that on November 21, 2012, US Bank, by way of its agent, sent correspondence to the foreclosure agent requesting an accounting of the HOA arrears.

19. In response, the foreclosure agent sent a letter to US Bank's agent. The foreclosure agent's letter stated that the total amount due was $4,186.00.

20. On December 6, 2012, US Bank, by way of its agent, mailed a check in the amount of $1,494.50 to the foreclosure agent, along with an accompanying letter, in an effort to satisfy the HOA's super-priority lien.

21. There is no evidence to indicate the HOA or foreclosure agent accepted or otherwise responded to the $1,494.50 check.

22. After sending the letter and $1,494.50 check to the foreclosure agent, US Bank made no other efforts to pay off the lien or otherwise prevent the foreclosure sale from going forward.

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

24. US Bank did not present evidence of any fraud, oppression or unfairness in regards to the foreclosure sale which would account for or bring about an unreasonably low purchase price.

25. 5316 Clover Blossom Ct Trust is a bona fide purchaser, and the US Bank has failed to present sufficient proof to disprove that the 5316 Clover Blossom Ct Trust was a bona fide purchaser.

26. Any findings of fact which should be considered to be a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. If, in a motion under NRCP 12(b)(5), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made

pertinent to such a motion by Rule 56. See NRCP 12(b).

2. This Court finds that, by virtue of the arguments presented in 5316 Clover Blossom Ct Trust's motion to dismiss, US Bank's opposition, and 5316 Clover Blossom Ct Trust's reply, matters outside the counterclaim were presented and, thus, 5316 Clover Blossom Ct Trust's motion to dismiss was converted into a motion for summary judgment and this court is treating it as such.

3. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate "no genuine issue as to any material fact [remains] and the moving party is entitled to judgment as a matter of law. See NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005).

4. To defeat a motion for summary judgment the non-moving party bears the burden to "do more than simply show there is some metaphysical doubt: as to the operative facts. Wood, 121 Nev. at 732 (citing Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1983)). Moreover, the non-moving party must come forward with specific facts showing a genuine issue exists for trial. Matsushita, 475 U.S. at 587; Wood P.3d at 1130. Further, in ruling upon a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the non-moving party. Torrealba v. Kesmetis, 124 Nev. 95, 178 P.3d 716 (2008).

5. When ruling on a motion for summary judgment, the court may take judicial notice of the public records attached to the motion. Harlow v. MTC Financial Inc. 865 F. Supp.2d 1095 (D. Nev. 2012). The recorded exhibits to US Bank's counterclaim are public records of which the Court may, and did take judicial notice. See NRS 47.150; Lemel v. Smith, 64 Nev. 545 (1947) (Judicial Notice takes the place of proof and is of equal force.") "Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic." NRS 52.165.

6. Summary judgment in favor of 5316 Clover Blossom Ct Trust is proper.

7. The HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of notice of delinquent assessment lien and notice of default and election to sell under homeowners association lien, and the recording, mailing, posting, and

publication of the notice of foreclosure sale.

8. The law presumes foreclosure notices are received upon proof of mailing, and does not require proof that the notices be received. Actual notice is not necessary as long as the statutory requirements are met. Mailing of the notices is all that the statute requires. Hankins v. Administrator of Veterans Affairs v. Administrator of Veterans Affairs 92 Nev. 578, 555 P.2d 483 (1976); Turner v. Dewco 87 Nev. 14, 479 P.2d 462 (1971).

9. There is a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2003); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210.

10. There is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A. Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

11. Nevada has a disputable presumption that "the law has been obeyed." See NRS 47.250(16). This creates a disputable presumption that the foreclosure sale was conducted in compliance with the law.

12. 5316 Clover Blossom Ct Trust, as the record title holder of the property, has a presumption of validity in its favor, and US Bank "has the burden to show that the sale should be set aside in light of" 5316 Clover Blossom Ct Trust's status as the record title holder. Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91 (2017).

13. The recitals in the foreclosure deed are sufficient and conclusive proof that the required notices were mailed by the HOA. See NRS 116.31166 and NRS 47.240(6) which also provide that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made

conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that US Bank bank was served with copies of the required notices for the foreclosure sale.

14. US Bank has not presented any evidence to show that equitable relief is warranted in this case or to disprove any of the recitals in the foreclosure deed.

15. US Bank has not presented any evidence to show any defect with the foreclosure sale or the recording and service of the notices prior to the foreclosure sale.

16. US Bank further argues that the low price when combined with fraud, unfairness, or oppression is sufficient to void said sale. However, US Bank failed to present any evidence of fraud, unfairness, or oppression in regards to the foreclosure sale.

17. US Bank argues there was fraud, oppression, or unfairness in the conduct of the sale because the foreclosure agent rejected US Bank's tender. However, the fraud, oppression, or unfairness must bring about or account for the low purchase price. See Shadow Wood, et al. Examples would be collusion between the auctioneer and the purchaser to keep the price artificially low or an effort to prevent public notice of the auction. US Bank never explains how rejection of a tender accounts for a low purchase price.

18. Nevada Rule of Civil Procedure 9(b) requires that "[i]n all averments of fraud..., the circumstances constituting fraud... shall be stated with particularity." US Bank, in alleging fraud in this matter, has not stated the basis for its fraud allegation with sufficient particularity or factual support.

19. There is no issue regarding whether the association foreclosed on the "super-priority" portion of its lien. The evidence and deed recitals show that both the notice of default and the notice of sale were properly mailed to US Bank. The language in both the notice of default and notice of sale shows that the HOA was foreclosing on a lien comprised of monthly assessments. As such, there is no genuine issue of material fact that the HOA possessed a super priority lien at the time of the foreclosure sale, and that the super priority lien was foreclosed upon. As stated in SFR, as to first deeds of trust, NRS 116.3116(2) splits an HOA lien into two pieces, a superpriority piece and a

subpriority piece. Unless the superpriority piece has been satisfied prior to the foreclosure sale, the HOA foreclosure sale on its assessment lien would necessarily include both the superpriority piece and a subpriority piece of the lien. US Bank failed to present any evidence that the superpriority portion of the lien was satisfied prior to the foreclosure sale.

20. In considering whether equity supports setting aside the sale in question, the Court is to consider any other factor bearing on the equities, including actions or inactions of both parties seeking to set aside the sale and the impact on a bona fide purchaser for value. Shadow Wood at 1114 (finding "courts must consider the entirety of the circumstances that bear upon the equities").

21. The attempted tender of assessments made by US Bank for $1,494.50, does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank had several different options to prevent the sale from going forward and failed to do so. Specifically, US Bank could have "pa[id] the entire amount and request[ed] a refund of the balance." SFR at 418. US Bank also could have sought "a temporary restraining order and preliminary injunction and fil[ed] a lis pendens on the property." Shadow Wood at 1114 n.7. US Bank failed to avail itself of any of these options and instead allowed the HOA to foreclose.

22. US Bank's tender letter contains conditions, including that the tender amount is "non-negotiable"; that endorsement of the check "will be strictly construed as an unconditional acceptance... of the facts" stated in the tender letter; and acceptance of the check is an acknowledgment that the lien has been "'paid in full.'" Because of these conditions, the tender was not valid and had no effect on the foreclosure sale of the HOA's lien. Smith v. School Dist. No. 64 Marion County, 89 Kan. 225, 131 P. 557, 558 (1913) ("A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due.")

23. US Bank's tender also contains conditions that were not consistent with Commission for Common Interest Communities and Condominium Hotels' (hereinafter "CCICCH") Advisory Opinion 2010-01 issued on December 8, 2010:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.
>
> ...
> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien.**

(emphasis added)

24. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

25. The fact that the foreclosure agent did not accept the tender does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank failed to take any steps to protect its interest aside from mailing the letter and check, which was in an amount less than the full amount of the HOA's lien. Accordingly, US Bank is not entitled to equitable relief. Shadow Wood at 1114 n.7.

26. Specifically, the Nevada Supreme Court decision of Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016) did not exist on December 6, 2012, when US Bank sent its tender, so the HOA and the foreclosure agent could not have relied upon that authority.

27. To the contrary, the December 8, 2010, CCICCH opinion existed on December 6, 2012, and the HOA and foreclosure agent could have relied upon that authority.

28. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

29. US Bank's further argues that the presence of a mortgage protection clause within the CC&Rs, which represents that the HOA lien "shall not affect the rights of the mortgagee under any first mortgage upon such Lot, Unit or Parcel," was evidence of fraud, oppression, and/or unfairness that rendered the foreclosure sale a subpriority sale. However, the mortgage protection language cited by US Bank was determined to be legally ineffective by the Nevada Supreme Court in SFR based on NRS 116.1104, which states that the provisions of NRS 116 "may not be varied by agreement, and rights conferred by it may not be waived." Based on SFR, this court finds the mortgage protection clause was invalid and thus was also not evidence of fraud, oppression, or unfairness.

30. Therefore, because US Bank's has failed to set forth material issues of fact demonstrating some fraud, unfairness, or oppression which led to the low purchase price, the Court finds that the price of the sale is not a legitimate basis to overturn the sale.

31. There is no issue of fact regarding whether the former owner was in default in payment of the assessments as well as whether the lien and foreclosure notices were properly served. The recitals in the foreclosure deed are conclusive as to these issues. Furthermore, 5316 Clover Blossom Ct Trust presented proof, which was not controverted, that the notices were mailed, published, and posted.

32. 5316 Clover Blossom Ct Trust is a bona fide purchaser ("BFP"). A subsequent purchaser is bona fide under common law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); see also Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive.").

33. The evidence shows 5316 Clover Blossom Ct Trust purchased said property for valuable consideration in the amount of $8,200.00 and had no actual, constructive, or inquiry notice of any dispute of title or defect in the sales process. Such evidence is clear from the fact US Bank did not pay

off the super-priority lien, attend the sale in question, record notice with the Clark County Recorder, or attempt to take any other action to put potential buyers on notice of any dispute. US Bank was in the position to take any number of simple steps to avoid a BFP issue and simply failed to take such action. After being fully apprised of the pending foreclosure sale and taking no action, US Bank looks now to enforce its rights. The Court notes that all that was required of US Bank to defeat BFP status was to put purchasers on notice of their claim to the property by either showing up to the sale to announce their claim of title, record a legal tender, file a lis pendens, or seek a temporary restraining order. US Bank's argument that 5316 Clover Blossom Ct Trust cannot be a BFP based on the mere fact that a Deed of Trust was recorded is not supported under the law.

34. In the absence of evidence to the contrary, US Bank had the burden of proving 5316 Clover Blossom Ct Trust was not a BFP because for 5316 Clover Blossom Ct Trust to prove it was a BFP would be akin to proving a negative, i.e., proving 5316 Clover Blossom Ct Trust was not aware of information which would defeat BFP status. See Shadow Wood at 1112 ("The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment."); First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 1442, 71 Cal. Rptr. 2d 295 (1998) ("That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of its reconveyed deed of trust was an element of First Fidelity's case.... Showing that Alliance was not an innocent purchaser for value was hence an element of First Fidelity's claim.")

35. Equitable relief is only available when no adequate remedy at law exists. One who seeks equitable relief cannot merely sit on its hands to its detriment. It would be a gross injustice for 5316 Clover Blossom Ct Trust, an innocent third party who paid valuable consideration, to have its equitable rights subordinate to US Bank, who did nothing to protect itself at the foreclosure sale. See generally Holmberg v. Armbrecht, 66 S. Ct. 582, 584 (1946)(quoting Russell v. Todd, 60 S. Ct. 527, 532 (1940)) (finding "[t]here must be conscience, good faith, and reasonable diligence, to call into action the [equitable] powers of the court."). Therefore, the Court finds 5316 Clover Blossom Ct Trust is a BFP, undisturbed by any issue raised in US Bank's opposition, as 5316 Clover Blossom Ct

Trust's equitable interest as an innocent purchaser cannot be outweighed by the inaction of US Bank.

36. US Bank is not entitled to equitable relief because it was on notice of the foreclosure sale and failed to take adequate steps to protect its interest in the property. The Nevada Supreme Court has stated, that "[w]here the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." Shadow Wood, 366 P.3d at 1116 (quoting Nussbaumer v. Sup. Ct. in & for Yuma Cty., 107 Ariz. 504, 489 P.2d 843, 846 (1971)). In Shadow Wood, the Nevada Supreme Court held that "[c]onsideration of harm to potentially innocent third parties is especially pertinent where [the lender] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." Shadow Wood, 366 P.3d at 1114 fn. 7.

37. The policies and equities favor the 5316 Clover Blossom Ct Trust. In balancing the equities, 5316 Clover Blossom Ct Trust's interest as the successor to a bona fide purchaser is not outweighed by the inaction of US Bank.

38. US Bank shall take nothing by way of its counterclaim.

39. Any conclusion of law which should be a finding of fact shall be considered as such.

ORDER and JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss, converted to a motion for summary judgment, is granted.

IT IS FURTHER ORDERED that judgment is entered on behalf of plaintiff 5316 Clover Blossom Ct Trust and against defendant US Bank.

IT IS FURTHER ORDERED that title to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, and legally described as:

PARCEL I

LOT NINETY TWO (92) OF THE PLAT OF ARBOR GATE AS SHOWN BY MAP THEREOF ON FILE IN BOOK 91 OF PLATS, PAGE 71, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II
A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AND ENJOYMENT IN AND TO THE ASSOCIATION PROPERTY AS SET FORTH IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR COUNTRY GARDEN (ARBOR GATE) A COMMON INTEREST COMMUNITY RECORDED FEBRUARY 25, 2000 IN BOOK 20000225 AS DOCUMENT NO. 00963, OF OFFICIAL RECORDS OF CLARK COUNTY, NEVADA, AS THE SAME MAY FROM TIME TO TIME BE AMENDED AND/OR SUPPLEMENTED, WHICH EASEMENT IS APPURTENANT TO PARCEL ONE.

APN 124-31-220-092

is hereby quieted in the name of 5316 Clover Blossom Ct Trust.

IT IS FURTHER ORDERED that as a result of the foreclosure sale conducted on January 16, 2013, as evidenced by the foreclosure deed recorded January 24, 2013, the interests of defendant US Bank, as well as its successors and assigns in the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, are extinguished.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, have no further right, title or claim to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, or anyone acting on their behalf. are forever enjoined from asserting any estate, right, title or interest in the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

///

///

///

A704412

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns or anyone acting on their behalf, are forever barred from enforcing any rights against the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

DATED this 5 day of February, 2018.

DISTRICT COURT JUDGE
Case No. A704412

Respectfully submitted by:

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

By: _____
MICHAEL F. BOHN, ESQ.
ADAM R. TRIPPIEDI, ESQ.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff

EXHIBIT Q

EXHIBIT Q

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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,
Appellant,
vs.
5316 CLOVER BLOSSOM CT. TRUST; AND COUNTRY GARDEN OWNERS ASSOCIATION,
Respondents.

No. 75861-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

U.S. Bank National Association appeals from district court orders granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

The original owners of the subject property failed to make periodic payments to their homeowners' association (HOA), Country Garden Owners Association. The HOA recorded a notice of lien for, among other things, unpaid assessments and, later, a notice of default and election to sell to collect on the past due assessments and other fees pursuant to NRS Chapter 116. Allegedly, prior to the sale, the servicer for U.S Bank National Association (U.S. Bank) tendered payment to the HOA foreclosure agent for an amount exceeding nine months of past due assessments, but the HOA foreclosure agent rejected the payment. The HOA then proceeded with its foreclosure sale, and 5316 Clover Blossom Ct. Trust (Clover

Blossom) purchased the property and filed the underlying action seeking to quiet title. Before the parties conducted any discovery, Clover Blossom filed a motion for summary judgment, which the district court granted. However, this court vacated the judgment and remanded for further proceedings. *See U.S. Bank, N.A. v. 5316 Clover Blossom Ct. Tr.*, Docket No. 68915-COA (Order Vacating Judgment and Remanding, June 30, 2017).

On remand, U.S. Bank counterclaimed—also seeking to quiet title to the property—and asserted crossclaims against the HOA. Both Clover Blossom and the HOA moved to dismiss U.S. Bank's claims, but the district court construed both motions as motions for summary judgment on grounds that the parties presented matters outside the pleadings. The district court granted summary judgment in favor of Clover Blossom, concluding that U.S. Bank was required to take further actions beyond its attempted tender to satisfy the HOA's superpriority lien. The district court also granted summary judgment in favor of the HOA, concluding that U.S. Bank's crossclaims were time-barred. This appeal followed.

U.S. Bank argues primarily that the district court erred in converting Clover Blossom's motion to dismiss into a motion for summary judgment without first providing notice to U.S. Bank that it was going to do so. U.S. Bank additionally contends that summary judgment in favor of Clover Blossom was inappropriate because U.S. Bank's tender satisfied the superpriority portion of the HOA's lien and rendered the sale void as to that portion of the lien. Finally, U.S. Bank contends that the district court erred in finding that its crossclaims were time-barred.

This court reviews a district court's order granting summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all

other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* When deciding a summary judgment motion, all evidence must be viewed in a light most favorable to the nonmoving party. *Id.* General allegations and conclusory statements do not create genuine issues of fact. *Id.* at 731, 121 P.3d at 1030-31.

Assuming without deciding that the district court properly converted Clover Blossom's motion to dismiss into a motion for summary judgment, summary judgment was unwarranted because a genuine issue of material fact remained as to whether U.S. Bank's deed of trust survived the foreclosure sale. U.S. Bank alleged and produced evidence showing that it tendered an amount in excess of the superpriority portion of the HOA's lien to the HOA foreclosure agent prior to the sale. Viewing that evidence in the light most favorable to U.S. Bank, the tender would have extinguished the superpriority lien such that the buyer at the foreclosure sale took the property subject to U.S. Bank's deed of trust. *See Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 605, 427 P.3d 113, 116 (2018). Moreover, we reject Clover Blossom's arguments on appeal that the tender was impermissibly conditional, that it constituted an assignment of the HOA's superpriority rights to U.S. Bank, and that U.S. Bank was required to take further actions to preserve the tender for it to extinguish the superpriority lien. *See id.* at 607-11, 427 P.3d at 118-21 (stating that a plain reading of NRS 116.3116 indicates that tender of the superpriority amount was sufficient to satisfy the superpriority lien and the first deed of trust holder had a legal right to insist on preservation of the first deed of trust; that "[t]endering the superpriority portion of an HOA lien does not create, alienate, assign, or surrender an interest in land;" and rejecting the buyer's

arguments that the bank was required to record its tender or take further actions to keep the tender good). Accordingly, the district court erred in granting summary judgment in favor of Clover Blossom.

We next consider whether the district court properly granted summary judgment in favor of the HOA on U.S. Bank's crossclaims for unjust enrichment, tortious interference with contractual relations, breach of the duty of good faith set forth in NRS 116.1113, and wrongful foreclosure. U.S. Bank argues primarily that the district court misapplied the relevant statutes of limitation because it erroneously concluded that the claims accrued as of the date the foreclosure deed was recorded. U.S. Bank contends that its crossclaims did not accrue until the district court entered a judgment extinguishing its interest in the subject property.

A statute of limitations period runs from the date a cause of action accrues, which is "when a suit may be maintained thereon." *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997). Because U.S. Bank knew or should have known as of the time the foreclosure deed was recorded that the HOA either lacked authority to foreclose on the superpriority portion of its lien or, alternatively, that it properly foreclosed and thereby extinguished U.S. Bank's interest, we conclude that the district court correctly determined the date of accrual. *See Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 440 (1998) (noting that a cause of action generally accrues when the wrong occurs or when the wronged party discovers or reasonably should have discovered the facts giving rise to the cause of action). Because U.S. Bank filed its crossclaims against the HOA over four years after the foreclosure deed was recorded, all of those claims were time-barred and thus, the district court properly granted summary judgment on that ground. *See* NRS 11.190(3)(a) (providing that the

limitations period for "[a]n action upon a liability created by statute" is three years);[1] *In re Amerco Derivative Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011) (noting that the limitations period for unjust enrichment is four years); *Stalk v. Mushkin*, 125 Nev. 21, 26-27, 199 P.3d 838, 842 (2009) (noting that the limitations period for tortious interference with contractual relations is three years); *see also Clark*, 113 Nev. at 950-51, 944 P.2d at 789 ("Summary judgment is proper when a cause of action is barred by the statute of limitations.").[2]

---

[1]We reject U.S. Bank's argument that adjudicating its wrongful foreclosure claim necessarily requires interpreting the CC&Rs and that the limitations period for that claim is therefore the six-year period applicable to actions upon instruments in writing. Although the Supreme Court of Nevada has previously noted that wrongful foreclosure actions can involve interpreting CC&Rs (which are instruments in writing), it also noted that "[a] wrongful foreclosure claim challenges the authority behind the foreclosure, not the foreclosure act itself." *See McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 616, 310 P.3d 555, 559 (2013). Because the authority to foreclose in the manner the HOA did is found in NRS Chapter 116, and because U.S. Bank's wrongful foreclosure claim as pleaded in its counterclaim was not premised upon the CC&Rs, U.S. Bank has not demonstrated that the district court erred in concluding that the wrongful foreclosure claim was subject to the three-year limitations period provided under NRS 11.190(3)(a).

[2]We also reject U.S. Bank's argument that its delay in filing its crossclaims should be excused under the doctrine of equitable tolling. U.S. Bank contends that "false assurances" made by the HOA in the CC&Rs that foreclosure would have no effect on the first deed of trust justified its delay in filing the crossclaims. However, U.S. Bank's own actions in making efforts to satisfy the HOA's superpriority lien prior to the foreclosure sale show that it was aware of the impact that foreclosure might have on its interest in the property and the extent to which any purported superpriority foreclosure might exceed the HOA's authority. Accordingly, U.S. Bank failed to demonstrate that it reasonably waited to file suit. *Cf. City of N.*

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[3]

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Hon. James Crockett, District Judge
Akerman LLP/Las Vegas
Law Offices of Michael F. Bohn, Ltd.
Leach Kern Gruchow Anderson Song/Las Vegas
Eighth District Court Clerk

Las Vegas v. State, EMRB, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011) ("If a reasonable plaintiff would not have known of the existence of a possible claim within the limitations period, then equitable tolling will serve to extend the [period] until the plaintiff can gather what information he needs." (internal quotation marks omitted)).

[3]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

EXHIBIT R

EXHIBIT R

BK-S-16-16593-abl

In Re: Alessi & Koenig, LLC

I, DAVID ALESSI, do swear and affirm the following:

1. I am the holder and custodian of records for Alessi & Koenig, LLC and HOA Lawyers Group, and as such have access to the records and data maintained by these entities in the regular course of business.
2. Alessi & Koenig, LLC was licensed in the State of Nevada at the time the business records in this affidavit were created. Alessi & Koenig, LLC filed dissolution paperwork with the State of Nevada on or about September 28, 2016.
3. HOA Lawyers Group, LLC filed Articles of Organization with the State of Nevada on April 22, 2016.
4. I hereby certify that it was and is a regular practice of Alessi & Koenig, LLC and HOA Lawyers Group to make and keep records of the acts, events, conditions, and opinions of these entities in the ordinary course of its business, hereafter referred to as "collection files."
5. Alessi & Koenig, LLC has received a subpoena or other request calling for the production of the collection file.
6. I have examined the original collection file and have made or caused to be made a true and exact copy of them, and have placed or caused them to be in a "dropbox," consistent with the procedures established in Case No. BK-S-16-16593-ABL. I hereby certify that the documents in the "dropbox" are being provided in accordance with applicable law and discovery rules, are true and correct copies and uploads of all of the records in my files that pertain to the Case (except as set forth in a Privilege Log, if applicable) that are in my possession and control as a holder and custodian of such records. The documents in the "dropbox" have not been tampered with, destroyed, or otherwise altered by me or any person or party associated with me.
7. I further certify that the original collection file, from which the documents in the "dropbox" were uploaded as of the date the "dropbox" was created, were made by the

personnel of the above described entities at or near the time of the transactions, by or from information transmitted by, a person of knowledge of those matters.

8. I hereby declare under the penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

DATED this 7th day of September, 2017.

By: _____
DAVID ALESSI, ESQ.

STATE of NEVADA }
} ss.
COUNTY of CLARK }

SUBSCRIBED and SWORN to before me
By: DAVID ALESSI, ESQ. this
7th day of September, 2017

_____
NOTARY PUBLIC in and for said County and State

JONA LEPOMA
Notary Public State of Nevada
No. 07-2229-1
My Appt. Exp. Feb. 14, 2019

My Commission Expires: 2/14/19

OPPS
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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.: A-14-704412-C DEPT NO.: XXIV **OPPOSITION TO U.S. BANK'S MOTION FOR SUMMARY JUDGMENT**

Plaintiff, 5316 Clover Blossom Ct Trust, by and through its attorney, Michael F. Bohn, Esq. opposes the motion for summary judgment filed by U.S. Bank on October 1, 2020 as follows.

DATED this 15th day of October, 2020.

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

By: /s/ /Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
Attorney for plaintiff

POINTS AND AUTHORITIES

A. The defendant should not be permitted to assert payment as an affirmative defense because it is untimely

Both the plaintiff 5316 Clover Blossom Ct Trust and defendant U.S. Bank filed motions for summary judgment on October 1, 2020. Counsel for the plaintiff anticipated that tender would be raised in the defendants motion for summary judgment, and cited extensive authorities regarding the statute of limitations and the effect of the statute of limitations on the defendants claims and defenses. The plaintiff would incorporate by reference all the authorities cited in it's motion for summary judgment, and assert the additional authorities and arguments below.

It is anticipated that the defendant will assert that statutes of limitations do not run on defenses, citing Dredge Corp v. Wells Cargo, Inc. 80 Nev. 99, 389 P.2d 394, 396 (1964). However, there are exceptions to this rule.

By raising its time-barred claim of payment in the present case, U.S. Bank is engaging in the same "subterfuge to characterize a claim as a defense in order to avoid a temporal bar" that was condemned by the court in City of Saint Paul, Alaska v. Evans, 344 F.3d 1029, 1035 (9th Cir. 2003). In that case, the City filed an action asserting claims that were barred by the six-year statute of limitations, and in response to the defendant's counterclaims, the City raised "the identical allegations as defenses to TDX's counterclaims." Id. at 1031.

In finding that the City's responses to the defendant's counterclaims were also time-barred, the court of appeals stated:

> TDX's counterclaims were filed in response to the City's claims, not as affirmative claims for relief. Indeed, the City's defenses to those counterclaims are mirror images of its time-barred claims. **No matter what gloss the City puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar.** In launching the current litigation, the City abandoned its right to seek solace in the status of a defendant. **In the circumstance presented here, the City cannot hide behind the maxim applicable to defenses asserted in the normal course nor may it sidestep the temporal bar to its claims**. *See* Duell v. United Bank of Pueblo, 892 P.2d 336, 340 (Colo. Ct. App. 1994) (holding that an exception in the limitation statute for compulsory counterclaims did not allow a "plaintiff, who has instituted litigation by asserting time-barred claims, to revive those same claims simply by re-pleading them as counterclaims in a reply to a defendant's counterclaim that is compulsory"); Hamilton v. Cunningham, 880 F. Supp. 1407, 1414 (D. Colo.1995) (finding "illogical and unsound" "the suggestion that a plaintiff in one action can 'revive' his concededly stale claims by

filing them as counterclaims in a parallel action brought by the defendant solely for the purpose of having those claims declared stale"). (emphasis added)

Id. at 1035-1036.

There are two reported federal cases involving HOA foreclosures in Nevada which discuss the City of St. Paul case, and another unreported case which examine the issues presented in this case.

Judge Gordon decided two cases based on the St. Paul case on the same date and used identical citations in both cases. The cases are Bank of New York for Certificateholders of CWALT, Inc. v. S. Highlands Cmty. Ass'n, 329 F. Supp. 3d 1208, 1214–15 (D. Nev. 2018), and Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2006-OA16, Mortg. Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald Ranch Master Ass'n, 329 F. Supp. 3d 1221, 1228 (D. Nev. 2018) in which the judge wrote:

> For example, in City of Saint Paul, the City filed suit for declaratory relief against a counter-party to a settlement agreement two years after the limitation period for a claim by a governmental entity had expired. 344 F.3d at 1032-33. The defendant counterclaimed, to which the City then asserted as defenses mirror images of its affirmative claims. Id. at 1033. The district court ruled the City's claims for relief were untimely but ruled on the merits of the City's defenses. Id.
>
> On appeal, the Ninth Circuit held the City's defenses were also time-barred. Id. at 1035-36. In doing so, the Ninth Circuit stated that "the emphasis [is] on the respective roles of the parties in the litigation as a whole," and thus "whether affirmative defenses are exempt from statutes of limitations largely hinges on a realistic assessment of the parties' litigation posture." Id. at 1035. The City was the "aggressor" in the litigation by initiating the lawsuit and by "disturb[ing] the equilibrium between the parties" by challenging in court the agreement's validity. Id. The Ninth Circuit described the City's conduct as follows:
>
> > At bottom, this lawsuit boils down to the City's effort to invalidate the agreement. TDX's counterclaims were filed in response to the City's claims, not as affirmative claims for relief. Indeed, the City's defenses to those counterclaims are mirror images of its time-barred claims. No matter what gloss the City puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar. In launching the current litigation, the City abandoned its right to seek solace in the status of a defendant. In the circumstance presented here, the City cannot hide behind the maxim applicable to defenses asserted in the normal course nor may it sidestep the temporal bar to its claims.
> > Id. at 1035-36.
>
> Like the City in Evans, at bottom, count one of BONY's lawsuit is to determine whether the HOA sale extinguished the deed of trust. That claim is expired, however, **and I predict the Supreme Court of Nevada would not allow BONY to evade the limitation**

> **on that claim by re-characterizing it as a defense. See id. (stating "a plaintiff cannot engage in a subterfuge to characterize a claim as a defense in order to avoid a temporal bar"**). I do not decide whether BONY will be able to assert its arguments as defenses should SFR ever sue BONY because that issue is not before me. (emphasis added, footnotes omitted)

In Fed. Nat'l Mortg. Ass'n v. SFR Investments Pool 1, LLC, No. 217CV01750APGBNW, 2019 WL 3291522, at *3–4 (D. Nev. July 22, 2019), Judge Gordon stated:

> I applied City of Saint Paul in Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2006-OA16, Mortgage Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald Ranch Master Association, 329 F. Supp. 3d 1221 (D. Nev. 2018). There, I held that the plaintiff could not recharacterize its time-barred declaratory relief claim as an anticipatory defense to avoid the statute of limitations. 329 F. Supp. 3d at 1228-29; see also City of Saint Paul, 344 F.3d at 1035 (noting that federal circuit courts have held that "statutes of limitations and laches bar declaratory judgment claims seeking to establish a defense in anticipation of an action to enforce a contract or regulation"). However, I specifically noted that I was not deciding whether the plaintiff in that case would "be able to assert its arguments as defenses should [the defendant] ever sue [the plaintiff] because that issue [was] not before me." Id. at 1229.1
>
> The Supreme Court of Nevada addressed a similar situation in Nevada State Bank v. Jamison Family Partnership, 801 P.2d 1377 (Nev. 1990). There, the plaintiffs timely filed suit, which prompted the defendant to file counterclaims for deficiency judgments that were untimely under the relevant statute of limitation. Id. at 1380. The district court ruled that the counterclaims were time-barred, but it allowed the defendant to assert those same claims as an equitable recoupment defense. Id. at 1381. The Supreme Court of Nevada affirmed, concluding that although the counterclaims were untimely, "equity is also a consideration," so the district court "did not err" by allowing the defendant to assert the time-barred claims as an equitable recoupment affirmative defense. Id. at 1382-83; see also Shadow Wood HOA v. N.Y. Cmty. Bancorp., 366 P.3d 1105, 1114 (Nev. 2016) (en banc) (stating that when sitting in equity, "courts must consider the entirety of the circumstances that bear upon the equities").
>
> The counterclaimant in Jamison Family Partnership was not the "aggressor" as the City was in City of Saint Paul or as Fannie Mae is in this case, so the case is not directly on point. However, it suggests that the Supreme Court of Nevada would allow the assertion of untimely claims as defenses where equity favors doing so. I thus conclude that even if the Supreme Court of Nevada would adopt the rule in City of Saint Paul, it would hold that equity favors considering all of the issues bearing on the equities in this case, including a time-barred defense so long as the defense is not a means to obtain affirmative relief. This resolution balances the tension between the concerns City of Saint Paul addresses versus the general rule that a statute of limitations does not apply to defenses and cannot be used as a sword, while also giving effect to Nevada's directive that courts consider all factors bearing on the equities in a particular case.
>
> SFR's quiet title claim is equitable in nature. Shadow Wood HOA, 366 P.3d at 1111 (stating that "a person who brings a quiet title action may, consistent with NRS Chapter 40 and our long-standing equitable jurisprudence, invoke the court's inherent equitable powers to resolve the competing claims to such title"). When resolving this equitable claim, I must consider all of the circumstances bearing on the equities. Id. at 1114. That

> would include, in this case, Fannie Mae's invocation of the federal foreclosure bar even though Fannie Mae's own claim for declaratory relief is time-barred.
>
> The consequence of Fannie Mae's declaratory relief claims being time-barred is that Fannie Mae cannot obtain a judgment in its favor in this case declaring that the deed of trust survived the HOA foreclosure sale. I thus will not enter a judgment on SFR's counterclaim declaring that the deed of trust still encumbers the property even if Fannie Mae successfully establishes the federal foreclosure bar as a defense. That would improperly allow Fannie Mae to obtain the same affirmative relief that it sought in its time-barred claims. See Karoun Dairies, Inc. v. Karlacti, Inc., No. 08CV1521 AJB WVG, 2014 WL 3340917, at *9 (S.D. Cal. July 8, 2014) (stating that where a party "attempts to disturb the status quo and ... expand current rights using a defense" by requesting affirmative recovery, "a court may properly view it as a claim masquerading as a defense and find it time barred").

It is respectfully submitted that this court should follow the reasoning of the City of St. Paul case and Judge Gordon in these cases and find that the defendant cannot assert payment as an affirmative defense because it is untimely.

B. The equities here favor the plaintiff

The plaintiff asserts that the defendant by it's actions waived it's defense of tender, is estopped from asserting payment to the plaintiff's claim, and has unclean hands precluding equitable relief.

i. Waiver

This court is aware that some banks began tendering payments through the Miles Bauer law firm as early as 2010. However, the payments were never revealed until after the Supreme Court's decision in SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 334 P.3d 408 (2014). In fact, prior to the original SFR decision, the banks asserted in court that the foreclosure of an HOA lien does not extinguish the banks' trust deeds.

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

Here, the Bank alleges it sent payment back on December 6, 2012. However, the bank did nothing to let potential purchasers at sale know of the tender, and the sale occurred on January 16, 2013.

The defendant failed to timely file suit to ask the courts to determine it's rights. In fact, when the plaintiff filed this case on July 25, 2014. Defendant U.S. Bank only filed an answer and did not assert a counterclaim in it's original answer, filed on September 25, 2014. This was even after the original SFR decision was rendered. U.S. Bank did not file it's counterclaim until October 10, 2017, more than four years after the sale and more than three years after this litigation was filed.

ii. Estoppel

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

First, the Bank was apprised of the fact that it sent payment to Alessi in on December 6, 2012. Second, the Bank, by virtue of its letter and check, must have intended to pay the super-priority portion (at least what it deemed it to be). Third, the plaintiff had no knowledge of the letter or check, and as such when it purchased this property it believed it was purchasing free and clear of any deeds of trust. Fourth, the party controlling the plaintiff engaged in litigation with the Bank in other cases for years prior to this case being filed, and for much of that time, the Bank disputed the interpretation of the statute. What is more, the Bank did nothing for over three years after this sale despite allegedly sending a letter back in December, 2012. As such, the Bank is equitably estopped from claiming it paid the super-priority portion this late in the game.

3. Unclean Hands.

"The application of the unclean hands doctrine raises primarily a question of fact." Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 173 (9th Cir. 1989). To preclude equitable relief, the party's inequitable conduct must be "unconscientious, unjust, or marked by the want of good faith" and sufficiently connected with the "subject-matter or transaction in litigation." Las Vegas Fetish & Fantasy

Halloween Ball, Inc., 182 P.3d at 766. (citing Income Investors v. Shelton, 101 P.2d 973, 974 (Wash. 1940)). Two factors must be considered when assessing if a party's conduct is sufficiently connected to the action: "(1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct." Id. In the present case, the Bank allegedly paid the super-priority in December, 2012. Yet, after supposedly sending this payment did nothing for over four years.

All told, the equities weigh in favor of the plaintiff , not the Bank, and "Diamond Spur" does not change this reality. As the Shadow Wood Court noted, "[e]quitable relief will not be granted to the possible detriment of innocent third parties." Shadow Wood, at 1115 quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966).

CONCLUSION

It is respectfully submitted that this court, in exercising it's equitable powers, should find that the defendant is precluded from it's untimely assertion of tender, and deny the defendants motion for summary judgment.

DATED this 15th day of October, 2020

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 15th day of October, 2020, an electronic copy of the **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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/s/ /Marc Sameroff /
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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 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

U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO PLAINTIFF 5316 CLOVER BLOSSOM CT TRUST'S MOTION FOR SUMMARY JUDGMENT

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**) opposes the motion for summary judgment filed by 5316 Clover Blossom CT Trust (**Clover Blossom**).

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

U.S. Bank's deed of trust survived Country Gardens Owners Association's (the **HOA**) foreclosure sale as a result of pre-sale tender. This Court should deny Clover Blossom's summary judgment motion and instead grant summary judgment in U.S. Bank's favor.

U.S. Bank's quiet title/declaratory relief claim is not a "tender claim" that seeks to impose statutory liability on Clover Blossom and is not governed by a three-year statute of limitations. Tender is not a standalone claim—it is simply an affirmative defense asserted in response to Clover Blossom's quiet title/declaratory relief claim. Further, U.S. Bank does not seek to impose statutory liability on Clover Blossom—it simply requests a declaration that its deed of trust remains valid. This Court should reject Clover Blossom's attempts to mischaracterize U.S. Bank's claim and pigeonhole it into an inapplicable statute of limitations.

II. STATEMENT OF FACTS

A. Dennis and Geraldine Johnson borrow $147,456.00 to purchase property.

On or about June 24, 2004, borrowers Dennis and Geraldine Johnson executed a promissory note in the amount of $147,456.00 to purchase property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**property**). The note is secured by a deed of trust executed in favor of Countrywide Home Loans, Inc., and recorded on June 30, 2004. Exhibit A to U.S. Bank's MSJ. The deed of trust was assigned to U.S. Bank via an assignment of deed of trust recorded on June 20, 2011. Exhibit B to U.S. Bank's MSJ.

B. The HOA retains Alessi to foreclose.

The property is governed by the HOA's Declaration of Covenants, Conditions, and Restrictions, which require the property's owner to pay certain assessments to the HOA. Borrowers defaulted on those obligations. To recover this delinquency and foreclose if necessary, the HOA retained Alessi. Exhibit C to U.S. Bank's MSJ. (Deposition of David Alessi, 30(b)(6) representative for Alessi & Koenig, LLC (**Alessi depo.**)), at 7:21–8:1, 16:13-20; *see also* Exhibit D to U.S. Bank's MSJ. (Deposition of Gerald Marks, 30(b)(6) representative for Country Garden Owners Association (**Marks depo.**)), at 27:23–28:9.

On February 22, 2012, Alessi recorded a notice of delinquent assessment (**lien**). Exhibit E to U.S. Bank's MSJ. The notice stated the total amount of the borrowers' delinquency was $1,095.50. *Id.* On April 20, 2012, Alessi recorded a notice of default and election to sell. Exhibit F to U.S. Bank's MSJ. On October 31, 2012, Alessi recorded a notice of trustee's sale, which set the sale for November 28, 2012. Exhibit G to U.S. Bank's MSJ.

C. Miles Bauer tenders payment to protect the deed of trust, and Alessi rejects it.

Upon being notified of the HOA's lien, Bank of America, N.A. (**BANA**)–who serviced the loan secured by the deed of trust at the time–retained Miles Bauer to protect the deed of trust by satisfying the lien's superpriority portion. *See* Exhibit H to U.S. Bank's MSJ., at ¶ 4. On November 21, 2012, Miles Bauer sent a letter to Alessi requesting a payoff ledger showing the superpriority amount and "offer[ing] to pay that sum upon presentation of adequate proof of the same[.]" Exhibit H-1 to U.S. Bank's MSJ; *see also* Exhibit I to U.S. Bank's MSJ (Alessi status report showing receipt of this letter).

Alessi provided Miles Bauer with a payoff ledger on or about November 27, 2012. Exhibit H-2 to U.S. Bank's MSJ; *see also* Exhibit I to U.S. Bank's MSJ. The ledger showed the HOA had not incurred any maintenance or nuisance-abatement charges, and its monthly assessments were $55.00 each. *See* Exhibit H-2 to U.S. Bank's MSJ, at 227; *see also* Exhibit D to U.S. Bank's MSJ (Marks depo.), at 15:23-25. Nine months of delinquent assessments thus totaled $495.00. *See* Exhibit H-2 to U.S. Bank's MSJ, at 227.

Miles Bauer tendered a $1,494.50 check to Alessi on or about December 6, 2012. Exhibit H-3 to U.S. Bank's MSJ. It was enclosed by a letter explaining that the tendered amount was composed of the $495.00 constituting "9 months' worth of common assessments" in addition to $999.50 "in reasonable collection costs," and was meant "to satisfy [U.S. Bank's] obligations to the HOA as a holder of the first deed of trust[.]" *See id.*, at 230. Alessi rejected this superpriority-plus tender by refusing delivery and returning the check to Miles Bauer. Exhibit H to U.S. Bank's MSJ, at ¶ 9; *see also* Exhibit H-4 to U.S. Bank's MSJ; Exhibit J to U.S. Bank's MSJ, at 7 (Clover Blossom's appellate brief stating the check was delivered to Alessi and returned to Miles Bauer).

Approximately one month later, Alessi foreclosed on the HOA's lien, selling the property to Clover Blossom for $8,200.00. Exhibit K to U.S. Bank's MSJ.

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D. Alessi had a known policy of rejecting Miles Bauer's tenders.

Alessi rejected Miles Bauer's superpriority-plus tender because of what it viewed as "restrictive language" regarding the composition of the HOA's superpriority lien in the letter that accompanied the check. *See* Exhibit C to U.S. Bank's MSJ (Alessi depo.), at 39:6-25. Alessi incorrectly believed its collection costs were secured by the superpriority portion of its association-clients' liens. *See* Exhibit L to U.S. Bank's MSJ, at 688-89; *see also* Exhibit C to U.S. Bank's MSJ (Alessi depo.), at 42:10-25. Further, Alessi incorrectly believed the superpriority portion of an association's lien did not exist until the senior deed of trust encumbering the same property was foreclosed. *See* Exhibit L to U.S. Bank's MSJ, at 688-89.

Alessi asserted these positions against BANA in *BAC Home Loans Servicing, LP v. Stonefield II Homeowners Ass'n*, Case No. 2:11-cv-JCM-RJJ (D. Nev.), a case in which BANA sought a declaratory judgment against Alessi and other associations and collection agents establishing its right to tender superpriority payments to protect senior deeds of trust. *See* Exhibit M to U.S. Bank's MSJ. In its motion to dismiss BANA's complaint, Alessi argued that it had "every right to refuse" Miles Bauer's superpriority tenders because BANA "refuses to include attorneys' fees and collection costs in" them. Exhibit N to U.S. Bank's MSJ, at 875-76. Alessi asserted the same position in a brief filed after dispute was referred to NRED arbitration. Exhibit O to U.S. Bank's MSJ, at 725-27.

Because of these mistaken beliefs, Alessi rejected Miles Bauer's superpriority tenders as a matter of course. *See* Exhibit C to U.S. Bank's MSJ (Alessi depo.), at 29:24–30:8, 41:23–42:2.

E. Procedural history.

Clover Blossom filed its complaint on July 25, 2014, seeking to quiet title to the property. Clover Blossom moved for summary judgment on May 18, 2015, arguing the recitals contained in the trustee's deed were sufficient to show that it obtained title free and clear through the HOA's foreclosure sale. 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. This Court granted summary judgment in Clover Blossom's favor on September 10, 2015.

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

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HOA's sale. On remand, U.S. Bank filed an answer and counterclaims for quiet title/declaratory relief. Clover Blossom moved to dismiss U.S. Bank's counterclaims on October 23, 2017. At the hearing on Clover Blossom's motion, this Court converted the motion to dismiss into a summary judgment motion and announced judgment would be entered in Clover Blossom's favor. The Court entered findings of fact, conclusions of law, and judgment to that effect on February 8, 2018. Exhibit P to U.S. Bank's MSJ. The Court found Miles Bauer "mailed a check in the amount of $1,494.50 to" Alessi, which Alessi did not "accept[] or otherwise respond to[.]" *Id.* at 4. This Court concluded the HOA's sale extinguished the deed of trust because Miles Bauer's tender was conditional, U.S. Bank did not take further actions to protect the deed of trust after the tender was rejected, and Clover Blossom was a bona fide purchaser. *See id.*, at 8-11. U.S Bank appealed.

The Nevada Court of Appeals reversed the judgment in Clover Blossom's favor. Exhibit Q to U.S. Bank's MSJ. The Court of Appeals found U.S. Bank "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." *Id.*, at 3. The Court of Appeals remanded "for proceedings consistent with [its] order." *Id.*, at 6.[1]

III. STANDARD OF REVIEW

Summary judgment is appropriate if "no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." NRCP 56(c); *Wood v. Safeway, Inc.*, 121 Nev. 724, 730, 121 P.3d 1026, 1030 (2005). Factual disputes are genuine "if the evidence is such that a rational trier of fact could return a verdict in favor of the nonmoving party." *Id.* at 731, 121 P.3d at 1031.

[1] This Court should take judicial notice of the following recorded land records, Exhibits A, B, E, F, G, and K to U.S. Bank's MSJ, the following pleadings from the *Stonefield* matter, Exhibits M, N to U.S. Bank's MSJ, and the following pleadings and orders from this matter, Exhibits J, P, Q to U.S. Bank's MSJ. *See Whitehead v. Nevada Comm'n on Judicial Discipline*, 110 Nev. 380, 418, 873 P.2d 946, 970 n.35 (1994) ("[A] court may appropriately take judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); *see also Garcia v. Regional Trustee Servs. Corp.*, 669 Fed. Appx. 918 (9th Cir. 2016) (citing *Ormsby v. First Am. Title Co. of Nev.*, 591 F.3d 1199, 1203 (9th Cir. 2010) (explaining recorded property records are "official public records")). Exhibit I to U.S. Bank's MSJ was produced by Alessi and accompanied by an affidavit from Alessi's custodian of records, which is attached as Exhibit R to U.S. Bank's MSJ.

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IV. LEGAL ARGUMENT

The Nevada Supreme Court has established binding precedent regarding Miles Bauer's efforts to protect senior deeds of trust from association-lien foreclosures. In *Bank of America, N.A. v. SFR Investments Pool 1, LLC* (***Diamond Spur***), the Supreme Court held Miles Bauer's tenders "cure[] the default as to the superpriority portion of [an association's] lien" such that the foreclosure-sale purchaser's title is "subject to [the senior] deed of trust." 134 Nev. 604, 612, 427 P.3d 113, 121 (2018). In *7510 Perla Del Mar Ave. Trust v. Bank of America, N.A.* (***Perla Trust***), the Court held that Miles Bauer was "excused" from tendering superpriority payments to collection agents that "had a known policy of rejecting such payments." 136 Nev. 62, 63, 458 P.3d 348, 349 (2020).

Here, the deed of trust survived under *Diamond Spur* because Miles Bauer tendered a superpriority-plus payment to Alessi before the foreclosure sale. Even if Miles Bauer had not tendered, the deed of trust would have still survived under *Perla Trust* because Alessi had a known policy of rejecting Miles Bauer's tenders.[2] For both of these independent reasons, Clover Blossom's motion for summary judgment should be denied, and U.S. Bank is entitled to summary judgment.

Clover Blossom's motion is built on a strawman—that U.S. Bank asserted a "tender claim" against Clover Blossom under NRS 116 for the first time in its counterclaims. In reality, U.S. Bank's sole claim against Clover Blossom is for "Quiet Title/Declaratory Relief," through which it seeks a declaration that its deed of trust encumbers the property. This is the same claim contained in Clover Blossom' original complaint, which was timely filed four months after the HOA's foreclosure sale. Even if this Court determines U.S. Bank asserted an entirely new "tender claim," it is timely because it relates back to original complaint. Finally, if this Court determines U.S. Bank's claim does not relate back, it is still timely because it is governed by a four or five-year statute of limitations.

A. The deed of trust survived under *Diamond Spur*.

This case is controlled by *Diamond Spur*, where the Supreme Court held that one of Miles Bauer's superpriority tenders substantively identical to the tender in this case was a "valid tender [that] cured the default as to the superpriority portion of the HOA's lien[.]" *See Diamond Spur*, 134 Nev. at

[2] U.S. Bank is not waiving the arguments it has previously asserted, including its argument that the deed of trust survived because the sale was inequitable.

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612, 427 P.3d at 113. Under *Diamond Spur*, so long as the amount Miles Bauer tenders is sufficient to satisfy the superpriority amount of the foreclosing association's lien, the foreclosure-sale purchaser takes title subject to the senior deed of trust. *See id.*

There is no genuine dispute that Miles Bauer tendered a sufficient amount. Before the foreclosure sale, Alessi provided Miles Bauer with a payoff ledger showing the HOA's monthly assessments were $55.00 each and that the HOA had not incurred any maintenance or nuisance-abatement charges.[3] *See* Ex. H-2 to U.S. Bank's MSJ, at 227; *see also* Ex. D to U.S. Bank's MSJ (Marks depo.), at 15:23-25. The maximum superpriority portion of the HOA's lien nine months of delinquent assessments–totaled $495.00. *See Diamond Spur*, 134 Nev. at 606, 427 P.3d at 117 ("A plain reading of this statute indicates that the superpriority portion of an HOA lien includes only charges for maintenance and nuisance abatement, and nine months of unpaid assessments."). Miles Bauer delivered a check to Alessi in the amount of $1,494.50, which included the $495.00 superpriority amount and $999.50 in "reasonable collection costs." *See* Ex. H-3 to U.S. Bank's MSJ.

There is no doubt a $1,494.50 tender is sufficient to satisfy a $495.00 lien. Clover Blossom admitted on appeal that Alessi received Miles Bauer's tender. *See* Ex. J to U.S. Bank's MSJ, at 7 ("Miles Bauer sent a letter to the foreclosure agent and enclosed a check for $1,494.50 … The foreclosure agent returned the check to Miles Bauer."); *see also* Ex. H to U.S. Bank's MSJ, at ¶ 9; Ex. H-4 to U.S. Bank's MSJ. Like the agent in *Diamond Spur*, Alessi rejected the tender because it incorrectly believed the superpriority amount included all of its collection costs. *See* Ex. C to U.S. Bank's MSJ (Alessi depo.), at 39:6-25. Alessi's unjustified rejection is irrelevant–the fact Miles Bauer tendered an amount sufficient to satisfy the superpriority portion of the HOA's lien renders all other facts immaterial under *Diamond Spur*. Clover Blossom purchased the property subject to the deed of trust as a matter of law, and U.S. Bank is entitled to summary judgment order stating the deed of trust encumbers Clover Blossom's title to the property.

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[3] Clover Blossom admitted in its answering brief on appeal that Alessi sent this payoff ledger to Miles Bauer. *See* Ex. J to U.S. Bank's MSJ, at 6.

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B. The Deed Recitals Do Not Invalidate the Effect of the Tender.

Clover Blossom argues extensively the recitals in the trustee's deed received by it at the HOA Sale were "conclusive" and insulated the sale from the effect of U.S. Bank's tender. MSJ at 5-10. This argument misstates the law.

The Nevada Supreme Court soundly rejected Clover Blossom's argument that foreclosure-deed recitals are the end-all-be-all in these HOA-lien cases in *Shadow Wood*. The Court held the "conclusive" recitals found in association foreclosure deeds do not bar mortgagees or homeowners from challenging the validity of an association's foreclosure sale. *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016). The Court noted the deed recitals outlined in NRS 116.3116 only concern "default, notice, and publication of the" notice of sale, and thus do not provide any presumption regarding other aspects of the foreclosure, such as the commercial reasonableness of the sale or the effect of a pre-foreclosure payment from a mortgagee or homeowner. *Id.* at 56, 366 P.3d at 1110. The Court further held the recitals are not conclusive to even the matters recited, such as whether the homeowner was in default. *Id.* at 57, 366 P.3d at 1110 ("[W]hile it is possible to read a conclusive recital statute like NRS 116.31166 as conclusively establishing a default justifying a foreclosure when, in fact, no default occurred, such a reading would be breathtakingly broad and is probably legislatively unintended."). The Court rejected the HOA-sale purchaser's argument that the deed recitals alone defeated the action to set aside the subject foreclosure sale. *Id.* at 58, 366 P.3d at 1111.

U.S. Bank's counterclaims assert the deed of trust survived the HOA's foreclosure sale because of Bank of America's superpriority-plus tender, the HOA's decision to foreclose on only the sub-priority portion of its lien, and the commercial unreasonableness (nka equity) of the HOA's sale if it is construed as a superpriority sale. U.S. Bank's Am. Answer and Countercl. at ¶¶ 21-30. The recitals found in the trustee's deed upon sale are irrelevant to these arguments.

As the Nevada Supreme Court has held, under NRS 116.31166, the recitals in an association's trustee's deed only "implicate compliance only with the statutory prerequisites to foreclosure." *Shadow Wood*, 132 Nev. at 59, 366 P.3d at 1112. But where a tender cures the default as to the superpriority portion of an HOA's lien, a "foreclosure sale on a mortgage lien after valid tender satisfies

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that lien is void, as the lien is no longer in default." *Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121; *see Bank of N.Y. Mellon v. Nev. Ass'n Servs., Inc.*, 2020 WL 704901, at *1 (D. Nev. Feb. 12, 2020) ("[D]eed recitals are not always conclusive … To the extent there is any evidentiary value found in deed recitals, it is limited only to 'default, notice, and publication,' and statutory prerequisites to sale … The recitals do not address the issues in this case, including tender . . . ."); *Mann St. Tr. v. Elsimore Homeowners Ass'n*, No. 78531, 2020 WL 3470345, at *1 n.2 (Nev. June 24, 2020) (unpublished) ("the foreclosure deed's recitals did not rule out the possibility that a superpriority tender had been made.").

Even if NRS 116.31166 spoke to the presence or absence of tender, it would not allow Clover Blossom to use the recitals as a tool to replace the actual fact of tender. The Nevada Supreme Court recently made this clear: "[w]e are unwilling to accept a trustee's legal conclusions contrary to the actual facts of the foreclosure process as conclusive evidence where an accurate reporting of the facts would have shown the legal conclusions to be incorrect." *See U.S. Bank, N.A. v. Resources Grp., LLC*, 135 Nev. 199, 205 n.4, 444 P.3d 442, 448 n.4 (2019) (internal quotations omitted). *Resources Group* concluded the notice recitals in NRS 116.31166 were ineffective because the foreclosure trustee failed to mail the notices—the fiction in the recitals could not replace the actual facts. *Id.* The Supreme Court similarly concluded the notice recitals in NRS 107.030(8), NRS 116.31166's sister statute, were of no consequence since there was confusion as to proper notice. *Dayco Funding Corp. v. Mona*, No. 70833, 2018 WL 4778005, at *6 (Nev. Oct. 2, 2018) (unpublished). Errant recitals will not prevail "over the actual facts of the foreclosure process." *Resources Grp.*, 135 Nev. at 205 n.4, 444 P.3d at 448 n.4.[4]

[4] The timing of the foreclosure notices supports U.S. Bank's position. The foreclosure deed states "[d]efault occurred as set forth in the Notice of Default. . . ." Exhibit K to U.S. Bank's MSJ. The notice of default was recorded in April 2012, more than nine months before the actual sale. Exhibit F to U.S. Bank's MSJ. The notice of default—which says nothing about the superpriority lien—simply discloses that a default has occurred at the time the notice is executed. The notice does not freeze the default in time; a mortgage lender (or borrower/homeowner) can cure the default at any time after the notice of default. Otherwise, there would be no reason to require the HOA to give notice of the default. Even if the recital of default was relevant, it could establish only that there was a default at the time of the notice—something that is not disputed. BANA tendered after receiving that notice and in advance of the sale. Even if the deed recitals were relevant, Clover Bloom would have to show reliance on them as an inducement for bidding on the property. *See Millennium Rock Mortg., Inc. v. T.D. Service Co.*, 102 Cal.Rptr.3d 544, 548 (Ct. App. 2009) ("The sale is deemed complete, for most purposes, when the auctioneer accepts the final bid, even though the trustee's deed is not given to the purchaser until a subsequent time."). Timing makes this impossible.

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The recitals in the deed regarding compliance with the statutory prerequisites to foreclosure cannot operate to validate a void sale. Clover Blossom's suggestion to the contrary reasserts arguments previously rejected by the Nevada Supreme Court in *Diamond Spur*.

C. U.S. Bank's Tender Argument is Not Subject to a Limitations Period.

Clover Blossom initiated this action by asserting the quiet title and declaratory relief claims at issue on July 25, 2014— less than two years after the HOA's foreclosure sale. *See* Compl. In its initial answer filed on September 25, 2014, U.S. Bank asserted as an affirmative defense to Clover Blossom's quiet title and declaratory relief claims that the HOA sale was "void as to [U.S. Bank]." *See* Answer at 4; *see also Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121 ("Because Bank of America's valid tender cured the default as to the superpriority portion of the HOA's lien, the HOA's foreclosure on the entire lien resulted in a ***void sale as to the superpriority portion***." (emphasis added). In its answer and counterclaims, U.S. Bank explicitly asserted "[t]he super-priority lien was satisfied prior to the homeowners association's foreclosure under the doctrines of tender, estoppel, laches, or waiver." Ans. and Counterclaims at 5.

1. U.S. Bank's Invocation of Tender as a Defense to Clover Blossom's Claims Is Not Subject to a Limitations Period.

Even if U.S. Bank's invocation of tender in its quiet title and declaratory relief counterclaims is subject to a limitations period, U.S. Bank also asserted tender as a defense to Clover Blossom's quiet title and declaratory judgment claims.

It is black letter Nevada law that "[l]imitations do not run against defenses. The statute is only available as a shield, not as a sword." *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964); *see SFR Invs. Pool 1, LLC v. Carrington Mortg. Servs., LLC*, No. 76614, 2020 WL 5634160, at *1 (Nev. Sept. 18, 2020) (unpublished)[5]; *SFR Invs. Pool 1, LLC v. Bank of N.Y. Mellon*, No. 76644, 2020 WL 5634126, at *1 (Nev. Sept. 18, 2020) (unpublished); *Citimortgage, Inc. v. River Glider Ave. Tr.*, No. 75294, 2020 WL 3415781, at *1 (Nev. June 19, 2020) (unpublished); *Renfroe v.*

[5] In *Carrington*, the *Supreme Court* opined: "We are not persuaded by appellant's argument that respondent is time-barred from asserting that Miles Bauer's tender preserved its deed of trust. Appellant has not provided any authority to support the proposition that "tender" is a claim or cause of action to which a limitations period would apply, . . nor is any authority self-evident." 2020 WL 5634160, at *1.

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Carrington Mortgage Servs., LLC, No. 76450, 2020 WL 762638, at *2 (Nev. Feb. 14, 2020). That is because "statutes of limitations are intended to protect a defendant against the evidentiary problems associated with defending a stale claim." *Nev. State Bank v. Jamison Family P'ship*, 106 Nev. 792, 798, 801 P.2d 1377, 1381 (1990). "To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation." *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 72 (1956). Unsurprisingly, Nevada's chapter listing various statutes of limitations explains that "[c]ivil actions can only be commenced within the periods prescribed in this chapter," and says nothing about limitations for raising defenses. NRS 11.010. Because U.S. Bank asserted tender as an affirmative defense, no statute of limitations applies to bar U.S. Bank from invoking tender as a defense to Clover Blossom's claims.

While Clover Blossom cited *Jamison* for the proposition that U.S. Bank's claims are time-barred, *see* MSJ at 5, *Jamison* actually undermines Clover Blossom's position. In *Jamison*, the Nevada Supreme Court held that a party should be able to raise as an affirmative defense a claim that was otherwise time-barred. 106 Nev. at 798-99, 801 P.2d at 1381-82 (despite the limitations period having run for a compulsory counterclaim, "the defendant can nonetheless assert his claim as an affirmative defense"). To the extent Clover Blossom's quiet-title claim is properly before this Court, there is no question that the court could evaluate the merits of the argument that tender provides the rule of decision. *Id*.

2. Tender is not a new cause of action – it is an argument supporting U.S. Bank's quiet title and declaratory relief claim.

The theory of void foreclosure asserted in U.S. Bank's original answer, and the additional tender allegations in support of U.S. Bank's affirmative defenses and counterclaims, do not constitute a new claim.[6] *See* Answer at 4; Answer and Countercl. at 4-12. Tender is simply one of the legal theories opposing the quiet title and declaratory relief claim that was asserted in Clover Blossom's original complaint on July 25, 2014. *See* Compl. at 1-3. As the United States Supreme Court has

[6] Although U.S. Bank did assert a counterclaim for declaratory judgment and quiet title out of an abundance of caution, it was not required to do so.

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explained, statutes of limitations bar untimely lawsuits, but have no application to legal theories raised in a pending suit:

> [T]he basic policy behind statutes of limitations has no relevance to the situation here. The purpose of such statutes is to keep stale litigation out of the courts. **They are aimed at lawsuits, not at the consideration of particular issues in lawsuits**. Here the action was already in court and held to have been brought in time. To use the statute of limitations to cut off the consideration of a particular defense in the case is quite foreign to the policy of preventing the commencement of stale litigation. **We think it would be incongruous to hold that once a lawsuit is properly before the court, decision must be made without consideration of all the issues in the case and without the benefit of all the applicable law**. If this litigation is not stale, then no issue in it can be deemed stale.

Western Pac. R.R, 352 U.S. at 72 (emphasis added).

Clover Blossom's argument that U.S. Bank asserted tender as a standalone claim for relief against it conflates legal theories with causes of action. *See* MSJ at 5. A "statute of limitations has application to the time within which civil actions may be commenced 'after the cause of action shall have accrued.'" *Dredge*, 80 Nev. at 102, 389 P.2d at 396 (quoting NRS 11.010). A "cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Put another way, a "cause of action accrues when a suit may be maintained thereon." *See Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 790 (1997).

U.S. Bank's "tender claim" is not a cause of action because neither U.S. Bank nor its predecessors-in-interest under the deed of trust "sustain[ed] injuries" when the tender occurred. *See Petersen*, 106 Nev. 274, 792 P.2d at 20. To the contrary, Miles Bauer's tender preserved the deed of trust by operation of law. *See Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121. Moreover, if U.S. Bank's "tender claim" was a standalone cause of action against Clover Blossom, then U.S. Bank's predecessor-in-interest could have "maintained a [tender] suit" against Clover Blossom the day the tender occurred (December 6, 2012), as that is when the cause of action would have accrued. *See Clark*, 113 Nev. at 951, 944 P.2d at 790. Clover Blossom did not own the property more than two months after that date. U.S. Bank's alleged "tender claim" against Clover Blossom is not a separate cause of action. Instead, it is a legal theory that can be raised in opposition to Clover Blossom's quiet title and declaratory relief claims.

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D. If tender is construed as a new cause of action, it should relate back to the original answer.

While the answer and counterclaims filed on October 10, 2017 in responded to the amended complaint contained additional allegations regarding Miles Bauer's tender as an affirmative defense to that claim and asserted declaratory relief and quiet title claims against Clover Blossom, s*ee* Answer and Countercl. at 4-12, the claims asserted in the original complaint–whether the deed of trust was extinguished by the sale–remained the same. Even if U.S. Bank's tender argument is construed as a standalone cause of action first asserted in the answer to amended complaint and counterclaims, the amendment relates back to the filing date of the original answer.[7]

"An amendment to a pleading relates back to the date of the original pleading when … the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading[.]" NRCP 15(c)(1). In determining whether an amendment "relates back" to a party's original pleadings, this Court considers whether those initial pleadings gave "fair notice of the fact situation" that give rise to the amendment. *Nelson v. City of Las Vegas*, 99 Nev. 548, 556, 665 P.2d 1141, 1146 (1983). Stated differently, where an "amendment states a *new cause of action* that describes *a new and entirely different source of damages*, the amendment does not relate back . . . ." *Id.* Finally, "NRCP 15(c) is to be liberally construed to allow relation back of the amended pleading where the amended party will be put to no disadvantage." *Costello v. Casler*, 127 Nev. 436, 441, 254 P.3d 631, 634 (2011).

If U.S. Bank's tender argument is a standalone claim, the amendment adding that claim satisfies Rule 15(c)'s test. The tender argument "arose out of the conduct, transaction, or occurrence set out" in the original answer–the imposition and eventual foreclosure of the HOA's lien. *See* NRCP 15(c)(1); *see also* Answer at 3-5. And Clover Blossom "will be put to no disadvantage" if the tender claim relates back. On July 22, 2015, U.S. Bank filed its summary judgment opposition and countermotion for summary judgment, which expressly set forth the facts entitling U.S. Bank to summary judgment on tender. Clover Blossom cannot claim U.S. Bank's tender argument came as any surprise.

…

[7] Although it was technically an answer to the first amended complaint rather than an amendment, the parties stipulated that it was an amendment of U.S. Bank's original answer. *See* stipulation and order to amend pleading and add parties.

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Clover Blossom has not and cannot show it will suffer any prejudice if U.S. Bank's supposed "tender claim" relates back to the original complaint. *See* MSJ at 9. Facing a case it will surely lose on the merits, *see Diamond Spur*, 134 Nev. at 612, 427 P.3d at 121, Clover Blossom seeks to win on an erroneous technicality. But "[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." *Costello*, 127 Nev. at 441, 254 P.3d at 441; *see also Schmidt v. Sadri*, 95 Nev. 702, 705, 601 P.2d 713, 715 (1979) ("The [L]egislature envisioned that [the Nevada Rules of Civil Procedure] would serve to simplify existing judicial procedures and promote the speedy determination of litigation upon its merits.").

Not allowing U.S. Bank's answer and compulsory counterclaim to relate back in this instance would produce an illogical and absurd result. Clover Blossom filed a motion to amend its complaint on February 9, 2015, which the court granted on March 12, 2015. Clover Blossom filed its amended complaint on April 23, 2015–prior to entry of the order granting it leave to amend on May 6, 2015. Then, before U.S. Bank's time for a responsive pleading to the amended complaint had even expired, Clover Blossom filed a summary judgment motion on May 18, 2015. On September 10, 2015, the Court entered an order granting Clover Blossom's summary judgment motion. The case was on appeal until the Nevada Court of Appeals reversed and remanded on June 30, 2017, and remittitur issued in this Court on July 31, 2017. U.S. Bank never had a chance to assert its counterclaims because Clover Blossom's premature summary judgment motion was granted and subsequently appealed. U.S. Bank's amended answer should relate back to the date of the original answer on September 25, 2014.

E. Even if U.S. Bank asserted a new claim that does not relate back, it is timely.

Even if this Court holds U.S. Bank's tender argument is a standalone claim that does not relate back, it is still timely. NRS 11.190(3)'s three-year statute of limitations does not apply because U.S. Bank's claim does not seek to impose liability created by statute. Instead, U.S. Bank simply seeks a declaration that its deed of trust remains valid. Because this relief is prospective, no statute of limitations applies. Alternatively, if this Court determines U.S. Bank seeks retrospective relief, U.S. Bank's claim is timely because it is governed by the five-year statutes of limitations found in NRS 11.070 and 11.080 for certain actions related to real property.

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1. NRS 11.190(3) does not apply.

NRS 11.190(3) provides a three-year statute of limitations for an "action upon a liability created by statute, other than a penalty of forfeiture." This statute only applies to actions that seek to impose "a liability which would not exist but for the statute." *See Torrealba v. Kesmetis*, 124 Nev. 95, 102, 178 P.3d 716, 722 (2008).

Quoting NRS 11.190(3), Clover Blossom contends U.S. Bank's claim is an "action upon a liability created by statute." *See* MSJ at 4. Clover Blossom's argument misses the mark for two reasons. First, U.S. Bank's claim does not seek to impose liability on Clover Blossom. Second, the tender's effect is not prescribed solely by statute.

a. U.S. Bank does not seek to impose liability on Clover Blossom.

The statute of limitations in NRS 11.190(3) does not apply to any cause of action which implicates a statutory provision; it applies only to an "action upon a **liability** created by statute." *See* NRS 11.190(3) (emphasis added). "Liability" most commonly refers to money damages – "[a] financial or pecuniary obligation in a specified amount." *Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019). Consistent with this understanding of "liability," courts evaluating whether NRS 11.190(3)'s statute of limitations applied to a particular claim have analyzed whether the defendant's liability for damages is prescribed by statute. *See, e.g., Torrealba*, 124 Nev. at 721, 178 P.3d at 722 (holding NRS 11.190(3) applied to claims against notaries because the claims were brought under statutes that imposed "civil liabilities for notary public misconduct and neglect"); *Camino Props., LLC v. Insurance Co. of the West*, 2015 WL 2225945, at *3 (D. Nev. May 12, 2015) (holding NRS 11.190(3) did not apply to a claim that did not allege either defendant "violated a statute"); *Gonzalez v. Pacific Fruit Exp. Co.*, 99 F. Supp. 1012, 1015 (D. Nev. 1951) (holding NRS 11.190(3) did not apply to statutory negligence claims because common-law liability for negligence existed independent of the statute).

Courts have held NRS 11.190(3)(a) does not apply to a senior lender's quiet title and declaratory relief claim against an HOA-sale purchaser. *See, e.g., HSBC Bank USA, N.A., as Trustee v. 3645 Julia Waldene St. Trust*, 2019 WL 1575622, at *3 (D. Nev. Apr. 11, 2019); *Lakeview Loan Servs., LLC v. SFR Investments Pool 1, LLC*, 2019 WL 1410885, at *5 (D. Nev. Mar. 28, 2019); *Bank*

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of New York Mellon v. SFR Investments Pool 1, LLC, 2019 WL 1338387, at *3 (D. Nev. Mar. 25, 2019); *Ocwen Loan Servicing, LLC v. SFR Investments Pool 1, LLC*, 2018 WL 2292807, at *3 (D. Nev. May 18, 2018). As the Court explained in *Julia Waldene*, such "claims are not actions upon a liability created by statute; they are equitable actions to determine adverse interests in real property, as codified in NRS 40.010." 2019 WL 1575622, at *3; *see also Lakeview Loan*, 2019 WL 1410885, at *5 ("Because actions to quiet title exist independent of statute under a court's inherent equitable jurisdiction, NRS 11.190(3)(a) does not apply.").

Like the senior lenders in these cases, U.S. Bank does not seek to impose liability on Clover Blossom, nor does it contend Clover Blossom violated a statute. U.S. Bank simply seeks a declaration that its deed of trust remains valid. NRS 11.190(3)(a) does not apply.

b. A tender's effect is not prescribed solely by statute.

NRS 11.190(3)(a) does not apply for an additional reason—the effect of Miles Bauer's tender was not prescribed solely by statute. Clover Blossom contends that "[i]n *Diamond Spur* … the Nevada Supreme Court decided the issue of satisfaction of the superpriority lien, by tender, solely under the language in NRS 116.3116." *See* MSJ at 9.

Clover Blossom is mistaken. While the Supreme Court in *Diamond Spur* analyzed NRS 116 to determine whether Miles Bauer's check was in an amount sufficient to satisfy the superpriority portion of the association's lien, it applied the common law doctrine of tender to determine the check cured the superpriority default even though it was rejected. *See Diamond Spur*, 134 Nev. at 606-11, 427 P.3d at 117-121 (citing case law and treatises discussing the tender doctrine). Because the effect of Miles Bauer's tender is not governed solely by statute, NRS 11.190(3)(a) would not apply to U.S. Bank's alleged "tender claim" even if that statute could apply to claims that do not seek monetary damages. *See Torrealba*, 124 Nev. at 102, 178 P.3d at 95 ("The phrase 'liability created by statute' means a liability **which would not exist but for** the statute.") (emphasis added) (quoting NRS 11.190(3)(a)).

2. U.S. Bank's claim for prospective relief is not governed by a statute of limitations.

U.S. Bank's claim is timely because it seeks only prospective relief to which no statute of limitations applies. Under Nevada law, suits for "injunctive and declaratory relief" seeking to establish

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a party's current and future rights are not governed by statutes of limitations. *City of Fernley v. State*, 132 Nev. at 34-35, 366 P.3d 699, 708 (2016).

In *City of Fernley*, the City challenged the constitutionality of a Nevada tax law. 132 Nev. at 43, 366 P.3d at 707. The Nevada Supreme Court held the City was time-barred from seeking retrospective relief in the form of damages under NRS 11.220's four-year statute of limitations. *Id.* at 44, 366 P.3d at 708. But the Court held that no statute of limitations applied to its claim for a declaratory judgment regarding the prospective application of the tax law. *Id.*. The Court explained that "no statutory limitation applies 'when a declaratory judgment will serve a practical end in determining and stabilizing an uncertain or disputed jural question, either as to present or prospective obligations'" of the parties. *See id.* at 42, 366 P.3d at 706 (quoting *Kirn v. Noyes*, 262 A.D. 581, 31 N.Y.S. 2d 90, 93 (1941)).

Like the claimants in *City of Fernley*, the relief U.S. Bank seeks is prospective – a declaration that its deed of trust remains valid and can be foreclosed in the future. *See* Answer and Countercl. at 11-12. U.S. Bank's deed of trust remains valid because Miles Bauer's superpriority tender preserved the deed of trust by operation of law, as U.S. Bank explained in its summary judgment motion. While U.S. Bank was not required to file suit to establish the tender's effect as a legal matter, it did as a practical matter. Without a declaratory judgment that its deed of trust survived, the possibility would remain that Clover Blossom would challenge the foreclosure post-sale, which would chill the post-sale market, complicate eviction proceedings against Clover Blossom's tenant, and make title insurance difficult to obtain. A pre-foreclosure declaratory judgment would serve to alleviate these future concerns, confirming the relief U.S. Bank seeks has a practical, prospective effect. *See Luckenbach S.S. Co. v. United States*, 312 F.2d 545, 550 (2nd Cir. 1963) ("The declaratory judgment [is] designed to permit the termination of a continuing actual controversy when that controversy might otherwise continue indefinitely.") (cited in *Dredge*). No statute of limitations applies.

3. Alternatively, if a limitations period applies, it is four or five years.

If this Court concludes a statute of limitations applies, the five-year statutes of limitations found in NRS 11.070 and 11.080 for certain actions related to real property, or NRS 11.220's catch-all four-year statute of limitations, provide the appropriate limitations period.

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NRS 11.070 provides a five-year limitations period for claims "founded upon the title to real property" where "the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the premises in question[.]" Thus, NRS 11.070 applies to a claim if (1) title to the property is foundational to the claim, and (2) the claimant, or its ancestor, predecessor, or grantor, had possession within five years of the filing date.

U.S. Bank's claim satisfies both elements. First, the claim is "founded upon … title," *see* NRS 11.070, because U.S. Bank seeks a declaration that Clover Blossom's title remains encumbered by the deed of trust. *See* Answer and Countercl. at 11-12. Second, the borrower, who was the "grantor" of the deed of trust, was "seized or possessed of the" property within the last five years. *See* NRS 107.410 ("'Borrower' means a natural person who is a mortgagor or grantor of a deed of trust[.]"). If a statute of limitations applies to U.S. Bank's claim, NRS 11.070's five-year period governs. *See Bank of New York Mellon v. Traccia Homeowners Ass'n*, 2018 WL 1459127, at *4 (Mar. 23, 2018) (holding that NRS 11.070 applied to senior lender's quiet title claim against HOA-sale purchaser).

> Alternatively, NRS 11.080's five-year limitations period applies. That statute provides: No action for the recovery of real property, or for the recovery of the possession thereof other than mining claims, shall be maintained, unless it appears that the plaintiff or the plaintiff's ancestor, predecessor or grantor was seized or possessed of the premises in question, within 5 years before the commencement thereof.

NRS 11.080. The statutory text indicates the limitations period applies to disputes about property interests other than title, as it encompasses "recovery of the possession thereof **other than mining claims**." *See id.* (emphasis added).

Mining claims are not a subset of real property, but rather a distinct form of property interest – one entity might own title to land while another owns the mining rights. *See, e.g., Mills v. United States*, 742 F.3d 400, 403 (9th Cir. 2014) (discussing different owners of legal title, mining rights, and possessory rights in land). That the Nevada legislature expressly exempted a non-title interest confirms this limitations period encompasses disputes about a variety of property interests, not just title. In fact, the Nevada Supreme Court has held NRS 11.080 supplies the statute of limitations for an HOA-sale purchaser's claim against a senior lender that the lender's deed of trust was extinguished. *See Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, 133 Nev. 21, 27,

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388 P.3d 226, 232 (2017). The statute of limitations would apply at least equally to a senior lender seeking a declaration that its deed of trust survived.

c. If not five years, then the four-year "catch-all" statute of limitations applies.

If this Court disagrees that the five-year limitations period found in either NRS 11.070 or NRS 11.080 applies, it should hold that NRS 11.220's four-year limitations period governs. This catch-all statute provides a four-year statute of limitations for claims to which "no squarely applicable limitations statute" governs. *See Federal Housing Finance Agency v. LN Management LLC, Series 2937 Barboursville*, 369 F. Supp. 3d, 1101, 1111 (D. Nev. 2019).

In sum, U.S. Bank's claim is timely if this Court applies either a four or five-year statute of limitations, as the answer and counterclaims filed on October 10, 2017 should relate back to the filing of the original answer on September 25, 2014, within four years of the HOA's January 16, 2013 foreclosure sale. If this Court has any uncertainty regarding which limitations period applies, policy dictate it apply the longer period. *See Wise v. Verizon Commc'ns, Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) ("When choosing between multiple potentially-applicable statutes, as a matter of federal policy the longer statute of limitations should apply."); *Fed. Deposit Ins. Corp. v. Former Officers and Dirs. of Metro. Bank*, 884 F.2d 1304, 1307 (9th Cir. 1989) ("This circuit has held, however, that when there is a substantial question which of two conflicting statutes of limitations to apply, the court should apply the longer.").[8]

F. The deed of trust survived under *Perla Trust.*

Alessi's "known policy" of rejecting Miles Bauer's tenders provides an independent basis to grant summary judgment in U.S. Bank's favor under *Perla Trust.* There, the Supreme Court held

[8] If this Court determines that a three-year or four-year statute of limitations applies and that U.S. Bank's answer and counterclaims do not relate back, the limitations period should be tolled during the period this case was on appeal until remittitur–from September 28, 2015 to July 31, 2017–as U.S. Bank was unable to file its answer and counterclaims during the pendency of the appeal. *See Young v. United States*, 535 U.S. 43, 50 (2002) (holding limitations period for claim against debtor tolled while debtor protected by automatic stay); *see also Irwin v. Dept. of Veterans Affairs*, 489 U.S. 89, 96 (1990) ("We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period."). Tolling for this period would make U.S. Bank's purported "tender claim" timely under either the three-year or four-year statute of limitations that Clover Blossom argues applies, because the answer and counterclaims would have been filed 42 days before three years had elapsed.

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Miles Bauer was excused from tendering superpriority payments to Nevada Association Services, Inc. (**NAS**) because "NAS's policy [was] to have its receptionist reject any check for less than the full lien amount if it was accompanied by a condition." *Perla Trust*, 136 Nev. at 64, 458 P.3d at 349. Since "NAS would have rejected" a "check for the superpriority portion of the lien," Miles Bauer was "excused from making a formal tender[.]" *Id.* at 67, 458 P.3d at 351-52. This excused tender had the same effect as a formal superpriority tender–it "cured the default as to that portion of [the association's] lien by operation of law" such that the HOA-sale purchaser took title subject to the senior deed of trust. *Id.* at 65 n.1, 458 P.3d at 350.

Like NAS, Alessi had a known policy of rejecting Miles Bauer's superpriority tenders. In response to BANA's January 31, 2011 lawsuit seeking a declaratory judgment establishing its right to tender superpriority payments to protect its deeds of trust, Ex. M to U.S. Bank's MSJ, Alessi argued that it had "every right to refuse" Miles Bauer's superpriority tenders because BANA "refuse[d] to include attorneys' fees and collection costs in" them. Ex. N to U.S. Bank's MSJ, at 875; Ex. O to U.S. Bank's MSJ, at 725-27.[9] On February 27, 2012 and July 26, 2012, Alessi sent Miles Bauer letters stating that it would not accept Miles Bauer's tenders because "nine-month super-priority is not triggered until the beneficiary under the first deed of trust forecloses," and once that portion is triggered, it includes Alessi's "costs of collecting[.]" *See* Ex. L to U.S. Bank's MSJ, at 688-89. When asked why Alessi did not "inform Miles Bauer [why] it was rejecting" the superpriority tender it submitted for this property in December 2012, Mr. Alessi testified that "Miles Bauer knew" the reason because Alessi had "engaged in this dance with Miles Bauer for … several years[.]" *See* Ex. C to U.S. Bank's MSJ (Alessi depo.), at 41:23–42:2.

There can be no genuine dispute that Alessi had a known policy of rejecting Miles Bauer's tenders during the time of the foreclosure here in 2012. *See Bank of Am., N.A. v. Lakeview Owners'*

[9] The Nevada Supreme Court held the arbitration brief filed by NAS in this matter – which stated the same incorrect position as Alessi regarding when a superpriority lien arises (after a deed of trust foreclosure) – established "that NAS had a 'known policy of reject[ion]' sufficient to excuse formal tender under [*Perla Trust*]." *See U.S. Bank N.A. Tr. to Wachovia Bank, N.A. v. SFR Invs. Pool 1, LLC*, No. 78003, 2020 WL 3003017, at *1 (Nev. June 4, 2020) (unpublished) (explaining that "the necessary implication" of NAS's position was "that NAS would not accept a superpriority tender before the first deed of trust was foreclosed").

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Ass'n, 2020 WL 4586861, at *2 (D. Nev. Aug. 7, 2020) ("[T]here is no genuine dispute that Alessi had a known policy that it would not accept a check for only nine months of assessments that was accompanied by a letter containing conditional language identical to that at issue in [*Perla Trust*]."). Consequently, U.S. Bank's deed of trust would have survived even if Miles Bauer had not tendered a superpriority payment. U.S. Bank is thus entitled to summary judgment.[10]

V. CONCLUSION

This Court should deny Clover Blossom's summary judgment motion and grant summary judgment in U.S. Bank's favor on Clover Blossom's quiet title and declaratory relief claims and U.S. Bank's quiet title and declaratory relief counterclaims, and enter an order stating that U.S. Bank's deed of trust encumbers the property.

DATED October 15, 2020.

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[10] This court should also deny judgment to Clover Blossom based on the law-of-the-case doctrine. *See Geissel v. Galbraith*, 105 Nev. 101, 103-04, 769 P.2d 1294, 1296 (1989) (Under the doctrine of the law of the case, where an appellate court states a principal or rule of law in deciding a case, that rule becomes the law of the case and is controlling both in the lower courts and on subsequent appeals, so long as the facts remain substantially the same. Thus, if a judgment is reversed on appeal, the court to which the cause is remanded can only take such proceedings as conform to the appellate court's judgment."). Although Clover Blossom will contend the law-of-the-case doctrine is inapplicable because this court has yet to address its new tender related arguments, "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument subsequently made after reflection upon the previous proceedings." *Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975). The Nevada Supreme Court recently relied on this doctrine where an HOA-sale purchaser attempted to raise new tender arguments upon remand where the Court previously addressed BANA's tender in its disposition. *SFR Invs. Pool 1, LLC v. Bank of Am., N.A.*, No. 78736, 2020 WL 6537518, at *1 (Nev. Sept. 18, 2020) (unpublished).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 15th day of October 2020, I caused to be served a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO PLAINTIFF 5316 CLOVER BLOSSOM CT TRUST'S MOTION FOR SUMMARY JUDGMENT**, 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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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.: A-14-704412-C DEPT NO.: XXIV **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Plaintiff 5316 Clover Blossom Ct Trust by and through its attorney, Law Offices of Michael F. Bohn, Esq., hereby submits its reply in support of its Motion for Summary Judgment filed on October 1, 2020, and in response to U.S. Bank, National Association, Successor Trustee to Bank of America, N.a., Successor by Merger to Lasalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-through Certificates Series 2006-OA1's ("**defendant**" or "**U.S. Bank**") opposition filed October 15, 2020. This reply is based on the points and authorities contained herein.

POINTS AND AUTHORITIES

LEGAL ARGUMENT

1. The defendant should not be permitted to assert payment as an affirmative defense because it is untimely

Both the plaintiff 5316 Clover Blossom Ct Trust and defendant U.S. Bank filed motions for summary judgment on October 1, 2020. Counsel for plaintiff anticipated that tender would be raised in defendant's motion for summary judgment, and cited extensive authorities regarding the statute of limitations and the effect of the statute of limitations on the defendants claims and defenses. The plaintiff hereby incorporates by reference all the authorities cited in its motion for summary judgment, and assert the additional authorities and arguments below.

At page 10 of its opposition, defendant asserts that statutes of limitations do not run on defenses, citing Dredge Corp v. Wells Cargo, Inc. 80 Nev. 99, 389 P.2d 394, 396 (1964). However, there are exceptions to this rule.

By raising its time-barred claim of payment in the present case, U.S. Bank is engaging in the same "subterfuge to characterize a claim as a defense in order to avoid a temporal bar" that was condemned by the court in City of Saint Paul, Alaska v. Evans, 344 F.3d 1029, 1035 (9th Cir. 2003). In that case, the City filed an action asserting claims that were barred by the six-year statute of limitations, and in response to the defendant's counterclaims, the City raised "the identical allegations as defenses to TDX's counterclaims." Id. at 1031.

In finding that the City's responses to the defendant's counterclaims were also time-barred, the court of appeals stated:

> TDX's counterclaims were filed in response to the City's claims, not as affirmative claims for relief. Indeed, the City's defenses to those counterclaims are mirror images of its time-barred claims. **No matter what gloss the City puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar.** In launching the current litigation, the City abandoned its right to seek solace in the status of a defendant. **In the circumstance presented here, the City cannot hide behind the maxim applicable to defenses asserted in the normal course nor may it sidestep the temporal bar to its claims**. *See* Duell v. United Bank of Pueblo, 892 P.2d 336, 340 (Colo. Ct. App. 1994) (holding that an exception in the limitation statute for compulsory counterclaims did not allow a "plaintiff, who has instituted litigation by asserting time-barred claims, to revive those same claims simply by re-pleading them as counterclaims in a reply to a defendant's counterclaim that is compulsory"); Hamilton v.

> Cunningham, 880 F. Supp. 1407, 1414 (D. Colo.1995) (finding "illogical and unsound" "the suggestion that a plaintiff in one action can 'revive' his concededly stale claims by filing them as counterclaims in a parallel action brought by the defendant solely for the purpose of having those claims declared stale"). (emphasis added)
>
> Id. at 1035-1036.

There are two reported federal cases involving HOA foreclosures in Nevada which discuss the City of St. Paul case, and another unreported case which examine the issues presented in this case.

Judge Gordon decided two cases based on the St. Paul case on the same date and used identical citations in both cases. The cases are Bank of New York for Certificateholders of CWALT, Inc. v. S. Highlands Cmty. Ass'n, 329 F. Supp. 3d 1208, 1214–15 (D. Nev. 2018), and Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2006-OA16, Mortg. Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald Ranch Master Ass'n, 329 F. Supp. 3d 1221, 1228 (D. Nev. 2018) in which the judge wrote:

> For example, in City of Saint Paul, the City filed suit for declaratory relief against a counter-party to a settlement agreement two years after the limitation period for a claim by a governmental entity had expired. 344 F.3d at 1032-33. The defendant counterclaimed, to which the City then asserted as defenses mirror images of its affirmative claims. Id. at 1033. The district court ruled the City's claims for relief were untimely but ruled on the merits of the City's defenses. Id.
>
> On appeal, the Ninth Circuit held the City's defenses were also time-barred. Id. at 1035-36. In doing so, the Ninth Circuit stated that "the emphasis [is] on the respective roles of the parties in the litigation as a whole," and thus "whether affirmative defenses are exempt from statutes of limitations largely hinges on a realistic assessment of the parties' litigation posture." Id. at 1035. The City was the "aggressor" in the litigation by initiating the lawsuit and by "disturb[ing] the equilibrium between the parties" by challenging in court the agreement's validity. Id. The Ninth Circuit described the City's conduct as follows:
>
> > At bottom, this lawsuit boils down to the City's effort to invalidate the agreement. TDX's counterclaims were filed in response to the City's claims, not as affirmative claims for relief. Indeed, the City's defenses to those counterclaims are mirror images of its time-barred claims. No matter what gloss the City puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise subject to the statute of limitations bar. In launching the current litigation, the City abandoned its right to seek solace in the status of a defendant. In the circumstance presented here, the City cannot hide behind the maxim applicable to defenses asserted in the normal course nor may it sidestep the temporal bar to its claims.
> >
> > Id. at 1035-36.
>
> Like the City in Evans, at bottom, count one of BONY's lawsuit is to determine whether

the HOA sale extinguished the deed of trust. That claim is expired, however, **and I predict the Supreme Court of Nevada would not allow BONY to evade the limitation on that claim by re-characterizing it as a defense. See id. (stating "a plaintiff cannot engage in a subterfuge to characterize a claim as a defense in order to avoid a temporal bar"**). I do not decide whether BONY will be able to assert its arguments as defenses should SFR ever sue BONY because that issue is not before me. (emphasis added, footnotes omitted)

In Fed. Nat'l Mortg. Ass'n v. SFR Investments Pool 1, LLC, No. 217CV01750APGBNW, 2019 WL 3291522, at *3–4 (D. Nev. July 22, 2019), Judge Gordon stated:

> I applied City of Saint Paul in Bank of New York for Certificateholders of CWALT, Inc., Alternative Loan Tr. 2006-OA16, Mortgage Pass-Through Certificates, Series 2006-OA16 v. Foothills at MacDonald Ranch Master Association, 329 F. Supp. 3d 1221 (D. Nev. 2018). There, I held that the plaintiff could not recharacterize its time-barred declaratory relief claim as an anticipatory defense to avoid the statute of limitations. 329 F. Supp. 3d at 1228-29; see also City of Saint Paul, 344 F.3d at 1035 (noting that federal circuit courts have held that "statutes of limitations and laches bar declaratory judgment claims seeking to establish a defense in anticipation of an action to enforce a contract or regulation"). However, I specifically noted that I was not deciding whether the plaintiff in that case would "be able to assert its arguments as defenses should [the defendant] ever sue [the plaintiff] because that issue [was] not before me." Id. at 1229.1
>
> The Supreme Court of Nevada addressed a similar situation in Nevada State Bank v. Jamison Family Partnership, 801 P.2d 1377 (Nev. 1990). There, the plaintiffs timely filed suit, which prompted the defendant to file counterclaims for deficiency judgments that were untimely under the relevant statute of limitation. Id. at 1380. The district court ruled that the counterclaims were time-barred, but it allowed the defendant to assert those same claims as an equitable recoupment defense. Id. at 1381. The Supreme Court of Nevada affirmed, concluding that although the counterclaims were untimely, "equity is also a consideration," so the district court "did not err" by allowing the defendant to assert the time-barred claims as an equitable recoupment affirmative defense. Id. at 1382-83; see also Shadow Wood HOA v. N.Y. Cmty. Bancorp., 366 P.3d 1105, 1114 (Nev. 2016) (en banc) (stating that when sitting in equity, "courts must consider the entirety of the circumstances that bear upon the equities").
>
> The counterclaimant in Jamison Family Partnership was not the "aggressor" as the City was in City of Saint Paul or as Fannie Mae is in this case, so the case is not directly on point. However, it suggests that the Supreme Court of Nevada would allow the assertion of untimely claims as defenses where equity favors doing so. I thus conclude that even if the Supreme Court of Nevada would adopt the rule in City of Saint Paul, it would hold that equity favors considering all of the issues bearing on the equities in this case, including a time-barred defense so long as the defense is not a means to obtain affirmative relief. This resolution balances the tension between the concerns City of Saint Paul addresses versus the general rule that a statute of limitations does not apply to defenses and cannot be used as a sword, while also giving effect to Nevada's directive that courts consider all factors bearing on the equities in a particular case.
>
> SFR's quiet title claim is equitable in nature. Shadow Wood HOA, 366 P.3d at 1111 (stating that "a person who brings a quiet title action may, consistent with NRS Chapter 40 and our long-standing equitable jurisprudence, invoke the court's inherent equitable

> powers to resolve the competing claims to such title"). When resolving this equitable claim, I must consider all of the circumstances bearing on the equities. Id. at 1114. That would include, in this case, Fannie Mae's invocation of the federal foreclosure bar even though Fannie Mae's own claim for declaratory relief is time-barred.
>
> The consequence of Fannie Mae's declaratory relief claims being time-barred is that Fannie Mae cannot obtain a judgment in its favor in this case declaring that the deed of trust survived the HOA foreclosure sale. I thus will not enter a judgment on SFR's counterclaim declaring that the deed of trust still encumbers the property even if Fannie Mae successfully establishes the federal foreclosure bar as a defense. That would improperly allow Fannie Mae to obtain the same affirmative relief that it sought in its time-barred claims. See Karoun Dairies, Inc. v. Karlacti, Inc., No. 08CV1521 AJB WVG, 2014 WL 3340917, at *9 (S.D. Cal. July 8, 2014) (stating that where a party "attempts to disturb the status quo and ... expand current rights using a defense" by requesting affirmative recovery, "a court may properly view it as a claim masquerading as a defense and find it time barred").

It is respectfully submitted that this court should follow the reasoning of the City of St. Paul case and Judge Gordon in these cases and find that the defendant cannot assert payment as an affirmative defense because it is untimely.

2. Defendant's tender claim does not relate back to defendant's original answer.

Defendant argues that the references to tender in its amended complaint relates back to the filing of defendant's original answer on September 25, 2014, which would save the tender allegations from being time-barred. However, this is untrue. FRCP 15 governs the relation back of amendments to a complaint:

> (c) Relation Back of Amendments.
>
> (1) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out — or attempted to be set out — in the original pleading; or
>
> (2) the amendment changes a party or the naming of a party against whom a claim is asserted, if Rule 15(c)(1) is satisfied and if, within the period provided by Rule 4(e) for serving the summons and complaint, the party to be brought in by amendment:
>
> (A) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (B) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Defendant's affirmative defense of tender, mentioned for the first time in its October 10, 2017, answer to plaintiff's amended complaint, doesnot fall into any of the relation back categories and thus does not relate back.

The most relevant portion of NRCP 15(c) is (1), which states that an amendment may relate back if it asserts a claim or defense that arose out of the conduct, transaction, or occurrence set forth in the original pleading. Here, defendant's original answer and amended answer are both related to the HOA foreclosure sale. The difference is the amended answer contains a fourth affirmative defense including "tender." The original answer contains no references to tender. Thus, this is not a situation where the same set of facts is being used to justify the inclusion of a new claim for relief, as contemplated under NRCP(c)(1)(B). This is a situation where defendant has added a new defense previously unbeknownst to defendant. This new defense is time-barred.

In Badger v. Eighth Jud. Dist. Ct., 132 Nev. 396, 404, 373 P.3d 89, 94–95 (2016) the Court discussed relation back and clarified that it has "previously refused to allow a new claim based upon a new theory of liability asserted in an amended pleading to relate back under NRCP 15(c) after the statute of limitations had run." On that basis, the Court in Badger concluded that relation back "may not be utilized to save an untimely application for a deficiency judgment under NRS 40.455(1)." Id. at 405, 95. Badger is directly on point here because here, defendant is asserting a new theory of liability (or a defense) - namely, tender - after the statute of limitations has run. Accordingly, under Badger, defendant's tender claim and defense are barred because defendant did not raise tender until after the four year statute of limitations had already run, and defendant cannot utilize relation back to save its untimely tender claims.

The Ninth Circuit has held that new claims for relief are acceptable if based on the same set of facts:

> Once the defendant is in court on a claim arising out of a particular transaction or set of facts, he is not prejudiced if another claim, **arising out of the same facts**, is added.

Santana v. Holiday Inns, Inc., 686 F.2d 736, 739 (9th Cir. 1982) (Emphasis added). Clearly, the important issue is that no new facts were added. This is contrary to what plaintiff has done here, add a new fact - tender - to its existing defenses. Any reference to tender in the amended answer is barred by the four year statute of limitations contained in NRS 11.220.

Based on the foregoing, there is no basis for defendant's tender defense to relate back to the date of the original answer. Defendant was in actual or constructive possession of the tender documents and

any information related to them because defendant is a successor-in-interest to Bank of America, N.A., the party that allegedly tendered. Further, defendant has been engaged in litigation in this matter since 2014 when it filed its original answer, yet defendant failed to allege tender at any point until October 10, 2017. The tender information that has been in defendant's control since day one, and yet defendant waited more than three years to after litigation began - and more than four years after the HOA foreclosure - to disclose the tender information. Plaintiff was then forced to defend against a brand new set of facts. Again, if defendant was asserting a new defense based on the same facts, this would be a different argument entirely because relation back would apply under the controlling rules and case law. But that is not the situation. The tender defense was based on a brand new set of facts of which defendant knew or should have known. There is no excuse for defendant's delay in bringing forth these facts. Just as importantly, there is nothing in NRCP 15 or the controlling case law that allows brand new facts and defenses to relate back to the filing of the original answer in order to defeat the statute of limitations.

The Ninth Circuit has also ruled that new facts unrelated to or unmentioned in previous pleadings do not relate back to those previous pleadings:

> "We permit relation-back if the new claim arises from the same 'conduct, transaction, or occurrence' as the original claim." Dominguez, 51 F.3d at 1510 (quoting Percy v. San Francisco General Hosp., 841 F.2d 975, 978 (9th Cir.1988)). As we explained in Dominguez, "[w]e will find such a link when 'the claim to be added will likely be proved by the "same kind of evidence" offered in support of the original pleadings.' " Id. (quoting Rural Fire Prot. Co. v. Hepp, 366 F.2d 355, 362 (9th Cir.1966)); see also Santana v. Holiday Inns, Inc., 686 F.2d 736, 738 (9th Cir.1982) (noting that once the defendant is in court on a claim arising out of a particular set of facts, he is not prejudiced if another claim, arising out of the same facts, is added). Therefore, relation back turns on whether the fraud alleged in the March 29 complaint is the same as the fraud alleged in the motion.
>
> Gschwend's March 29 complaint alleges a number of specific incidents of fraud by Pinnacle Construction and Albert K. Markus, Markus's ex-husband and business partner, in performing work for Gschwend that form the basis of the § 523 nondischargeability claim. However, these are not the same facts set out in the motion. Evidence which would show that Markus fraudulently conveyed assets or undervalued them after Gschwend initiated her lawsuit and obtained her judgment, as described in the motion, would not show that Markus made false representations about Pinnacle before the judgment. See Magno v. Rigsby (In re Magno), 216 B.R. 34, 39 (9th Cir.BAP 1997) (rejecting relation back of amended § 523(a)(6) complaint when new claim did not rely on same facts as original § 727(a) complaint).
>
> In sum, the January 20 motion pointed in a completely different direction from the March 29 pleading. The fraud averred is a different fraud from the fraud upon which the March 29 complaint proceeds. The two conclusory references to "fraudulent actions" that caused

> Gschwend to have to continue paying debts and to lose her business do not signal the distinct particulars that followed in the March 29 complaint. Accordingly, we conclude that the January 20 motion did not substantially comply with Rule 8(a) in so far as alleged fraud preceding Gschwend's judgment is concerned. This leaves nothing to which the March 29 complaint can relate back. However, the result would be the same even were we to construe the motion as sufficiently compliant to be a complaint, for we cannot conclude that the two documents share a common evidentiary base. Therefore, the March 29 complaint does not relate back to the January 20 motion, and is untimely.

In re Markus, 313 F.3d 1146, 1150–51 (9th Cir. 2002). Thus, in In re Markus, the court finds that because the new facts are "are not the same facts set out in the motion," and because they "point[] in a completely different direction" from a previous pleading, the new pleading does not relate back "and is untimely." Likewise, here, in the previous years of litigation of this matter, defendant never alleged tender. As a result, the amended answer's references to tender, which form the basis of defendant's motion for summary judgment and opposition to plaintiff's motion for summary judgment, do not relate back to the original answer and are time-barred under the four year statute of limitations.

Defendant argues on page 14 of its opposition that it "never had a chance to assert its counterclaims" because this court granted plaintiff's motion for summary judgment on September 10, 2015. However, this argument is belied by the fact that defendant did indeed have a chance to assert its counterclaims and affirmative defenses based on tender when it filed its original answer on September 25, 2014, almost a year before this court granted summary judgment in favor of plaintiff. Accordingly, defendant had ample opportunity to assert tender in 2014 and 2015, yet it simply failed to do so.

3. The equities here favor the plaintiff.

The plaintiff asserts that the defendant by its actions waived its defense of tender, is estopped from asserting payment to the plaintiff's claim, and has unclean hands precluding equitable relief.

i. Waiver

This court is aware that some banks began tendering payments through the Miles Bauer law firm as early as 2010. However, the payments were never revealed until after the Supreme Court's decision in SFR Investments Pool 1, LLC v. U.S. Bank N.A. 130 Nev. 742, 334 P.3d 408 (2014). In fact, prior to the original SFR decision, the banks asserted in court that the foreclosure of an HOA lien does not extinguish the banks' trust deeds.

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

Here, defendant alleges it sent payment back on December 6, 2012. However, the bank did nothing to let potential purchasers at sale know of the tender, and the sale occurred on January 16, 2013.

The defendant failed to timely file suit to ask the courts to determine it's rights. In fact, when the plaintiff filed this case on July 25, 2014. Defendant U.S. Bank only filed an answer and did not assert a counterclaim in it's original answer, filed on September 25, 2014. This was even after the original SFR decision was rendered. U.S. Bank did not file it's counterclaim until October 10, 2017, more than four years after the sale and more than three years after this litigation was filed.

ii. Estoppel

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

First, the Bank was apprised of the fact that it sent payment to Alessi in on December 6, 2012. Second, the Bank, by virtue of its letter and check, must have intended to pay the super-priority portion (at least what it deemed it to be). Third, the plaintiff had no knowledge of the letter or check, and as such when it purchased this property it believed it was purchasing free and clear of any deeds of trust. Fourth, the party controlling the plaintiff engaged in litigation with the Bank in other cases for years prior to this case being filed, and for much of that time, the Bank disputed the interpretation of the statute. What is more, the Bank did nothing for over three years after this sale despite allegedly sending a letter back in

December, 2012. As such, the Bank is equitably estopped from claiming it paid the super-priority portion this late in the game.

iii. Unclean Hands.

"The application of the unclean hands doctrine raises primarily a question of fact." Dollar Sys., Inc. v. Avcar Leasing Sys., Inc., 890 F.2d 165, 173 (9th Cir. 1989). To preclude equitable relief, the party's inequitable conduct must be "unconscientious, unjust, or marked by the want of good faith" and sufficiently connected with the "subject-matter or transaction in litigation." Las Vegas Fetish & Fantasy Halloween Ball, Inc., 182 P.3d at 766. (citing Income Investors v. Shelton, 101 P.2d 973, 974 (Wash. 1940)). Two factors must be considered when assessing if a party's conduct is sufficiently connected to the action: "(1) the egregiousness of the misconduct at issue, and (2) the seriousness of the harm caused by the misconduct." Id. In the present case, the Bank allegedly paid the super-priority in December, 2012. Yet, after supposedly sending this payment did nothing for over four years.

All told, the equities weigh in favor of the plaintiff , not the Bank, and "Diamond Spur" does not change this reality. As the Shadow Wood Court noted, "[e]quitable relief will not be granted to the possible detriment of innocent third parties." Shadow Wood, at 1115 quoting Smith v. United States, 373 F.2d 419, 424 (4th Cir. 1966).

CONCLUSION

It is respectfully submitted that this court, in exercising its equitable powers, should find that defendant is precluded from its untimely assertion of tender, and grant plaintiff's motion for summary judgment.

DATED this 3rd day of December, 2020

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 3rd day of December, 2020, an electronic copy of the **PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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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 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

U.S. BANK, N.A., AS TRUSTEE'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT

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**) files this reply in support of its 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.

…

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Clover Blossom does not dispute that Miles Bauer tendered payment for the full superpriority amount (and more) of the HOA's lien before it was foreclosed. That fact, standing alone, entitles U.S. Bank to summary judgment and an order that its deed of trust encumbers Clover Blossom's title to the Property. Clover Blossom's meritless statute of limitations and equitable arguments cannot alter the effect of Miles Bauer's tender.

II. LEGAL ARGUMENT

A. Clover Blossom's new statute of limitations argument lacks merit.

Clover Blossom's new statute of limitations argument[1] is that U.S. Bank "is engaging in 'subterfuge to characterize [its tender] claim as a defense in order to avoid" Clover Blossom's argument that its tender "claim" is time barred. *See* Clover Blossom's OMSJ, at 2. To put an end to this alleged "subterfuge," Clover Blossom asks this court to "follow the reasoning of" the Ninth Circuit's decision in the *City of Saint Paul, Alaska v. Evans*, 344 F.3d 1029, 1035 (9th Cir. 2003) and two "reported federal cases involving HOA foreclosures in Nevada" which relied on *City of Saint Paul*, to hold that U.S. Bank "cannot assert payment as an affirmative defense." *See* Clover Blossom's OMSJ, at 5.

Clover Blossom ignores an obvious difference between the parties barred from engaging in "subterfuge" in the three cases it cites and U.S. Bank here – those parties initiated their respective lawsuits, while U.S. Bank was sued by Clover Blossom. *City of Saint Paul* holds that a party cannot initiate a lawsuit by filing time-barred claims, prompt the defendant to assert compulsory counterclaims, and then style its time-barred claims as affirmative defenses to the compulsory counterclaims as an end run around statutes of limitation. *See City of Saint Paul*, 344 F.3d at 1035 ("TDX's counterclaims were filed in response to the City's claims … [i]ndeed, the City's defenses to those counterclaims are mirror images of its time-barred claims … [n]o matter what gloss the City

[1] Clover Blossom incorporated by reference the statute of limitations arguments it raised in its motion for summary judgment. *See* Clover Blossom's OMSJ, at 2. U.S. Bank addressed those arguments in its opposition to Clover Blossom's motion, and U.S. Bank incorporates by reference its rebuttals to those arguments here. *See* U.S. Bank's OMSJ, at 10-19.

puts on its defenses, they are simply time-barred claims masquerading as defenses and are likewise [time barred].").

That is not what occurred here. Clover Blossom sued U.S. Bank on July 25, 2014, seeking a declaration that U.S. Bank's deed of trust was extinguished. *See* Clover Blossom's OMSJ, at 6. On July 22, 2015, U.S. Bank filed a countermotion for summary judgment based, in part, on its argument that Miles Bauer's superpriority tender protected the deed of trust from the HOA's foreclosure sale. Tender has been a central issue in this case ever since. *See U.S. Bank, N.A. v. 5316 Clover Blossom Ct. Trust*, 2017 WL 2945135, at *1 (Nev. App. Jun. 30, 2017) (noting the "HOA's rejection of the tender that was made by U.S. Bank" may bear "upon the equities"); *U.S. Bank, N.A. v. 5316 Clover Blossom Ct. Trust*, 2019 WL 5260057, at *2 (Nev. App. Oct. 26, 2019) ("U.S. Bank alleged and produced evidence showing that it tendered an amount in excess of the superpriority portion of the HOA's lien … [v]iewing that evidence in the light most favorable to U.S. Bank, the tender would have extinguished the superpriority lien such that [Clover Blossom] took the property subject to U.S. Bank's deed of trust.").

After litigating on the merits the effect of Miles Bauer's tender since July 2015, Clover Blossom now in 2020 claims that U.S. Bank's tender "claim" is untimely so it can win on a technicality. The only party engaging in "subterfuge" here is Clover Blossom. *See* Clover Blossom's OMSJ, at 2 (quoting *City of Saint Paul*, 344 F.3d at 1035). No limitations period can save Clover Blossom from the effect of Miles Bauer's tender. *See* U.S. Bank's OMSJ, at 6-21. Clover Blossom purchased "the [P]roperty subject to the deed of trust" as a matter of law. *See Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018) (***Diamond Spur***).

B. <u>Miles Bauer's tender makes it irrelevant whether "the equities favor" Clover Blossom.</u>

Clover Blossom spends the rest of its opposition asserting various arguments to support its contention that "the equities weigh in its favor," and "'*Diamond Spur*' does not change this reality." *See* Clover Blossom OMSJ, at 5-7. Clover Blossom's equitable arguments are frivolous. Several published decisions from the Nevada Supreme Court make that clear.

In *Diamond Spur*, the Supreme Court held that Miles Bauer's tenders cure a superpriority default "by operation of law," meaning the association's subsequent foreclosure is "void . . . as to the

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

The Nevada Supreme Court has reiterated that courts do "not grant equitable relief" when they "correctly determine[] that [the HOA-sale purchaser] took title to the property subject to the first deed of trust because the superpriority tender cured the default as to that portion of the HOA's lien by operation of law" in unpublished decisions following *Diamond Spur*. *See, e.g., Paradise Harbor Place Trust v. Nationstar Mortg., LLC*, 448 P.3d 544 (Table), 2019 WL 4390488, at *1 n.2 (Nev. Sep. 12, 2019).[2] So has the Ninth Circuit. *Nationstar Mortg. LLC v. Springs at Spanish Tr. Ass'n*, 812 Fed. Appx. 526, at *1 (9th Cir. Jul. 13, 2020) (Mem.) (rejecting Saticoy's argument that the district court "was still required to weigh the equities" despite Miles Bauer's tender, and also rejecting five other "arguments [that] are foreclosed under Nev. Rev. Stat. § 116.3116(2) (2011), our precedent, and the Nevada Supreme Court's decision in [*Diamond Spur*]"). Miles Bauer's tender makes the equities irrelevant. This is settled law.

Diamond Spur's central holding is unequivocal – "a first deed of trust holder's unconditional tender of the superpriority amount due results in the buyer at foreclosure taking the property subject

[2] *Accord TRP Fund IV, LLC v. Bank of New York Mellon, as Trustee*, 434 P.3d 926 (Table), 2019 WL 912693, at *2 n.3 (Nev. Feb. 20, 2019) (same); *see also Bank of America, N.A. v. BDJ Investments*, 464 P.3d 104 (Table), 2018 WL 6433115, at *1 (Nev. Dec. 4, 2018) ("Respondent also contends that … [it] is protected as a bona fide purchaser, but we recently rejected similar arguments [in *Diamond Spur*]."); *SFR Investments Pool 1, LLC v. Morg. Elec. Reg. Sys., Inc.*, 431 P.3d 55 (Table), 2018 WL 6433003, at *1 (Nev. Dec. 4, 2018) (same); *Deutsche Bank Nat'l Trust v. Premier One Holdings, LLC*, 431 P.3d 55 (Table), 2018 WL 6433119, at *1 (Nev. Dec. 4, 2018) (same); *Daisy Trust v. Green Tree Loan Servs., LLC*, 435 P.3d 1226 (Table), 2019 WL 1253394, at *1 (Nev. Mar. 15, 2019) (same).

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to the deed of trust." *See Diamond Spur*, 134 Nev. at 605. Clover Blossom's title to the property is encumbered by U.S. Bank's deed of trust.

C. Clover Blossom's specific equitable arguments are meritless.

Even if this Court were to consider Clover Blossom's specific equitable arguments of waiver, equitable estoppel, and unclean hands, it should find them to be meritless.

1. U.S. Bank did not waive its right to assert tender.

"Waiver requires the intentional relinquishment of a known right." *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). To infer waiver from a party's conduct, the conduct must be "so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Id.* Waiver cannot be established based on a party's "delay alone." *Id.*

U.S. Bank's purported delay is the sole basis for Clover Blossom's waiver argument. *See* Clover Blossom's OMSJ, at 5-6. Specifically, Clover Blossom contends that U.S. Bank "failed to timely file suit to ask the courts to determine it's rights," and even after Clover Blossom filed its complaint on July 25, 2014, U.S. Bank "did not file a counterclaim until October 10, 2017." *See id.*

The Court of Appeals has already rejected Clover Blossom's argument that "U.S. Bank was required to take further actions to preserve the tender for it to extinguish the superpriority lien" **in this case**. *See 5316 Clover Blossom*, 2019 WL 5260057, at *2. It is frivolous for Clover Blossom to continue to assert that U.S. Bank's post-tender actions had any impact on the tender's effect.

Miles Bauer's tender protected the deed of trust by operation of law. *See Diamond Spur*, 134 Nev. at 611. U.S. Bank was not required to file suit to obtain a judgment that the deed of trust survived. *See Renfroe v. Carrington Mortg. Servs., LLC*, 456 P.3d 1055 (Table), 2020 WL 762638, at *2 (Nev. Feb. 14, 2020) ("Moreover, we clarify that Carrington had no obligation to prevail in a judicial action as a condition precedent to enforcing its deed of trust that had already survived the HOA's foreclosure sale.") (citing *Diamond Spur*, 134 Nev. at 606).

While Clover Blossom's waiver argument is legally meritless, it is still worth addressing its attempt to fault U.S. Bank for not asserting tender in a counterclaim until October 10, 2017. *See* Clover Blossom's OMSJ, at 6. U.S. Bank moved for summary judgment based, in part, on Miles

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Bauer's superpriority tender **on July 22, 2015**. This case has revolved around tender ever since. Clover Blossom's argument that U.S. Bank "intentionally relinquish[ed]" its right to assert tender when it has been contending for more than five years that the tender protected its deed of trust is absurd. *See* Clover Blossom's OMSJ, at 6.

2. U.S. Bank is not equitably estopped from arguing tender.

"Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." *In re Harrison Living Trust*, 121 Nev. 217, 223, 112 P.3d 1058, 1061 (2005). Clover Blossom's equitable estoppel argument treads the same ground as its waiver argument with respect to U.S. Bank's alleged failure to file suit to determine the effect of Miles Bauer's tender. *See* Clover Blossom's OMSJ, at 6 ("What is more, the Bank did nothing for over three years after this sale[.]").

Again, Clover Blossom's argument is frivolous in light of the Court of Appeals' rejection of it **in this case**. *See 5316 Clover Blossom*, 2019 WL 5260057, at *2 ("[W]e reject Clover Blossom's argument[] … that U.S. Bank was required to take further actions to preserve the tender for it to extinguish the superpriority lien"). U.S. Bank was not required to file suit based on the tender. *Diamond Spur*, 134 Nev. at 612 ("It follows that after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale … cannot extinguish the first deed of trust on the property."); *id.* ("[W]hen a bank pays the superpriority portion of an HOA lien, the subsequent foreclosure sale will not extinguish the Bank's mortgage lien[.]") (internal quotations omitted). Since the tender was effective upon delivery, U.S. Bank's decision not to file suit to confirm the tender's effect cannot equitably estop it from arguing the tender protected the deed of trust. *See id.*

3. U.S. Bank does not have unclean hands.

Unclean hands can only work to "bar[] a party from receiving equitable relief." *See Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008). U.S. Bank does not seek equitable relief though Miles Bauer's tender because that tender protected the deed of trust by operation of law. *See Diamond Spur*, 134 Nev. at 612; *see also Paradise Harbor Place Trust v. Nationstar Mortg., LLC*, 448 P.3d 544 (Table), 2019 WL 4390488, at *1 n.2 (Nev. Sep. 12, 2019) ("[W]e clarify that the district court did not grant equitable relief [when] it

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correctly determined that appellant took title to the property subject to the first deed of trust because the superpriority tender cured the default as to that portion of the HOA's lien by operation of law."); *TRP Fund IV, LLC v. Bank of New York Mellon, as Trustee*, 434 P.3d 926 (Table), 2019 WL 912693, at *2 n.3 (Nev. Feb. 20, 2019) (same). The doctrine of unclean hands is thus irrelevant. *See Las Vegas Fetish*, 124 Nev. at 275.

Moreover, the only "egregious[]" conduct Clover Blossom alleges is that U.S. Bank "allegedly paid the super-priority amount in December, 2012 … [y]et, after supposedly sending this payment did nothing for over four years." *See* Clover Blossom's OMSJ, at 7. Again, this argument is frivolous. *See 5316 Clover Blossom*, 2019 WL 5260057, at *2.

And while Clover Blossom adds adjectives like "supposedly" when discussing Miles Bauer's tender throughout its opposition, it produces no evidence that raises a fact issue regarding whether the tender was sufficient in amount or delivered. *See* Clover Blossom's OMSJ, at 1-7. The exhibits attached to U.S. Bank's renewed motion prove the amount tendered exceeded the superpriority amount and that the tender was delivered to Alessi. *See* U.S. Bank's RMSJ, at 6-7. Clover Blossom thus owns the property subject to U.S. Bank's deed of trust. *See Diamond Spur*, 134 Nev. at 612. U.S. Bank is entitled to summary judgment.

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III. CONCLUSION

For these reasons, this Court should grant summary judgment in U.S. Bank's favor on Clover Blossom's quiet title and declaratory relief claims and U.S. Bank's quiet title and declaratory relief counterclaims, and enter an order stating that U.S. Bank's deed of trust encumbers the property.

DATED December 3, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 3rd day of December 2020, I caused to be served a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR SUMMARY JUDGMENT**, 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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A-14-704412-C

DISTRICT COURT
CLARK COUNTY, NEVADA

Other Title to Property	**COURT MINUTES**	**December 07, 2020**

A-14-704412-C 5316 Clover Blossom CT Trust, Plaintiff(s)
vs.
U S Bank National Association, Defendant(s)

December 07, 2020 **3:00 AM** **All Pending Motions**

HEARD BY: Crockett, Jim **COURTROOM:** Phoenix Building 11th Floor 116

COURT CLERK: Dara Yorke

RECORDER:

REPORTER:

PARTIES PRESENT:

JOURNAL ENTRIES

- U.S. BANK, N.A., AS TRUSTEE'S RENEWED MOTION FOR SUMMARY JUDGMENT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT STATUS CHECK: RESET TRIAL DATE

AS TO: U.S. BANK, N.A., AS TRUSTEE'S RENEWED MOTION FOR SUMMARY JUDGMENT Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by the parties without oral argument since the court deems oral argument unnecessary. US Bank contends that it is entitled to Summary Judgment on its claim of quiet title and its claims for declaratory relief that it deed of trust survived the foreclosure sale. There is no other conclusion to reach in this case. Prior to the foreclosure sale by Country Gardens HOA, Miles Bauer tendered an amount in excess of the superpriority lien amount and even though the tender was rejected and Bauer knew it was being rejected, the tender itself operated to cure the default as to the superpriority lien resulting in the deed of trust surviving the foreclosure sale. In the Diamond Spur case, the Nevada Supreme court held that a similar tender under similar circumstances cured the default as to the superpriority portion of the lien resulting in the DOT surviving the foreclosure sale. The same result obtains here. There are no genuine disputes as to any material issues of fact. The Motion for

Summary Judgment is GRANTED. Counsel for U S Bank to prepare and submit the order with in14 days per EDCR 7.21. COURT FURTHER ORDERED, matter SET for status Check.

AS TO: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT STATUS CHECK: RESET TRIAL DATE
Pursuant to EDCR 2.23 (c) and (d), this matter is being decided on the briefs and pleadings filed by the parties without oral argument since the court deems oral argument unnecessary. The granting of U S Bank's Motion for Summary Judgment necessarily results in the denial of Plaintiff s Motion for Summary Judgement . Accordingly, Plaintiff s Motion for Summary Judgment is DENIED, Status Check: Reset Trial Date OFF CALENDAR as MOOT. Counsel for U S Bank to prepare and submit the order with in14 days per EDCR 7.21. COURT FURTHER ORDERED, matter SET for status Check.

1/12/21 (CHAMBERS) STATUS CHECK: FILING OF ORDER

CLERK'S NOTE: The above minute order has been electronically served to parties via email and/or Odyssey File & Serve. //12-7-20/ dy

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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 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

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

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

FINDINGS OF FACT

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

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

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

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

5. On April 20, 2012, Alessi recorded a notice of default and election to sell in the Clark County Recorder's Office as instrument number 20120420-0000428.

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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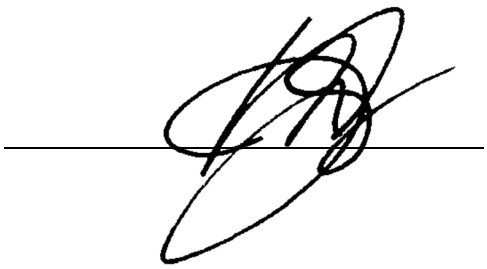
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this order fully resolves all claims asserted by all parties and thus constitutes a final judgment.

DATED _____, 2020.

Dated this 29th day of December, 2020



CF8 94C 88A7 AF85
Jim Crockett
District Court Judge

Dated: December 28, 2020

Submitted by:

AKERMAN LLP

/s/ Nicholas E. Belay
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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

5316 Clover Blossom CT Trust, Plaintiff(s) vs. U S Bank National Association, Defendant(s)	CASE NO: A-14-704412-C DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 12/29/2020

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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 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
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 29th 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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An employee of AKERMAN LLP

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EXHIBIT A

EXHIBIT A

FFCO
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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 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

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

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

FINDINGS OF FACT

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

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

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

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

5. On April 20, 2012, Alessi recorded a notice of default and election to sell in the Clark County Recorder's Office as instrument number 20120420-0000428.

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

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

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

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

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

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

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

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

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

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

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

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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

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

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

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

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

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

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

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

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

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

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

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

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

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

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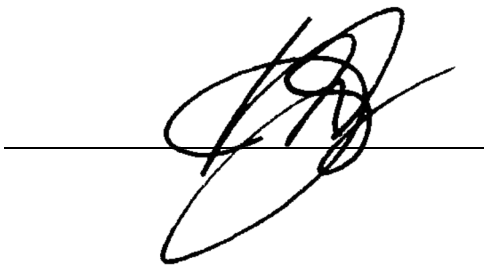
IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this order fully resolves all claims asserted by all parties and thus constitutes a final judgment.

DATED _____, 2020.

Dated this 29th day of December, 2020



CF8 94C 88A7 AF85
Jim Crockett
District Court Judge

Dated: December 28, 2020

Submitted by:

AKERMAN LLP

/s/ Nicholas E. Belay
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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

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CSERV

DISTRICT COURT
CLARK COUNTY, NEVADA

5316 Clover Blossom CT Trust, Plaintiff(s) vs. U S Bank National Association, Defendant(s)	CASE NO: A-14-704412-C DEPT. NO. Department 24

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

Service Date: 12/29/2020

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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.: A-14-704412-C DEPT NO.: XXIV **NOTICE OF APPEAL**

NOTICE IS HEREBY GIVEN that plaintiff 5316 Clover Blossom Ct Trust hereby appeals to the Supreme Court of Nevada from the Judgment granted upon a motion for summary judgment, which

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was entered on December 29, 2020.

DATED this 28th day of January, 2021

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

By: /s/ */Michael F. Bohn, Esq./*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 28th day of January, 2021, an electronic copy of the **NOTICE OF APPEAL** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Melanie D. Morgan, Esq.
Nicolas E. Belay, Esq.
Akerman LLP
1635 Village Center Circle # 200
Las Vegas, NV 89134

/s/ /Marc Sameroff /
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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.: A-14-704412-C DEPT NO.: XXIV **CASE APPEAL STATEMENT**

1. The appellant filing this case appeal statement is 5316 Clover Blossom Ct Trust.

2. The judge issuing the judgment appealed from is the honorable James Crockett.

3. The parties to the proceedings in District Court are 5316 Clover Blossom Ct Trust, plaintiff; 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;

4. The parties to this appeal are the appellant 5316 Clover Blossom Ct Trust, and respondents

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.

5. Counsel for appellant 5316 Clover Blossom Ct Trust is Michael F. Bohn, Esq.; 2260 Corporate Circle, Suite 480, Henderson, NV 89074; (702) 642-3113. Counsel for respondents 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., is Melanie D. Morgan, Esq., 1635 Village Center Circle, Suite 200, Las Vegas, Nevada, 89134 (702) 634-5000.

6. The attorneys for both the plaintiff/appellant and defendants/respondents are licensed in the state of Nevada.

7. The appellant was represented by retained counsel in the District Court;

8. The appellant is represented by retained counsel on appeal;

9. There were no orders granting leave to proceed in forma pauperis;

10. The complaint was filed in District Court on July 25, 2014;

11. The plaintiff filed this action seeking title to the real property as a result of a foreclosure sale. The district court ruled in favor of defendants after summary judgment.

12. The case has previously been the subject of an appeal, #65708.

13. The case does not involve child custody or visitation; and,

14. It is unlikely that this case can be settled.

DATED this 28th day of January, 2021

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

By: /s/ */Michael F. Bohn, Esq./*
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
2260 Corporate Circle, Suite 480
Henderson, Nevada 89074
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 28th day of January, 2021, an electronic copy of the **CASE APPEAL STATEMENT** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Melanie D. Morgan, Esq.
Nicolas E. Belay, Esq.
Akerman LLP
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/s/ /Marc Sameroff /
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MICHAEL F. BOHN, ESQ., LTD.