IN THE SUPREME COURT OF THE STATE OF NEVADA

LN MANAGEMENT LLC SERIES 3111 BEL AIR 24G, Appellant, v. BANK OFAMERICA, N.A.; DITECH FINANCIAL LLC, Respondent.	)	Supreme Court Case No.: 82534

Appeal
From the Eighth Judicial District Court, Clark County, Nevada
The Honorable Mark R. Denton
District Court Case A-12-669570-C

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO RULE 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Iyad Haddad – Managing Trustee of Plaintiff

Ryan Welch – Managing Trustee of Plaintiff

Kerry P. Faughnan, Esq. ,who has represented Plaintiff/Appellant in the state court cases and during this appeal.

Dated September 16, 2021.

/s/ Kerry P. Faughnan

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JURISDICTIONAL STATEMENT

This is an appeal from an order granting Respondents Bank of America, N.A. and Ditech Financial LLC's ("Respondents") Motion for Summary Judgment

The motion was heard December 3, 2020, which became a written Order Granting Respondent's Summary Judgment Motion entered January 20, 2021, 4PA937- 962. The Order was a final pursuant to NRCP 54(b). 4PA90.

Written Notice of Entry of Order was filed the same day, January 21, 2021, 4PA963-991.

An appeal is due 30 days from notice of entry of order of the order to be appealed from, NRAP 4(a)(1). Notice of Appeal was filed February 22, 2021, 4PA992-99, making the appeal timely.

This Court has jurisdiction as an appeal may be taken from a district court in a civil action of a final judgment entered in a proceeding. NRAP 3A(b)(1).

ROUTING STATEMENT

This matter is presumptively retained by the Supreme Court because the matter is not one of the enumerated case categories presumptively assigned to the Court of Appeals under NRAP 17(b).

STATEMENT OF THE ISSUES

Was the district court erroneous as a matter of law in finding that the five year rule had not run and that the under NRCP 41(e) the case had been "brought to trial" by virtue of the 2014 MSJ that was subsequently set aside?

Was the district court erroneous as a matter of law in finding Respondent's offer to make payment, without anything more, a valid tender, so that Respondents would be entitled to assert valid tender for the purposes of granting summary judgment as a matter of law without any evidence of futility?

Was the district court erroneous as a matter of law in finding that the foreclosure sale was a sub-priority sale?

Was the district court erroneous as a matter of law in finding that Fannie Mae had an actual interest when BANA had failed to raise the defense during discovery?

STATEMENT OF THE CASE

The state court proceeding was an action to quiet title and for declaratory relief after a home owner association foreclosure, Complaint, 1PA1 – 92, 1PA93-104.

The property came to Appellant LN Management LLC Series 3111 Bel Air 24G ("LN Management") as a result of a December 17, 2012 HOA foreclosure auction for delinquent assessments conducted pursuant to NRS Chapter 116, Foreclosure Deed, 1PA102-104. Appellant LN Management is of the opinion that this foreclosure was a "HOA Super Priority Lien Sale."

Bank of America, N.A. initiated a district court case on October3, 2012. 1PA1-92. LN Management initiated the district court case May 17, 2013 to quiet title in LN Management's name against any and all interested parties. Complaint, 1PA93- 104. The cases were consolidated on October 29, 2013. 1PA105-106.

At the time of the HOA public auction, the public record showed Bank of America, N.A. as the beneficiary of a first deed of trust secured against the property for $322,100.00 which was recorded October 20, 2004, Deed of Trust, 1PA49 - 77. Ditech is predecessor-in-interest to BANA.

Respondents filed their motion for summary judgment September 29, 2020. Appellant opposed the motion, and Respondents filed a reply. 3PA584 – 4PA867, 4PA868-879, 4PA880 – 935.

The District Court granted Respondent's motion for summary judgment. The order granting summary judgment stated among other facts that:

> "27. To the extent LN Management believed the five-year rule expired in October 2017, LN Management has intentionally relinquished any such argument." 1PA976
>
> "55. Just as in *Perla Del Mar*, Bank of America and Miles Bauer offered to pay the HOA, through Collections of America, the superpriority amount "actually due" with no impermissible conditions attached. *See 7510 Perla Del Mar Ave. Trust v. Bank of America*, N.A., 458 P.3d 348, 349 (Nev. 2020) (noting "[a]n actual tender is unnecessary where it is apparent the other party will not accept it."). The HOA, through its agent, stated no superpriority lien existed until Bank of America completed its own foreclosure." 4PA983.
>
> "61. Here, the undisputed evidence shows the HOA's agent, Collections of America, explicitly informed Bank of America it was not "foreclosing on a super-priority lien pursuant to NRS 116.3116" and that the HOA did not claim "to have a super-priority lien since the first mortgage [had] not [been] foreclosed." 4PA984

This resulted in the district court granting thereafter ruling as an issue of law that, despite any actual evidence to support this conclusion and despite the evidence presented showed the five year rule had tolled, that nothing in the Collections of America letter stated they would not accept payments and that the lien foreclosed upon was not reduced to remove the super-priority portion of the lien.

The court thereafter included "final judgment" language in its order granting summary judgment, 4PA990, leading to Notice of Appeal being filed by Appellant LN Management. 4PA992-993.

STATEMENT OF THE FACTS

Appellant LN Management purchased the real property commonly known as 3111 Bel Air Drive #24G, Las Vegas, NV 89109 ("the Property") on December 12, 2012 for $7,001.00 at an HOA foreclosure auction for delinquent assessments, conducted by Collections of America, Inc pursuant to NRS Chapter 116 for the benefit of Las Vegas International Country Club Estates , Foreclosure Deed, 1PA102 - 104.

At the time of the HOA public auction, the public record showed Bank of America as the beneficiary of a first deed of trust secured against the property.

Respondents filed their case on October 3, 2012. The Five Year Rule expired on October 3, 2017. The District Court failed to dismiss this matter as required under the rule. On February 21, 2017, the Court held a status check which resulted in the Court dismissing all the claims of Green Tree without prejudice which left only LN's claims in the matter. On May 23, 2018, this Court issued an Order of Dismissal.

On June 21, 2018, LN filed a Motion to Reopen Case for the sole purpose of LN filing a Motion for Summary Judgment. The Court entered an Order reopening the case on July 5, 2018. LN filed a Motion for Summary Judgment that was opposed by BANA. 2PA283-2PA363. The matter was

heard on September 27, 2018 and denied without prejudice. No Order was entered as Ditech filed a Notice of Bankruptcy. At no time did BANA move to set aside the dismissal of its claims.

About August 16, 2012 Miles Bauer Bergstrom & Winters, LLP, on behalf of Bank of America, wrote a two page letter to Collections of America ("COA"), the homeowner association's foreclosure trustee, inquiring about the amount due to satisfy the super-priority portion of the HOA's lien, 4PA772-773.

About November 27, 2012, COA, responded to Miles Bauer Bergstrom & Winters, LLP with a Payoff Demand. 4PA775.

From this point, there was no further action taken by Miles Bauer Bergstrom & Winters, LLP, or Bank of America, N.A. There never was a tender of any actual check or money.

The Property ultimately went to sale December 12, 2012, where Appellant purchased the property. Foreclosure Deed, 1PA102 - 104.

Respondents in their motion for summary judgment has not pled Miles Bauer Bergstrom & Winters, LLP, or Bank of America, N.A took any other action, or that notice of the foreclosure sale was not known of or received, before the foreclosure sale transpired.

LN Management plead in opposition to the Motion for Summary Judgment that, "Mr. Garabedian, also worked at Miles Bauer with Mr. Jung and there was nothing that precluded him from tendering a check for the nine months of the assessments. Nothing in their communication indicates that COA would have rejected the payment and in fact COA provided Miles Bauer with a payoff statement and adequate information to determine the nine months that would have been necessary to protect BANA's interest and yet Miles Bauer made no attempt to pay." 4PA873, Lines 1 – 7.

SUMMARY OF THE ARGUMENT

The district court erred as a matter of law in granting Respondent's motion for summary judgment when there was never any actual tender of money without any evidence of futility, that the five year rule had run, that the 2014 MSJ that was subsequently set aside was not a tolling of the five year rule, that there was no evidence of the sale being a sub-priority sale and that BANA failed to disclose any alleged Fannie Mae interest and thus waived the defense, requiring reversal and remand.

STANDARD OF REVIEW

Summary judgment is only available to resolve issues of law where the facts are not in dispute. Molino v. Asher, 96 Nev. 814, 618 P.2d 878 (1980). Summary judgment orders are reviewed de novo. Houston v. Wells Fargo Bank, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003).

ARGUMENT

THE DISTRICT COURT ERRORED IN FINDING AS A MATTER OF LAW THAT THE FIVE YEAR RULE HAD BEEN TOLLED BY THE 2014 MOTION FOR SUMMARY JUDGMENT THAT WAS SUBSEQUENTLY SET ASIDE

The case was filed on October 3, 2012. The Five Year Rule expired on October 3, 2017. There has never been a request to extend the Five Year Rule and no stipulation and Order has been entered. Respondents argued that the grant of summary judgment on August 13, 2014 constituted bringing the matter to trial and thus tolled the five year rule. Respondents offered no good cause why the matter should not have been dismissed for want of prosecution over three years after the five year rule has expired.

NRCP 41(e) only applies if an action is not brought to trial within 5 years after the action was filed. *See* NRCP 41(e)(2)(B). This Court defines "trial" as "the examination before a competent tribunal, according to the law of the land, of questions of fact or of law put in issue by pleadings, for the purpose of determining the rights of the parties." United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting Indus. v. Manson, 105 Nev. 816, 819–20, 783 P.2d 955, 957 (1989).

Appellant filed a Motion to set aside the August 13, 2014 grant of summary judgment which was granted and the summary judgment was set

aside in September, 2014. Black's Law Dictionary defines "set aside" as "To set aside a judgment decree, award, or any proceedings is to **cancel, annul, or revoke them** at the instance of a party unjustly or irregularly affected by them. State v. Primm, 01 Mo. 171; Brandt v. Brandt, 40 Or. 477, 07 Pac. 508. [Emphasis added] The very act of revoking or annulling an order is to determine that it never existed and to return to the parties to the point prior to the grant of the order. In this case, the district court erred by granting summary judgment based on Respondents argument that the grant of summary judgment constituted "bringing the matter to trial" after it had annulled that judgment thus making it a non-existent event.

Respondents further argued that Appellants Motion to Reopen the case on June 21, 2018 constituted a waiver of the five year rule however they failed to provide any evidence that Appellants requested a waiver or extension of the five year rule anywhere in its motion. Appellant's motion simply requested that the Court reopen the case for the sole purpose of allowing Appellants to file a Motion for Summary Judgment which was filed on July 30, 2018 and heard on September 27, 2018 and denied.

Importantly during this time was the fact that on February 21, 2017, the district court held a status check which resulted in the Court dismissing all the claims of Respondents without prejudice which left only LN's claims

in the matter. At no time after that did Respondents move to set aside that dismissal thus making their Motion for Summary Judgment inappropriate because they had no remaining claims in the case.

Following the denial of the Appellant's MSJ, Respondents did nothing for over two more years and never sought to extend the five year rule. Despite the fact that Appellant had sought to reopen the case for the sole purpose of filing an motion for summary judgment and having done that, Respondents made no effort to seek a further extension of the five year rule nor moving to set aside the dismissal of their claims thus waiving that right.

Based upon the foregoing, the district court erred in finding that the five year rule had not run and that the matter must be dismissed for want of prosecution pursuant to NRCP 41(e). As such the Court must reverse and remand with instructions to dismiss the matter for lack of prosecution within the five year rule.

THE DISTRICT COURT ERRORED IN FINDING AS A MATTER OF LAW THAT AN INQUIRY LETTER, WITHOUT MONEY OR EVIDENCE OF FUTILITY IS A LEGAL TENDER OR THAT THE HOA FORECLOSED ON ONLY A SUB-PRIORITY LIEN ENTITLING RESPONDENTS TO SUMMARY JUDGMENT AS A MATTER OF LAW

Equity requires all persons materially interested in a deed of trust with notice of a HOA foreclosure sale to make inquiry. SFR Investments Pool v. U.S. Bank, 130 Nev. Adv Op. 75, 334 P.3d 408 (2014), citing In re

_____, 52 F.3d 451, 455 (2d Cir. 1995) "[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take the necessary steps to preserve that right."

In Ditech's motion for summary judgment, Respondent argued that the DOT was not extinguished based on Collections of America's ("COA") statement that they were not foreclosing on the super-priority portion of the lien because such a portion did not exist until the bank foreclosed. And that even if it did that tender would have been futile.

This Court addressed these very arguments in Bank of America, N.A. v. Thomas Jessup, LLC Series VII, 462 P.3d 255 (Table), 2020 WL 2306320 (unpublished). This Court held that "Appellants contend that ACS's September 2011 letter demonstrates that it foreclosed on only the subpriority portion of Foxfield's lien. We disagree, as ACS's mistaken belief regarding the foreclosure sale's effect could not alter the sale's actual legal effect, particularly when the superpriority portion of the HOAs lien was still in default at the time of the sale and the sale otherwise complied with NRS Chapter 116s requirements." That is exactly what Ditech argued is that COA's mistaken belief regarding the foreclosure sales effect does not alter the actual legal effect of the sale. COA, whether responding truthfully that it

wasn't claiming a super-priority lien because of the misstatement of law by Jory C. Garabedian, and provides a payoff because it believes it is a super-priority lien, or mistakenly agrees with Jory C. Garabedian's misstatement of the law, but still provides a payoff, ultimately sold the subject property pursuant to NRS Chapter 116.

There was no evidence before the Court that when the lien was sold, the HOA subtracted from the lien the super-priority portion of the lien.

The only way to sell a non super priority lien is if the super priority portion has been satisfied. There is no provision in the law for a HOA to simply choose what portion of its lien it is selling, because the super priority portion always exists as a matter of law. Because of the lack of prior satisfaction of the super priority portion of the lien, it sold both liens, and the super priority portion of the lien extinguished Bank of America's deed of trust.

This Court went on to hold in Jessup that "While we recognize that Shadow Canyon supports appellants argument, *see id.* at 749 n.11, 405 P.3d at 648 n.11 (citing ZYZZX2 v. Dizon, No. 2:13-CV-1307, 2016 WL 1181666 (D. Nev. 2016)), the district court found that "Mr. Jung understood that failure to pay the superpriority portion of the lien would result in the loss of his client's interest in the property." The implication behind this

factual finding is that the district court determined it was unreasonable for Mr. Jung to abandon Miles Bauer's legal position regarding NRS 116.3116(2) based solely on ACS's September 2011 letter, and we are not persuaded that this finding was clearly erroneous." Mr. Garabedian, also worked at Miles Bauer with Mr. Jung and there was nothing that precluded him from tendering a check for the nine months of the assessments. Nothing in their communication indicates that COA would have rejected the payment and in fact COA provided Miles Bauer with a payoff statement and adequate information to determine the nine months that would have been necessary to protect Respondent's interest and yet Miles Bauer made no attempt to pay.

Ditech should further be equitably estopped from arguing tender because it had the last clear chance to prevent harm coming to innocent third parties, and chose to do nothing. Mahban v. MGM Grand Hotels, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984). Yet the district court did not consider Ditech's duty to attempt to tender an actual check, and declared the single inquiry letter, a "legal tender", entitling Ditech to summary judgment as a matter of law.

However, an offer to make tender is not a legal tender.

In the unpublished June 15, 2018 Order of Affirmance in Bank of America v. SFR Investments Pool 1, LLC, Case 69323, this Court held in part:

> "Although Bank of America contends that its agent tendered the superpriority lien amount to the HOA's agent via a February 2011 letter, we are not persuaded that Bank of America's future offer to pay the superpriority lien amount, once that amount was determined, was sufficient to constitute a valid tender. See Southfork Invs. Grp., Inc. v. Williams, 706 So. 2d 75, 79 (Fla. Dist. Ct. App. 1998) ("To make an effective tender, the debtor must actually attempt to pay the sums due; mere offers to pay, or declarations that the debtor is willing to pay, are not enough."),"
>
> "McDowell Welding & Pipefitting, Inc. v. U.S. Gypsum Co., 320 P.3d 579 (Or. Ct. App. 2014) ("In order to serve the same function as the production of money, a written offer of payment must communicate a present offer of timely payment. The prospect that payment might occur at some point in the future is not sufficient for a court to conclude that there has been a tender .... " (internal quotations, citations, and alterations omitted)); cf. 74 Am. Jur. 2d Tender§ 1 (2018) (recognizing the general rule that an offer to pay without actual payment is not a valid tender); 86 C.J.S. Tender§ 24 (2018) (same)."

In Bank of America, N.A. v. SFR, Case 69323, Miles Bauer, on behalf of Bank of America, wrote a letter to Absolute Collection Services, the same as in this case where Miles Bauer, on behalf of Bank of America, wrote to Collections of America inquiring for a payoff amount.

In the present case, Collections of America said to Miles Bauer, here's our position regarding your inquiry. However, distinct from that case, COA provided a Statement of Account on November 27, 2012.

After receiving the response and the Statement of Account in this case, Respondents did nothing. It did not send a follow up letter, file a court action, or do anything else. FFCL, 4PA963-991.

This Court has repeatedly stated that courts must look at the entirety of the circumstance that bear upon the equities. Shadow Wood HOA v. N.Y. Cmty. Bancorp, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1114 (2016). The district court did not look at the entirety of the circumstances in determining that the single inquiry letter, without payment, after receipt of a Statement of Account, creates legal tender as a matter of law.

Furthermore, in 7510 Perla Del Mar Ave. Tr. v. Bank of Arnerica, N.A., 136 Nev., Adv. Op. 6, 458 P.3d 348, 349 (2020), this Court held "an offer to pay the superpriority amount in the future, once that amount is determined, does not constitute a tender sufficient to preserve the first deed of trust". The Court in Perla Del Mar held that in order to be excused from making a tender, Respondents would have to show that payment would have been futile, which Respondents can not claim because there is no evidence

that COA would have rejected the payment and there is no evidence that Respondents even attempted and was rejected

Respondents received the response for Collections of America and the Statement of Account, and Respondents made no subsequent inquiry or tender any money despite knowledge of the HOA foreclosure sale. There was never any money sent, just an inquiry letter. FFCL, 4PA963-991. Neither reason creates "legal tender" as a matter of law entitling Respondents to summary judgment, therefore this matter must be reversed and remanded.

ARGUMENT IS NOT FACT. AND THE FACTS DEMONSTRATE THERE NEVER WAS FUTILITY

It is said that hindsight is 20/20.

In this case the district court saw:

- a August 16, 2012 a letter from Miles Bower (4PA772-773);
- an November 27, 2012 payoff demand from Collections of America (4PA775-786);
- an December 7, 2012 Email exchange between Jory Garabedian and an unknown person at Collections of America (4PA788-789);
- and a Foreclosure Deed dated November 20, 2013 (1PA102 – 104).

No affidavit was attached to Respondent's motion for summary judgment that Miles Bauer had ever attempted to tender a payment to Collection of America, for any property, or that Miles Bauer had actually received a rejection of a payment concerning any property, from Collection of America.

Summary judgment in favor of Respondents thus was granted solely on the argument that the Collection of America response and alleged email, by themselves, as a matter of law, entitled Respondents to summary judgment and survival of Respondent's deed of trust, no admissible fact being introduced in support of the motion that tender was ever attempted on any property or rejection ever received. 4PA963-991,

A reasonable person would attempt at least once to send an actual payment to a trustee before claiming that tender would be futile, yet there is no admissible evidence of any attempt in support of the motion.

In Bank of Am., N.A. v. Inspirada Comm. Ass'n, 2017 WL 2938198, at *2 (D. Nev. July 10, 2017), the US District Court for Nevada found that in April, 2013, Leach Johnson, another collection firm, was giving Miles Bauer information and accepting payments on behalf of Inspirada Community Association. The actual facts in the cited case were however that no super-priority information was ever given just like in the present

case, yet Miles Bauer still subsequently sent a check estimating nine months of commons assessments, which Leach Johnson accepted.

Therefore Respondents were aware that Miles Bauer did send checks, based upon a Miles Bauer estimation of monthly association dues to other collection firms that provided them similar information as in the present case and those checks were accepted. This finding completely negates Respondent's argument that any attempted payment would be futile, as an attempt was actually made, and it was accepted.

Nothing prevented Miles Bauer on behalf of Respondents from submitting a tender for the property the subject of this litigation. But what did Bank of America do? It did nothing instead of attempting tender.

Since there was no affidavit in Respondents's motion for summary judgment, combined with the facts in Bank of Am., N.A. v. Inspirada Comm. Ass'n, evidence when taken in the light most favorable to Appellant, the non moving party, there would have been no futility of Miles Bauer making a best guess tender to COA, as the one time it was attempted in past similar cases, it was accepted by the collection firm.

It was only unsupported argument, not fact, in Respondent's Motion for Summary Judgment, that tender would have been futile.

The letter, Collection of America's response and the email correspondence, by themselves, without more context, were insufficient as a matter of law to determine that a tender without payment was successfully completed. More was needed to support the motion for summary judgment.

Hindsight in this case was that Miles Bauer was attempting tenders, despite the language in the December 7, 2012 email, before the December 12, 2012 HOA foreclosure sale.

Without an affidavit even claiming impossibility or rejections of tender, there was insufficient evidence as a matter of law to grant summary judgment of a legal tender without a check because of some alleged claim in an email.

The district court was required to look at the totality of the circumstances, not just isolated letters and emails without a supporting affidavit claiming a single attempted tender or rejection, to decide the case.

It is improper to argue futility if the only actual futility you can cite to is acceptance of check based upon an estimate, made in a similar case in that same time period.

It was the practice of Miles Bauer, even with limited information, to still send checks. This case has no check.

The evidence in the light most favorable to Appellant is that tender with a check in this case was not only possible, Appellant has demonstrated in fact that tenders with a check concerning homes in similar cases were being attempted by Miles Bauer and accepted even with contradictory information regarding the super-priority status. The matter must be reversed and remanded as summary judgment as a matter of law was not warranted on argument alone without further context of the letter and email, and there being no affidavit to support that any tenders with a check had been made and that checks were being returned. Costello v. Casler, 127 Nev. 436, at 439, 254 P.3d 631 (2011), "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party."

THE DISTRICT COURT ERRORED IN FINDING AS A MATTER OF LAW THAT RESPONDENTS HAD NOT WAIVED THE FEDERAL FORECLOSURE BAR DEFENSE BY FAILING TO DISCLOSE IT DURING DISCOVERY

Respondents failed to raise the defense of the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), until August 28, 2018, almost 6 years after the foreclosure sale and long after the close of discovery when it raised it in their Opposition to LN's Motion for Summary Judgment.

Respondents appeared in the action October 3, 2012, did not hold an early case conference, make any initial disclosure of documents, or submit any sort of case conference report causing any scheduling in the case.

The district court dismissed the consolidated cases May 23, 2018 for lack of bringing the action to trial in 5 years, then subsequently reopened the matter solely to Appellant to bring a motion for summary judgment.

Respondents opposed the Motion for Summary Judgment, raising for the very first time as a defense, the Federal Foreclosure Bar.

Respondents never even made any initial disclosures until June 29, 2019 over 6 and a half years after filing the case and long after discovery closed.

In that Respondents never disclosed any documents in this case during discovery nor within the five year rule pursuant to NRCP 41, Appellants opposed the introduction of documents never disclosed in more than six and a half years, and for having not even disclosed a single document up until June 29, 2019, Appellant asserted that respondents waived the right to raise such defense after six and a half years and after the case was opened for the sole purpose of Appellant an MSJ and for want of prosecution and/or laches.

The district court erred in that it never considered that the Respondents failed to raise the Federal Foreclosure Bar as a defense in over six and a half years of litigation and at anytime during discovery and as such waived the defense. As such the Court must reverse and remand for further proceedings prohibiting Respondents from raising the waived defense of the Federal Foreclosure Bar.

CONCLUSION

The district court erred as a matter of law in granting Respondent's motion for summary judgment when there was never any actual tender of money without any evidence of futility, that the five year rule had run, that the 2014 MSJ that was subsequently set aside was not a tolling of the five year rule, that there was no evidence of the sale being a sub-priority sale and that BANA failed to disclose any alleged Fannie Mae interest during discovery and thus waived the defense, requiring reversal and remand.

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Summary judgment in this matter in favor of Respondents should be reversed, and the matter remanded for further proceedings in conformity with such findings.

Respectfully submitted,

DATED September 16, 2021.

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CERTIFICATE OF COMPLIANCE

1.I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Word 2010 in 14 point Times New Roman;

2.I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is:

Proportionately spaced, has a typeface of 14 points or more, and contains approximately 2,279 words;

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED September 16, 2021.

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CERTIFICATE OF SERVICE

I certify that on September 16, 2021, I served a copy of the foregoing upon all counsel of record by allowing the Court's ECF system to serve same upon:

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