IN THE SUPREME COURT OF NEVADA

LN MANAGEMENT LLC SERIES 3111 BEL AIR 24G,

Appellant,

vs.

BANK OF AMERICA, N.A; DITECH FINANCIAL LLC,

Respondent.

Case No. 82534

APPEAL
from the Eighth Judicial District Court, Clark County
The Honorable Mark R. Denton, District Judge
District Court Case No. A-12-669570-C

RESPONDENTS' ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

BAC North America Holding Company

Bank of America, N.A.

Bank of America Holding Corporation

Bank of America Corporation

Berkshire Hathaway Inc.

NB Holdings Corporation

Ditech Financial LLC

Ditech Holding Corporation

Walter Investment Management Corp

Akerman LLP

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1). The Notice of Entry of the Findings of Fact and Conclusions of Law in favor of Defendant-Appellees Bank of America, N.A. (**BANA**) and Ditech Financial LLC f/k/a Green Tree Servicing LLC (**Ditech**) (together with BANA, **Defendants**) was served on January 21, 2021. 4 PA 963-90. Appellant LN Management LLC Series 3111 Bel Air 24G (**LN Management**) filed its Notice of Appeal on February 22, 2021. 4 PA 992-93; *see* NRAP 4(a)(1) (notice of appeal must be filed "no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served"); NRAP 26(a)(1)(C) (when computing a specified time period, "if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday").

ROUTING STATEMENT

This appeal is presumptively retained by this Court because it raises a question of statewide public importance. NRAP 17(a)(12). Defendants agree that quiet title actions are not one of the enumerated case categories presumptively assigned to the Court of appeals under NRAP 17(b). *See* Appellant's Opening Br. (**AOB**) at 1.

INTRODUCTION

This appeal involves a fact pattern familiar to the Court: A purchaser of property sold at a homeowners' association foreclosure sale contends that it acquired free-and-clear title because, under NRS 116.3116, the HOA sale purportedly extinguished a deed of trust encumbering the property at the time of the foreclosure. But because the Federal National Mortgage Association (**Fannie Mae**) owned the deed of trust (**Deed of Trust**) at the time of the foreclosure sale, a federal statute precludes that result here. Specifically, the Housing and Economic Recovery Act of 2008 (**HERA**), Pub. L. No. 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq*.), provides that property, including lien interests, of Fannie Mae and the Federal Home Loan Mortgage Corporation (**Freddie Mac**) (together, the **Enterprises**) cannot be extinguished by any foreclosure process without the Federal Housing Finance Agency's (**FHFA** or the **Conservator**) consent while the Enterprises are under FHFA's conservatorship. 12 U.S.C. § 4617(j)(3) (the **Federal Foreclosure Bar**).

The district court correctly entered judgment for Defendants after concluding that the Federal Foreclosure Bar protected the Deed of Trust from extinguishment. 4 PA 977-83, 989-90. The district court's holding was based on its determination that Fannie Mae owned the Deed of Trust at the time of the foreclosure sale and FHFA did not consent to the Deed of Trust's extinguishment. *Id*. The district court

properly concluded that Fannie Mae's Deed of Trust "was not extinguished by the HOA's foreclosure sale." 4 PA 989.

On appeal, LN Management does not contest the merits of the district court's decision that the Federal Foreclosure Bar preserved Fannie Mae's Deed of Trust. Rather, LN Management argues that: 1) Defendants "waived the Federal Foreclosure Bar defense" because Defendants first invoked the Federal Foreclosure Bar in their opposition to LN Management's summary judgment motion; 2) Defendants failed to timely make disclosures; (3) the district court erred in alternatively finding tender excused as futile; and (4) the district court erred by not dismissing the case under NRCP 41(e). AOB at 9-23.

LN Management's arguments fail. Defendants' invocation of the Federal Foreclosure Bar and their disclosure of documents were timely and appropriate. Further, the uncontroverted evidence shows the HOA's trustee would not have accepted a tender of the superpriority amount because it did not even believe such a lien existed until after foreclosure of the Deed of Trust. Lastly, the district court correctly found NRCP 41(e) had not run, and LN Management fails to even address the reasoning discussed in the district court's findings.

This Court should affirm.

ISSUES PRESENTED

1. Whether the district court correctly concluded the Federal Foreclosure Bar preserved the Deed of Trust from extinguishment, notwithstanding LN Management's argument Defendants waived the Federal Foreclosure Bar argument.

2. Whether this court should affirm the district court's grant of summary judgment because formal tender was excused as futile, the HOA conducted a subpriority sale, and the Deed of Trust survived as a matter of equity.

3. Whether the district court correctly determined the five-year rule under NRCP 41(e) had not expired.

STATEMENT OF THE CASE

The district court found that Fannie Mae owned the promissory note and Deed of Trust on the subject property that secured repayment of the note, and that FHFA did not consent to the extinguishment of the Deed of Trust through the HOA foreclosure sale. Applying the same reasoning this Court has endorsed in several decisions—including *Daisy Trust v. Wells Fargo Bank, N.A.*, 445 P.3d 846 (Nev. 2019) (en banc), and *Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d 363 (Nev. 2018) (en banc)—the district court held that because the Federal Foreclosure Bar protected Fannie Mae's Deed of Trust from extinguishment, LN Management took title subject to the Deed of Trust. 4 PA 977-83, 989-90.

This appeal followed.

STATEMENT OF FACTS

I. The Secondary Mortgage Market

Congress created Fannie Mae to support a nationwide secondary mortgage market. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Under its charter, Fannie Mae's business is investing in secured residential mortgage loans. *See* 12 U.S.C. §§ 1717(b), 1719.

Fannie Mae does not directly manage many of the practical aspects of mortgage relationships, such as day-to-day borrower interactions; instead, it contracts with servicers to act on its behalf. In that role, servicers often appear as record beneficiaries of deeds of trust. *See Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757-58 (Nev. 2017) (acknowledging servicers' role); *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1039 (9th Cir. 2011) (describing servicers' role); Restatement (Third) of Property: Mortgages § 5.4 cmt. c (discussing the common practice where investors in the secondary mortgage market designate their servicer to be assignee of the mortgage); Fannie Mae's Single-Family Servicing Guide (the **Guide**) at F-1-11 (discussing Fannie Mae's relationship with servicers to manage the loans Fannie Mae purchases and recognizing that servicers may serve as record beneficiaries).[1] In such situations, the note owner

[1] Relevant portions of the Guide were submitted with Defendants' renewed motion for summary judgment. *See* 3PA662-749. This Court may also take judicial notice of the Guide. *E.g.*, *Daisy Trust*, 445 P.3d at 849 n.3 (taking judicial notice of

Footnote continues on next page.

remains a secured creditor with a property interest in the collateral, even if the recorded deed of trust names only the loan servicer. *See, e.g.*, *In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015) (en banc); *Daisy Trust*, 445 P.3d at 849.

II. Statutory Background

HERA established FHFA as the Enterprises' regulator, authorized its Director to place the Enterprises into conservatorships in certain circumstances, and enumerated the powers, privileges, and exemptions FHFA possesses as Conservator.

In September 2008—at the height of the financial crisis—FHFA's Director placed the Enterprises into conservatorships, where they remain today. *See Nationstar*, 396 P.3d at 755.

The Federal Foreclosure Bar—a broad statutory "exemption," captioned "Property protection," within HERA's conservatorship provision—mandates that when the Enterprises are under FHFA conservatorship, "[n]o property of the Agency

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Freddie Mac's servicing guide on appeal). The Guide is "generally known," especially by members of the mortgage lending and servicing industry in Nevada, and "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, so that the fact is not subject to reasonable dispute." NRS 47.130(2). Interactive and PDF versions of the Guide are available on Fannie Mae's website at https://servicing-guide.fanniemae.com/. Archived prior versions of the Guide are available at https://singlefamily.fanniemae.com/selling-and-servicing-guide-forms-and-communications by clicking "AllRegs.com" in the right-hand column and then choosing on the left-hand column under "Fannie Mae Single Family" the year of the archived Servicing Guide. While some sections of the Guide have been amended over the course of Fannie Mae's ownership of the loan, none of these amendments have materially changed the relevant sections.

shall be subject to … foreclosure … without the consent of the Agency …." 12 U.S.C. § 4617(j)(3). Another HERA provision mandates that upon the inception of conservatorship, FHFA succeeds immediately and by operation of law to "all rights, titles, powers, and privileges" of the entity in conservatorship "with respect to [its] assets," thereby making all conservatorship assets "property of the Agency" for the duration of the conservatorship. *See* 12 U.S.C. §§ 4617(b)(2)(A), (j)(3).

III. Facts Specific to the Property at Issue

This case involves a Deed of Trust securing a $322,100 promissory note (the **Note**) (together with the Deed of Trust, the **Loan**) on property located at 3111 Bel Air Drive, Unit 24G in Las Vegas (the **Property**). 3 PA 608-22. The Deed of Trust, recorded on October 20, 2004, lists Michael T. Elliott as the borrower (**Borrower**) and BANA as the lender (**Lender**) and beneficiary. *Id.* Fannie Mae purchased the Loan in November 2004, thereby acquiring ownership of the Deed of Trust. 3 PA 639 (Babin Decl.) ¶¶ 5-8. BANA serviced the Loan on Fannie Mae's behalf. *See* 3 PA 640 ¶ 11; 3 PA 661.

According to a Trustee's Deed Upon Sale recorded on December 17, 2012, 3111 Bel Air Drive 24G Trust purchased the Property at a homeowners' association foreclosure sale (**HOA Sale**) on December 12, 2012 for $7,001. 4 PA 794-96. At the time of the HOA Sale, Fannie Mae owned the Loan and BANA served as record

beneficiary of the Deed of Trust in its capacity as Fannie Mae's Loan servicer. *See* 3 PA 639-40 ¶¶ 5-8, 11-12.

3111 Bel Air Drive 24G Trust conveyed its interest in the Property to LN Management through a Quitclaim Deed recorded on April 26, 2013. 4 PA 798-800.

BANA serviced the Loan for Fannie Mae until around April 30, 2013, when the servicing rights were transferred to Ditech. 3 PA 640 ¶ 11; 3 PA 661. On July 30, 2013, BANA recorded an assignment of the Deed of Trust to Ditech. 4 PA 751. On December 20, 2019, Ditech recorded an assignment of the Deed of Trust to New Residential Mortgage, LLC. 4 PA 754-55. On March 17, 2020, New Residential Mortgage, LLC recorded an assignment of the Deed of Trust to NewRez LLC d/b/a Shellpoint Mortgage Servicing. 4 PA 757-58.

At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Fannie Mae's interest in the Deed of Trust. To the contrary, FHFA has publicly stated that it "has not consented, and will not consent in the future, to the foreclosure or other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection with HOA foreclosures of super-priority liens." 4PA802 (FHFA's Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), https://www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx).

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IV. Relevant Procedural History

On October 3, 2012, well before the December 12, 2012 HOA Sale, BANA filed a complaint against the Borrower, Las Vegas International Country Club Estates Home Owners Association, Inc., and Regency Towers Association, Inc.—entities that caused a lien for delinquent assessments and notices of default and election to sell to be recorded against the Property—seeking reformation of the Deed of Trust through unilateral or mutual mistake, an equitable lien, equitable subrogation to an earlier deed of trust, and declaratory relief. 1 PA 1-9. BANA brought the action due to a legal description error in the Deed of Trust and sought to clear up any title issues as a result of that error. *See* 1 PA 5.

While the litigation was pending, BANA learned the HOA intended to move forward with its December 12, 2012, foreclosure sale. SA 13. Following the sale, and consistent with the HOA's repeated representations to BANA regarding the priority of its deed of trust, BANA and the HOA entered a stipulation of dismissal on May 7, 2013. SA 1-4. The HOA specifically acknowledged the HOA's lien "did not contain and/or constitute a super-priority lien pursuant to NRS 116.3116(2) and the ensuing foreclosure sale did not affect the priority or extinguish the Deed of Trust, which remains a valid first mortgage/deed of trust on the Subject Property." SA 3. The HOA further agreed to be bound by the final judgment establishing the deed of trust as the "valid first mortgage lien against the Subject Property." *Id.* A

notice of entry of the stipulation was entered on May 7, 2013, resolving the action in its entirety as to the HOA. SA 5-10.

In May 2013—after the October 3, 2012 HOA Sale and the HOA's acknowledgment that the deed of trust remained valid—LN Management filed a complaint against the Borrower and BANA seeking to quiet title and for injunctive relief. 1 PA 93-96. In October 2013, the cases were consolidated. 1 PA 105-06.

Ditech moved for summary judgment on July 17, 2014. 1 PA 112 – 2 PA 263. The court granted summary judgment in favor of Ditech on August 13, 2014, holding that the Deed of Trust is reformed to include the correct legal description and that any interest acquired by LN Management is subject to the Deed of Trust. 2 PA 264-270. The order granted Ditech's motion "in its entirety" and constituted the "final order/judgment in this matter," including as to the consolidated action. 2 PA 269.

In September 2014, LN Management moved to set aside the judgment and reopen the case, which the court granted on September 24, 2014. 2 PA 271-78. The court dismissed the action without prejudice under Rule 41(e) in May 2018 because of inaction by LN Management, including its failure to file a motion for summary judgment. *See* 4 PA 972 ¶ 31; 4 PA 908. In June 2018, LN Management moved for reconsideration of the court's order, contending that the court should set aside the May 2018 order and reopen the case for the purpose of submitting its motion for summary judgment and obtaining "final orders that would determine each of the

parties[’] rights as to the property." *See* 4 PA 972 ¶ 33; 4 PA 909. In its motion to reopen the case, LN Management recognized that it was "errant" in failing to timely file a summary judgment motion in the case, and that it was "failure in LN's part" that resulted in dismissal of the case. 4 PA 909. LN Management also stated that "[a]ll that remains at this time is that the Court re-instate the matter and the Court rule on LN's Motion for Summary Judgment which will be immediately filed." *Id*. No other party filed an opposition to LN Management's motion. SA 145-148.

The court granted LN Management's motion to reopen the case in July 2018, *see* 4 PA 972 ¶ 35, 4 PA 913-14; and LN Management filed a motion for summary judgment that same day, 2 PA 283-88.[2] On August 28, 2018, BANA filed an opposition to LN Management's motion for summary judgment in which it raised the Federal Foreclosure Bar. 2 PA 364-76. The case was stayed in March 2019 because of Ditech's bankruptcy. 2 PA 496-99. Defendants moved to lift the stay

[2] In its opening brief, LN Management asserts that the district court reopened the matter, upon LN Management’s motion, “solely to Appellant to bring a motion for summary judgment.” AOB at 22. LN Management requested that the court "reopen the instant case and allow LN to file its Motion for Summary Judgement." 4PA910. When the district court granted LN Management’s motion to reopen the case, it did so without any express qualification about what could be subsequently filed or by whom. *See* 4 PA 913-14. LN Management also superficially argues "laches" in connection with its reopening of the case. AOB at 22. LN Management does not explain this argument. But in any event, laches is simply inapplicable—the district court reopened the case on LN Management's own request and did not in any way limit the subsequent proceedings, which includes Defendants' substantive arguments on the merits.

and reopen the case concurrently with their summary judgment motion filed in September 2020. 3PA584-606; 4PA972 ¶ 37. Following the completion of briefing and a hearing on Defendants' motion, the district court entered its Findings of Fact, Conclusions of Law and Judgment in favor of Defendants on January 20, 2021. 4 PA 937-62. The district court entered Notice of Entry of its Findings of Fact, Conclusions of Law and Judgment the following day. 4 PA 963-91. LN Management noticed this appeal. 4 PA 992-93.

STANDARD OF REVIEW

This Court reviews a district court's decision to enter summary judgment and its conclusions of law de novo. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1029 (Nev. 2005). A motion for summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Id*.; NRCP 56(c). A district court's decision to admit evidence is reviewed under an abuse of discretion standard. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 193 P.3d 536, 544 (Nev. 2008). "Absent a clear abuse of discretion, [this Court] will not disturb a district court's decision regarding discovery." *In re Adoption of Minor Child*, 60 P.3d 485, 489 (Nev. 2002).

The court reviews a district court's interpretation of the Nevada Rules of Civil Procedure de novo. *Ford v. Branch Banking & Tr. Co.*, 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015).

The court reviews a district court's decision to apply defenses such as equitable estoppel for abuse of discretion. *In re Harrison Living Tr.*, 121 Nev. 217, 222, 112 P.3d 1058, 1061 (2005).

SUMMARY OF ARGUMENT

The district court correctly held that the Federal Foreclosure Bar protected Fannie Mae's Deed of Trust from extinguishment through the HOA Sale. LN Management's arguments on appeal are meritless, and this Court should reject them.

LN Management does not contest the merits of the district court's decision that the Federal Foreclosure Bar preserved Fannie Mae's Deed of Trust. Rather, LN Management argues that: 1) Defendants "waived the Federal Foreclosure Bar defense" because Defendants first invoked the Federal Foreclosure Bar in their opposition to LN Management's motion for summary judgment, less than six years after the 2012 HOA Sale, and 2) Defendants failed to timely disclose their associated evidence during discovery.

Each of LN Management's arguments fails. The Federal Foreclosure Bar negates a necessary component of LN Management's claim—superior title. As such, it is not an affirmative defense, and it need not be set forth in a pleading; Defendants

properly asserted it in opposing LN Management's motion for summary judgment. But even if the Federal Foreclosure Bar is assumed to be an affirmative defense, LN Management suffered no prejudice from the timing of the argument and had an opportunity to respond or seek further discovery. Nor were Defendants' disclosures untimely, given that LN Management did not initiate discovery or seek a scheduling order setting the timeframes and terms of discovery in this case. Defendants' invocation of the Federal Foreclosure Bar and their disclosure of documents were thus timely and appropriate.

Even if the Federal Foreclosure Bar did not apply (which it does), this court should still affirm under the alternative grounds detailed in the district court's ruling. The district court properly found the Deed of Trust survived because tender was excused as futile based on the numerous representations from the HOA's trustee that it was conducting a subpriority sale, and the superpriority component did not even arise until after foreclosure on the Deed of Trust. The district court also found the HOA conducted a subpriority sale and alternatively the Deed of Trust survived as a matter of equity. LN Management does not even address the district court's equitable ruling in its opening brief.

Lastly, LN Management's argument that the five-year rule under NRCP 41(e) commands dismissal lacks merit. The district court correctly found that NRCP 41(e)

was inapplicable, and, in any event, had been waived. Further, even if it were applicable, it had not expired due to tolling. This Court should affirm.

ARGUMENT

I. The District Court Correctly Concluded that the Federal Foreclosure Bar Applies Here.

A. The Evidence Establishes that the Federal Foreclosure Bar Preserved Fannie Mae's Deed of Trust.

The district court correctly concluded Fannie Mae was placed under FHFA conservatorship in 2008 and remains in conservatorship today, 4 PA 968 ¶ 3; that the evidence "proves Fannie Mae owned the note and deed of trust at the time of the HOA sale and was in a contractual relationship with [BANA] as the loan servicer," 4 PA 980 ¶ 43; and that "LN Management has not shown it obtained [FHFA's] consent," 4 PA 981 ¶ 48. The district court thus correctly concluded that the Federal Foreclosure Bar preserved Fannie Mae's Deed of Trust. 4 PA 977-83 ¶¶ 35-53, 989. LN Management does not appeal the merits of the district court's decision on the Federal Foreclosure Bar.

Indeed, the district court's decision comports with the many decisions of this Court[3] and the Ninth Circuit[4] holding that an HOA foreclosure sale cannot

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[3] *See, e.g.*, *Daisy Trust*, 445 P.3d at 847; *Christine View*, 417 P.3d at 368.

[4] *See, e.g.*, *Nationstar Mortg. LLC v. Saticoy Bay LLC, Series 9229 Millikan Ave.*, 996 F.3d 950, 954 (9th Cir. 2021); *FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136, 1149 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1618 (2019); *Berezovsky v. Moniz*, 869 F.3d 923, 929-31 (9th Cir. 2017).

extinguish an Enterprise's property interests while it is in conservatorship, that an Enterprise's authenticated business records and Guide excerpts establish an Enterprise's loan ownership, and that FHFA must affirmatively consent to the extinguishment of conservatorship property. *Daisy Trust* confirmed that an Enterprise "did not need to be the [deed of trust's] beneficiary of record to establish its ownership interest," and "Nevada's recording statutes d[o] not require [an Enterprise] to publicly record its ownership interest as a prerequisite for establishing that interest." 445 P.3d at 849.

Defendants presented evidence materially identical to that presented in *Daisy Trust* and other similar decisions. Specifically, Defendants provided business records supported by an employee declaration describing and authenticating the records. *See* 3 PA 638-61. As explained in Fannie Mae's employee declaration, the data from Fannie Mae's business records state that Fannie Mae acquired ownership of the Loan in November 2004 and continued to own the Loan at the time of the HOA Sale in December 2012. *See* 3 PA 639-40 ¶¶ 5-8. That evidence also establishes that at the time of the HOA Sale, BANA served as the Deed of Trust's record beneficiary in its capacity as Fannie Mae's servicer. *See* 3 PA 639-40 ¶¶ 11-12. Fannie Mae's declaration confirms the relationship between Fannie Mae and its servicers, including BANA and Ditech, is governed by the Guide. 3 PA 640 ¶ 13.

B. Defendants Timely and Appropriately Invoked the Federal Foreclosure Bar.

LN Management neither disputes the controlling Federal Foreclosure Bar case law nor contests the merits of the district court's decision on the issue. Rather, LN Management's only purported shield against the Federal Foreclosure Bar is to dispute whether it was timely asserted. LN Management appears to contend both that Defendants untimely raised the argument, and also that the evidence supporting that argument was not timely produced. AOB at 21-23. Neither is accurate. LN Management raised these arguments in its district court briefing, *see* 4 PA 873-74, and the district court implicitly rejected LN Management's timeliness arguments when it concluded that the Federal Foreclosure Bar applies to preserve the Deed of Trust, 4 PA 977-83.

1. Defendants Timely Invoked the Federal Foreclosure Bar.

LN Management contends that because Defendants purportedly "failed to raise the defense of the Federal Foreclosure Bar … until August 28, 2018, almost 6 years after the foreclosure sale," Defendants "waived the right to raise such defense." AOB at 21-22. LN Management's argument is unclear, as it neither explains its reasoning in any detail nor identifies under what rule or legal theory such a purported delay is improper. For this reason alone, the Court should reject LN Management's timeliness arguments. *See Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280, 1288 n. 38 (Nev. 2006) (citing cases and noting appellant's responsibility to provide

cogent arguments in support of its appellate arguments and declining to consider an appellate challenge to a district court's rulings when appellant failed to do so).[5]

To the extent LN Management intends to argue that the Federal Foreclosure Bar is an affirmative defense, and Defendants therefore could not raise it outside the pleadings, that argument fails for two reasons.

First, the omission of the Federal Foreclosure Bar from Defendants' Answer does not automatically bar the argument. If the Court assumes the Federal Foreclosure Bar is an affirmative defense—as it has sometimes done without deciding the issue, *see Nationstar Mortg., LLC v. Guberland LLC-Series 3* (***Guberland 3***), No. 70546, 2018 WL 3025919, at *1 (Nev. June 15, 2018) (unpublished disposition)—the district court was well within its discretion to allow Defendants to assert it, because LN Management suffered no prejudice from the timing of the argument and had ample opportunity to respond or seek further discovery. *Second*, the Federal Foreclosure is not an affirmative defense that had to be asserted in a pleading.

[5] In making its argument, LN Management also fails to recognize that any delay resulted in part due to its own failure to take action to advance the case. *See, e.g.*, 2 PA 271-78; 4 PA 972 ¶ 31; 4 PA 908 (district court dismissing the action in May 2018 because of inaction by LN Management, including its failure to file a motion for summary judgment, following the reopening of the case in September 2014).

a. Assuming the Federal Foreclosure Bar is a Claim or Affirmative Defense, Defendants Appropriately Raised It.

This Court has held that even if the Federal Foreclosure Bar is assumed to be an affirmative defense, a servicer does not waive it by not pleading it in the Answer, so long as the HOA sale acquirer is not prejudiced by its invocation later in the case. *See Guberland 3*, 2018 WL 3025919, at *1. Here, LN Management suffered no prejudice because of the timing of Defendants' disclosure that they would assert the Federal Foreclosure Bar, and LN Management does not assert otherwise on appeal.

Nevada requires prejudice before an affirmative defense can be barred as untimely. That is, waiver applies only when the "opposing party is not given reasonable notice and an opportunity to respond." *Williams v. Cottonwood Cove Dev. Co.*, 619 P.2d 1219, 1221 (Nev. 1980).

In *Guberland 3*, the servicer did not assert the Federal Foreclosure Bar in its pleadings. 2018 WL 3025919, at *1. The Court "assume[d]," without deciding the issue, "that preemption based on the Federal Foreclosure Bar is an affirmative defense under NRCP 8(c)." *Id*. The Court concluded nevertheless that a servicer was not precluded from raising the Federal Foreclosure Bar for the first time in its countermotion for summary judgment. *Id*. In doing so, this Court vacated the district court ruling that the servicer in that case had waived the Federal Foreclosure Bar argument by not raising it until summary judgment briefing. The Court instead

concluded that the servicer "raised the defense in its countermotion for summary judgment, such that respondent … had reasonable notice and an opportunity to respond." *Id*. The Court further concluded that even if the servicer had untimely made discovery disclosures related to the Federal Foreclosure Bar "such that [respondent] was surprised by the defense, [respondent] had an opportunity to respond and could have requested a continuance under NRCP 56(f) if it believed additional discovery would lead to evidence supporting its opposition." *Id.* The Court concluded that "[u]nder the circumstances, [the Court] cannot agree with the district court that Nationstar was precluded from raising the Federal Foreclosure Bar in its countermotion for summary judgment." *Id.*; *see also Fort Apache Homes, Inc. v. JPMorgan Chase Bank, N.A.*, No. 72257, 2019 WL 4390833, at *1 (Nev. Sep. 12, 2019) (unpublished disposition) (similarly finding that "respondent raised the [Federal Foreclosure Bar] in its countermotion for summary judgment, such that appellant had reasonable notice and an opportunity to respond" and that appellant could have sought a continuance under NRCP 56(f)).

Similarly here, LN Management, which itself acknowledged during district court proceedings that "it has a number of these cases," 4 PA 909, is a repeat litigant in Federal Foreclosure Bar proceedings and "had an opportunity to respond" to the Federal Foreclosure Bar argument in its reply. And LN Management "could have requested a continuance under NRCP 56(f) if it believed additional discovery would

lead to evidence supporting its opposition" but elected not to do so. *See id.* LN Management, a repeat litigant familiar with Federal Foreclosure Bar litigation, therefore chose not to avail itself of any of the opportunities at its disposal to correct any purported prejudice it claims to have suffered.

Moreover, "[f]ailure to amend does not affect the outcome because a judgment may be upheld on any theory supported by the facts proved, even if not set forth in the pleadings." *In re Kemmer*, 265 B.R. 224, 230 (Bankr. E.D. Cal. 2001) (citing *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch*, 80 F.3d 895, 900 (4th Cir. 1996)). That is the case here; the undisputed facts support Fannie Mae's ownership of the Loan on the date of the HOA Sale. 3 PA 639-40 ¶¶ 5-8, 11-12; 4 PA 980-81 ¶¶ 43-46. Defendants timely invoked the Federal Foreclosure Bar.

b. The Federal Foreclosure Bar is Not an Affirmative Defense that Needs to be Raised in the Pleadings.

To the extent LN Management contends that Defendants were required to assert the Federal Foreclosure Bar as an affirmative defense, LN Management cites no authority to support that argument. The Federal Foreclosure Bar is a legal theory upon which parties like Defendants can rely to defeat the cause of action in this case—LN Management's quiet-title claim—without separately pleading it as an affirmative defense.

Under Nevada law, an argument that would "negate an element" the plaintiff must establish is *not* an affirmative defense. *Clark County School Dist. v.*

Richardson Const., Inc., 123 Nev. 382, 396 (2007). In a Nevada quiet-title action, the plaintiff must prove "superiority of title"; there are no separate elements to the claim. *Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 318-19. Because the Federal Foreclosure Bar "negate[s]" LN Management's claim to superior title, it is not an affirmative defense, it is a defensive legal theory. Thus, it is irrelevant whether Defendants' Answer references the Federal Foreclosure Bar itself because "[s]pecific legal theories need not be pleaded." *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001). The Federal Foreclosure Bar is the specific legal theory that prevents LN Management from achieving the quiet-title relief it seeks. Defendants thus properly raised the Federal Foreclosure Bar in their August 2018 opposition to LN Management's Motion for Summary Judgment. 2 PA 364-76.

Relatedly, this Court has rejected the argument that a servicer's invocation of the Federal Foreclosure Bar as a defense was equivalent to asserting a standalone claim. *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 396 P.3d 754, 757 (Nev. 2017). "Rather, SFR asserted a quiet title claim against Nationstar, and Nationstar has merely argued that [Fannie Mae]'s property is not subject to foreclosure while it is in conservatorship under federal law." *Id.* Because SFR's quiet-title claim was properly before the court, there was no question that the court could evaluate the merits of the argument that the Federal Foreclosure Bar provided the rule of decision in resolving that claim. *Id.* That is the precise situation here. LN Management has

asserted a quiet-title claim, and Defendants are permitted to rely upon the Federal Foreclosure Bar as the rule of decision to defeat LN Management's claim of superior title without having to plead it as a counterclaim or affirmative defense.

2. Defendants Timely Disclosed Evidence Related to the Federal Foreclosure Bar.

Second, LN Management contends that Defendants "did not make any initial disclosures until June 29, 2019[,] over 6 and a half years after filing the case and long after discovery closed."[6] AOB at 22. Defendants' evidence supporting their reliance on the Federal Foreclosure Bar—*i.e.*, evidence supporting both Fannie Mae's ownership of the Loan and its relationship with its servicer at the time of the HOA Sale—was timely disclosed. On June 24, 2019, Defendants served their Initial Disclosures, 4 PA 916-25, and, on September 30, 2020, Defendants served a First Supplemental Disclosure of Witnesses and Documents, 4 PA 926-34. Those disclosures contained both a corporate designee for Fannie Mae and the Fannie Mae business records discussed above. *See* 4 PA 919, 921, 929, 931. Accordingly, as was the case in *Daisy Trust*, 445 P.3d at 850-51, a Fannie Mae representative and supporting documentation were properly disclosed and properly relied upon by the district court. *See Prabhu v. Levine*, 930 P.2d 103, 110 (Nev. 1996) (a "district court enjoys broad discretion in determining whether evidence should be admitted").

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[6] Defendants served their Initial Disclosures on June 24, 2019, 4 PA 916-25, not June 29, 2019 as LN Management contends, AOB at 22.

LN Management's argument that the district court erred by considering Defendants' purportedly untimely evidence fails. *See* AOB at 22. LN Management materially misstates the posture of this case. LN Management, the plaintiff in the case, did not initiate discovery or seek a scheduling order setting the timeframes and terms of discovery in this case. As a result, there was no deadline beyond which Defendants' disclosure of evidence would have been untimely. Defendants' evidence was disclosed in June 2019, 4 PA 916-25, 926-34, *over a year* before Defendants filed their motion for summary judgment in September 2020, 3 PA 584-606. LN Management thus had every opportunity and right to pursue discovery to challenge that evidence, but declined to do so. LN Management thus cannot claim to have been prejudiced by the timing of Defendants' disclosures. Given the absence of a scheduling order and a deadline for discovery, LN Management has made no plausible argument that the district court abused its discretion when it considered LN Management's Federal Foreclosure Bar evidence. *See M.C. Multi-Family Dev.*, 193 P.3d at 544 (district court's decision to admit evidence is reviewed under an abuse of discretion standard).

Accordingly, the district court did not abuse its discretion when it considered Defendants' timely disclosed evidence.

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II. The District Court Correctly Held Futility Excused Payment

A. Tender Was Excused under *Perla Trust*

A trustee's known policy of rejecting superpriority tender checks renders tender efforts futile and excuses a formal tender. In *Perla Trust*, as in this case, BANA retained Miles Bauer to protect its interest in a recorded first deed of trust after receiving a notice from the association's trustee that it was foreclosing on a homeowners' association's lien. 458 P.3d at 349, 136 Nev. at 64. Miles Bauer wrote a letter to the HOA's trustee NAS "request[ing] that NAS identify the superpriority portion of the lien . . . and offered to pay that sum upon proof of same." *Id.* NAS received the letter but did not respond to it. *Id.* Neither BANA, nor Miles Bauer, took additional steps to protect the deed of trust. *Id*.

BANA argued, and the court agreed, its obligation to tender the superpriority amount was excused because NAS's policy was to reject any payment for only the superpriority lien amount. *Id.* at 351. The court held that because NAS's policy was to "reject any check for less than the full lien amount," and because Miles Bauer and BANA knew about NAS's policy, "substantial evidence support[ed] the district court's finding that even if Miles Bauer had tendered a check for the superpriority amount, it would have been rejected . . . As a result, [BANA] was excused from making a formal tender in this instance . . . ." *Id.* (emphasis added). The court affirmed the district court's ruling that BANA "preserved its interest in the property

such that Perla Trust purchased the property subject to the Bank's first deed of trust." *Id.* at 352.

Perla Trust did not create a new futility exception to tender. Rather, it confirmed the well-established principle that "[a]n actual tender is unnecessary where it is apparent the other party will not accept it." *Id.* at 351 (citing *Schmitt v. Sapp,* 71 Ariz. 48, 223 P.2d 403, 406-07 (1950)). This is because the "law does not require one to do a vain and futile thing." *Id*; *see also Mark Turner Props., Inc. v. Evans,* 274 Ga. 547, 554 S.E.2d 492, 495 (2001) ("Tender of an amount due is waived when the party entitled to payment, by declaration *or by conduct,* proclaims that, if tender of the amount due is made, an acceptance of it will be refused." (alteration and internal quotation marks omitted)); *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 350 N.W.2d 1, 5 (1984) ("A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made." (internal quotation marks omitted)); *Shields v. Harris,* 934 P.2d 653, 655 (Utah Ct. App. 1997) ("If a demand for a larger sum is so made that it amounts to an announcement that it is useless to tender a smaller sum, it dispenses with the tender requirement." (internal quotation marks omitted)); *see also* 74 Am. Jur. 2d *Tender* § 4 (2012) ("A tender of an amount due is waived when the party entitled to payment, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted."); 86 C.J.S. *Tender* § 5 (2017) (same).

B. BANA knew the HOA's trustee would not accept its tender

The district court correctly determined this case falls under the excused tender framework. Just as in *Perla Trust*, BANA offered to pay the HOA, through Collections of America, the superpriority amount "actually due" with no impermissible conditions attached. Through Miles Bauer, BANA sent a letter to Collections of America requesting a payoff ledger showing the superpriority amount of the HOA's lien so that it could calculate and pay that amount. 4 PA 765-773. In response to BANA's letter, a representative from Collections of America and Miles Bauer had a telephone conversation. Following the call, Miles Bauer recounted the telephone call in an email to Collections of America. 4 PA 788-789. Collections of America then responded and confirmed 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." *Id.* BANA stood ready, willing, and able to tender the full statutory super-priority amount to protect the Deed of Trust, but the HOA obstructed BANA's ability to tender the superpriority portion of the HOA's lien through its representations and assurances. *Id.*

This court recently addressed this exact type of statement—denying that a lien had superpriority before the bank foreclosed—and found it provides sufficient evidence that tender would have been futile. *See U.S. Bank N.A. v. SFR Invs. Pool 1 LLC*, No. 78003, 2020 WL 3003017, at *1 (Nev. June 4, 2020) (unpublished) ("The

necessary implication of these statements is that [the HOA trustee] would not accept a superpriority tender before the first deed of trust was foreclosed").

C. LN Management failed to rebut the evidence of futility

The evidence Defendants presented below could create only one reasonable inference: Collections of America would not have accepted a valid tender from BANA, and BANA's counsel knew about that policy. Defendants carried their initial burden on this issue. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact."). The burden of production then shifted to LN Management to show the existence of a genuine issue of material fact, specifically, that Collections of America would have accepted a tender of the correct superpriority portion from Miles Bauer. *Id.* at 602-03, 172 P.3d 131 at 134 ("If such a showing is made, then the party opposing summary judgment assumes a burden of production to show the existence of a genuine issue of material fact."). LN Management introduced ***zero*** contrary evidence to rebut this inference, nor does the record contain any such evidence. The district court correctly granted judgment in Defendants' favor.

D. LN Management fails to identify any error below

LN Management does not substantively address Defendants' evidence of futility in its opening brief, including Collections of America's own direct statement

that the superpriority lien did not apply. Instead, LN Management raises a number of meritless contentions in support of remand. Specifically, LN Management argues: (1) the district court was required to weigh the equities before granting judgment; (2) BANA's offer to pay the superpriority amount does not constitute a tender; (3) BANA should have "done more" to protect its interest; and (4) Collections of America could not have conducted a subpriority sale despite their representations. AOB 11-21.[7] Defendants addresses these arguments in turn.

1. The court was not required to weigh the equities

The district court found BANA's excused tender preserved the deed of trust as a matter of law. 4 PA 953-954. The district court was not, as LN Management suggests, still required to weigh the equities. This court did not balance the equities in *Diamond Spur*, instead confirming a valid tender cures the default on the superpriority portion of the lien, preventing a superpriority foreclosure. 427 P.3d at 120-21. This court echoed this sentiment in *Perla Trust*, noting "[t]he district court did not grant the Bank equitable relief; instead, it determined that Perla Trust took title to the property subject to the Bank's deed of trust because the superpriority tender, or rather the excuse thereof, cured the default as to that portion of Mandolin's

[7] LN Management also curiously argues Defendants did not include an affidavit in their underlying summary judgment motion. Notwithstanding that there is no evidentiary requirement that futility be proven through an affidavit, Defendants did provide the affidavit of Miles Bauer in support of its motion. 4 PA 765-773.

lien ***by operation of law***. *Perla Trust*, 136 Nev. at 65 n.1 (emphasis added). This court should summarily disregard any suggestion the district court was required to weigh the equities in granting summary judgment on futility of tender.[8]

2. Whether an offer constitutes a tender is irrelevant.

LN Management argues that an offer to tender is not a legal tender. This argument is immaterial to the district court's judgment. The district court did not find that BANA's offer to tender constituted a valid tender. Rather, it found that Collections of America's conduct rendered tender futile, excusing the need for BANA to send a formal tender payment. 4 PA 953-954. These are distinct issues.[9]

3. BANA had no obligation to "do more"

LN Management suggests BANA was required to take additional actions after receiving Collections of America's response, such as sending yet another letter or filing a court action. This argument fails. BANA had no obligation to take any additional steps once it was already clear the trustee would not accept a proper tender (because it expressly believed there was no superpriority lien that even could be satisfied through tender). As explained in *Perla Trust*, "[t]he law does not require one to do a vain and futile thing." *See Perla Trust*, 458 P.3d at 351 (citing *Schmitt v.*

[8] Even if the equities were relevant to the futility analysis, LN Management fails to demonstrate the equities are in its favor. They are not. *See* 4 PA 985-988.

[9] LN Management also argues Ditech should be "equitably estopped" from arguing tender based on some purported duty to tender. No such duty exists. And, in any case, the district court ruled based on futility of tender, not tender.

Sapp, 71 Ariz. 48, 223 P.2d 403, 406-07 (1950)). In fact, none of the authorities underlying and relied on in *Perla Trust* require the tendering party to take ***any*** affirmative action—they all focus on the action of the creditor or lienor:

- "'An actual tender is unnecessary where it is apparent ***the other party*** will not accept it. The law does not require one to do a vain and futile thing.'" *Perla Trust*, 458 P.3d at 351 (*quoting Schmitt v. Sa*pp, 223 P.2d 403, 406-407 (Ariz. 1950));
- "'Tender of an amount due is waived when ***the party entitled to payment***, by declaration or by conduct, proclaims that, if tender of the amount due is made, an acceptance of it will be refused.'" *Perla Trust*, 458 P.3d at 351 (*quoting Mark Turner Props. v. Evans*, 554 S.E.2d 492, 492 (Ga. 2001));
- "'A formal tender is not necessary where a party has shown by act or word that it would not be accepted if made.'" *Perla Trust*, 458 P.3d at 351 (*quoting Chiles, Heider & Co. v. Pawnee Meadows, Inc*., 350 N.W.2d 1, 5 (Neb. 1984));
- "[T]ender was waived where it was clear that 'if a strict legal tender had been made, ***defendant would not have accepted the money***.'" *Perla Trust*, 458 P.3d at 351 (*quoting Alfrey v. Richardson*, 231 P.2d 363, 368 (Okla. 1951));

- "'A tender of an amount due is waived when ***the party entitled to payment***, by declaration or by conduct, proclaims that, if tender of the amount due is made, it will not be accepted.'" *Perla Trust*, 458 P.3d at 351 (*quoting* 74 Am. Jur. 2d *Tender* § 4 (2012));
- "[T]ender is excused 'where ***the lienor*** claims a larger sum than he or she is entitled to collect.'" *Perla Trust*, 458 P.3d at 352 (*quoting Jenkins v. Equip. Ctr., Inc*. 869 P.2d 1000, 1003 (Utah Ct. App. 1994)).

The only relevant question is whether the party entitled to payment made clear that tender would be rejected. If it did (as it did here), then tender is excused even if the tendering party does nothing at all. LN Management's attempt to shift the blame fails on its face.

E. Collections of America conducted a subpriority sale

LN Management argues Collections of America's representations that it was conducting a subpriority sale are irrelevant because they could not change the legal effect of the sale. This argument fails for several reasons.

First, for the purpose of the futility analysis, it is immaterial whether the HOA and its trustee *actually* conducted a subpriority sale. The relevant inquiry is whether their representations rendered formal tender excused. Here, they plainly did. *See U.S. Bank N.A.*, 2020 WL 3003017, at *1.

Second, LN Management's representation is factually incorrect. The HOA stipulated, and the district court approved, an order affirmatively establishing that its lien did not contain a superpriority component, such that the HOA foreclosure sale could not have extinguished the deed of trust. SA 3. This was consistent with the HOA's representations prior to the sale. At no point in time did LN Management move for reconsideration of this order. The district court then reiterated the subpriority status of the sale in its findings of fact and conclusions of law. 4 PA 954-955. As the district court noted, an association can choose to foreclose on either the subpriority or superpriority portion of its lien. *Id.* (citing *Shadow Wood Homeowners Ass'n v. New York Cmty. Bancorp, Inc.*, 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1116 (2016) ("And **if** the association forecloses on its superpriority lien portion, the sale also would extinguish other subordinate interests in the property."); *see also River Glider Ave. Tr. v. The Bank of N.Y. Mellon*, No. 79808 (Nev. Sup. Ct. Sept. 18, 2020) (unpublished disposition) (finding representations of purchaser in judicial proceeding determinative for whether a sale was a subpriority or super-priority sale). LN Management does not even address this finding in its opening brief. *Rizvi*, 2021 WL 5276632, at *1.[10]

. . .

[10] LN Management also entirely fails to address the district court's finding that the deed of trust alternatively survived as a matter of equity. 4 PA 985-88. This alone commands affirmance.

III. The District Court Correctly Determined the Five-Year Rule Under NRCP 41(e) Had Not Expired.

A. LN Management fails to address each ground on which the district court found the five-year rule inapplicable.

The district court's findings of fact and conclusions of law detail five independent grounds to support its ruling that the five-year rule had not expired. These include: (1) the action was brought to trial prior to NRCP 41(e)'s expiration, rendering it inapplicable; (2) LN Management stipulated to forego the five-year rule; (3) judicial estoppel forecloses LN Management from obtaining dismissal; (4) equitable estoppel and waiver bar LN Management's five-year rule argument; and (5) the five-year rule had not run due to tolling. 4 PA 943-947.

LN Management's opening brief only superficially addresses the district court's first and second grounds, while completely ignoring the remaining three grounds for the district court's decision. *See* AOB at 9-11. This alone is fatal to LN Management's appeal on this issue. *Rizvi v. U.S. Bank Nat'l Ass'n as Tr. for Bluewater Inv. Tr. 2018-A*, No. 82010, 2021 WL 5276632, at *1 (Nev. Nov. 10, 2021) (affirming district court where appellant failed to address each reason for its determination); *see also Hillis v. Heineman*, 626 F.3d 1014, 1019 n.1 (9th Cir. 2010) (affirming where appellants did not challenge alternative ground on which the district court dismissed); *AED, Inc. v. KDC Inv., LLC*, 307 P.3d 176, 181 (Idaho 2013) ("[I]f an appellant fails to contest all of the grounds upon which a district court

based its grant of summary judgment, the judgment must be affirmed."); *Gilbert v. Utah State Bar*, 379 P.3d 1247, 1254-55 (Utah 2016) ("[W]e will not reverse a ruling of the district court that rests on independent alternative grounds where the appellant challenges only one of those grounds.").

Issues not raised in an appellant's opening brief are deemed waived. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011); *see also* NRAP 28(a). Because LN Management failed to address each basis for the court's five-year rule determination, this court should summarily affirm.

B. The five-year rule under NRCP 41(e) does not support dismissal.

Even if the court considers LN Management's arguments, they still fail for each of the reasons detailed in the district court's underlying order.

1. The district court action was previously brought to trial.

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). The Nevada supreme 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). Under this definition, "proceedings leading to a complete grant of

summary judgment constitute a trial" for purposes of the rule. *Monroe v. Columbia Sunrise Hosp. & Med. Ctr.*, 123 Nev. 96, 100, 158 P.3d 1008, 1010 (2007).

It is undisputed the district court granted summary judgment in favor of Ditech on August 13, 2014. 2 PA 264-70. The order granted Ditech's motion "in its entirety" and constituted the "final order/judgment in this matter." *Id.* LN Management does not argue that this August 2014 order failed to bring the action to trial within the meaning of NRCP 41(e). Instead, LN Management argues the court should simply ignore the effect of this order on the five-year rule because the district court ultimately granted LN Management's motion to set aside the judgment in September 2014. AOB at 10. This argument fails for several reasons.

First, nowhere in the underlying record did LN Management argue the motion to set aside negated the effect of the initial judgment on NRCP 41(e). *See generally* 4 PA 868-79. Arguments not raised to the district court below cannot be considered on appeal. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 53, 623 P.2d 981, 984 (1981).

Second, while LN Management is correct that the initial judgment itself was no longer operative after being vacated, LN Management fails to address how this negates the plain language of NRCP 41(e). Nothing in either NRCP 41(e) or Nevada case law contradicts the fact Ditech brought the action "to trial" within the meaning of Rule 41(e). This is only logical. If post-judgment motions could undo a parties' prior compliance with the rule, this would open the door to procedural

gamesmanship, as litigants could strategically wait until after the five-year rule has run before moving to set aside or reconsider a judgment. Rule 41(e)'s plain language does not contemplate the five-year rule being reinstated after it has already been satisfied on summary judgment. *See Vanguard Piping v. Eighth Jud. Dist. Ct.*, 129 Nev. 602, 608, 309 P.3d 1017, 1020 (2013) (stating the rules of statutory interpretation apply to procedural rules and noting the court should look to the plain language of the rule); *Thran v. District Ct.*, 79 Nev. 176, 180-81 (1963) (Rule 41(e) is "clear, unambiguous and requires no construction other than its own language."). Because Defendants already satisfied the five-year rule, it could no longer bar the subsequent proceedings.

2. LN Management Stipulated to Forego the Five-Year Rule.

NRCP 41(e)(5) provides a party may stipulate in writing to extend the time in which to prosecute an action. These stipulations do not necessarily need to be in the form of a formal submission. For instance, this court has recognized that certain actions, such as making representations in open court, can constitute a stipulation even absent a formal written stipulation. *See Prostack v. Lowden*, 96 Nev. 230, 231, 606 P.2d 1099, 1099-1100 (1980).

Here, the district court entered an order dismissing the action under NRCP 41(e) on May 21, 2018. SA 135-136. LN Management elected to move for reconsideration. SA 137-142. In its motion, LN Management explicitly argued the

court should set aside the court's five-year rule dismissal and reopen the case so that the parties could obtain "final orders that would determine each of the parties rights as to the property." SA 140. No other party filed an opposition to LN Management's motion. SA 144. Pursuant to EDCR local rule 2.20, a non-opposition constitutes "consent to granting" the motion.

By filing an unopposed motion to disregard the five-year rule dismissal and litigate the matter on the merits, LN Management and the remaining parties stipulated to forego application of the five-year rule to this matter. The district court accepted this stipulation when it granted LN Management's motion and reopened the case notwithstanding NRCP 41(e). SA 143-144.

LN Management argues the motion to reopen the case could not have constituted a waiver/stipulation because it "simply requested that the Court reopen the case for the sole purpose of allowing Appellants to file a Motion for Summary Judgment." AOB at 10. As a preliminary matter, LN Management did not raise this argument below, and this court should deem it waived. *See generally* 4 PA 868-879; *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 53, 623 P.2d 981, 984 (1981). Further, this argument entirely ignores the context of its motion, which was requesting the district court set aside its NRCP 41(e) dismissal order. LN Management could not

possibly have obtained its requested relief without waiving the five-year rule.[11] LN Management cannot retroactively revive a rule that it already successfully set aside.

3. The district court correctly applied judicial estoppel and LN Management does not argue otherwise

Even assuming the five-year rule continued to apply (and it did not), the district court correctly found LN Management was judicially estopped from obtaining dismissal. Judicial estoppel has five elements: "(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake." *Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017) (citation omitted). All elements are satisfied to prevent LN Management from asserting the five-year rule below.

First, LN Management took two positions. In its opposition to Defendants' summary judgment motion, LN Management argued the five-year rule expired on October 3, 2017, necessitating dismissal of this action. 4 PA 871. But LN Management previously moved for reconsideration on **June 21, 2018**, of the district

[11] LN Management also argues the court had previously dismissed Defendants' claims, such that Defendants had no remaining claims. LN Management fails to cite to any written order of dismissal. Further, LN Management ignores that Defendants also obtained judgment on LN Management's own claims.

court's order dismissing the action for want of prosecution under the ***very same*** rule. SA 137-142. In the reconsideration motion, LN Management explicitly represented any delay in resolving the case after the court granted its initial motion to reopen in September 2014 was due to LN Management's ***own*** "excusable neglect." SA 140. LN Management argued reconsideration of the dismissal order was warranted because defendants and LN Management needed the district court "to issue final orders that would determine each of the parties rights as to the property." *Id.*

Second, LN Management's positions were both taken in the same underlying case, a judicial proceeding.

Third, LN Management successfully obtained reconsideration of the court's order dismissing the action under Rule 41(e). The court granted LN Management's motion and reopened the case on July 27, 2018. SA 143-144.

Fourth, the positions are plainly inconsistent. LN Management moved for (and obtained) reconsideration of the court's Rule 41(e) dismissal, explicitly arguing such relief was appropriate due to its own wrongful conduct. LN Management then sought to undo its own motion by arguing the five-year rule somehow expired in October 2017. These positions are entirely irreconcilable. The district court correctly found LN Management could not argue for dismissal under Rule 41(e) when it previously moved to reopen the case notwithstanding this very rule.

Finally, LN Management's conduct cannot be found to result from ignorance, fraud or mistake. LN Management moved on its own volition for reconsideration of the district court's dismissal order and directly argued the order should be set aside based on excusable neglect. In LN Management's own words, such reconsideration was justified because the parties "needed" the court to determine the parties' respective rights in the property. The district court correctly applied judicial estoppel to foreclose LN Management from obtaining a benefit from its own inconsistent positions.

4. The district court correctly applied estoppel and waiver and LN Management does not argue otherwise

In addition to being judicially estopped, the district court also correctly found LN Management waived any argument the five-year rule applied and was equitably estopped from changing its position at summary judgment.

Waiver is the intentional relinquishment of a known right. *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 152 P.3d 737, 740 (Nev. 2007). Waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished. *Id.* Further, a party seeking equity is required to do equity. *Overhead Door Co. of Reno, Inc. v. Overhead Door Corp.*, 734 P.2d 1233, 1235 (Nev. 1987). Equitable estoppel prevents a party from asserting legal rights

that, in equity and good conscience, they should not be allowed to assert because of their own conduct. *NGA #2 Liab. Co. v. Rains*, 946 P.2d 163, 168 (Nev. 1997).

Here, LN Management *twice* moved to reopen this case: First, after Ditech brought the action to trial; and second, after LN Management obtained reconsideration of the court's rule 41(e) dismissal order. SA 143-144. To the extent LN Management believed the five-year rule expired in October 2017 (which defendants contest), the district court properly found LN Management intentionally relinquished any such argument. Had LN Management indicated *any* intent to argue for five-year rule dismissal prior to its opposition to the at-issue summary judgment motion, Defendants could have acted accordingly to either obtain affirmative relief or request an expediated resolution of the matter. Instead, LN Management did the exact opposite, arguing the court should maintain the case notwithstanding any such rule. Defendants reasonably relied on this relinquishment and would be severely prejudiced if the district court dismissed the action without resolving the parties' respective interests in the property. This is precisely the type of circumstance waiver and equitable estoppel seek to prevent.

5. Alternatively, the Five-Year Rule did not run due to tolling, and LN Management does not argue otherwise

Even to the extent LN Management is correct the five-year rule was reinstituted based on the September 24, 2014 order granting LN Management's post-trial motion to reopen the case, the district court correctly found it would not have

expired due to tolling. Under this scenario, the earliest the five-year rule could have expired is September 24, 2019, or five-years after the court reinstituted the action. But this court has explicitly recognized the deadline can be tolled under certain circumstances, such as when the court stays proceedings. *Baker v. Noback*, 112 Nev. 1106, 1110 (1996) (noting it would be "patently unfair" to dismiss an action for failure to bring to trial when a stay prevented the parties from going to trial within the period); *see also Boren v. City of N. Las Vegas*, 98 Nev. 5, 6, 638 P.2d 404, 405 (1982) ("**Any** period during which the parties are prevented from bringing an action to trial by reason of a stay order shall not be computed in determining the five-year period of [NRCP] 41(e).") (emphasis added).

Here, the underlying matter was closed between May 23, 2018 and July 27, 2018 before the court granted LN Management's motion to reopen. SA 145-48. The matter was then stayed due to Ditech's bankruptcy on March 27, 2019, and it remained stayed until the underlying judgment. 2 PA 496-99. Accounting for these tolling periods, the five-year deadline would be **246 days**[12] from the date the district court lifted the stay and entered its findings of fact and conclusions of law. LN Management once again does not address the district court's application of tolling in its opening brief. This court should affirm on all grounds.

[12] There are 65 days between May 23, 2018 and July 27, 2018. There are 181 days between March 23, 2019, and September 24, 2019 (the earliest date the five-year rule deadline could expire absent tolling).

CONCLUSION

For the foregoing reasons, Defendants respectfully requests that this Court affirm the district court's decision.

Dated this 17th day of December, 2021.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY 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 Microsoft Word in Times New Roman and 14 point font size.

I FURTHER CERTIFY 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 proportionally spaced, has a typeface of 14 points or more and contains 10,510 words.

FINALLY, I CERTIFY I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found.

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…

…

I understand I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 17th day of December, 2021.

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/s/ Nicholas E. Belay

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CERTIFICATE OF SERVICE

I certify that I electronically filed on December 17, 2021, the foregoing **RESPONDENTS' ANSWERING BRIEF** with the Clerk of the Court for the Nevada Supreme Court by using the Court's electronic file and serve system. I further certify that all parties of record to this appeal are either registered with the Court's electronic filing system or have consented to electronic service and that electronic service shall be made upon and in accordance with the Court's Master Service List.

I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Carla Llarena
An employee of AKERMAN LLP