IN THE SUPREME COURT OF THE STATE OF NEVADA

WESLEY RUSCH,

Appellant,

vs.

THE MARTIN CONDOMINIUM UNIT OWNERS' ASSOCIATION,

Respondent.

Supreme Court No. 85821

Clark County District Court Case No. A-21-850526-C (consolidated with A-20-826568-C)

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

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.

Defendant-Respondent Martin Condominium Unit Owners Association is a Nevada domestic nonprofit corporation organized and existing under the laws of the State of Nevada. It has no parent corporation, nor is it a publicly traded company.

Defendant-Respondent is represented on this appeal by Marc S. Cwik of Lewis Brisbois Bisgaard & Smith LLP, 6385 S. Rainbow Blvd., Suite 600, Las Vegas, Nevada 89118. Mr. Cwik's Nevada Bar Number is 6946.

Appellant Wesley Rusch is represented in proper person. He is a non-Nevada, non-practicing attorney, who in the past has held licenses to practice law in the States of California, New York and Wisconsin.

DATED this 30th day of May, 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By *_/s/ Marc S. Cwik_*
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STATEMENT OF RELATED CASES

The facts and claims alleged by Appellant Wesley Rusch overlap, in part, with facts alleged by Wesley Rusch and his partner, Oliver Longboy (a non-appellant in the present appeal), in Clark County District Court Case No. A-17-764643-C, which was a Quiet Title Action concerning the condominium at issue in the present appeal. The Quiet Title Action concluded in August 2018 and title was quieted in favor of the Buyer and against Wesley Rusch and Oliver Longboy. Beginning in late 2020, Wesley Rusch and Oliver Longboy began filing motions with arguments overlapping with the arguments proffered in the Consolidated Cases discussed in the present appeal. After losing these motions in the Quiet Title Action, Wesley Rusch, individually and without Oliver Longboy as an appellant, filed serial appeals in the Quiet Title Action on June 5, 2022; July 26, 2022; and September 29, 2022. *See* Nevada Supreme Court Cases No. 84857, 85094 and 85819. These appeals were dismissed on June 30, 2022; August 8, 2022; and February 8, 2023, respectively.

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JURISDICTIONAL STATEMENT

Appellant Wesley Rusch's ("Rusch") Notice of Appeal filed on September 29, 2022, indicates that he is appealing an Order entered on August 30, 2022 in Clark County District Court Case No. A-21-840526-C, which was a Minute Order entered by the District Court denying a Motion for Reconsideration of the District Court's Order entering summary judgment in favor of Defendant-Respondent The Martin Condominium Unit Owners' Association ("Martin CUOA"). However, in an Order entered by the Nevada Supreme Court on January 20, 2023 denying Respondent The Martin Condominium Unit Owners' Association's ("Martin CUOA") Motion to Dismiss Appeal, the Nevada Supreme Court ruled it interprets Rusch's Notice of Appeal as a timely appeal of the Order Granting Martin CUOA's Motion to Dismiss, or in the Alternative, Motion for Summary Judgment, which was entered by the District Court on June 30, 2023 ("Dispositive Order"). *See* Order, January 20, 2023; and RA-2020-TWELVE-2670-2684 (Case No. A-20-826568-C).[1] Thus, this appeal

[1] Appellant's Amended Informal [Opening] Brief filed on April 3, 2023, indicates that he is appealing Orders entered on July 12, 2022 and October 18, 2022 in Clark County District Court Case No. A-21-840526-C. The District Court did not enter any Orders on either of those dates in Case No. A-21-840526-C.

concerns only the Dispositive Order entered by the District Court.[2] Jurisdiction of the present appeal of the Dispositive Order exists under NRAP 3A(b)(1).

ROUTING STATEMENT

This appeal would presumptively be assigned to the Nevada Court of Appeals, since it involves a dismissal of Clark County District Court Case No. A-21-840526-C, which involved tort allegations by Rusch against Martin CUOA, and involves "a judgment, exclusive of interest, attorney fees, and costs, of $250,000 or less in a tort case" in favor of Martin CUOA. *See* NRAP 17(b)(5).

Notwithstanding the above, this appeal could be retained by the Nevada Supreme Court because this appeal implicates several frequently recurring issues of statewide public importance arising within the context of non-judicial foreclosure sales. *See* NRAP 17(a)(12); NRAP 17(d).

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[2] On June 30, 2023, the District Court also entered an Order granting, in part, Martin CUOA's Motion for (1) Pre-Filing Order Against Plaintiffs Pursuant to Nevada's Vexatious Litigant Standard and (2) an Award of Attorney's Fees and Costs Resulting From Plaintiffs' Ongoing Vexatious Conduct (the "Motion for Pre-Filing Order and Attorney's Fees"). Since the Nevada Supreme Court has already interpreted Rusch's Notice of Appeal to specifically be an appeal of the Dispositive Order, and the Motion for Pre-Filing Order and Attorney's Fees is not mentioned, and because Rusch's Amended Informal [Opening] Brief does not mention the Motion for Pre-Filing Order and Attorney's Fees, nor provides any analysis of the District Court's findings and conclusions therein, only the Dispositive Order is addressed in this Answering Brief. *See Verner v. Jouflas*, 95 Nev. 69, 70-71, 589 P.2d 1025, 1026 (1979) (concluding that an appellant's failure to appeal from an appealable order resulted in a waiver of a later challenge to that order).

STATEMENT OF ISSUES

Rusch, who is representing himself in proper person, filed an Amended Informal [Opening] Brief on April 3, 2023 on an informal brief form pursuant to NRAP 28(k). The appeal challenges the Dispositive Order entering summary judgment in favor of Martin CUOA and against Rusch and Oliver Longboy ("Longboy," who was a Plaintiff in the District Court, but who is not an Appellant in the present appeal), in Clark County District Court Case No. A-21-840526-C, with regard to Rusch and Longboy's claims concerning a non-judicial foreclosure of their condominium at The Martin (the "Subject Condominium"). Rusch raises two issues in the "Statement of District Court Error" section of his informal brief: (1) Whether the District Court failed to rule on the legality of the sale; and (2) Whether the sale of the subject condominium was conducted in violation of CC&Rs, Nevada law and the constitutional right of due process. Martin CUOA recognizes that Rusch is representing himself in proper person and, therefore, believes the issues raised by Rusch do not properly reflect the issues on appeal, and that the issue on appeal should be re-characterized, as follows:

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Whether the District Court properly granted summary judgment in favor of Martin CUOA, and against Rusch and Longboy, and dismissed Rusch and Longboy's Complaint in Clark County District Court Case No. A-21-840526-C, upon one or more of the following bases:

(a) Title concerning the Subject Condominium had previously been quieted in Clark County District Court Case No. A-17-764643-C;

(b) Applicable limitation periods to Rusch and Longboy's claims concerning the foreclosure of the Subject Condominium had expired prior to the filing of Clark County District Court Case No. A-21-840526-C;

(c) Rusch and Longboy had accepted the excess proceeds from the foreclosure sale without protest and, therefore, were estopped from suing Martin CUOA concerning the foreclosure of the Subject Condominium;

(d) Rusch and Longboy failed to establish the requisite elements for asserting a Wrongful Foreclosure claim to challenge the foreclosure of the Subject Condominium; and

(e) After Rusch and Longboy were discharged in bankruptcy, bankruptcy law permitted the foreclosure to proceed against the Subject Condominium.

I.

STATEMENT OF THE CASE

Rusch has appealed a final, Dispositive Order, entered on June 30, 2023 which granted summary judgment in favor of Martin CUOA and against himself and his partner, Longboy (who is not a party to this appeal) (Eighth Judicial District Court, Clark County, Nevada; Hon. Nancy Allf, District Court Judge). The District Court's Order was entered in the third serial lawsuit filed by Rusch and Longboy (the first two being dismissed without prejudice on different procedural grounds, and neither prior dismissal being appealed) after a non-judicial foreclosure sale of Rusch and Longboy's Subject Condominium located at The Martin in Las Vegas, Nevada, after Rusch and Longboy became woefully delinquent on payment of assessments and fines. The foreclosure was conducted by non-party Red Rock Financial Services, LLC ("RRFS") on behalf of Martin CUOA, and completed in October 2017, many years before Rusch and Longboy filed their third lawsuit which is the subject of this appeal. Rusch and Longboy filed their third lawsuit many years after (1) foreclosure had been completed, and (2) title concerning the Subject Condominium had been quieted in Clark County District Court Case No. A-17-764643-C. The District Court entered summary judgment in favor of Martin CUOA and dismissed Rusch and Longboy's third lawsuit on multiple substantive grounds, including collateral estoppel, waiver/estoppel grounds for Rusch and Longboy's acceptance of excess

proceeds from the foreclosure sale without protest, expiration of applicable limitations periods, application of bankruptcy law, and the inability of Rusch and Longboy to establish a key element of a wrongful foreclosure claim. Rusch alone has now individually appealed the dismissal of the third lawsuit.

II.

STATEMENT OF RELEVANT FACTS

Rusch and non-appellant Longboy are former owners of a condominium located at The Martin (f/k/a Panorama Towers) in Las Vegas, Nevada. On August 10, 2017, non-party RRFS, on behalf of Martin CUOA, foreclosed upon Rusch and Longboy's condominium after they became woefully delinquent on paying assessments and failed to pay fines which resulted from inappropriate conduct in common areas at The Martin. Thereafter, Rusch and Longboy filed three serial lawsuits against Martin CUOA. The first two were dismissed on procedural grounds. The third, which is the lawsuit at issue in Rusch's present appeal, was dismissed on substantive grounds. The second and third lawsuits were consolidated by the District Court prior to the second lawsuit reaching finality, in the interests of judicial economy; however, each lawsuit still maintained its individuality and set of appellate timelines, and neither Rusch nor Longboy filed an appeal after dismissal

of the second lawsuit.[1] The following provides a concise, yet thorough statement of facts pertinent to the issues on appeal.[2] This statement of facts further negates any claim by Rusch that Martin CUOA admitted any facts argued by Rusch in his Amended Informal [Opening] Brief and that the District Court failed to rule on any issue argued by Rusch.

A. <u>The Parties and the Subject Condominium.</u>

1. On or about August 11, 2014, Rusch and non-appellant Longboy purchased a condominium located at The Martin (f/k/a Panorama Towers), 4471

[1] Where two or more actions are consolidated, Eighth Judicial District Court Rule 2.50, requires parties to file briefs with a consolidated caption and documents to be filed in the lower case number's docket. *See* EDCR 2.50(a)(2). Rusch and Longboy often did not comply with this requirement; hence, not all documents filed after February 15, 2022, the date consolidation was entered by the District Court, were docketed by the Clerk of Court in the lower case number in the Record on Appeal and some were only docketed in the higher case number. All documents are part of the Record of Appeal transmitted by the Clerk of Court on January 26, 2023 and Martin CUOA provides throughout this Answering Brief citations to them where they are located in the Record on Appeal.

[2] On January 26, 2023, the Clerk of the Clark County District Court transmitted the entire record of Case No. A-20-826568-C and Case No. A-21-840526-C (which were previously consolidated by the District Court) to the Nevada Supreme Court. Therefore, since the entire Record on Appeal is already before this Court, in the required interests of brevity, Martin CUOA is not submitting its own Appendix. *See* NRAP 30(b). Reference below to documents in the court records, therefore, will use the designation "RA-2020-letters spelling volume number-page numbers" for Case No. A-20-826568-C, and "RA-2021-letters spelling-volume number-page numbers" for Case No. A-21-840526-C, with the appropriate numbers filled in (e.g., RA-2020-ONE-1-25).

Dean Martin Drive, Unit 2206, Las Vegas, Nevada 89103 ("Subject Condominium"). A Grant, Bargain, Sale Deed was recorded on this date, Instrument No. 20140811-0001716. *See* RA-2020-SIX-1234-1236.

2. Martin CUOA is a Nevada Domestic Nonprofit Corporation established to be the Unit Owners' Association for The Martin. *See* RA-2020-SIX-1238-1240.

3. RRFS, a non-party, was retained by Martin CUOA to handle collections matters, including the foreclosure of delinquent units within The Martin under the provisions of NRS Chapter 116. *See* RA-2020-SIX-1242-1244.

B. Plaintiffs' Delinquent Assessments and Recordation of Martin CUOA's Claim of Lien for Delinquent Assessments.

4. On December 4, 2015, RRFS recorded a Notice of Claim of Lien for Delinquent Assessments, Instrument No. 20151204-0000797. *See* RA-2020-SIX-1246.

5. On December 7, 2015, RRFS sent separate letters to Rusch and Longboy concerning the recording of the Notice of Claim of Lien for Delinquent Assessments. *See* RA-2020-SIX-1248-1249 and RA-2020-SIX-1251-1252.

6. On January 14, 2016, RRFS sent separate follow-up letters to Rusch and Longboy regarding Nevada law permitting RRFS on behalf of Martin CUOA to record a Notice of Default and Election to Sell no sooner than 31 days after the mailing of the Notice of Claim of Lien for Delinquent Assessments. *See* RA-2020-SIX-1254 and RA-2020-SIX-1256.

7. On February 12, 2016, RRFS sent separate letters to Rusch and Longboy to respond to their requests for verification of the debt and to provide an account ledger showing the amount of the debt at that time. *See* RA-2020-SIX-1258-1261 and RA-2020-SIX-1263-1266.

8. On February 24, 2016, RRFS recorded a Notice of Default and Election to Sell Pursuant to the Lien for Delinquent Assessments, Instrument No. 20160224-0002832. *See* RA-2020-SIX-1268-1269.

9. On February 25, 2016, RRFS sent separate letters to Rusch and Longboy to provide a copy of the Notice of Default and Election to Sell. *See* RA-2020-SIX-1271-1273 and RA-2020-SIX-1275-1277.

10. On May 3, 2016, RRFS sent separate letters to Rusch and Longboy regarding the forthcoming recording of a Notice of Sale Pursuant to the Notice of Claim of Lien for Delinquent Assessments. Also, the letters informed them a Permission for Publication of Non-Judicial Foreclosure Sale will be sent to the Martin CUOA for signature to publish the property for sale in 30 days. *See* RA-2020-SIX-1279 and RA-2020-SIX-1281.

C. Commencement of Non-Judicial Foreclosure of the Subject Condominium.

11. On July 19, 2016, RRFS recorded a Notice of Foreclosure Sale Under the Lien for Delinquent Assessments, Instrument No. 20160719-0001870. *See* RA-2020-SIX-1283-1284.

12. On July 22, 2016, RRFS sent separate letters to Rusch and Longboy regarding the recording of the Notice of Foreclosure Sale Under the Lien for Delinquent Assessments. *See* RA-2020-SIX-1286-1288 and RA-2020-SIX-1290-1292.

D. Rusch and Longboy's Bankruptcy Filings During Pendency of the Non-Judicial Foreclosure.

13. On August 9, 2016, RRFS was served with notice that Longboy filed for Chapter 7 Bankruptcy in the District of Nevada, Case No. 16-14378-MKN and foreclosure proceedings were temporarily halted. *See* RA-2020-SIX-1294.

14. On November 18, 2016, RRFS was served with a Notice of Discharge of Longboy's bankruptcy. *See* RA-2020-SIX-1296-1299.

15. While RRFS was permitted to proceed with the foreclosure without starting the process over pursuant to the applicable provisions at NRS 116.3116 *et seq.*, on February 13, 2017, RRFS was served with notice that Rusch filed for Chapter 7 Bankruptcy in the District of Nevada, Case No. 17-10673-LED before the foreclosure resumed, and foreclosure proceedings were again temporarily halted. *See* RA-2020-SIX-1301-1303.

16. On May 23, 2017, an Order of Discharge under 11 U.S.C. § 727 was entered in favor of Wesley Rusch. *See* RA-2020-SIX-1305-1307.

E. Resumption and Completion of Non-Judicial Foreclosure Proceedings.

17. With both Plaintiffs' bankruptcies having been discharged, foreclosure proceedings lawfully resumed pursuant to the applicable provisions at NRS 116.3116 *et seq.*, and the foreclosure sale took place on August 10, 2017. A Certificate of Sale was recorded as Instrument No. 20170810-0001690, noting Rita Bedford of Hollyvale Rental Holdings, LLC ("Hollyvale") was the highest bidder. *See* RA-2020-SIX-1309.

18. On October 9, 2017, RRFS sent a letter to NRED to provide a copy of the unrecorded Foreclosure Deed as a result of a foreclosure sale conducted on August 10, 2017. *See* RA-2020-SIX-1311-1313.

19. After expiration of the 60-day redemption period under Nevada law, the Foreclosure Deed was recorded by Hollyvale on October 17, 2017. *See* RA-2020-SIX-1315-1317.

F. Plaintiffs' Execution of Disbursement and Indemnification Agreement Prepared by RRFS on Behalf of Martin CUOA, and Plaintiffs' Acceptance of Excess Proceeds after the Foreclosure Was Completed.

20. On or about February 22, 2018, Plaintiffs executed a Disbursement and Indemnification Agreement ("DIA") which had been prepared by RRFS (who, as noted above, performed the foreclosure on behalf of Martin CUOA). The DIA noted in the Recitals section that the foreclosure had been completed and that it was a result

of Plaintiffs' failure to pay Martin CUOA's assessments, fees and costs, including related collection fees and costs. The DIA also noted in the Agreement section that Plaintiffs held a subordinate position and were only entitled to funds after all prior obligations were satisfied pursuant to NRS 116.31164(7)(b). The DIA also noted that Excess Proceeds in the amount of $290,513.47 were being held by RRFS and that Plaintiffs were agreeing to indemnify and release RRFS with regard to all claims related to distribution of the Excess Funds and claims arising out of or in connection with the sale of the Subject Condominium. *See* RA-2020-SIX-1242-1244.

21. On February 23, 2018, Koch & Scow, LLC, who were the attorneys for RRFS holding the Excess Proceeds in trust, issued Check No. 1331 in the amount of $290,513.47 to Olympia Law Attorney-Client Trust Account (Plaintiffs' attorney at the time) to tender the Excess Proceeds to the Plaintiffs. *See* RA-2020-SIX-1319.

G. Quiet Title Proceedings by the Bona Fide Purchaser of the Subject Condominium.

22. A few weeks later, on November 14, 2017, Hollyvale, the bona fide purchaser at the foreclosure, commenced quiet title proceedings against Plaintiffs, in Clark County District Court Case No. A-17-764643-C, Department 10 (Honorable Tierra D. Jones), *Hollyvale Rental Holdings, LLC v. Wesley Rusch and Oliver Longboy*. *See* RA-2020-SIX-1321-1329.

23. On May 29, 2018, Judge Jones entered a Judgment quieting title in favor of Hollyvale and also permitted Hollyvale's successor-in-interest, Champery

Rental REO, LLC ("Champery"), to be substituted in the action as the plaintiff. Notice of Entry of Order was then served on May 30, 2018. *See* RA-2020-SIX-1331-1339.

24. On August 9, 2018, Judge Jones entered a subsequent Order denying Plaintiffs' subsequent Rule 60 Motion, with a Notice of Entry of Order then being served on August 10, 2018. *See* RA-2020-SIX-1341-1346.

H. Summary of Plaintiffs' Three Lawsuits against Martin CUOA.

Prior to the present appeal, Rusch and Longboy filed three lawsuits in the Clark County District Courts against Martin CUOA related to the foreclosure of the Subject Condominium. These lawsuits include the following.

25. Rusch and Longboy's first action is Clark County District Court Case No. A-18-774190-C, *Wesley Rusch and Oliver Longboy v. The Martin Condominium Unit Owners Association* (the "First Action"), which was litigated before Department 6 of the Clark County District Court. The First Action was dismissed on procedural grounds for failure to first mediate before the Nevada Real Estate Division on March 27, 2019. *See* RA-2020-SIX-1348-1349. Rusch and Longboy did not file an appeal.

26. Plaintiffs' second action is Clark County District Court Case No. A-20-826568-C, *Wesley Rusch and Oliver Longboy v. The Martin Condominium Unit Owners Association* (the "Second Action"). This action was litigated before the

Honorable Nancy Allf of Department 27 of the Clark County District Court. The Second Action was dismissed by the District Court in an Order entered on November 9, 2021, due to Rusch and Longboy's failure to serve their Complaint and the District Court quashing alleged service of process. *See* RA-2020-SIX-1354-1373.

27. The Order of the District Court in the Second Action also informed Rusch and Longboy of the following observation of the Honorable Judge Nancy Allf: "**IT IS HEREBY FURTHER NOTED** by this Court that title has already been quieted with regard to the Subject Property and, furthermore, Plaintiffs' claims against Martin UOA appear to be time-barred under applicable Nevada statutes of limitations, and this Court has so cautioned the Plaintiffs should the Plaintiffs seek to refile their Complaint." (Emphasis in original.). *See* RA-2020-SIX-1371.

28. On September 2, 2021, prior to the District Court entering its Order dismissing the Second Action, Plaintiffs commenced their third action, Clark County District Court Case No. A-21-840526-C, *Wesley Rusch and Oliver Longboy v. The Martin Condominium Unit Owners Association* (the "Third Action"), which is the action at issue in Rusch's present appeal. The Third Action was initially assigned to Department 8 of the Clark County District Court. *See* RA-2020-SIX-1375-1386.

29. On November 29, 2021, Plaintiffs filed a Motion for Reconsideration of the Order dismissing their Second Action. *See* RA-2020-TWO-446-462.

30. The Motion for Reconsideration was denied, and the denial Order was

entered on February 15, 2022. *See* RA-2020-FIVE-973-976. Notice of Entry of Order was then served on February 16, 2022. *See* RA-2020-FIVE-977-983.

31. Rusch and Longboy did not file a Notice of Appeal of the dismissal of the Second Action, and the dismissal became final under NRAP 4(a)(4) on March 17, 2022.

I. Consolidation of the Second Action and Third Action by the District Court.

32. Due to the identical allegations and claims in the Second Action and the Third Action, and because the Second Action had not reached finality, in the interests of judicial economy, Martin CUOA filed on December 17, 2021 a Motion to Consolidate the Second Action and the Third Action. *See* RA-2020-THREE-516-579.

33. The motion was granted by the District Court and the formal consolidation order was entered on February 15, 2022, approximately one month prior to the 2020 Action reaching finality. *See* RA-2020-FIVE-968-972. Notice of Entry of the Consolidation Order was then served on February 16, 2022. *See* RA-2020-FIVE-984-991.

J. Plaintiffs' Motion Seeking Nullification of the Foreclosure Sale and Repossession of the Subject Condominium in the 2021 Action.

34. On February 10, 2022, Plaintiffs filed in the Third Action a motion entitled "Rusch Request to Nullify Sale Based on Violation of Constitutional Right of Due Process and Nevada Law and Restore Possession of the Condo to Its Rightful Owners Rusch and Longboy," claiming they are entitled to nullification of the foreclosure processed by RRFS on behalf of Martin CUOA, along with restoration of possession of the Subject Condominium. An Order Denying this motion was entered by the District Court on March 31, 2022. *See* RA-2020-FOUR-932-937.

K. Dispositive Motions Filed by the Parties in the Third Action.

35. On May 3, 2022, Martin CUOA filed in the Third Action a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment (the "MSJ"). *See* RA-2020-SIX-1195-1220. The MSJ was accompanied by a separate Appendix. *See* RA-2020-SIX-1221-1405 and RA-2020-SEVEN-1406-1412.

36. On June 5, 2022, Rusch and Longboy filed a response to Martin CUOA's MSJ, which they called a "Reply." *See* RA-2021-ONE-198-227. Rusch and Longboy also filed a document entitled "Rusch Reply and Request for Summary Judgment" (hereinafter the "Counter-MSJ"). *See* RA-2021-ONE-196-197.

37. On June 8, 2022, Martin CUOA filed a Reply to Rusch and Longboy's filings dated June 5, 2023. *See* RA-2020-ELEVEN-2561-2575.

38. On June 11, 2022, Rusch and Longboy filed additional documents in support of their Counter-MSJ response to Martin CUOA's MSJ, which they entitled "Rusch Counter-Reply" (*see* RA-2021-ONE-228-242 and the continuation at RA-2021-ONE-243-245), and "Rusch Counter Reply re Martin Argument" (*see* RA-2021-ONE-246-248).

39. Martin CUOA's MSJ, and Rusch and Longboy's Counter-MSJ, came on for hearing before the District Court on June 15, 2022. *See* RA-2021-ELEVEN-2508. The Honorable Nancy Allf took full oral argument from the parties, granted Martin CUOA's MSJ in its entirety, and denied Rusch and Longboy's counter-MSJ. *See* RA-2020-TWELVE-2670-2684.

40. On June 30, 2022, the District Court entered its formal Dismissal Order in the Third Action. *See id.* Notice of Entry of Order was served on July, 1 2023. *See* RA-2020-TWELVE-2685-2703.

41. Thereafter, Rusch filed two Motions for Reconsideration of the Dismissal Order, one on July 12, 2022 (*see* RA-2021-TWO-261-376) and another on September 12, 2022 (*see* RA-2020-FOURTEEN-3055-3080).

42. The District Court denied both of Rusch's Motions for Reconsideration. *See* Denial Orders entered by the District Court on September 7, 2022 (*see* RA-2020-THIRTEEN-3030-3034) and December 7, 2022 (*see* RA-2020-FOURTEEN-3106-3112). Notices of Entry of Order were respectively served on September 8, 2022

(*see* RA-2020-THIRTEEN-3039-3043) and December 7, 2022 (*see* RA-2020-FOURTEEN-3113-3123).

43. Rusch filed a Notice of Appeal of the Dispositive Order (i.e., the Order granting summary judgment in favor of Martin CUOA). The Nevada Supreme Court has interpreted Rusch's Notice of Appeal to be a timely appeal of the Dispositive Order and no other order entered by the District Court. *See* Order entered in present appeal, January 20, 2023.

III.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's entry of summary judgment in favor of Martin CUOA on both procedural grounds and substantive grounds.

With regard to procedural grounds, the District Court granted summary judgment in favor of Martin CUOA on five (5) independent, substantive legal grounds. In his Informal [Opening] Brief, however, Rusch has failed to address each and every ground upon which the District Court ruled in favor of Martin CUOA. Rather, Rusch only reargues his argument to the District Court without citation to pertinent documents and does not address each ground adopted by the District Court in support of its ruling. Thus, by operation of appellate law applicable to all parties to an appeal, whether or not they have counsel, this Court should necessarily affirm the District Court.

With regard to substantive grounds, all five (5) legal bases adopted by the District Court in granting summary judgment in favor of Martin CUOA were proper. First, the District Court properly ruled that the gravamen of Rusch and Longboy's Third Action was an action challenging the Notice of Default and Election to Sell that was recorded against the Subject Condominium for the purpose of seeking to recover possession. Second, the District Court properly ruled that because title to the Subject Condominium was quieted in a separate action commenced by the buyer after the non-judicial foreclosure, collateral estoppel principles preclude Rusch and Longboy's Third Action. Third, the District Court properly ruled that multiple limitations periods under Nevada law precluded Rusch and Longboy's Third Action, including the limitations periods for an action to redeem real property, the limitations period for an action to void a foreclosure sale, and the limitations period for alleging a tort claim for wrongful foreclosure. Fourth, the District Court properly ruled that Rusch and Longboy's acceptance of the excess proceeds after conclusion of the non-judicial foreclosure barred their Third Action under waiver and estoppel principles. Finally, the District Court properly ruled that Rusch and Longboy's bankruptcy filings rendered Rusch and Longboy unable to establish the elements of a wrongful foreclosure claim, and unable to prevent the non-judicial foreclosure from proceeding under bankruptcy law after the discharges were entered.

As only one legal basis is needed for an appellate court to affirm a district court, for all of the above procedural and substantive reasons, this Court should affirm the District Court.

IV.

ARGUMENT

A. Standard of Appellate Review.

The District Court granted summary judgment in favor of Martin CUOA on five (5) independent grounds supported by the Record on Appeal. On appeal, a Nevada appellate court reviews a district court's grant of summary judgment *de novo*, without deference to the findings of the lower court. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *A Cab, LLC v. Murray*, 501 P.3d 961, 971, 137 Nev. Adv. Rep. 84 (2021). Summary judgment is appropriate "when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *See Cuzze v. Univ. & Cmty. College Sys.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007); NRCP 56. "[W]hen reviewing a motion for summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

With respect to burdens of proof and persuasion in the summary judgment context, Nevada follows the federal approach outlined in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). *Cuzze*, 123 Nev. at 602, 172 P.3d at 134. The party moving for summary judgment bears the initial burden of production to show the absence of a genuine issue of material fact. *Id.* 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. *Id.* The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial. *Id.* If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence. *Id.* But if the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by either (1) submitting evidence that negates an essential element of the nonmoving party's claim, or (2) "pointing out . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 602-603, 172 P.3d at 134. In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact. *Id.*

In reviewing a summary judgment ruling by a district court, an appellate court can affirm on any grounds supported by the record. *See Weiser v. United States*, 959 F.2d 146, 147 (9th Cir. 1992); *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *See Bernhardt v. Richardson-Merrell, Inc.*, 892 F.2d 440, 444 (5th Cir. 1990). Consequently, an appellate court may affirm a grant of summary judgment if the trial court's judgment is correct, albeit for different reasons. *See Butler ex rel. Biller v. Bayer*, 123 Nev. 450, 460 n.22, 168 P.3d 1055, 1062 n.22 (2007) (citing *Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987)). Hence, in Rusch's present appeal, only one ground supported by the record is all that is needed to affirm the District Court's entry of summary judgment in favor of Martin CUOA.

As will be demonstrated below, since all five (5) grounds for summary judgment entered by the District Court were each independently proper, and only one is needed for this Court to affirm, this Court should affirm the District Court.

B. Affirmance of the District Court Is Appropriate Because Rusch Has Neither Raised Nor Challenged in His Appeal All of the Grounds upon Which Summary Judgment Was Entered by the District Court.

Martin CUOA brings to this Court's attention that upon review of Rusch's Amended Informal [Opening] Brief, it is clear that Rusch simply reasserts in very simplistic form his argument to the District Court without proper citation to

documents, pleadings, motion papers, etc. in the Record on Appeal. Moreover, in doing the same, Rusch does not address each one of the five (5) grounds upon which the District Court entered summary judgment in favor of Martin CUOA.

The Nevada Supreme Court holds that where an appellant fails to raise arguments addressing the various grounds relied upon by the district court in granting summary judgment, s/he has waived any such challenge and the district court is to be necessarily affirmed. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in appellant's opening brief are deemed waived."). The Nevada Supreme Court has further held that it need not consider claims that are not cogently argued. *See Edwards v. Emperor's Garden Rest*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). These Nevada rules of appellate review are consistent with the general rule of appellate jurisprudence that where a district court enters an order on multiple grounds and all grounds are not challenged and addressed by the appellant, the district court must be affirmed. *See*, *e.g.*, *Jones v. Miller*, 520 S.W.3d 253 (Ark. 2017) (holding that when a circuit court bases its decision on more than one independent ground and the appellant challenges fewer than all those grounds on appeal, the supreme court will affirm without addressing any of the grounds); *State v. Hicks*, 692 S.E.2d 919, 920 (S.C. 2010) (holding where the ruling of a trial judge is based on more than one ground, an appellate court must affirm, unless the

appellant appeals all grounds upon which the ruling was based); *Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC*, 2018 Tenn. App. LEXIS 450, *21, 2018 WL 3740565 (Tenn. Ct. App. 2018) (holding where a trial court provides more than one basis for its ruling, the appellant must appeal all the alternative grounds for the ruling); *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.").

Based upon the above, it clearly follows that this Court should affirm the District Court's entry of summary judgment in favor of Martin CUOA. Although Rusch may be representing himself in proper person in this appeal, the Nevada Supreme Court holds that self-representation is not a license for non-compliance with relevant rules of procedural and substantive law, and a self-represented litigant must abide by rules of procedure and courtroom protocol. *See Gallego v. State*, 117 Nev. 348, 361, 23 P.3d 227, 236 (2001) (citations omitted). *See also King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Rules governing appellate review and the burden on appeal apply equally to pro per parties as they do to parties represented by counsel. *See Nwosu v. Uba*, 122 Cal. App. 4th 1229, 1246-1247, 19 Cal. Rptr. 3d 416, 430-431 (Cal. Ct. App. 2004); *Bistawros v. Greenberg*, 189 Cal. App. 3d 189, 193, 234 Cal. Rptr. 377, 379 (Cal. Ct. App. 1987). Thus, this Court should affirm the District Court because of Rusch's failure to comply with the above substantive

rule of law concerning appellate briefing. However, as will be demonstrated in the next section, if this Court still elects to substantively review Rusch's appeal and each of the District Court's bases for entering summary judgment in favor of Martin CUOA, no reversible error exists, and this Court should enter an order of affirmance.

C. Affirmance of the District Court Is Further Appropriate upon Each and Every Substantive Basis upon Which the District Court Entered Summary Judgment in Favor of Martin CUOA.

The District Court entered summary judgment in favor of Martin CUOA on five (5) independent grounds. As will be demonstrated below, each of these grounds is independently supported by the Record on Appeal. As only one ground is needed for an affirmance, this Court should enter an order of affirmance.

1. The District Court Properly Determined That the Gravamen of Rusch and Longboy's Complaint Was an Action Challenging the Notice of Default and Election to Sell that was Recorded Against the Subject Condominium for the Purpose of Seeking to Recover Possession.

In the factual background section of Rusch's Amended Informal [Opening] Brief, Rusch sets forth his arguments disputing the existence of notice concerning foreclosure of the Subject Condominium. Under Nevada law, the document which commences a non-judicial foreclosure sale is the Notice of Default and Election to Sell that is recorded against real property. *See* NRS 116.3116 *et seq*. Rusch summarily argues, without any citation to the court record, that he never received

any notice from non-party RRFS on behalf of Martin CUOA concerning the foreclosure of his Subject Condominium at The Martin, and he then concludes that "therefore the sale is VOID and the sale must be reversed and Plaintiff must be returned to his condo." *See* Amended Informal [Opening] Brief at pp. 4-6. Thus, Rusch seeks on appeal repossession of the Subject Condominium by addressing notice issues in his Amended Informal [Opening] Brief. This request is consistent with Rusch's repeated position argued to the District Court. *See* RA-2020, *generally*; RA-2021, *generally*.[3]

In Nevada, it is well-established that the gravamen of the Complaint determines the nature of the action, not the plaintiff's choice of label of the claims. *See State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (holding that the nature of the grievance, or the gravamen of the complaint, determine the character of the action); *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 770, 383 P.3d 257, 260 (2016) ("The nature of the claim, not its label, determines what statute of limitations applies."). The gravamen of a complaint determines the appropriate statute of limitations. *See Stalk v. Mushkin*, 125 Nev. 21, 29, 199 P.3d

[3] Rusch and Longboy raised the same baseless notice issues, regardless of the District Court's consistent rejection of same, in nearly every brief they filed in the Second Action (which was dismissed by written order entered on November 9, 2021, *see* RA-2020-SIX-1354-1373) and the Third Action (which is the subject of Rusch's present appeal). It would require too long a citation of each and every time the argument was raised across thousands of pages of the Record on Appeal to be in keeping with the requirements of economy and brevity here.

838, 843 (2009) (holding a claim for breach of fiduciary duty would be treated the same as a claim of professional malpractice for purposes of determining the applicable statute of limitations, as the claim was based upon the same alleged breach of duties arising out of the professional relationship); *Perry*, 132 Nev. at 770, 383 P.3d at 260 (citing *Stalk*).

In Rusch and Longboy's Third Action, the gravamen of their pro per, disjointed Complaint was determined by the District Court to be an action challenging the notice of default and election to sell that was recorded against the Subject Condominium for the purpose of seeking to recover possession of the Subject Condominium. *See* RA-2020-TWELVE-2675. The District Court properly made this determination for two reasons. First, Rusch and Longboy's Complaint included lengthy, unnumbered sections which set forth the facts supporting Plaintiffs efforts to repossess the Subject Condominium, and which included specific statements seeking repossession of the Subject Condominium (*see* RA-2020-SIX-1375-1386). Second, Rusch and Longboy filed an immediate dispositive motion in their Third Action, entitled "Rusch Request to Nullify Sale Based on Violation of Constitutional Right of Due Process and Nevada Law and Restore Possession of the Condo to Its Rightful Owners Rusch and Longboy," which specifically sought immediate repossession of the Subject Condominium by challenging notice by RRFS on behalf of Martin CUOA. Hence, this express conduct of Rusch and

Longboy, who were pro per plaintiffs, along with the express wording used in their Complaint when read as a whole, along with their statements in motion practice before the District Court, lead to the District Court's to determine that the gravamen of the Third Action was an action challenging the notice of default and election to sell that was recorded against the Subject Condominium for the purpose of seeking to recover possession of the Subject Condominium. Such determination by the District Court was proper, since it is clear from the overall record that was before the District Court that the nature of Rusch and Longboy's Third Action is a challenge to the foreclosure, and the nature of the grievance controls, not a plaintiff's labels. *See Wharton*, *supra*. As will be discussed below, the District Court properly applied its determination of the gravamen of Rusch and Longboy's Third Action in granting summary judgment in favor of Martin CUOA and denying summary judgment in favor of Rusch and Longboy.

2. <u>The District Court Properly Granted Summary Judgment in Favor of Martin CUOA on Collateral Estoppel Grounds, Because Title to the Subject Condominium Had Already Been Adjudicated Against Rusch and Longboy in the Buyer's Quiet Title Action Which Preceded Rusch and Longboy's Lawsuit on Appeal.</u>

Immediately after the non-judicial foreclosure was completed in October 2017 by RRFS on behalf of Martin CUOA, the Buyer, Hollyvale Rental Holdings, LLC ("Hollyvale"), commenced a Quiet Title Action against Rusch and Longboy in Clark

County District Court, Case No. A-17-764643-C to adjudicate the validity of the foreclosure sale. *See* RA-2020-SIX-1321-1329. On May 29, 2018, the Honorable Judge Tierra Jones entered Judgment, quieting title in favor of Hollyvale, and permitting Hollyvale's successor-in-interest to be substituted in place of Hollyvale. *See* RA-2020-SIX-1331-1339. Rusch and Longboy later challenged the Judgment by filing an NRCP 60 motion, which was denied by Judge Jones on August 9, 2018. *see* RA-2020-SIX-1341-1346. Rusch and Longboy did not file an appeal of either the Judgment or denial of the Rule 60 motion, and the judgment became final by operation of Nevada law under NRAP 4(a)(1).

In their Third Action (Case No. A-21-840526-C) on appeal, Rusch and Longboy's Complaint, opposition to Martin CUOA's dispositive motion, and counter-request for summary judgment all sought to challenge the transfer of title of the Subject Condominium to Hollyvale, and to recover possession. Since the gravamen of Rusch and Longboy's Third Action was properly determined by the District Court to be an action challenging the notice of default and election to sell that was recorded against the Subject Condominium for the purpose of seeking to recover possession of the Subject Condominium, Rusch and Longboy's Third Action, is clearly barred under collateral estoppel principles, namely, the doctrine of issue preclusion, and the District Court properly entered summary judgment in favor of Martin CUOA.

In *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008), the Nevada Supreme Court adopted the following four (4) factors for application of the doctrine of issue preclusion (previously referred to as "collateral estoppel"): (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation; and (4) the issue was actually and necessarily litigated. All of these elements are met by the procedural history surrounding the subject foreclosure.

With regard to the first element, the issue decided in the Quiet Title Action is identical to the issue presented by Rusch and Longboy in the Third Action. Both actions concerned the validity of the foreclosure conducted by RRFS on behalf of Martin CUOA, and involved the same history and documents. *Cf.* RA-2020-SIX-1331-1339 and RA-2020-TWELVE-2670-2684. In addition, Rusch and Longboy presented the same core arguments for seeking repossession of the Subject Condominium in the Quiet Title Action and the Third Action. *See id.* Therefore, the issue decided in the Quiet Title Action is the same as the issue presented in the Third Action, namely, the validity of the foreclosure sale based upon notice issues. As such, the first element for application of issue preclusion (collateral estoppel) is clearly met.

With regard to the second element, Judge Jones in the Quiet Title Action ruled upon a Motion for Default Judgment and entered a substantive order quieting title in favor of Hollyvale. *See* RA-2020-SIX-1331-1339. Rusch and Longboy subsequently filed an NRCP 60 motion seeking to set aside the default, which was denied on substantive grounds. *See* RA-2020-SIX-1341-1346. Therefore, Judge Jones' rulings in the Quiet Title Action were on the merits. In addition, Rusch and Longboy did not file an appeal in the Quiet Title Action within the required time period under NRAP 4(a)(1) to challenge either the Judgment or the denial of the Rule 60 motion. As such, well in advance of the filing of Rusch and Longboy's Third Action at issue in the present appeal, the rulings in the Quiet Title Action became final. Accordingly, the second element for application of issue preclusion (collateral estoppel) is met.

With regard to the third element, Rusch and Longboy, who are the parties against whom the judgment was entered in the Quiet Title Action with regard to the validity of the foreclosure sale of their Subject Condominium, are the same parties who filed the Third Action at issue in the present appeal. Thus, the third element for application of issue preclusion (collateral estoppel) is met.

Finally, with regard to the fourth element, the issue of the validity of the foreclosure sale was necessarily litigated in the Quiet Title Action. *See Resources Grp., LLC v. Nev. Ass'n Servs.*, 437 P.3d 154, 157-158 (2019) (the purpose of a quiet

title action is for the party claiming title to real property to plead and prove superior title in him/herself). Therefore, since Rusch and Longboy are the same parties in both the Quiet Title Action and the Third Action arguing the same core issues concerning the validity of the foreclosure (e.g., notice issues), and Rusch and Longboy did not prevail in the Quiet Title Action, the fourth element for application of issue preclusion (collateral estoppel) is clearly met.

With all four (4) elements of the doctrine of issue preclusion (collateral estoppel) clearly being met, it clearly follows that the District Court properly entered summary judgment in favor of Martin CUOA on collateral estoppel grounds.

3. The District Court Properly Granted Summary Judgment in Favor of Martin CUOA on Grounds That Applicable Limitations Periods Had Expired Prior to Filing of Rusch and Longboy's Third Action.

As noted above, the District Court determined the gravamen of Rusch and Longboy's Third Action to be an action challenging the notice of default and election to sell that was recorded against the Subject Condominium for the purpose of seeking to recover possession of the Subject Condominium. As will be demonstrated below, the District Court properly evaluated each statute of limitations which could apply to the gravamen of Rusch and Longboy's Third Action.

a. The District Court Properly Applied Nevada's Limitation Period for an Action to Redeem Real Property Foreclosed upon by an Association.

If a property owner wishes to redeem real property which has been foreclosed upon by an association, the Nevada Legislature has set a sixty (60) day period of time after the foreclosure sale in which the owner may take steps to make requisite payments to redeem the condominium. *See* NRS 116.31166(3); *La Costa Loans v. Grigorian*, 2020 Nev. Unpub. LEXIS 332, *3, 460 P.3d 25, 2020 WL 1531427 (Nev., March 27, 2020). The 60-day right of redemption statute of limitations under NRS 116.31166(3) expired as early as October 9, 2017 (i.e., 60 days after the date of the foreclosure sale), and certainly by no later than April 23, 2018 (date Plaintiffs later executed the DIA prepared by RRFS to accept the Excess Proceeds). Rusch and Longboy's Third Action, which is at issue in the present appeal, was not filed until September 2, 2021, many years after expiration of the 60-day right of redemption period. Rusch and Longboy never presented to the District Court any basis upon which tolling would have applied. Since Rusch and Longboy could not demonstrate to the District Court under the provisions of NRCP 56 that they made the requisite payments to Martin CUOA to redeem the Subject Condominium, they waived any right to sue Martin CUOA to redeem the Subject Condominium. Therefore, the District Court properly ruled that Rusch and Longboy's Third Action was barred by the limitations period of NRS 116.31166(3).

b. The District Court Properly Applied Nevada's Statute of Limitations for an Action to Void a Foreclosure Sale.

In order to challenge a notice of default and election to sell recorded against real property to void a foreclosure sale, a property owner must file an action within ninety (90) days after the foreclosure sale. *See* NRS 107.080(6); *Tai-Si Kim v. Kearney*, 838 F. Supp. 2d 1077, 1089, 2012 U.S. Dist. LEXIS 7080, *23-24, 2012 WL 194400 (D. Nev. 2012); *Archer v. Bank of Amer. Corp.*, 2011 WL 6752562 (D. Nev. 2011) (interpreting the prior version of the statute with same limitations period). Rusch and Longboy's Third Action, which is the action at issue in the present appeal, seeks to void the sale, as evidenced by their allegations and motion practice. *See* discussion in Section IV, subsection (C)(1), *supra*. The applicable 90-day statute of limitations expired on November 7, 2017 (i.e., 90 days after the date of the foreclosure sale) and certainly by no later than May 23, 2018 (date Plaintiffs later executed the DIA prepared by RRFS to accept the Excess Proceeds). As such, the statute of limitations for an action seeking to void the sale expired years before Plaintiffs' Third Action was filed on September 2, 2021. Rusch and Longboy never presented to the District Court under the provisions of NRCP 56 any basis upon which tolling would have applied. Therefore, the District Court properly ruled that Rusch and Longboy's Third Action was barred by NRS 107.080(6).

c. The District Court Alternatively Properly Applied Nevada's Statute of Limitations for Wrongful Foreclosure Actions.

Since Rusch and Longboy's Third Action concerning the foreclosure of the Subject Condominium is premised upon (unfounded) allegations surrounding notice, the District Court also considered statute of limitations issues from the perspective of Rusch and Longboy's Third Action constituting a claim for wrongful foreclosure. Rusch and Longboy's claims are alleged to arise under the provisions they cite under NRS Chapter 116, which they claim give rise to liability for the actions of RRFS on behalf of Martin CUOA. In other words, Plaintiffs claim to seek recovery on a liability created by statute. Nevada applies a three (3) year statute of limitations to a wrongful foreclosure claim premised upon a violation of NRS Chapter 116. *See* NRS 11.190(3)(a). Taking into account three years from August 10, 2017 (date of the foreclosure), plus the Nevada Governor's tolling of statutes of limitations from April 1, 202 through July 31, 2020 during the Coronavirus Pandemic , computes to a statute of limitations of December 14, 2020. Rusch and Longboy's Third Action was not filed until September 2, 2021, approximately 8.5 months after expiration of the 3-year statute of limitations. *See also* RA-2020-SIX-1207-1209. Rusch and Longboy never presented to the District Court under the provisions of NRCP 56 any basis upon which tolling would have applied. Therefore, the District Court properly ruled that Rusch and Longboy's Third Action was barred by NRS 11.190(3)(a).

4. <u>The District Court Properly Entered Summary Judgment in Favor of Martin CUOA on Estoppel Principles Because Rusch and Longboy Accepted the Excess Proceeds from the Foreclosure Sale without Protest and Released RRFS, Martin CUOA's Agent, from Claims Arising out of the Foreclosure of the Subject Condominium</u>

As overviewed in Section II, subsection F, *supra*, approximately four (4) months after Hollyvale recorded the Foreclosure Deed, Rusch and Longboy executed a Disbursement and Indemnification Agreement ("DIA") prepared by RRFS. *See* RA-2020-SIX-1242-1244. Through the terms of the DIA, Rusch and Longboy were to receive Excess Proceeds from the foreclosure sale in the amount of $290,513.47, and Rusch and Longboy released RRFS, Martin CUOA's agent, with regard to claims arising out of or in connection with the sale of the Subject Condominium. At the time of executing the DIA, Rusch and Longboy also sent a letter to their attorney at the time, Bryan Naddafi, stating the following: "Bryan, Please acknowledge receipt and give Red Rock Koch & Scow OK to distribute funds to me today. Wes." *See* RA-2020-SIX-1242. The aforementioned documents indicate that Rusch and Longboy, nor their counsel, accepted the Excess Proceeds under any form of protest. Rusch and Longboy presented no evidence to the District Court under the provisions of NRCP 56 to the contrary.

Rusch and Longboy's acceptance of Excess Proceeds without protest, and execution of the DIA releasing RRFS, the agent of Martin CUOA who conducted

the foreclosure, through their attorney, operate as a clear waiver under Nevada law of any challenge of the foreclosure by Rusch and Longboy, since such conduct through one's attorney obviously implies intentional conduct which operates as the very antithesis of objecting to and challenging a foreclosure. *See Gottwals v. Rencher*, 98 P.2d 481, 484, 60 Nev. 47, 52 (1940) (holding that actions of a party's attorney bind the client and dispense with the necessity of proof); *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. County of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (waiver may be inferred from intentional, clear conduct). *See also State v. Cobos*, 315 P.3d 600, 603 (Wash. Ct. App. 2013) (holding that an attorney can waive the rights of a client when authorized to act).[4] The giving of a release to RRFS (who performed the non-judicial foreclosure on behalf of Martin CUOA) operates as a bar to subsequent litigation against Martin CUOA. *See Whittlesea v. Farmer*, 86 Nev. 347, 469 P.2d 57 (1970). Moreover, case law with analogous facts establishes that a property owner is estopped from later challenging the validity of a foreclosure sale where s/he accepts proceeds of a foreclosure sale without protest. *See Pollock v. Pesapane*, 732 S.W.2d 253, 254 (Mo. Ct. App. 1987)

[4] Rusch and Longboy's First Action (Clark County District Court Case No. A-18-774190-C), which was filed by attorney Bryan Naddafi, did not raise Rusch and Longboy's claims in the Second Action and Third Action challenging the foreclosure itself. Rusch has failed to point out this important fact to this Court, further demonstrating that Rusch and Longboy long ago engaged in conduct which waived the claims they attempted to assert in the Second Action and Third Action, and of which Rusch is trying to revive in the present appeal.

(citing *Cobb v. Massey*, 160 S.W.2d 733, 735 (Mo. 1942); *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934, 940, 941 (Mo. Ct. App. 1984)). It has long been held in Nevada within the mortgage and real property context that a person cannot accept the benefits derived from a transaction and repudiate the burdens connected with the transaction. *See Federal Mining & Eng'g Co. v. Pollak*, 59 Nev. 145, 150, 85 P.2d 1008, 1009 (1939); *Moore v. Rochester Weaver Mining Co.*, 42 Nev. 164, 168, 174 P. 1017, 1018 (1918) ("Where one having the right to accept or reject a transaction takes and retains benefits thereunder, he becomes bound by the transaction and cannot avoid its obligations or effect by taking a position inconsistent therewith." … "A party cannot apply to his own use that part of the transaction which may bring to him a benefit and repudiate the other which may not be to his interest to fulfil."). (citations omitted). Rusch and Longboy never presented any law to the District Court pursuant to the provisions of NRCP 56 holding to the contrary.

It follows that the District Court properly entered summary judgment in favor of Martin CUOA.

5. <u>The District Court Properly Entered Summary Judgment in Favor of Martin CUOA on the Basis That Rusch and Longboy's Bankruptcy Filings Established Both That Rusch and Longboy Could Not Establish the Requisite Elements of a Wrongful Foreclosure Claim, Nor Prevent the Foreclosure From Being Completed after Being Discharged of Their Obligation to Martin CUOA under Bankruptcy Law.</u>

As noted in Section IV, subsection (C)(3), *supra*, the District Court not only evaluated Rusch and Longboy's claims in the Third Action from the perspective of an action seeking repossession, but also from the perspective of an action for wrongful foreclosure. In Nevada, in order to establish a wrongful foreclosure, the plaintiff must establish the following elements: (1) the defendant exercised a power of sale or foreclosed on plaintiff's property; and (2) no breach of condition or failure of performance existed on the mortgagor's or trustor's part which would have authorized the foreclosure or exercise of the power of sale. *See Collins v. Union Fed. S&L Ass'n*, 99 Nev. 284, 304 (1983). As discussed in Section II, subsection D, *supra*, during the pendency of the foreclosure, both Rusch and Longboy filed for bankruptcy and were discharged with regard to their obligation owed to Martin CUOA. *See* RA-2020-SIX-1294; RA-2020-SIX-1296-1299; RA-2020-SIX-1301-1303; and RA-2020-SIX-1305-1307. The District Court took note of these facts in its findings, and in applying such findings, concluded that Rusch and Longboy could not establish the second element of a wrongful foreclosure claim, namely, that they

were not in breach of a condition or had not engaged in a failure of performance which would authorize the foreclosure. *See* RA-2020-ELEVEN-2573-2575; RA-2020-TWELVE-2680-2682. It is a well-established principle of law that after filing for bankruptcy, a debtor cannot later pursue a claim, unless it was "dealt with" in the bankruptcy action or abandoned by the trustee. *See*, *e.g.*, *Dynamics Corp. of America v. Marine Midland Bank-New York*, 505 N.E.2d 601 (N.Y. 1987). Here, Rusch and Longboy obviously cannot file for bankruptcy in the middle of a foreclosure proceeding, merely obtain a discharge of the debt without having the bankruptcy trustee adjudicate the lawfulness of the debt owed to Martin CUOA, and then later file suit against Martin COA to challenge the lawfulness of the foreclosure. Rusch and Longboy presented no evidence to the District Court pursuant to the provisions of NRCP 56 that the bankruptcy trustee abandoned the claims they have asserted against Martin CUOA. Hence, by operation of law, Rusch and Longboy's bankruptcy operates as a party admission that they could not establish that that they were not in breach of a condition or had not engaged in a failure of performance which would authorize the foreclosure conducted by RRFS on behalf of Martin CUOA. Under Nevada law, a defendant needs to negate only one element of a plaintiff's claim to be entitled to summary judgment. *See Harrington v. Syufy Enters.*, 113 Nev. 246, 248, 931 P.2d 1378, 1380 (1997) (citing *Perez v. Las Vegas Medical Center*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991)). *See also Celotex*,

477 U.S. at 323, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265, 273 (1986) ("[C]omplete failure of proof concerning an essential element of [the] case necessarily renders all other facts immaterial."). As the second element of a wrongful foreclosure claim is clearly lacking, the District Court properly entered summary judgment in favor of Martin CUOA.

In addition, it is well-established in bankruptcy jurisprudence that while a bankruptcy may discharge a debtor's personal liability for a debt, it does not prevent a foreclosure upon the collateral property. *See Long v. Bullard*, 117 U.S. 617, 621 (1886); *accord Dewsnup v. Timm*, 502 U.S. 410, 417 (1992) ("the creditor's lien stays with the real property until the foreclosure"); *Farrey v. Sanderfoot*, 500 U.S. 291, 297 (1991) ("Ordinarily, liens and other secured interests survive bankruptcy."); *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991) ("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam–while leaving intact another–namely, an action against the debtor in rem."). The Nevada Supreme Court concurs. *See Property Plus Invs., LLC v. Mortgage Elec. Registration Sys.*, 133 Nev. 462, 467-68, 401 P.3d 728, 732 (2017) (holding a bankruptcy discharge "extinguishes only 'the personal liability of the debtor'" (citing *Johnson*, *supra*), and that a "bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action

against the debtor in rem," thereby holding that foreclosure of HOA fees and assessments which arose before the bankruptcy discharge may proceed (citing *Farrey* and *Johnson*, *supra*)). The District Court acknowledged this rule of law and Nevada's adherence to same, ruling that once Plaintiffs were personally discharged of the debt owing to Martin CUOA concerning the Subject Condominium, the foreclosure was permitted to proceed against the Subject Condominium itself. As such, the District Court properly granted summary judgment in favor of Martin CUOA.

V.

CONCLUSION

Based on the foregoing, as well as points, authorities and evidence in the Record on Appeal filed by the Clerk of the District Court, Respondent Martin CUOA respectfully requests that the District Court's entry of summary judgment in favor of Martin CUOA be affirmed. Although only one independent basis for the entry of summary judgment supported by the Record on Appeal needs to exist for an affirmance, Martin CUOA submits that all five (5) bases (namely, issue preclusion/collateral estoppel as a result of outcome of Quiet title Action, expiration of applicable limitations periods, estoppel by Rusch and Longboy's acceptance of excess proceeds without protest, Rusch and Longboy's failure to demonstrate a lack of evidence of no breach of condition/obligation on their part to support a wrongful

foreclosure claim, and bankruptcy rule of law concerning a lien running with real property) upon which the District Court entered summary judgment in favor of Martin, are supported by the Record on Appeal, and that all bases should be adopted in affirming the District Court in the present appeal.

DATED this 30th day of May, 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By */s/ Marc S. Cwik*
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VI.

ATTORNEY CERTIFICATE PURSUANT TO NRAP 28.2

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 Microsoft 365 Word in Times New Roman, size 14.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a) 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 8,935 words.

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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 this 30th day of May, 2023.

LEWIS BRISBOIS BISGAARD & SMITH LLP

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VII.

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of LEWIS BRISBOIS BISGAARD & SMITH LLP, and that on this 30th day of May, 2023, I did cause a true copy of the foregoing **RESPONDENT'S ANSWERING BRIEF** to be served via the Court's electronic filing and service system to all parties on the current service list.

I further certify that I did cause a true copy of the **RESPONDENT'S ANSWERING BRIEF** to be served via email and U.S. Mail (first class) to:

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By */s/ Peggy Kurilla*
An Employee of LEWIS BRISBOIS BISGAARD & SMITH LLP