

IN THE SUPREME COURT OF THE STATE OF NEVADA

AIRMOTIVE INVESTMENTS, LLC, A)
NEVADA LIMITED LIABILITY)
COMPANY,)

Appellant,)

vs.)

BANK OF AMERICA, N.A.,)

Respondent.)

Electronically Filed
Dec 21 2020 05:53 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Supreme Court No. 80373

APPEAL

From the Eighth Judicial District Court,
The Honorable Stefany A. Miley, District Judge
District Court Case No. A-12-654840-C

JOINT APPENDIX - VOLUME 3

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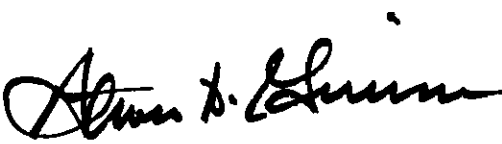
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CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP, LLC,)
a Nevada limited liability company,)

Plaintiff,)

Case No. A-12-654840-C
Dept. No. XXIII

vs.)

BANK OF AMERICA, GENEVIEVE UNIZA-)
ENRIQUEZ, DOES 1 THROUGH 20, AND)
ROE CORPORATIONS 1 THROUGH 20,)
INCLUSIVE,)

Defendants.)

BANK OF AMERICA, N.A.)

Counterclaimant,)

vs.)

LAS VEGAS DEVELOPMENT GROUP, LLC,)

Counter-Defendant.)

THIRD AMENDED COMPLAINT

COMES NOW, Plaintiff, LAS VEGAS DEVELOPMENT GROUP, LLC, by and through
its attorneys, ROGER P. CROTEAU & ASSOCIATES, LTD., and hereby complains and alleges
as follows:

PARTIES

1. At all times relevant to this matter, Plaintiff, LAS VEGAS DEVELOPMENT GROUP, LLC, was and is a Nevada limited liability company, authorized to do business and doing business in the County of Clark, State of Nevada.
2. Upon information and belief, at all times relevant to this matter, Defendant, GENEVIEVE UNIZA-ENRIQUEZ, was and is an individual and resident of the County of Clark, State of Nevada.
3. Upon information and belief, at all times relevant to this matter, Defendant, BANK OF AMERICA, N.A. (*“Bank of America”*), was and is a national banking association, authorized to do business and doing business in the County of Clark, State of Nevada.
4. Plaintiff is unaware of the true names and capacities whether individuals, corporations, associates, or otherwise of Defendants DOES I through X and ROE Corporations I through X, inclusive, and therefore sues these Defendants by such fictitious names. Plaintiff is informed and believes and thereupon alleges that the Defendants, and each of them, are in some manner responsible and liable for the acts and damages alleged in this Complaint. Plaintiff will seek leave of this Court to amend this Complaint to allege the true names and capacities of the DOES and ROE CORPORATIONS Defendants when the true names of the DOES and ROE CORPORATIONS Defendants are ascertained.

GENERAL ALLEGATIONS

5. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 4 hereof as if set forth fully herein.
6. On or about March 12, 2004, a Declaration was recorded as instrument number 20040312-01067 in the Official Records of the Clark County Recorder, thereby creating the Palo Verde Ranch Homeowners’ Association (*the “HOA”*) and perfecting a lien in favor of the HOA on all real property located within the common interest community it governed, including but not limited to that real property commonly known as 6279 Downpour Court, Las Vegas, Nevada 89110, Assessor Parcel No. 140-34-413-075 (*the “Property”*).

- 1 7. The lien having been recorded prior to any other liens is first in right and first in time as
2 to all other interests recorded after the Declaration with the exception of liens for real
3 estate taxes and other governmental assessments.
- 4 8. N.R.S. Chapter 116 provides that the lien perfected by the Declaration is subordinate to a
5 “first security interest on the unit recorded before the date on which the assessment
6 sought to be enforced became delinquent.”
- 7 9. While this statutory subordination applies to the majority of the lien perfected by the
8 Declaration, pursuant to N.R.S. 116.3116(2)(c), it does not subordinate the lien to two
9 specific charges incurred under it.
- 10 10. The charges which are NOT subordinated to the first security interest include: (1) any
11 charges incurred by the association on a unit pursuant to NRS 116.310312 and; (2) that
12 portion of the assessments for common expenses based on the periodic budget adopted by
13 the association pursuant to NRS 116.3115 which would have become due in the absence
14 of acceleration during the 9 months immediately preceding institution of an action to
15 enforce the lien.
- 16 11. On or about August 12, 2004, Defendant, GENEVIEVE UNIZA-ENRIQUEZ (“*Former*
17 *Owner*”) acquired title to and ownership of the Property.
- 18 12. Between approximately August 12, 2004, and April 12, 2011, Former Owner held title to
19 and ownership of the Property.
- 20 13. Upon information and belief, Former Owner obtained one or more mortgages and/or lines
21 of credit secured by the Property.
- 22 14. Upon information and belief, Bank of America is the current holder and/or owner of a
23 deed of trust recorded against the Property on or about June 30, 2006, recorded in the
24 Official Records of the Clark County Recorder as Instrument No. 20060630-0002110
25 (“*First Deed of Trust*”).
- 26 15. Bank of America may claim a beneficial interest in the First Deed of Trust and, as such,
27 claim an interest in the Property.
- 28 16. The Property is and was subject to certain Covenants, Conditions and Restrictions

1 (“CC&Rs”) of HOA.

2 17. By virtue of her ownership of the Property, Former Owner was a member of the HOA and
3 accordingly was obligated to pay HOA assessments pursuant to the terms of the CC&Rs.

4 18. At some point in time during his ownership of the Property, Former Owner failed to pay
5 the HOA assessments related to the Property.

6 19. As a result of the failure of Former Owner to pay the HOA assessments, HOA caused one
7 or more Notices of Delinquent Assessment Lien (“*HOA Lien*”) to be recorded with the
8 Office of the Recorder of Clark County, Nevada.

9 20. Thereafter, HOA caused a Notice of Default and Election to Sell to be recorded with the
10 Office of the Recorder of Clark County, Nevada.

11 21. Upon information and belief, the Notice of Default and Election to Sell was served upon
12 the Former Owner, as well as all interested parties holding a security interest in the
13 Property.

14 22. After the expiration of 90 days from the recording and mailing of the Notice of Default,
15 HOA caused a Notice of Trustee’s Sale to be recorded with the Office of the Recorder of
16 Clark County, Nevada.

17 23. Upon information and belief, the Notice of Trustee’s Sale was served upon the Former
18 Owner, as well as all interested parties holding a security interest in the Property.

19 24. On or about April 12, 2011, HOA caused a foreclosure sale (“*HOA Foreclosure Sale*”) to
20 be conducted pursuant to the powers conferred by the Nevada Revised Statutes 116.3116,
21 116.31162, 116.31163 and 116.31164; the CC&Rs; the Notice of Delinquent Assessment
22 Lien; and the Notice of Default and Election to Sell.

23 25. Plaintiff purchased the Property by successfully bidding at the HOA Foreclosure Sale in
24 accordance with N.R.S. 116.3116, *et seq.*

25 26. On or about April 13, 2011, a Trustee’s Deed Upon Sale (“*HOA Foreclosure Deed*”) was
26 recorded in the Official Records of the Clark County Recorder as Instrument No.
27 201104130000953, vesting title to the Property in the name of Plaintiff.

28 27. The HOA Foreclosure Sale complied with all requirements of law, including but not

- 1 limited to, the recording and mailing of copies of the Notice of Delinquent Assessment
2 and Notice of Default, and the recording, posting and publication of the Notice of Sale.
- 3 28. Upon information and belief, Defendants had actual and/or constructive notice of the
4 HOA foreclosure proceedings.
- 5 29. N.R.S. 116.3116(2) provides that an HOA Lien has priority over all other liens and
6 encumbrances except:
- 7 (a) Liens and encumbrances recorded before the recordation of the declaration
8 and, in a cooperative, liens and encumbrances which the association creates,
9 assumes or takes subject to;
10 (b) A first security interest on the unit recorded before the date on which the
11 assessment sought to be enforced became delinquent or, in a cooperative, the first
12 security interest encumbering only the unit's owner's interest and perfected before
13 the date on which the assessment sought to be enforced became delinquent; and
14 (c) Liens for real estate taxes and other governmental assessments or charges
15 against the unit or cooperative.
- 16 30. N.R.S. 116.3116(2) further provides that a portion of the HOA Lien has priority over
17 even a first security interest in the Property, stating as follows:
- 18 The lien is also prior to all security interests described in paragraph (b) to the
19 extent of any charges incurred by the association on a unit pursuant to NRS
20 116.310312 and to the extent of the assessments for common expenses based on
21 the periodic budget adopted by the association pursuant to NRS 116.3115 which
22 would have become due in the absence of acceleration during the 9 months
23 immediately preceding institution of an action to enforce the lien[.]
- 24 31. Upon information and belief, the HOA incurred charges within the 9 months immediately
25 preceding the initiation of the HOA foreclosure action that constituted super priority
26 amounts.
- 27 32. Upon information and belief, no party still claiming an interest in the Property recorded a
28 lien or encumbrance prior to the declaration creating the HOA.
33. Upon information and belief, the prevailing bid at the HOA Foreclosure Sale was equal to
or in excess of the amount necessary to satisfy the costs of sale and the super-priority
portion of the HOA Lien.
34. Upon information and belief, the HOA distributed or should have distributed any excess
funds that existed to lien holders in order of priority pursuant to N.R.S. 116.3114(c).
35. Upon information and belief, Defendants had actual and/or constructive notice of the

1 requirement to pay assessments to the HOA and of the HOA Lien.

2 36. Upon information and belief, prior to the HOA Foreclosure Sale, no individual or entity
3 paid the full amount of delinquent assessments described in the Notice of Default.

4 37. Upon information and belief, prior to the HOA Foreclosure Sale, no individual or entity
5 paid the super priority portion of the delinquent assessments described in the Notice of
6 Default.

7 38. Upon information and belief, Defendants had actual and/or constructive notice of the
8 super priority portion of the HOA Lien.

9 39. Upon information and belief, prior to the HOA Foreclosure Sale, Bank of America had
10 not assigned the First Deed of Trust to the Secretary of Housing and Urban Development
11 (“*HUD*”), the Federal National Mortgage Association (“*FNMA*”), the Federal Home
12 Loan Mortgage Corporation (“*Freddie Mac*”) or any governmental agency or
13 instrumentality.

14 40. Upon information and belief, at the time of the HOA Foreclosure Sale, neither the United
15 States nor any of its agencies or instrumentalities possessed any interest in either the First
16 Deed of Trust or the Property.

17 41. Upon information and belief, Bank of America knew or should have known that any
18 security interest that it may have possessed pursuant to the First Deed of Trust would be
19 extinguished through foreclosure if it failed to cure the super-priority portion of the HOA
20 Lien representing 9 months of assessments for common expenses based upon the periodic
21 budget adopted by the HOA which would have become due in the absence of acceleration
22 for the relevant time period.

23 42. Pursuant to N.R.S. 116.31166, the HOA Foreclosure Sale vested title in Plaintiff “without
24 equity or right of redemption.”

25 43. Pursuant to N.R.S. 116.31166, the HOA Foreclosure Deed is conclusive against the
26 Property’s “former owner, his or her heirs and assigns, and all other persons.”

27 44. Former Owner’s ownership interest in the Property was extinguished by the foreclosure
28 of the HOA Lien.

- 1 45. Bank of America's security interest in the Property, if any, was extinguished by the
2 foreclosure of the HOA Lien and the First Deed of Trust was rendered null, void and
3 unenforceable.
- 4 46. By virtue of its purchase of the Property at the HOA Foreclosure Sale, Plaintiff became
5 the sole owner of all right, title and interest in the Property free and clear of any
6 encumbrances of the Defendants.
- 7 47. In the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d
8 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014), the Nevada Supreme Court
9 resolved a split that previously existed in the state and federal courts of the State of
10 Nevada regarding the force, effect and interpretation of N.R.S. §116.3116.
- 11 48. In doing so, the Nevada Supreme Court clarified that the statute provides a homeowners
12 association a true super-priority lien over real property that can and does extinguish a first
13 deed of trust when non-judicially foreclosed. *Id.*
- 14 49. In *SFR Investments*, the Nevada Supreme Court also recognized that a foreclosure deed
15 "reciting compliance with notice provisions of N.R.S. 116.31162 through NRS
16 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or her
17 heirs and assigns and all other persons.'" *See id.* at 3 (citing NRS 116.3116(2)).
- 18 50. Moreover, under Nevada law, the HOA foreclosure sale and the resulting foreclosure
19 deed are both presumed valid. NRS 47.250(16)-(18) (stating that disputable presumptions
20 exist "that the law has been obeyed"; "that a trustee or other person, whose duty it was to
21 convey real property to a particular person, has actually conveyed to that person, when
22 such presumption is necessary to perfect the title of such person or a successor in
23 interest"; "that private transactions have been fair and regular"; and "that the ordinary
24 course of business has been followed.").

25 **FIRST CAUSE OF ACTION**

26 **(Quiet Title against Bank of America and Former Owner)**

- 27 51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
28 through 50 hereof as if set forth fully herein.

- 1 52. Plaintiff properly acquired title and ownership of the Property at the HOA Foreclosure
2 Sale in exchange for good and valuable consideration.
- 3 53. By virtue of its purchase of the Property at the HOA Foreclosure Sale, Plaintiff became
4 the sole owner of all right, title and interest in the Property free and clear of any
5 encumbrances of the Defendants.
- 6 54. Upon information and belief, Bank of America may claim an interest in the Property
7 pursuant to the First Deed of Trust.
- 8 55. Upon information and belief, Former Owner may claim an interest in the Property based
9 upon her past ownership of the Property.
- 10 56. A justiciable controversy exists regarding the right, title and interest held by Plaintiff and
11 Defendants in the Property.
- 12 57. The interests of Plaintiff and Defendants are adverse in this justiciable controversy.
- 13 58. The Plaintiff has a legally protectible interest in the Property.
- 14 59. The controversy between Plaintiff and Defendants is ripe for judicial determination.
- 15 60. This Court should enter an Order which determines all and every claim, estate or interest
16 of the parties in the Property.
- 17 61. The Plaintiff is entitled to a declaratory judgment finding that: (1) Plaintiff is the title
18 owner of the Property; (2) the HOA Foreclosure Deed is valid and enforceable; (3) the
19 HOA Foreclosure Sale extinguished the Defendants' ownership and security interests in
20 the Property; and (4) Plaintiff's rights and interest in the Property are superior to any
21 interest claimed by the Defendants and/or any third party.
- 22 62. Title to the Property should be quieted solely in the name of Plaintiff.
- 23 63. As a direct and proximate result of the actions of the Defendants, it has become necessary
24 for Plaintiff to retain the services of an attorney to protect its rights and prosecute this
25 Claim.
- 26 64. Plaintiff reserves the right to amend this Complaint under the Nevada Rules of Civil
27 Procedure as further facts become known.
- 28

SECOND CAUSE OF ACTION

(Unjust Enrichment against Bank of America and Former Owner)

65. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 64 hereof as if set forth fully herein.

66. Plaintiff has expended significant funds and resources in connection with the acquisition and maintenance of the Property.

67. In the event that the Plaintiff does not maintain sole and exclusive title to and possession of the Property, the Defendants will obtain substantial benefits from the funds and resources expended by the Plaintiff.

68. It would be unjust for the Defendants to accept and retain such benefits without compensating Plaintiff for the value of the benefits which they received.

69. As a direct and proximate result of the actions of the Defendants, it has become necessary for Plaintiff to retain the services of an attorney to protect its rights and prosecute this Claim.

70. Plaintiff reserves the right to amend this Complaint under the Nevada Rules of Civil Procedure as further facts become known.

THIRD CAUSE OF ACTION

(Equitable Mortgage against Bank of America and Former Owner)

71. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 70 hereof as if set forth fully herein.

72. Plaintiff has expended significant funds and resources in connection with the acquisition and maintenance of the Property.

73. In the event that the Plaintiff does not maintain sole and exclusive title to and possession of the Property, the Defendants will obtain substantial benefits from the funds and resources expended by the Plaintiff.

74. It would be unjust for the Defendants to accept and retain such benefits without compensating Plaintiff for the value of the benefits which they received.

75. In the event that the Plaintiff does not maintain sole and exclusive title to and possession

1 of the Property, the existence of an equitable mortgage is essential to the effectuation of
2 justice and to protect the interests of Plaintiff .

3 76. In the event that Plaintiff is divested of title to the Property for any reason, an equitable
4 mortgage should be imposed against the Property in favor of Plaintiff to secure the
5 payment of all sums expended by Plaintiff in connection with the acquisition and
6 maintenance of the Property.

7 77. As a direct and proximate result of the actions of the Defendants, it has become necessary
8 for Plaintiff to retain the services of an attorney to protect its rights and prosecute this
9 Claim.

10 78. Plaintiff reserves the right to amend this Complaint under the Nevada Rules of Civil
11 Procedure as further facts become known.

12 **FOURTH CAUSE OF ACTION**

13 **(Temporary Restraining Order, Preliminary Injunction and**
14 **Permanent Injunction against all Defendants)**

15 79. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
16 through 78 hereof as if set forth fully herein.

17 80. Plaintiff properly acquired title and ownership of the Property at the HOA Foreclosure
18 Sale in exchange for good and valuable consideration.

19 81. By virtue of its purchase of the Property at the HOA Foreclosure Sale, Plaintiff became
20 the sole owner of all right, title and interest in the Property free and clear of any
21 encumbrances of the Defendants.

22 82. Bank of America has caused one or more Notices of Breach and Election to Sell to be
23 recorded against the Property in the Official Records of the Clark County Recorder.

24 83. Bank of America has caused one or more Notices of Trustee's Sale to be recorded against
25 the Property in the Official Records of the Clark County Recorder.

26 84. Any foreclosure sale based upon the First Deed of Trust would be invalid and ineffective
27 because the First Deed of Trust was extinguished by virtue of the HOA Foreclosure Sale.

28 85. Any attempt to take or maintain possession of the Property by Defendants would be

1 invalid because Defendants' interest in the Property, if any, was extinguished by the HOA
2 Foreclosure Sale.

3 86. Any attempt to sell, transfer, encumber or otherwise convey the Property by Defendants
4 would be invalid because Defendants' interest in the Property, if any, was extinguished by
5 the HOA Foreclosure Sale.

6 87. The Property is unique.

7 88. Plaintiff would suffer irreparable harm, damage and injury in the event of an attempted
8 foreclosure of the Property by Defendants.

9 89. Plaintiff has no adequate remedy at law or otherwise for the harm or damage that would
10 be done as a result of an attempted foreclosure of the Property by Defendants.

11 90. Plaintiff possesses a reasonable probability of success on the merits of its claims.

12 91. The Court should issue a Temporary Restraining Order, Preliminary Injunction and
13 Permanent Injunction against Defendants and any third party, enjoining the initiation or
14 continuation of any foreclosure proceedings related to the Property.

15 92. As a direct and proximate result of the actions of the Defendants, it has become necessary
16 for Plaintiff to retain the services of an attorney to protect its rights and prosecute this
17 Claim.

18 93. Plaintiff reserves the right to amend this Complaint under the Nevada Rules of Civil
19 Procedure as further facts become known.

20 **FIFTH CAUSE OF ACTION**

21 **(Slander of Title against Bank of America)**

22 94. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
23 through 93 hereof as if set forth fully herein.

24 95. Plaintiff properly acquired title and ownership of the Property at the HOA Foreclosure
25 Sale in exchange for good and valuable consideration.

26 96. By virtue of its purchase of the Property at the HOA Foreclosure Sale, Plaintiff became
27 the sole owner of all right, title and interest in the Property free and clear of any
28 encumbrances of the Defendants.

1 97. Bank of America has caused one or more Notices of Breach and Election to Sell to be
2 recorded against the Property in the Official Records of the Clark County Recorder.

3 98. Bank of America has caused one or more Notices of Trustee's Sale to be recorded against
4 the Property in the Official Records of the Clark County Recorder.

5 99. The Notice(s) of Breach and Election to Sell, Notice(s) of Trustee's Sale and/or other
6 documents recorded by Defendants since the time that Plaintiff purchased the Property
7 have impugned Plaintiff's title to the Property.

8 100. Plaintiff's title to the Property has been disparaged and slandered, and there is a cloud on
9 Plaintiff's title.

10 101. The actions of the Defendants were done with the intent to cause Plaintiff harm, or in
11 conscious disregard for its rights, or were done with conscious disregard for the
12 consequences of their actions, and were therefore done with either express or implied
13 malice.

14 102. As a direct and proximate result of the actions of the Defendants, it has become necessary
15 for Plaintiff to retain the services of an attorney to protect its rights and prosecute this
16 Claim.

17 103. Plaintiff reserves the right to amend this Complaint under the Nevada Rules of Civil
18 Procedure as further facts become known.

19 WHEREFORE, Plaintiff, LAS VEGAS DEVELOPMENT GROUP, LLC, prays for
20 judgment as follows:

21 A. On its First Cause of Action, for an Order which determines all and every claim,
22 estate or interest of the parties in the Property, finding that: (1) Plaintiff is the title
23 owner of the Property; (2) the HOA Foreclosure Deed is valid and enforceable;
24 (3) the HOA Foreclosure Sale extinguished the Defendants' ownership and
25 security interests in the Property; and (4) Plaintiff's rights and interest in the
26 Property are superior to any interest claimed by the Defendants and/or any third
27 party;

28 B. On its Second Cause of Action, for general and special damages in excess of Ten

- 1 Thousand Dollars (\$10,000.00);
- 2 C. On its Third Cause of Action for, in the event that Plaintiff is divested of title to
- 3 the Property for any reason, for the imposition of an equitable mortgage against
- 4 the Property in favor of Plaintiff to secure the payment of all sums expended by
- 5 Plaintiff in connection with the acquisition and maintenance of the Property;
- 6 D. On its Fourth Cause of Action, for the issuance of a Temporary Restraining Order,
- 7 Preliminary Injunction and Permanent Injunction against Defendants and any third
- 8 party, enjoining the initiation or continuation of any foreclosure proceedings
- 9 related to the Property;
- 10 E. On its Fifth Cause of Action, for general and special damages in excess of Ten
- 11 Thousand Dollars (\$10,000.00) and for exemplary or punitive damages in an
- 12 amount sufficient to deter Defendants and others from engaging in similar
- 13 conduct, said amount to adequately express social outrage over Defendants’
- 14 wrongful actions;
- 15 F. For costs and attorneys’ fees incurred in bringing this action; and
- 16 G. For such other and further relief as this Court may deem meet and proper.

17 DATED this 29th day of February, 2016.

18 ROGER P. CROTEAU & ASSOCIATES, LTD.

19

20 /s/ Timothy E. Rhoda

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27 (702) 254-7775

28 *Attorney for Plaintiff*

LAS VEGAS DEVELOPMENT GROUP, LLC

CERTIFICATE OF SERVICE

Pursuant to Nevada Rules of Civil Procedure 5(b), I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 29th day of February, 2016, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

X VIA ELECTRONIC SERVICE: through the Eighth Judicial District Court's Odyssey e-file and serve system.

Akerman LLP

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Akerman Las Vegas Office

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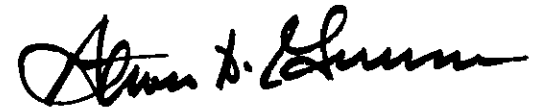
— VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

— VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

— VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

/s/ Timothy E. Rhoda

An employee of ROGER P. CROTEAU &
ASSOCIATES, LTD.



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**DISTRICT COURT FOR
CLARK COUNTY, NEVADA**

LAS VEGAS DEVELOPMENT GROUP,
LLC, a Nevada limited liability company,

Plaintiff,

vs.

BANK OF AMERICA; GENEVIEVE UNIZA-
ENRIQUEZ; DOES 1 through 20, and ROE
CORPORATIONS 1 through 20, inclusive,

Defendants.

Case No.: A-12-654840-C
Dept. No.: XXIII

**BANK OF AMERICA, N.A.'s ANSWER
TO THIRD AMENDED COMPLAINT
AND COUNTERCLAIMS**

BANK OF AMERICA, N.A.,

Counterclaimant,

vs.

LAS VEGAS DEVELOPMENT GROUP, LLC,

Counter-Defendant.

Defendant Bank of America, N.A. ("Bank of America"), answers the Complaint filed by
Plaintiff Las Vegas Development Group, LLC ("Plaintiff") as follows:

1. Bank of America lacks sufficient information to admit or deny the allegations of
Paragraph 1 and therefore denies the same.

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7/3827868.1

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2. Bank of America lacks sufficient information to admit or deny the allegations of Paragraph 2 and therefore denies the same.

3. Bank of America admits that it is a national banking association that does business in Clark County, Nevada.

4. The allegations in Paragraph 4 of the Complaint are directed to unnamed entities or persons and, therefore, no response is required. To the extent a response is required, Bank of America lacks sufficient information to admit or deny such allegations and therefore denies same.

GENERAL ALLEGATIONS

5. Bank of America adopts and incorporates by reference its responses to the preceding paragraphs of Plaintiff's Complaint as if set forth fully herein.

6. Bank of America lacks sufficient information to admit or deny the allegations of Paragraph 6 and therefore denies the same.

7. The allegations in Paragraph 7 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Bank of America denies the allegations in Paragraph 7.

8. The allegations in Paragraph 8 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Bank of America states that the referenced statute speaks for itself and to the extent any of the allegations in Paragraph 8 are inconsistent with the referenced statute, such allegations are denied.

9. The allegations in Paragraph 9 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Bank of America states that the referenced statute speaks for itself and to the extent any of the allegations in Paragraph 9 are inconsistent with the referenced statute, such allegations are denied.

10. The allegations in Paragraph 10 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Bank of America states that the referenced statute speaks for itself and to the extent any of the allegations in Paragraph 10 are inconsistent with the referenced statute, such allegations are denied.

11. Bank of America admits that Defendant Genevieve Uniza-Enriquez was at one time the record owner of the Property.

12. Bank of America states that the property records speak for themselves and to the extent any of the allegations in Paragraph 12 are inconsistent with the property records, such allegations are denied.

13. Bank of America states that the property records speak for themselves and to the extent any of the allegations in Paragraph 13 are inconsistent with the property records, such allegations are denied.

14. Bank of America admits that a Deed of Trust was recorded on June 30, 2006 as instrument number 20060630-0002110 (the **Deed of Trust**). Bank of America states that the recorded Deed of Trust speaks for itself, and, to the extent any allegations contained in Paragraph 14 of the Complaint are inconsistent with the Deed of Trust, such allegations are denied.

15. Admitted.

16. Admitted upon information and belief.

17. Bank of America lacks sufficient information to admit or deny the allegations of Paragraph 17 and therefore denies the same.

18. Bank of America lacks sufficient information to admit or deny the allegations of Paragraph 18 and therefore denies the same.

19. Bank of America admits that a Notice of Delinquent Assessment Lien was recorded on April 1, 2010 as instrument number 20100401-0001086. Bank of America states that the recorded document speaks for itself, and, to the extent any allegations contained in Paragraph 19 of the Complaint are inconsistent with the document, such allegations are denied.

20. Bank of America admits that a Notice of Default and Election to Sell Under Notice of Delinquent Assessment was recorded on July 14, 2010 as instrument number 20100714-0001222. Bank of America states that the recorded document speaks for itself, and, to the extent any allegations contained in Paragraph 20 of the Complaint are inconsistent with the document, such allegations are denied.

1 21. Bank of America denies that the Notice of Default was served upon all interested
2 parties holding an interest in the Property. Bank of America lacks sufficient information to admit or
3 deny the remaining allegations of Paragraph 21 and therefore denies the same.

4 22. Bank of America admits that a Notice of Trustee's Sale was recorded on November
5 18, 2010 as instrument number 20101118-0001542. Bank of America states that the recorded
6 document speaks for itself, and, to the extent any allegations contained in Paragraph 22 of the
7 Complaint are inconsistent with the document, such allegations are denied.

8 23. Bank of America denies that the Notice of Trustee's Sale was served upon all
9 interested parties holding an interest in the Property. Bank of America lacks sufficient information
10 to admit or deny the remaining allegations of Paragraph 23 and therefore denies the same.

11 24. Bank of America admits that the Trustee's Deed Upon Sale reflects that the HOA
12 held a foreclosure sale on April 12, 2011 (**HOA foreclosure sale**). Bank of America denies that this
13 foreclosure sale was conducted in compliance with the applicable law.

14 25. Bank of America lacks sufficient information to admit or deny the allegations of
15 Paragraph 25 and therefore denies the same. Bank of America denies that this foreclosure sale was
16 conducted in compliance with the applicable law and denies that the interest Plaintiff acquired by
17 virtue of the HOA foreclosure sale, if any, is superior to the Deed of Trust.

18 26. Bank of America admits that a Trustee's Deed Upon Sale was recorded on April 13,
19 2011 as instrument number 20110413-0000953. Bank of America states that the recorded document
20 speaks for itself, and, to the extent any allegations contained in Paragraph 26 of the Complaint are
21 inconsistent with the document, such allegations are denied. Bank of America denies that the
22 interest Plaintiff acquired by virtue of the HOA foreclosure sale, if any, is superior to the Deed of
23 Trust.

24 27. The allegations in Paragraph 27 of the Complaint state legal conclusions to which no
25 response is required. To the extent a response is required, Bank of America denies that the HOA
26 foreclosure sale was conducted in compliance with the applicable law.

1 28. The allegations in Paragraph 28 of the Complaint state legal conclusions to which no
2 response is required. To the extent a response is required, Bank of America denies the allegations in
3 Paragraph 28.

4 29. The allegations in Paragraph 29 of the Complaint state characterizations and legal
5 conclusions to which no response is required. To the extent a response is required, Bank of America
6 states that the referenced statute speaks for itself and, to the extent any of the allegations in
7 Paragraph 29 are inconsistent with the statute, Bank of America denies such allegations.

8 30. The allegations in Paragraph 30 of the Complaint state characterizations and legal
9 conclusions to which no response is required. To the extent a response is required, Bank of America
10 states that the referenced statute speaks for itself and, to the extent any of the allegations in
11 Paragraph 30 are inconsistent with the statute, Bank of America denies such allegations.

12 31. Bank of America lacks sufficient information to admit or deny the allegations of
13 Paragraph 31 and therefore denies the same.

14 32. Bank of America lacks sufficient information to admit or deny the allegations of
15 Paragraph 32 and therefore denies the same.

16 33. Bank of America lacks sufficient information to admit or deny the allegations of
17 Paragraph 33 and therefore denies the same.

18 34. The allegations in Paragraph 34 of the Complaint state characterizations and legal
19 conclusions to which no response is required. To the extent a response is required, Bank of America
20 states that the referenced statute speaks for itself and, to the extent any of the allegations in
21 Paragraph 34 are inconsistent with the statute, Bank of America denies such allegations.

22 35. The allegations in Paragraph 35 of the Complaint state legal conclusions to which no
23 response is required. To the extent a response is required, Bank of America denies the allegations in
24 Paragraph 35. Bank of America lacks sufficient information to admit or deny the remaining
25 allegations of Paragraph 35 and therefore denies the same.

26 36. Bank of America lacks sufficient information to admit or deny the remaining
27 allegations of Paragraph 36 and therefore denies the same.

1 37. Bank of America lacks sufficient information to admit or deny the remaining
2 allegations of Paragraph 37 and therefore denies the same.

3 38. Bank of America denies that it was provided actual or constructive notice of the
4 super-priority portion of the HOA lien. Bank of America lacks sufficient information to admit or
5 deny the remaining allegations of Paragraph 38 and therefore denies the same.

6 39. Bank of America admits that the property records speak for themselves and to the
7 extent any of the allegations in Paragraph 39 are inconsistent with the property records, Bank of
8 America denies such allegations.

9 40. Denied. Bank of America states that Fannie Mae owned the subject loan at the time
10 of the HOA foreclosure sale.

11 41. The allegations in Paragraph 41 of the Complaint state legal conclusions to which no
12 response is required. To the extent a response is required, Bank of America denies the allegations in
13 Paragraph 41.

14 42. The allegations in Paragraph 42 of the Complaint state characterizations and legal
15 conclusions to which no response is required. To the extent a response is required, Bank of America
16 states that the referenced statute speaks for itself and, to the extent any of the allegations in
17 Paragraph 42 are inconsistent with the statute, Bank of America denies such allegations.

18 43. The allegations in Paragraph 43 of the Complaint state characterizations and legal
19 conclusions to which no response is required. To the extent a response is required, Bank of America
20 states that the referenced statute speaks for itself and, to the extent any of the allegations in
21 Paragraph 43 are inconsistent with the statute, Bank of America denies such allegations.

22 44. The allegations in Paragraph 44 of the Complaint state characterizations and legal
23 conclusions to which no response is required. To the extent a response is required, Bank of America
24 denies that the Deed of Trust was extinguished.

25 45. The allegations in Paragraph 45 of the Complaint state characterizations and legal
26 conclusions to which no response is required. To the extent a response is required, Bank of America
27 denies that the Deed of Trust was extinguished.

1 46. The allegations in Paragraph 46 of the Complaint state characterizations and legal
2 conclusions to which no response is required. To the extent a response is required, Bank of America
3 denies that allegations in Paragraph 46.

4 47. The allegations in Paragraph 47 of the Complaint state characterizations and legal
5 conclusions to which no response is required. To the extent a response is required, Bank of America
6 states that the referenced case speaks for itself and, to the extent any of the allegations in Paragraph
7 47 are inconsistent with the case, Bank of America denies such allegations.

8 48. The allegations in Paragraph 48 of the Complaint state characterizations and legal
9 conclusions to which no response is required. To the extent a response is required, Bank of America
10 states that the referenced case speaks for itself and, to the extent any of the allegations in Paragraph
11 48 are inconsistent with the case, Bank of America denies such allegations.

12 49. The allegations in Paragraph 49 of the Complaint state characterizations and legal
13 conclusions to which no response is required. To the extent a response is required, Bank of America
14 states that the referenced case speaks for itself and, to the extent any of the allegations in Paragraph
15 49 are inconsistent with the case, Bank of America denies such allegations. Bank of America denies
16 that the recitals in the foreclosure deed are conclusive proof of anything.

17 50. The allegations in Paragraph 50 of the Complaint state characterizations and legal
18 conclusions to which no response is required. To the extent a response is required, Bank of America
19 denies that allegations in Paragraph 50.

20 **FIRST CAUSE OF ACTION**

21 **(Quiet Title against Bank of America and Former Owner)**

22 51. Bank of America adopts and incorporates by reference its responses to the preceding
23 paragraphs of Plaintiff's Complaint as if set forth fully herein.

24 52. The allegations in Paragraph 52 of the Complaint state characterizations and legal
25 conclusions to which no response is required. To the extent a response is required, Bank of America
26 denies that allegations in Paragraph 52.

1 53. The allegations in Paragraph 53 of the Complaint state characterizations and legal
2 conclusions to which no response is required. To the extent a response is required, Bank of America
3 denies that allegations in Paragraph 53.

4 54. Admitted.

5 55. Bank of America lacks sufficient information to admit or deny the remaining
6 allegations of Paragraph 55 and therefore denies the same.

7 56. The allegations in Paragraph 56 of the Complaint state characterizations and legal
8 conclusions to which no response is required. To the extent a response is required, Bank of America
9 admits that there is a justiciable controversy regarding the right, title, and interest purportedly held
10 by Plaintiff and Bank of America.

11 57. Bank of America admits that its interest are adverse to Plaintiff's.

12 58. The allegations in Paragraph 58 of the Complaint state characterizations and legal
13 conclusions to which no response is required. To the extent a response is required, Bank of America
14 denies that Plaintiff has any interest in the Property superior to the Deed of Trust.

15 59. The allegations in Paragraph 59 of the Complaint state characterizations and legal
16 conclusions to which no response is required. To the extent a response is required, Bank of America
17 admits that the controversy between Plaintiff and Bank of America is ripe for judicial determination.

18 60. The allegations in Paragraph 59 of the Complaint state characterizations and legal
19 conclusions to which no response is required. To the extent a response is required, Bank of America
20 admits that this court has the authority to determine all claims to the Property.

21 61. Denied.

22 62. Denied.

23 63. The allegations in Paragraph 63 of the Complaint state characterizations and legal
24 conclusions to which no response is required. To the extent a response is required, Bank of America
25 denies the allegations in Paragraph 63.

1 64. The allegations in Paragraph 64 of the Complaint state characterizations and legal
2 conclusions to which no response is required. To the extent a response is required, Bank of America
3 states that the Nevada Rules of Civil Procedure speak for themselves.

4 **SECOND CAUSE OF ACTION**

5 **(Unjust Enrichment against Bank of America and Former Owner)**

6 65. Bank of America adopts and incorporates by reference its responses to the preceding
7 paragraphs of Plaintiff's Complaint as if set forth fully herein.

8 66. Bank of America lacks sufficient information to admit or deny the remaining
9 allegations of Paragraph 66 and therefore denies the same.

10 67. The allegations in Paragraph 67 of the Complaint state characterizations and legal
11 conclusions to which no response is required. To the extent a response is required, Bank of America
12 denies the allegations in Paragraph 67.

13 68. The allegations in Paragraph 68 of the Complaint state characterizations and legal
14 conclusions to which no response is required. To the extent a response is required, Bank of America
15 denies the allegations in Paragraph 68.

16 69. The allegations in Paragraph 69 of the Complaint state characterizations and legal
17 conclusions to which no response is required. To the extent a response is required, Bank of America
18 denies the allegations in Paragraph 69.

19 70. The allegations in Paragraph 70 of the Complaint state characterizations and legal
20 conclusions to which no response is required. To the extent a response is required, Bank of America
21 states that the Nevada Rules of Civil Procedure speak for themselves.

22 **THIRD CAUSE OF ACTION**

23 **(Equitable Mortgage against Bank of America and Former Owner)**

24 71. Bank of America adopts and incorporates by reference its responses to the preceding
25 paragraphs of Plaintiff's Complaint as if set forth fully herein.

26 72. Bank of America lacks sufficient information to admit or deny the allegations of
27 Paragraph 72 and therefore denies the same.

74. The allegations in Paragraph 74 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America denies the allegations in Paragraph 74.

75. The allegations in Paragraph 75 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America denies the allegations in Paragraph 75.

76. The allegations in Paragraph 76 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America denies the allegations in Paragraph 76.

77. The allegations in Paragraph 77 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America denies the allegations in Paragraph 77.

78. The allegations in Paragraph 78 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America states that the Nevada Rules of Civil Procedure speak for themselves.

**(Temporary Restraining Order, Preliminary Injunction
and Permanent Injunction against all Defendants)**

79. Bank of America adopts and incorporates by reference its responses to the preceding paragraphs of Plaintiff's Complaint as if set forth fully herein.

80. The allegations in Paragraph 80 of the Complaint state characterizations and legal conclusions to which no response is required. To the extent a response is required, Bank of America denies that Plaintiff has any interest in the Property superior to the Deed of Trust.

81. Denied.

1 82. Bank of America admits that the property records speak for themselves and to the
2 extent any of the allegations in Paragraph 40 are inconsistent with the property records, Bank of
3 America denies such allegations.

4 83. Bank of America admits that the property records speak for themselves and to the
5 extent any of the allegations in Paragraph 83 are inconsistent with the property records, Bank of
6 America denies such allegations.

7 84. Denied.

8 85. Denied.

9 86. Denied.

10 87. Bank of America lacks sufficient information regarding Plaintiff's meaning of the
11 word "unique" and cannot admit or deny the allegations of Paragraph 87 and therefore denies the
12 same.

13 88. Denied.

14 89. Denied.

15 90. Denied.

16 91. Denied.

17 92. The allegations in Paragraph 92 of the Complaint state characterizations and legal
18 conclusions to which no response is required. To the extent a response is required, Bank of America
19 denies the allegations in Paragraph 92.

20 93. The allegations in Paragraph 93 of the Complaint state characterizations and legal
21 conclusions to which no response is required. To the extent a response is required, Bank of America
22 states that the Nevada Rules of Civil Procedure speak for themselves.

23 **FIFTH CAUSE OF ACTION**

24 **(Slander of Title against Bank of America)**

25 94. Bank of America adopts and incorporates by reference its responses to the preceding
26 paragraphs of Plaintiff's Complaint as if set forth fully herein.

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7. Bank of America denies that Plaintiff is entitled to the relief sought in Paragraph G of the Prayer for Relief.

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

(Failure to State a Claim)

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

(Void for Vagueness)

To the extent that Plaintiff may rely on and accurately interpret NRS 116.3116 to support its claim, the statute, and Chapter 116, are void for vagueness as applied to this matter.

(Due Process Violations)

A senior deed of trust beneficiary cannot be deprived of its property interest in violation of the Procedural Due Process Clause of the 14 Amendment of the United States Constitution and Article 1, Sec. 8, of the Nevada Constitution.

FOURTH AFFIRMATIVE DEFENSE**(Violation of Procedural Due Process)**

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

FIFTH AFFIRMATIVE DEFENSE**(Commercial Reasonableness and Violation of Good Faith – NRS 116.1113)**

The homeowner's association foreclosure sale was not commercially reasonable, and the circumstances of sale of the property violated the homeowner's association's obligation of good faith under NRS 116.1113 and duty to act in a commercially reasonable manner.

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

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

SEVENTH AFFIRMATIVE DEFENSE**(No Standing)**

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

EIGHTH AFFIRMATIVE DEFENSE**(Unclean Hands)**

Bank of America avers the affirmative defense of unclean hands.

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

Bank of America denies that Plaintiff is entitled to any relief for which it prays.

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

Bank of America avers the affirmative defense of failure to do equity.

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

Bank of America was not provided proper notice of the “superpriority” assessment amounts and the homeowner’s association foreclosure sale, and any such notice provided to Bank of America failed to comply with the statutory and common law requirements of Nevada and with state and federal constitutional law.

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

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

THIRTEENTH AFFIRMATIVE DEFENSE**(Plaintiff is not a Bona Fide Purchaser for Value)**

Plaintiff purchased the property with record notice of the interest of the senior deed of trust recorded against the property.

FOURTEENTH AFFIRMATIVE DEFENSE**(Barred by 12 U.S.C. § 4617(j)(3))**

Plaintiff’s claim of free and clear title to the Property is barred by 12 U.S.C. § 4617(j)(3), which precludes an HOA sale from extinguishing the Deed of Trust on the Property and preempts any state law to the contrary.

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

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

SIXTEENTH AFFIRMATIVE DEFENSE**(Due Process—Facially Unconstitutional Provisions)**

Chapter 116 of the Nevada Revised Statutes is facially unconstitutional because its “opt-in” notice provisions do not mandate that reasonable and affirmative steps be taken to give actual notice

1 to a record lien holder before depriving that lien holder of its property rights, in violation of the Due
2 Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution and of
3 the Nevada Constitution.

4 **SEVENTEENTH AFFIRMATIVE DEFENSE**

5 ***(SFR Investments Cannot be Applied Retroactively)***

6 The Deed of Trust cannot be extinguished by the HOA foreclosure sale because the Nevada
7 Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev.
8 2014) cannot be applied retroactively.

9 **COUNTERCLAIMS**

10 Defendant/Counterclaimant Bank of America, N.A., as successor by merger to BAC Home
11 Loans Servicing, LP fka Countrywide Home Loans Servicing, LP ("Bank of America") hereby
12 counterclaims against Plaintiff/Counter-Defendant Las Vegas Development Group, LLC
13 ("Plaintiff") as follows:

14 **PARTIES**

- 15 1. Bank of America is a national association doing business in Clark County, Nevada.
- 16 2. On information and belief, Plaintiff is a Nevada limited liability company.

17 **JURISDICTION AND VENUE**

18 3. This Court has jurisdiction over Plaintiff because the allegations set forth in Bank of
19 America's counterclaims relate to Plaintiff's purported purchase of an interest in real property
20 located and situated in Clark County, Nevada.

21 4. Venue is proper in this judicial district because the property that is the subject of this
22 action is situated in this district.

23 **GENERAL ALLEGATIONS**

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

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

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

8. NRS 116.3116 makes a homeowners' association lien for assessments junior to a first deed of trust beneficiary's secured interest in the property, with one limited exception: a homeowners' association lien is senior to a first deed of trust beneficiary's secured interest "to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months¹ immediately preceding institution of an action to enforce the lien[.]" NRS 116.3116(2)(c).

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

FACTUAL ALLEGATIONS

The Deed of Trust and Assignment

10. On or about June 22, 2006, Genevieve Uniza-Enriquez ("Borrower") executed a Note to finance the purchase of real property located at 6279 Downpour Court, Las Vegas Nevada 89110 (the "Property"), which was secured by a Deed of Trust. This Deed of Trust in favor of Mortgage Electronic Registration Systems ("MERS") was recorded on June 30, 2006.

¹ This is reduced to 6 months where the subject loan is owned by a government-sponsored enterprise.

11. On or about June 25, 2010, the Deed of Trust was assigned to BAC Home Loans Servicing, LP via an Assignment of Deed of Trust. This Assignment was recorded on June 30, 2010.

12. Borrowers defaulted under the terms of the Note and First Deed of Trust.

13. The unpaid principal balance due on the loan secured by the Deed of Trust, as of April 12, 2011, exceeds \$452,557.77. The total amount due has continued to increase pursuant to the Note and Deed of Trust.

The HOA Lien and Foreclosure

14. Upon information and belief, Borrower failed to pay the HOA all amounts due to it. Accordingly, on April 1, 2010, Absolute Collection Services, LLC (ACS), as agent for the HOA, recorded a Notice of Delinquent Assessment Lien. The Notice stated the amount due to the HOA was \$754.56. This Notice neither identifies the super-priority amount claimed by the HOA, nor describes the “deficiency in payment” required by NRS 116.31162(1)(b)(1).

15. On July 14, 2010 the HOA, through ACS, recorded a Notice of Default and Election to Sell Under Notice of Delinquent Assessment. The Notice stated the amount due to the HOA was \$1,749.65. This Notice neither identifies the super-priority amount claimed by the HOA, nor describes the “deficiency in payment” required by NRS 116.31162(1)(b)(1).

16. In none of the recorded documents did the HOA or the HOA Trustee identify the amount of the alleged lien that was for late fees, interest, fines/violations, or collection fees/costs.

17. In none of the recorded documents nor in any notice did the HOA or ACS specify whether it was foreclosing on the super-priority portion of its lien, if any, or on the sub-priority portion of its lien.

18. Despite the deficiency of the Notices, ACS, conducted a foreclosure sale on behalf of the HOA on April 12, 2011. The property was sold to Plaintiff for \$4,001.00.

19. ACS’s sale of the HOA’s interest in the Property for less than 1% of the value of the unpaid principal balance of the loan secured by the first Deed of Trust, and, on information and

1 belief, for a similarly diminutive percentage of the Property's fair market value, is commercially
2 unreasonable and not in good faith as required by NRS 116.1113.

3 29. This foreclosure sale was commercially unreasonable because the manner in which
4 ACS conducted the sale, including the notices it provided, the legal uncertainty concerning the effect
5 of the sale, and other circumstances surrounding the sale, was not calculated to attract proper
6 prospective purchasers, and thus could not promote an equitable sales price of the Property.

7 **FIRST CAUSE OF ACTION**

8 **(Counterclaim for Declaratory Relief Against Plaintiff)**

9 30. Bank of America repeats and re-alleges the preceding paragraphs as though fully set
10 forth herein and incorporates the same by reference.

11 31. Under NRS 30.010 *et seq.*, this Court has the power and authority to declare Bank of
12 Americas' rights and interests in the Property and to resolve Plaintiff's adverse claim in the Property.

13 32. The HOA, through ACS, foreclosed on the HOA's lien on April 12, 2011. Plaintiff
14 purchased the Property at the HOA foreclosure sale.

15 33. Upon information and belief, Plaintiff claims an interest in the Property adverse to
16 Bank of America, in that Plaintiff claims that the HOA's foreclosure sale extinguished the first Deed
17 of Trust. A judicial determination is necessary to ascertain the rights, obligations, and duties of the
18 various parties.

19 34. The HOA's foreclosure sale did not extinguish the first Deed of Trust because the
20 recorded notices, even if they were in fact provided, failed to describe the lien in sufficient detail as
21 required by Nevada law, including, without limitation: whether the deficiency included a "super-
22 priority" component, the amount of the super-priority component, how the super-priority component
23 was calculated, when payment on the super-priority component was required, where payment was to
24 be made, or the consequences for failure to pay the super-priority component.

25 35. The foreclosure sale did not extinguish the first Deed of Trust because the sale was
26 commercially unreasonable or otherwise failed to comply with the good faith requirement of NRS
27 116.1113 in several respects, including, without limitation: the lack of sufficient notice, the sale of
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1 the Property for a fraction of the loan balance or actual market value of the Property, a foreclosure
2 that was not calculated to promote an equitable sales price for the Property or to attract proper
3 prospective purchasers, and a foreclosure sale that was designed and/or intended to result in a
4 maximum profit for the HOA and ACS without regard to the rights and interests of those who have
5 an interest in the loan and made the purchase of the Property possible in the first place.

6 36. The HOA's foreclosure sale did not extinguish the Deed of Trust because the statute
7 authorizing the foreclosure sale, NRS 116, *et seq.*, is facially unconstitutional because it does not
8 mandate that deed of trust beneficiaries receive actual notice of an HOA's foreclosure sale, as
9 required by the Due Process Clause of the United States Constitution.

10 37. Because the foreclosure sale conducted by ACS was commercially unreasonable, the
11 sale is invalid. Consequently, the Deed of Trust continued to encumber the Property after the HOA
12 foreclosure sale.

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

15 39. Bank of America is entitled to a declaration that the HOA sale was not a valid sale.

16 40. Bank of America is required to retain an attorney to prosecute this action, and is
17 therefore entitled to collect its reasonable attorney's fees and costs.

18 **SECOND CAUSE OF ACTION**

19 **(Counterclaim for Quiet Title Against Plaintiff)**

20 41. Bank of America repeats and re-alleges the preceding paragraphs as though fully set
21 forth herein and incorporates the same by reference.

22 42. Under NRS 40.010, this Court has the power and authority to declare Bank of
23 America's rights and interests in the Property and to resolve Plaintiff's adverse claim in the Property.

24 43. At the time of the HOA foreclosure sale, the Deed of Trust was a first secured interest
25 on the Property as intended by NRS 116.3116(2)(b).

26 44. Based on the adverse claims being asserted by the parties, the parties are entitled to a
27 judicial determination regarding the rights and interests of the respective parties.

46. Bank of America was required to retain an attorney to prosecute this action, and is therefore entitled to collect its reasonable attorney's fees and costs.

(Counterclaim for Unjust Enrichment Against Plaintiff)

47. Bank of America repeats and re-alleges the preceding paragraphs as though fully set forth herein and incorporates the same by reference.

48. The HOA's foreclosure sale unjustly enriched Plaintiff by allowing it to obtain title to real property secured by a Deed of Trust with an unpaid principal balance of \$452,557.77 for the inequitable purchase price \$4,001.00.

49. Upon information and belief, Plaintiff continues to retain and derive income from the Property to the detriment of Bank of America, contrary to fundamental principles of fairness, justice, and fair dealing.

50. Bank of America is entitled to the reasonable amount of the benefits obtained by Plaintiff based on a theory of unjust enrichment.

51. Bank of America was required to retain an attorney to prosecute this action, and are therefore entitled to collect its reasonable attorney's fees and costs.

PRAYER FOR RELIEF

WHEREFORE, Bank of America prays for the following:

1. An order declaring that the HOA sale was invalid and that the transfer of the Property conveyed no legitimate interest to Plaintiff, and that the Deed of Trust continues to encumber the Property;

2. An order establishing that the first Deed of Trust is secured against the Property and that any interest of Plaintiff is subject to the Deed of Trust;

3. Judgment in Bank of America's favor against Plaintiff for the amount that it was unjustly enriched in an amount in excess of \$10,000;

3. Reasonable attorney's fees as special damages and the costs of the suit; and
4. For such other and further relief the Court deems proper.

DATED this 12th of May, 2016.

AKERMAN LLP

/s/ Matthew Knepper, Esq.

ARIEL E. STERN, ESQ.

Nevada Bar No. 8276

MATTHEW KNEPPER, ESQ.

Nevada Bar No. 12796

AKERMAN LLP

1160 Town Center Drive, Suite 330

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Email: ariel.stern@akerman.com

Email: matthew.knepper@akerman.com

Attorneys for Bank of America, N.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 12th day of May, 2016 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A.’s ANSWER TO THIRD AMENDED COMPLAINT AND COUNTERCLAIMS** in the following manner:

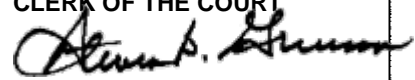
(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court’s facilities to those parties listed on the Court’s Master Service List.

Roger P. Croteau & Associates, Ltd.	
Contact	Email
Roger P. Croteau, Esq.	croteaulaw@croteaulaw.com

For those Parties not registered pursuant to Administrative Order 14-2, service was made in the following manner:

(UNITED STATES MAIL) Pursuant to NRCP 5(b), by depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed below at their last-known mailing addresses, on the date above written.

/s/ Julia M. Diaz
An employee of AKERMAN LLP



1 **SAO**
2 ARIEL STERN, ESQ.
3 Nevada Bar No. 8276
4 NATALIE L. WINSLOW, ESQ.
5 Nevada Bar No. 12125
6 **AKERMAN LLP**
7 1635 Village Center Circle, Suite 200
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11 Email: ariel.stern@akerman.com
12 Email: natalie.winslow@akerman.com

13 *Attorneys for Bank of America, N.A.*

14 **EIGHTH JUDICIAL DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 **LAS VEGAS DEVELOPMENT GROUP, LLC**

17 Plaintiff,

18 vs.

19 **BANK OF AMERICA; GENEVIEVE UNIZA-
20 ENRIQUEZ; DOES 1 through 20, and ROE
21 CORPORATIONS 1 through 20, inclusive,**

22 Defendants.

Case No.: A-12-654840-C

Dept. No.: XXIII

23 **STIPULATION AND ORDER TO REOPEN
24 AND EXTEND DISCOVERY DEADLINES
25 (FIRST REQUEST)**

26 **BANK OF AMERICA, N.A.,**

27 Counterclaimant,

28 vs.

LAS VEGAS DEVELOPMENT GROUP, LLC,

Counter-Defendant.

Las Vegas Development Group, LLC (**Plaintiff**) and Defendant Bank of America, N.A. (**Bank of America**) submit this Stipulation and Order to Reopen and Extend Discovery by one hundred eighty (180) days.

I. INTRODUCTION.

This dispute arises out of Plaintiff's complaint with the following claims for relief: (1) a determination and declaration that Plaintiff is the rightful holder of title to the subject property, and

(2) for a declaration and determination that Defendants have no right, title or interest in the subject property.

II. STATEMENT SPECIFYING THE DISCOVERY COMPLETED.

The following discovery has been completed:

1. Plaintiff served its Initial Disclosures on May 31, 2012.
2. Bank of America served its Initial Expert Disclosures on May 17, 2017.
3. Bank of America served its First Set of Requests for Admission to Plaintiff on June 20, 2017.
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6. Bank of America served a Subpoena Duces Tecum to Absolute Collection Services, LLC on June 20, 2017.
7. Bank of America served a Subpoena Duces Tecum to Palo Verde Ranch Homeowners Association on June 20, 2017.
8. Bank of America served a Notice of Deposition of Rule 30(b)(6) witness for Plaintiff on June 21, 2017.
9. Plaintiff served its Responses to Bank of America's First Set of Requests for Admission on July 24, 2017.

III. SPECIFIC DESCRIPTION OF THE DISCOVERY THAT REMAINS TO BE COMPLETED.

- (a) Written discovery of the Plaintiff, HOA, and HOA Trustee.
- (b) Disclosures of the Plaintiff, HOA, and HOA Trustee.
- (c) Depositions of fact witnesses and Rule 30(b)(6) witnesses for all parties.
- (d) Depositions of expert witnesses for all parties.

The parties reserve the right to participate in additional discovery during the time frames outlined below should the need arise.

1 **IV. REASONS THE DISCOVERY REMAINING WILL NOT BE COMPLETED WITHIN THE CURRENT**
2 **TIME LIMITS.**

3 Since May 2016, there has been little activity in this case. Accordingly, on February 6, 2017,
4 Bank of America filed a Joint Case Conference Report submitting new discovery deadlines. At the
5 Status Check on September 26, 2017, counsel for Bank of America informed the Court that the
6 attorney regularly handling the case was out on medical leave and that she was familiarizing herself
7 with the case file. The Court held a colloquy regarding the case status and noted that the parties should
8 submit a waiver of the five year rule. At the Status Check on March 20, 2018, the parties signed an
9 order waiving the five year rule, and this Court asked the parties to contact the Discovery
10 Commissioner regarding an updated trial schedule. Based on this Court's recommendation, the parties
11 have agreed to an extension of discovery of one hundred eighty (180) days. This extension will not
12 unduly delay the progress of this case, but will instead allow the parties to further marshal their
13 evidence and arguments as this case quickly approaches resolution. Moreover, an extension of the
14 discovery deadlines will allow this case to be fully heard on the merits. Accordingly, the parties
15 respectfully request entry of a Scheduling Order setting forth those dates.

16 **V. PROPOSED SCHEDULE FOR COMPLETING ALL REMAINING DISCOVERY.**

17 Plaintiff and Bank of America propose the following:

- 18 (a) Discovery Cut-Off Date: **Wednesday, March 6, 2019.**
19 (b) Deadline to Amend Pleadings and Add Parties: **Thursday, December 6, 2018.**
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21 (d) Rebuttal Experts: No extension requested.
22 (e) Dispositive Motions: **Friday, April 5, 2019.**

23 **VI. CURRENT TRIAL DATE.**

24 There is no currently scheduled trial date. The parties respectfully request that the Court reset
25 the trial date in accordance with the new deadlines.

26 . . .

27 . . .
28

DATED this 18th day of September, 2018.

ROGER P. CROTEAU & ASSOCIATES, LTD.	AKERMAN LLP
ROGER P. CROTEAU, ESQ. Nevada Bar No. 4958 TIMOTHY E. RHODA, ESQ. Nevada Bar No. 7878 9120 West Post Road, Suite 100 Las Vegas, Nevada 89148 <i>Attorneys for Las Vegas Development Group, LLC</i>	ARIEL STERN, ESQ. Nevada Bar No. 8276 NATALIE L. WINSLOW, ESQ. Nevada Bar No. 12125 1635 Village Center Circle, Suite 200 Las Vegas, NV 89134 <i>Attorneys for Bank of America, N.A.</i>

ORDER

IT IS HEREBY ORDERED that the deadlines shall be extended as set forth below:

- (a) Discovery Cut-Off Date: **Wednesday, March 6, 2019.**
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IT IS SO ORDERED.

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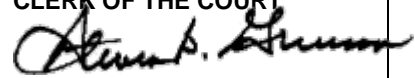
DISCOVERY COMMISSIONER

Submitted by:
AKERMAN LLP

ARIEL STERN, ESQ.
Nevada Bar No. 8276
NATALIE L. WINSLOW, ESQ.
Nevada Bar No. 12125
1635 Village Center Circle, Suite 200
Las Vegas, NV 89134

Attorneys for Bank of America, N.A.

TRIAL DATE TO BE SET
ON OR AFTER 5-20-19



NTSO
ARIEL STERN, ESQ.
Nevada Bar No. 8276
NATALIE L. WINSLOW, ESQ.
Nevada Bar No. 12125
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, NV 89134
Telephone: (702) 634-5000
Facsimile: (702) 380-8572
Email: ariel.stern@akerman.com
Email: natalie.winslow@akerman.com

Attorneys for Bank of America, N.A.

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, NEVADA

LAS VEGAS DEVELOPMENT GROUP,
LLC

Plaintiff,

vs.

BANK OF AMERICA; GENEVIEVE UNIZA-
ENRIQUEZ; DOES 1 through 20, and ROE
CORPORATIONS 1 through 20, inclusive,

Defendants.

BANK OF AMERICA, N.A.,

Counterclaimant,

vs.

LAS VEGAS DEVELOPMENT GROUP, LLC,

Counter-Defendant.

Case No.: A-12-654840-C

Dept. No.: XXIII

**NOTICE OF ENTRY OF STIPULATION AND
ORDER TO REOPEN AND EXTEND
DISCOVERY DEADLINES**

(FIRST REQUEST)

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that a **STIPULATION AND ORDER TO REOPEN AND EXTEND DISCOVERY DEADLINES (FIRST REQUEST)** was entered on this 24th day of September, 2018 a copy of which is attached hereto as **Exhibit A**.

Dated: September 25, 2018

AKERMAN LLP

/s/ Natalie L. Winslow

ARIEL STERN, ESQ.

Nevada Bar No. 8276

NATALIE L. WINSLOW, ESQ.

Nevada Bar No. 12125

1635 Village Center Circle, Suite 200
Las Vegas, NV 89134

Attorneys for Bank of America, N.A.

AKERMAN LLP

1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 25th day of September, 2018, I caused to be served a true and correct copy of the foregoing **NOTICE OF ENTRY OF STIPULATION AND ORDER TO REOPEN AND EXTEND DISCOVERY DEADLINES (FIRST REQUEST)**, in the following manner:

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

ROGER P. CROTEAU & ASSOCIATES, LTD.

Roger Croteau croteaulaw@croteaulaw.com
Shirin Weisman receptionist@croteaulaw.com

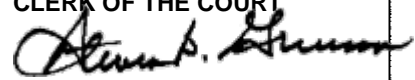
/s/ Christine Weiss
An employee of Akerman LLP

AKERMAN LLP

1635 VILLAGE CENTER CIRCLE, SUITE 200
LAS VEGAS, NEVADA 89134
TEL.: (702) 634-5000 – FAX: (702) 380-8572

EXHIBIT A

EXHIBIT A



1 **SAO**
2 ARIEL STERN, ESQ.
3 Nevada Bar No. 8276
4 NATALIE L. WINSLOW, ESQ.
5 Nevada Bar No. 12125
6 **AKERMAN LLP**
7 1635 Village Center Circle, Suite 200
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11 Email: ariel.stern@akerman.com
12 Email: natalie.winslow@akerman.com

13 *Attorneys for Bank of America, N.A.*

14 **EIGHTH JUDICIAL DISTRICT COURT**

15 **CLARK COUNTY, NEVADA**

16 **LAS VEGAS DEVELOPMENT GROUP, LLC**

17 Plaintiff,

18 vs.

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Case No.: A-12-654840-C

Dept. No.: XXIII

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24 There is no currently scheduled trial date. The parties respectfully request that the Court reset
25 the trial date in accordance with the new deadlines.

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DATED this 18th day of September, 2018.

ROGER P. CROTEAU & ASSOCIATES, LTD.	AKERMAN LLP
ROGER P. CROTEAU, ESQ. Nevada Bar No. 4958 TIMOTHY E. RHODA, ESQ. Nevada Bar No. 7878 9120 West Post Road, Suite 100 Las Vegas, Nevada 89148 <i>Attorneys for Las Vegas Development Group, LLC</i>	ARIEL STERN, ESQ. Nevada Bar No. 8276 NATALIE L. WINSLOW, ESQ. Nevada Bar No. 12125 1635 Village Center Circle, Suite 200 Las Vegas, NV 89134 <i>Attorneys for Bank of America, N.A.</i>

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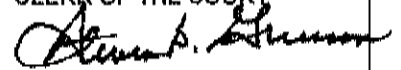
DISCOVERY COMMISSIONER

Submitted by:
AKERMAN LLP

ARIEL STERN, ESQ.
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Las Vegas, NV 89134

Attorneys for Bank of America, N.A.

TRIAL DATE TO BE SET
ON OR AFTER 5-20-19



MSJD

DARREN T. BRENNER, ESQ.

Nevada Bar No. 8386

JARED M. SECHRIST, ESQ.

Nevada Bar No. 10439

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Email: jared.sechrist@akerman.com

Attorneys for Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

AIRMOTIVE INVESTMENTS, LLC, a Nevada
limited liability company,

Plaintiff,

vs.

BANK OF AMERICA, N.A.; GENEVIEVE
UNIZA-ENRIQUEZ; DOES 1 through 20, and
ROE CORPORATIONS 1 through 20, inclusive,

Defendants,

AND ALL RELATED CLAIMS.

Case No.: A-12-654840-C

Dept. No.: XXIII

HEARING REQUESTED

**BANK OF AMERICA, N.A.'S MOTION
FOR SUMMARY JUDGMENT**

Defendant Bank of America, N.A. hereby files its motion for summary judgment on plaintiff Airmotive Investments, LLC¹ claims for quiet title and declaratory relief, as well as Bank of America's claims for quiet title and declaratory relief against plaintiff. This Motion relies upon the Memorandum of Points and Authorities and exhibits attached hereto, and oral argument at hearing.

INTRODUCTION

Plaintiff alleges that it obtained an interest in property purchased at a homeowners' association foreclosure sale (**HOA Sale**), which it contends extinguished a deed of trust then encumbering the property. Plaintiff relies on NRS § 116.3116(2) (**State Foreclosure Statute**), which allows properly conducted HOA foreclosure sales to extinguish all junior interests. But at the

¹ A Stipulation and Order to Substitute Airmotive Investments, LLC in as the plaintiff in place of Las Vegas Development Group, LLC has been submitted to this Court for entry.

1 time of the HOA Sale, BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing
2 LP (BAC) was beneficiary of record of that deed of trust as a contractually authorized servicer for
3 the Federal National Mortgage (Fannie Mae), which owned the deed of trust and therefore had a
4 property interest in the collateral. A federal statute provides that while Fannie Mae is in
5 conservatorship of the Federal Housing Finance Agency (FHFA), none of its property "shall be
6 subject to . . . foreclosure . . . without the consent of [FHFA]." 12 U.S.C. § 4617(j)(3) (the **Federal**
7 **Foreclosure Bar**).

8 The Nevada Supreme Court has confirmed that the Federal Foreclosure Bar preempts the
9 State Foreclosure Statute. *See Saticoy Bay LLC Series 9641 Christine View v. Fannie Mae*, 417 P.3d
10 363 (Nev. 2018). The Ninth Circuit and many state and federal trial courts, including this Court,
11 have held the same, and further concluded that the Federal Foreclosure Bar protects Fannie Mae's
12 property interests under circumstances, like here, where a servicer appeared as record beneficiary of
13 a deed of trust Fannie Mae owns. *See, e.g., FHFA v. SFR Invs. Pool 1, LLC*, 893 F.3d 1136 (9th Cir.
14 2018); *Berezovsky v. Moniz*, 869 F.3d 923 (9th Cir. 2017); *Saticoy Bay, LLC v. Flagstar Bank, FSB*,
15 699 F. App'x 658 (9th Cir. 2017); *Elmer v. JPMorgan Chase & Co.*, 707 F. App'x 426 (9th Cir.
16 2017); *Williston Inv. Grp., LLC v. JPMorgan Chase Bank, NA*, 736 F. App'x 168 (9th Cir. 2018);
17 *G&P Inv. Enterps., LLC v. Barney*, 730 F. App'x 563 (9th Cir. 2018); *JPMorgan Chase Bank, N.A.*
18 *v. Las Vegas Dev. Grp.*, 740 F. App'x 153 (9th Cir. 2018); *LN Management v. Pedro Medina*
19 *Revocable Trust*, No. A-14-697403-C (Nev. Dist. Ct. Aug. 17, 2018). Here, Fannie Mae has been in
20 FHFA conservatorship at all relevant times, and FHFA did not consent to extinguish Fannie Mae's
21 property interest. Under the Supremacy Clause, the Federal Foreclosure Bar preempts the State
22 Foreclosure Statute, and the HOA Sale did not extinguish Fannie Mae's interest.

23 UNDISPUTED FACTS SPECIFIC TO THIS CASE

24 *The Subject Property, Note, and Deed of Trust*

25 1. A Deed of Trust listing Genevieve Uniza-Enriquez as the borrower (**Borrower**); Utah
26 Financial, Inc. as the lender (**Lender**); and Mortgage Electronic Registration Systems, Inc. (**MERS**),
27 as beneficiary solely as nominee for Lender and Lender's successors and assigns, was executed on
28 June 23, 2006, and recorded on June 30, 2006. **Exhibit A**. The Deed of Trust granted Lender a

1 security interest in real property known as 6279 Downpour Court, Las Vegas, Nevada 89110 (the
2 **Property**) to secure the repayment of a promissory note (the **Note**) in the original amount of
3 \$360,000.00 to the Borrowers (the Note and Deed of Trust constitute the **Loan**). *Id.*

4 2. In August 2006, Fannie Mae purchased the Loan, thereby becoming successor to the
5 Lender and acquiring ownership of the Deed of Trust. **Exhibit B.** Fannie Mae maintained that
6 ownership at the time of the HOA Sale on April 12, 2011. *Id.*

7 3. On June 30, 2010, MERS, as nominee for Lender and Lender's successors and
8 assigns, recorded an assignment of the Deed of Trust to BAC. **Exhibit C.**

9 4. Bank of America is successor by July 2011 *de jure* merger to BAC.²

10 5. At the time of the HOA Sale on April 12, 2011, Bank of America was the servicer of
11 the Loan for Fannie Mae. *Id.*

12 ***Fannie Mae's Contract with Its Servicers, Including Bank of America***

13 6. The contractual relationship between Bank of America, as the servicer for Fannie Mae,
14 which is the owner of the Loan, is governed by the Fannie Mae Single-Family Servicing Guide
15 (**Guide**), a central governing document for Fannie Mae's relationship with servicers nationwide.
16 Among other things, the Guide provides that Fannie Mae's servicers may act as record beneficiaries
17 for the deeds of trust owned by Fannie Mae and requires that servicers assign these deeds of trust to
18 Fannie Mae upon Fannie Mae's demand. *See Exhibit B-B, Selling Guide at A2-1-01, Servicing*
19 *Guide F-1-11.*

20 7. The Guide provides that:

21 The servicer ordinarily appears in the land records as the mortgagee to
22 facilitate performance of the servicer's contractual responsibilities,
23 including, but not limited to, the receipt of legal notices that may impact
24 Fannie Mae's lien, such as notices of foreclosure, tax, and other liens.
25 However, *Fannie Mae may take any and all action with respect to the*
26 *mortgage loan it deems necessary to protect its ... ownership of the*
27 *mortgage loan, including recordation of a mortgage assignment, or its*
28 *legal equivalent, from the servicer to Fannie Mae or its designee.* In the
event that Fannie Mae determines it necessary to record such an
instrument, the servicer must assist Fannie Mae by

² For ease of reference, Bank of America refers to the servicer at the time of the HOA Sale as Bank of America.

- preparing and recording any required documentation, such as mortgage assignments, powers of attorney, or affidavits; and
- providing recordation information for the affected mortgage loans.

Id., Guide at A2-1-03 (emphasis added)

8. The Guide also provides for a temporary transfer of possession of the note when necessary for servicing activities, such as managing litigation on behalf of Fannie Mae:

In order to ensure that a servicer is able to perform the services and duties incident to the servicing of the mortgage loan, Fannie Mae temporarily gives the servicer possession of the mortgage note whenever the servicer, acting in its own name, represents the interests of Fannie Mae in foreclosure actions, bankruptcy cases, probate proceedings, or other legal proceedings.

This temporary transfer of possession occurs automatically and immediately upon the commencement of the servicer's representation, in its name, of Fannie Mae's interests in the foreclosure, bankruptcy, probate, or other legal proceeding.

Id., Guide at A2-1-04.

9. The Guide includes a chapter regarding how and when servicers should pursue foreclosure. *See generally* Guide at E-3 (Managing Foreclosure Proceedings). The chapter includes detailed provisions for how servicers may foreclose on properties when either Fannie Mae, MERS, or the servicer itself is the beneficiary of record of the deed of relevant deed of trust. *See id.*, Guide at E-3.2-09.

10. The Guide also includes a chapter regarding how servicers should manage litigation on behalf of Fannie Mae. *See generally* Guide at E-1 (Referring Default-Related Legal Matters and Non-Routine Litigation to Law Firms). Included among the "non-routine" litigation that servicers are obligated to manage on behalf of Fannie Mae is that concerning "[a]ny issue involving Fannie Mae's conservatorship." *Id.*, Guide at E-1.3-01.

11. Nevertheless, "Fannie Mae is at all times the owner of the mortgage note," and "[a]t the conclusion of the servicer's representation of Fannie Mae's interests in the foreclosure . . . possession automatically reverts to Fannie Mae." *Id.*, Guide at A2-1-04.

12. Pursuant to the Guide, a servicer is required to "maintain in the individual mortgage loan file all documents and system records that preserve Fannie Mae's ownership interest in the mortgage loan." *Id.*, Guide at A2-4-01.

13. Any servicer retaining documents related to a particular loan, such as a deed of trust, has "no right to possession of these documents and records except under the conditions specified by Fannie Mae." *Id.*, Guide at A2-5.1-02.

The HOA Foreclosure Sale and Plaintiff's Purported Acquisition of the Property

14. On April 1, 2010, the HOA Trustee, as agent for the Palo Verde Ranch HOA (the HOA), recorded a Notice of Delinquent Assessment Lien. **Exhibit D.**

15. The HOA Trustee, on behalf of the HOA, recorded a Notice of Default and Election to Sell on July 14, 2010. **Exhibit E.**

16. On November 18, 2010, the HOA Trustee, on behalf of the HOA, recorded a Notice of Trustee's Sale, setting the sale for January 11, 2011. **Exhibit F.**

17. The HOA Trustee, on behalf of the HOA, recorded a Trustee's Deed Upon Sale on April 13, 2011. The foreclosure deed states that the Property was sold to Las Vegas Development Group, LLC at a foreclosure sale on April 12, 2011 for \$4,001.00. **Exhibit G.**

18. At no time did the Conservator consent to the HOA Sale extinguishing or foreclosing Fannie Mae's interest in Property. **Exhibit H** (FHFA's Statement on HOA Super-Priority Lien Foreclosures (Apr. 21, 2015), www.fhfa.gov/Media/PublicAffairs/Pages/Statement-on-HOA-Super-Priority-Lien-Foreclosures.aspx).

19. Las Vegas Development Group, LLC subsequently conveyed its interest in the Property to Plaintiff via a Grant Deed recorded on March 7, 2017. **Exhibit I.**

LEGAL STANDARD

"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 that the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1031 (Nev. 2005). "While the pleadings and other evidence must be construed in the light most favorable to the nonmoving party, that party has the burden to 'do more than simply show that there is some metaphysical doubt' as to the operative facts to defeat a motion for summary judgment." *Id.* at 1031 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986)). The governing law determines which "factual disputes are

1 material and will preclude summary judgment; other factual disputes are irrelevant." *Id.*
2 Accordingly, Nevada courts follow the federal summary judgment standard, not the "slightest doubt"
3 standard previously applicable before *Wood*. *Id.* at 1031, 1037.

4 LEGAL ARGUMENT

5 **I. The Federal Foreclosure Bar Defeats Plaintiff's Claim to an Interest in the Property** 6 **Free and Clear of the Deed of Trust.**

7 **A. The Secondary Mortgage Market**

8 In the 1930s, Congress chartered Fannie Mae to facilitate the nationwide secondary mortgage
9 market, and thereby to enhance the equitable distribution of mortgage credit throughout the nation.
10 *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1114 (9th Cir. 2014). Congress has confirmed
11 that "the continued ability of [Fannie Mae] and [Freddie Mac] to accomplish their public missions is
12 important to providing housing in the United States and the health of the Nation's economy." 12
13 U.S.C. § 4501. Fannie Mae's federal statutory charter authorizes it to purchase and deal only in
14 secured "mortgages," not unsecured loans. *See* 12 U.S.C. §§ 1717(b), 1719; *see also Lightfoot v.*
15 *Cendant Mortg. Corp.*, 137 S. Ct. 553, 557 (2017) (Fannie Mae "purchases mortgages that meet its
16 eligibility criteria, packages them into mortgage-backed securities, and sells those securities to
17 investors, and it invests in mortgage-backed securities itself."); *FHFA v. Nomura Holding Am., Inc.*,
18 873 F.3d 85, 105 (2d Cir. 2017) (same); *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 599-600
19 (D.C. Cir. 2017) (same).

20 Fannie Mae has purchased millions of mortgages nationwide, including hundreds of
21 thousands in Nevada. In 2012, "the value of the combined debt and mortgage-related assets of
22 [Fannie Mae and Freddie Mac] along with the Federal Home Loan Banks . . . exceed[ed] \$5.9
23 trillion" nationwide. *Town of Babylon v. FHFA*, 699 F.3d 221, 225 (2d Cir. 2012). Indeed, "[t]he
24 position held in the home mortgage business by Fannie Mae and Freddie Mac make[s] them the
25 dominant force in the market." *Id.* Their dominant position continues to today. *See Nomura*, 873.
26 F.3d at 105; *Perry*, 864 F.3d at 599.

27 Although Fannie Mae owns a large number of mortgage loans through its purchases on the
28 secondary market, it is not in the business of managing the mortgages themselves, such as handling

1 day-to-day borrower communications. Rather, like other investors in loans, Fannie Mae contracts
2 with servicers to act on its behalf, and these servicers often are assigned deeds of trust as record
3 beneficiary to facilitate their efficient management of those loans. *See Cervantes v. Countrywide*
4 *Home Loans, Inc.*, 656 F.3d 1034, 1038-39 (9th Cir. 2011) (describing how loan owners contract
5 with servicers and the servicers' role); Restatement (Third) of Prop.: Mortgages § 5.4 cmt. c
6 (**Restatement**) (discussing the common practice where investors in the secondary mortgage market
7 designate their servicer to be assignee of the mortgage); Fannie Mae's Single-Family Selling Guide
8 at A2-1-01 and Fannie Mae's Single-Family Servicing Guide (**Guide**) at F-1-11 (discussing Fannie
9 Mae's relationship with servicers to manage the loans Fannie Mae purchases).³ The Nevada
10 Supreme Court has recognized the importance of these relationships by adopting the Restatement
11 approach. *See In re Montierth*, 354 P.3d 648, 650-51 (Nev. 2015). *Montierth* holds that when a loan
12 owner has an agency or contractual relationship with an entity who acts as the beneficiary of record
13 of a deed of trust, the loan owner (though not the recorded beneficiary) maintains a secured property
14 interest. *Id.*

15 Fannie Mae and its servicers also work with MERS. The Ninth Circuit has noted that while
16 "MERS, as the 'nominee' of the lender and of any assignee of the lender, is designated . . . as the
17 'beneficiary' . . . under the deed of trust," a "lender *owns* the home loan borrower's . . . promissory
18 note." *In re Mortg. Elec. Registration Sys., Inc.*, 754 F.3d 772, 776 (9th Cir. 2014) (emphasis
19 added). The "obvious advantage" of the system is that "it allows residential lenders to avoid the
20 bother and expense of recording every change of *ownership* of promissory notes." *Id.* at 776-77
21 (emphasis added); *see also Higgins v. BAC Home Loans Servicing, LP*, 793 F.3d 688, 689 (6th Cir.
22 2015) (holding that sale of note to new owner while MERS remains beneficiary of record of a
23

24 ³ The Guide is publicly available on Fannie Mae's website. An interactive version is available at
25 <https://www.fanniemae.com/content/guide/servicing/index.html>, and archived prior versions of the Guide are available at
26 that URL by clicking "Show All" in the left hand column of that site. While some sections of the Guide have been
27 amended over the course of Fannie Mae's ownership of the Loan, none of these amendments have materially changed the
28 relevant sections. A static, PDF copy of the most recent version of the Guide is available at
<https://www.fanniemae.com/content/guide/svc111418.pdf>. The Court may take judicial notice of the Guide. *See, e.g.,*
Berezovsky, 869 F.3d at 932, n.9 (taking judicial notice of Freddie Mac's servicing guide); *Charest v. Fannie Mae*, 9 F.
Supp. 3d 114, 118 & n.1 (D. Mass. 2014); *Cirino v. Bank of Am., N.A.*, No. CV 13-8829, 2014 WL 9894432, at *7 (C.D.
Cal. Oct. 1, 2014).

1 mortgage does not trigger Kentucky recordation requirement). The true owner of the loan is the
2 lender, its successor, or its assignee—not MERS. *See Cervantes*, 656 F.3d at 1039.

3 **B. FHFA and Fannie Mae in Conservatorship**

4 In July 2008, Congress passed the Housing and Economic Recovery Act of 2008, Pub. L. No.
5 110-289, 122 Stat. 2654 (codified as 12 U.S.C. § 4511 *et seq.*), which established FHFA as an
6 independent federal agency with regulatory and oversight authority over Fannie Mae, the Federal
7 Home Loan Mortgage Corporation (**Freddie Mac**), and the Federal Home Loan Banks. In
8 September 2008, FHFA placed Fannie Mae and Freddie Mac (together, the **Enterprises**) into
9 conservatorships "for the purpose of reorganizing, rehabilitating, or winding up [their] affairs." 12
10 U.S.C. § 4617(a)(2). Congress had authorized the Conservator "to undertake extraordinary
11 economic measures" out of a concern that "a default by Fannie and Freddie would imperil the
12 already fragile national economy." *Perry*, 864 F.3d at 599. Accordingly, Congress granted FHFA
13 an array of powers, privileges, and exemptions from otherwise applicable laws when acting as
14 Conservator. Among these is the Federal Foreclosure Bar, which provides that "[n]o property" of
15 FHFA conservatorships "shall be subject to . . . foreclosure . . . without the consent of [FHFA]." 12
16 U.S.C. § 4617(j)(3).

17 The Conservator has stated that it supports invocation of the Federal Foreclosure Bar by
18 "authorized servicers" such as Bank of America in litigation such as this one: "FHFA supports the
19 reliance on Title 12 United States Code Section 4617(j)(3) in litigation by authorized servicers of
20 [Fannie Mae] to preclude the purported involuntary extinguishment of [Fannie Mae]'s interest by an
21 HOA foreclosure sale." **Exhibit J**, FHFA, Statement on Servicer Reliance on the Housing and
22 Economic Recovery Act of 2008 in Foreclosures Involving Homeownership Associations (Aug. 28,
23 2015), [http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-](http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance.pdf)
24 [Servicers-Reliance.pdf](http://www.fhfa.gov/Media/PublicAffairs/PublicAffairsDocuments/Authorized-Enterprise-Servicers-Reliance.pdf).

25 **C. The Federal Foreclosure Bar Preempts Contrary State Law**

26 The law is settled: the Federal Foreclosure Bar preempts the State Foreclosure Statute. As
27 the Nevada Supreme Court has held, "the [State Foreclosure Statute] is in direct conflict with
28 Congress's clear and manifest goal to protect Fannie Mae's property interest while under the FHFA's

conservatorship from threats arising from state foreclosure law. As the two statutes conflict, the Federal Foreclosure Bar implicitly preempts [the State Foreclosure Statute] to the extent that a foreclosure sale extinguishes the deed of trust." *Christine View*, 417 P.3d at 367; *see also A&I Series 3, LLC v. Fannie Mae*, No. 71124, 2018 WL 3387787, at *1 (Nev. July 10, 2018) (unpublished disposition); *SFR Invs. Pool 1, LLC v. Green Tree Serv'g, LLC*, No. 72010, 2018 WL 6721370, at *2 (Nev. Dec. 17, 2018) (unpublished disposition); *OneWest Bank FSB v. Holm Int'l Props., LLC*, No. 72933, 2018 WL 6817052, at *2 (Nev. Dec. 20, 2018) (unpublished disposition). The Federal Foreclosure Bar necessarily protects the Deed of Trust because the Conservator has succeeded by law to all of Fannie Mae's "rights, titles, powers, and privileges," 12 U.S.C. § 4617(b)(2)(A)(i). Accordingly, "Fannie Mae's property interest effectively becomes the FHFA's while the conservatorship exists." *Christine View*, 417 P.3d at 367 (citing 12 U.S.C. § 4617(b)(2)(A)(i)).

The Ninth Circuit has held the same. *See, e.g., Berezovsky*, 869 F.3d at 930 ("[T]he Federal Foreclosure Bar implicitly demonstrates a clear intent to preempt [the State Foreclosure Statute]."); *FHFA v. SFR*, 893 F.3d at 1146-47 (following *Berezovsky*). Moreover, numerous courts in the U.S. District Court of Nevada⁴ and Nevada state courts⁵ have followed the Ninth Circuit and Nevada

⁴ *See, e.g., Skylights v. Byron*, 112 F. Supp. 3d 1145, 1153 (D. Nev. 2015); *Opportunity Homes, LLC v. Freddie Mac*, 169 F. Supp. 3d 1073 (D. Nev. 2016); *My Glob. Vill., LLC v. Fannie Mae*, No. 2:15-cv-00211-RCJ-NJK, 2015 WL 4523501 (D. Nev. July 27, 2015); *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-CV-01975-KJD-NJK, 2015 WL 5709484 (D. Nev. Sept. 29, 2015); *FHFA v. SFR Investments Pool 1, LLC*, No. 2:15-cv-1338-GMN-CWH, 2016 WL 2350121 (D. Nev. May 2, 2016); *FHFA v. Nevada New Builds, LLC*, No. 2:16-cv-1188-GMN-CWH, 2017 WL 888480 (D. Nev. Mar. 6, 2017); *Springland Vill. Homeowners Ass'n v. Pearman*, No. 3:16-cv-00423-MMD-WGC, 2018 WL 357853 (D. Nev. Jan. 10, 2018); *MRT Assets LLC v. Nationstar Mortg., LLC*, No. 2:17-cv-0070-JCM-CWH, 2018 WL 1245501 (D. Nev. Mar. 9, 2018); *Nationstar Mortg., LLC v. Tow Props. LLC II*, No. 2:17-cv-01770-APG-VCF, 2018 WL 2014064 (D. Nev. Apr. 27, 2018); *Fannie Mae v. Kree, LLC*, No. 3:17-cv-730-LRH-WGC, 2018 WL 2697406 (D. Nev. June 5, 2018); *Ditech Fin. LLC v. Paradise Springs One Homeowners Ass'n*, No. 2:16-cv-2900-APG-GWF, 2018 WL 3429676 (D. Nev. July 16, 2018).

⁵ *See, e.g., Order, RLP-Buckwood Court, LLC, v. GMAC Mortg., LLC*, No. A-13-686438-C (Nev. Dist. Ct. May 24, 2016); *Order, Saticoy Bay LLC Series 4930 Miners Ridge v. JPMorgan Chase Bank N.A.*, No. A-13-681090-C (Nev. Dist. Ct. June 27, 2017); *Order, RJRN Holdings, LLC v. Green Tree Servicing LLC*, A-14-704682-C (Nev. Dist. Ct. July 21, 2017); *Hampton & Hampton Collections, LLC v. Pan*, No. 14-A-706519-C, 2017 WL 5660707 (Nev. Dist. Ct. Oct. 6, 2017); *Nationstar Mortg., LLC v. Kincer*, No. 14-A-698443-C, 2017 WL 6940444 (Nev. Dist. Ct. Nov. 27, 2017); *Nevada New Builds, LLC v. JPMorgan Chase Bank*, No. 13-A-690954, 2017 WL 7058170 (Nev. Dist. Ct. Dec. 14, 2017); *J&K USA, Inc. v. BAC Home Loans Servicing, LP*, No. 14-A-702573, 2018 WL 1612075 (Nev. Dist. Ct. Feb. 27, 2018); *Saticoy Bay 10021 Via Toro v. Chase*, A-14-694140-C, 2018 WL 1995672 (Nev. Dist. Ct. March 15, 2018); *NV Eagles, LLC v. BAC Home Loan Servicing*, No. A-16-733337, 2018 WL 1989741 (Nev. Dist. Ct. Mar. 15, 2018); *Renfroe v. Bank of America, N.A.*, No. 14-A-701932, 2018 WL 1995668 (Nev. Dist. Ct. Mar. 21, 2018); *Gutierrez v. SFR Investments Pool 1, LLC*, No. 13-A-684715-C, 2018 WL 2336188 (Nev. Dist. Ct. Apr. 11, 2018); *TRP Fund II*,

1 Supreme Court precedent to resolve claims legally identical and factually similar to those in this case
2 in favor of the Enterprises and their servicers.

3 Given the weight of authority, Plaintiff cannot challenge either the preemptive effect of the
4 Federal Foreclosure Bar or that Fannie Mae's loan ownership is a property interest the Federal
5 Foreclosure Bar protects. Thus, the only issues for the Court to decide is whether (1) Fannie Mae
6 had a property interest at the time of the HOA Sale, (2) FHFA consented to extinguish Fannie Mae's
7 property interest, and (3) Bank of America can assert the protections of the Federal Foreclosure Bar
8 in this case. As explained below, Fannie Mae had a protected property interest that FHFA did not
9 consent to extinguish, and Bank of America can raise the Federal Foreclosure Bar here because it is
10 Fannie Mae's contractually authorized representative. The Federal Foreclosure Bar thus protected
11 Fannie Mae's property interest from extinguishment by the HOA Sale.

12 **D. Fannie Mae Had a Property Interest at the Time of the HOA Sale**

13 **i. Uncontradicted Evidence Confirms Fannie Mae's Property Interest**

14 The Nevada Supreme Court has held that "business records and testimony from employees"
15 constitute "ample evidence" to "demonstrate Fannie Mae's ownership" of a loan. *SFR Invs. Pool 1,*
16 *LLC v. Green Tree Servicing, LLC*, No. 72010, 2018 WL 6721370, at *1 (Nev. Dec. 17, 2018)
17 (unpublished disposition); *see also CitiMortgage, Inc. v. SFR Invs. Pool 1, LLC*, No. 70237, 2019
18 WL 289690, at *1 n.1 (Nev. Jan. 18, 2019) (unpublished disposition) (holding that Fannie Mae's
19 business records, supported by employee testimony, "establish[ed] that Fannie Mae owned the loan
20 at the time of the HOA foreclosure sale"). Similarly, the Ninth Circuit has repeatedly confirmed that
21 Fannie Mae's property interest may be established by Fannie Mae's business records and a
22 declaration from a Fannie Mae employee explaining that the records show when Fannie Mae owned
23 the Loan. *See, e.g., FHFA v. SFR*, 893 F.3d 1136; *Berezovsky*, 869 F.3d at 933; *Elmer*, 707 F. App'x

24
25
26
27 *LLC v. Fannie Mae*, No. A-16-735893, 2018 WL 2338239 (Nev. Dist. Ct. Apr. 13, 2018); *SFR v. First Horizon Home*
28 *Loans*, No. A-13-685826-C, 2018 WL 3702059 (Nev. Dist. Ct. Jun. 14, 2018); *Alessi & Koenig, LLC v. Storm*, No. A-
14-699883-C, 2018 WL 3702051 (Nev. Dist. Ct. Jun. 27, 2018). Bank of America does not cite these cases as
precedential authority but rather, consistent with Nev. R. App. P. 36(c)(3), cites them for their persuasive value.

1 at 428; *Williston*, 736 F. App'x at 169; *G&P*, 740 F. App'x at 564; *Las Vegas Dev. Grp.*, 740 F.
2 App'x at 154.⁶

3 Here, BANA has submitted materially identical evidence to that which the Nevada Supreme
4 Court said was sufficient to prove the Enterprises' ownership interest in *SFR v. Green Tree* and
5 *CitiMortgage*, and that which the many Ninth Circuit decisions cited above have held is sufficient to
6 grant summary judgment to the Enterprises and their servicers. These business records and
7 employee declarations support the fact that Fannie Mae acquired the Loan in August 2006 and
8 continued to own the Loan at the time of the HOA Sale in April 2011. *See Exhibit B*. As explained
9 in Fannie Mae's declaration, Fannie Mae maintains its business records in its Servicer and Investor
10 Reporting (SIR) platform, which Fannie Mae uses in the course of its everyday business to manage
11 and record information about the mortgage loans it owns. *Id.* The loan activity history, among other
12 elements in Fannie Mae's records, shows that the servicer continued to report monthly to Fannie Mae
13 about the Loan in April 2011 and that no event ending Fannie Mae's ownership of the Loan had
14 occurred prior to that date. *Id.*

15 The business records and declarations also show that Bank of America was Fannie Mae's
16 servicer for the Loan at the time of the HOA Sale. The declarations explain how the business
17 records identify the servicer for the Loan and how one can determine that Bank of America, the
18 current servicer, was also the servicer at the time of the HOA Sale in April 2011. *Id.*

19 Under the applicable rules of evidence, business records are, by their nature, admissible to
20 prove the truth of their contents when introduced by a qualified witness, as they are here. *See* NRS
21 51.135; Fed. R. Evid. 803 (advisory committee's note to 1972 proposed rules) (noting that business
22 records, including electronic database records, have "unusual reliability"). The Ninth Circuit has
23 held that Enterprise business records are admissible and sufficient to support the Enterprises'
24 property interests on summary judgment. *Berezovsky*, 869 F.3d at 932 & n.8 (holding that Freddie
25 Mac "database printouts" were sufficient to support a "valid and enforceable" property interest under

26 ⁶ This Ninth Circuit precedent should be highly persuasive here, as federal courts and Nevada courts have
27 adopted the same standard for what evidence is sufficient for summary judgment. *See Wood v. Safeway, Inc.*, 121 P.3d
28 1026, 1031 (Nev. 2005) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) for Nevada's
standard for summary judgment).

1 Nevada law); *Elmer*, 707 F. App'x at 428 (finding that a declaration from a Freddie Mac employee
2 and records from Freddie Mac's database were "reliable and uncontroverted evidence of its interest
3 in the property on the date of the foreclosure"); *Williston*, 736 F. App'x at 169 (confirming business
4 records are "sufficient" evidence for summary judgment); *G&P*, 740 App'x at 564 (same); *Las Vegas*
5 *Dev. Grp.*, 740 App'x at 154 (same). The same analysis applies to the evidence here.

6 **ii. Fannie Mae Owned the Note and Deed of Trust Under Nevada Law**

7 **1. Nevada Adopts the Restatement Approach that Acknowledges the**
8 **Loan Owner-Servicer Relationship**

9 Under Nevada law, when Fannie Mae purchased the Loan in August 2006, Fannie Mae
10 acquired ownership of the note and Deed of Trust. Nevada law incorporates the Restatement, which
11 describes the typical arrangement between investors in mortgages, such as Fannie Mae, and their
12 servicers:

13 Institutional purchasers of loans in the secondary mortgage market often
14 designate a third party, not the originating mortgagee, to collect payments on
15 and otherwise "service" the loan for the investor. In such cases the
16 promissory note is typically transferred to the purchaser, but an assignment of
17 the mortgage from the originating mortgagee to the servicer may be executed
and recorded. This assignment is convenient because it facilitates actions that
the servicer might take, such as releasing the mortgage, at the instruction of
the purchaser. The servicer may or may not execute a further unrecorded
assignment of the mortgage to the purchaser.

18 Restatement § 5.4 cmt. c (emphasis added). The Restatement then emphasizes that this arrangement
19 preserves the investor's ownership interest: "*It is clear in this situation that the owner of both the*
20 *note and mortgage is the investor and not the servicer.*" *Id.* (emphasis added). Thus, the
21 Restatement acknowledges that the assignment of a deed of trust to a servicer does not alter the fact
22 that the loan purchaser remains the owner of the note and deed of trust. The Restatement approach
23 also is a recognition of the realities of the mortgage industry: Fannie Mae and Freddie Mac can
24 more efficiently support the national secondary mortgage market if they can contract with servicers
25 to manage loans without relinquishing ownership of deeds of trust.

26 The Nevada Supreme Court reaffirmed that it adopted the entirety of the Restatement
27 approach to ownership and assignment of deeds of trust described above. See *Montierth*, 354 P.3d at
28 650-51. *Montierth* explains that where the record beneficiary of the deed of trust has contractual or

1 agency authority to foreclose on the note owner's behalf, the note owner maintains a property interest
2 in the collateral. *See id.*

3 In *Montierth*, the Nevada Supreme Court applied the Restatement to a situation where
4 MERS, as nominee for the original lender and its successors and assigns, served as record
5 beneficiary of a deed of trust, while Deutsche Bank had acquired the related promissory note from
6 the original lender. *Id.* at 649. The Nevada Supreme Court concluded that the relationship between
7 MERS and Deutsche Bank, wherein MERS had authority to foreclose on Deutsche Bank's behalf,
8 ensured that Deutsche Bank remained a "secured creditor" with a "fully-secured, first priority deed"
9 that could be enforced. *Id.* at 650-51. Deutsche Bank, like Fannie Mae here, accordingly retained a
10 property interest while another entity was beneficiary of record of the deed of trust.

11 *Montierth's* analysis begins by stating an uncontroversial point of Nevada law—that
12 "perfection of a deed of trust occurs upon proper execution and recordation," and thus "a security
13 interest attaches to the property as between the mortgagor and mortgagee upon execution and as
14 against third parties upon recordation." 354 P.3d at 650 (quotation marks and citation omitted).
15 Next, *Montierth* explains that at the relevant time, Deutsche Bank owned the note, while MERS
16 appeared as the corresponding deed of trust's beneficiary of record. Finally, *Montierth* concludes
17 that Deutsche Bank's "security interest attached *and was perfected* before bankruptcy," while MERS
18 was still record beneficiary. *Id.* (emphasis added). *Montierth's* holding that Deutsche Bank's interest
19 "was perfected" under Nevada law necessarily means that Deutsche Bank's interest was properly
20 recorded and therefore effective "*against third parties.*" The same is true here.

21 The Nevada Supreme Court has since confirmed that *Montierth's* holding applies in a case
22 involving materially the same facts and legal issues as here. Most recently, in *CitiMortgage*, the
23 court held that "[a servicer's] status as the recorded deed of trust beneficiary does not create a
24 question of material fact regarding whether Fannie Mae owns the subject loan, as this court has
25 recognized that such an arrangement is acceptable and common." 2019 WL 289690, at *2.

26 In *Nationstar Mortgage, LLC v. Guberland LLC-Series 3*, the Nevada Supreme Court cited
27 *Montierth* and the Restatement and "conclude[d] that the district court erred in determining that the
28 Federal Foreclosure Bar does not apply" in a situation when "Fannie Mae was not the beneficiary of

1 the deed of trust" at the time of the HOA foreclosure sale. No. 70546, 2018 WL 3025919, at *2
2 (Nev. June 15, 2018) (unpublished disposition). In so doing, the Nevada Supreme Court emphasized
3 that "different parties may hold the note and the deed of trust. Where that is the case, the note
4 remains secured 'if there is *either* a principal-agent relationship between the note holder and the
5 mortgage holder, *or* the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s
6 behalf.'" *Id.* (quoting *Montierth*, 354 P.3d at 650-51) (emphasis and alteration in original); *see also*
7 *Ohfiji Invs., LLC v. Nationstar Mortg., LLC*, No. 72676, 2018 WL 1448729, at *1 (Nev. Mar. 15,
8 2018) (unpublished disposition) (characterizing *Montierth* as "recognizing that it is an acceptable
9 practice for a loan servicer to serve as the beneficiary of record for the actual deed of trust
10 beneficiary").

11 The Ninth Circuit, in addition to various state and federal trial courts, has recognized that
12 under the approach articulated by *Montierth* and the Restatement, Fannie Mae need not have been
13 beneficiary of record of a deed of trust in order to have a protected property interest. *See, e.g.,*
14 *FHFA v. SFR*, 893 F.3d at 1149-50; *Berezovsky*, 869 F.3d at 932; *Flagstar*, 699 F. App'x at 658-59;
15 *Elmer*, 707 F. App'x at 427-28; *G&P*, 740 F. App'x at 564; *Las Vegas Dev. Grp.*, 740 F. App'x at
16 154. The Ninth Circuit rejected any argument that, under Nevada law, a loan owner's property
17 interest depends on its name appearing in the public property records: "[a]lthough the recorded deed
18 of trust here omitted [Fannie Mae]'s name, [Fannie Mae]'s property interest is valid and enforceable
19 under Nevada law" because Fannie Mae owned the note and its servicer was beneficiary of record of
20 the deed of trust. *Berezovsky*, 869 F.3d at 932; *see also FHFA v. SFR*, 893 F.3d at 1149-50. This
21 Court should do the same here.

22 (2) Nevada Adopts the Uniform Commercial Code, Which Is
23 Consistent with the Restatement Approach

24 The Restatement approach, acknowledging that different entities might be *owner* or *record*
25 *beneficiary* of a Deed of Trust, is consistent with Nevada's adoption of Uniform Commercial Code
26 Article 3, which provides that "[a] person may be a person entitled to enforce [a promissory note]
27 even though the person is not the owner of the [that note]." Nev. Rev. Stat. § 104.3301. A "person
28 entitled to enforce" a note may be a "holder" of the note or even a "nonholder in possession of the

[note] who has the rights of the holder." *Id.* Accordingly, "the status of holder merely pertains to one who may enforce the debt and is a separate concept from that of ownership." *Thomas v. BAC Home Loans Servicing, LP*, No. 56587, 2011 WL 6743044, at *3 n.9 (Nev. Dec. 20, 2011). That is because "[o]wnership rights in instruments may be determined by principles of the law of property . . . which do not depend upon whether the instrument was transferred." UCC § 3-203 cmt. 1. For that reason, a transfer of a note has no bearing on ownership, but instead "vests in the transferee any right of the transferor to enforce the instrument." Nev. Rev. Stat. § 104.3203.⁷

In fact, the Nevada Supreme Court has applied this principle in a similar circumstance, where Freddie Mac claimed to own a note while BAC was the holder of the note and the record beneficiary of the associated deed of trust. The court held there was nothing inconsistent with this situation under Nevada law. *See Thomas*, 2011 WL 6743044, at *1, 3 & n.9. Here, too, there is nothing inconsistent with Fannie Mae being the owner of the note and the Deed of Trust, while Bank of America, its servicer, was beneficiary of record of the Deed of Trust.

iii. The Guide Confirms that Fannie Mae Retains Ownership of the Deed of Trust While Bank of America Is Record Beneficiary

The Guide serves as a central document governing the contractual relationship between Fannie Mae and its servicers nationwide, including Bank of America. *See Selling Guide* at A2-1-01. The provisions of the Guide demonstrate that Fannie Mae and its loan servicers maintain the type of relationship described in the Restatement and *Montierth* to secure Fannie Mae's ownership interest in the Deed of Trust. *See Berezovsky*, 869 F.3d at 932-33; *Montierth*, 354 P.3d at 651 (looking to whether a loan owner can "compel an assignment of the deed of trust"); *Guberland*, 2018 WL 3025919, at *2 (recognizing Fannie Mae's relationship with its servicers as dictated by the Guide).

For example, the Guide provides that: "Fannie Mae may take any and all action with respect to the mortgage loan it deems necessary to protect its . . . ownership of the mortgage loan, including

⁷ Similarly, Uniform Commercial Code Article 9 provides that "[t]he attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security, mortgage or other lien." NRS § 104.9203(7). Thus, "a transferee of a mortgage note" such as Fannie Mae "whose property right in the note has attached also automatically has an attached property right in the mortgage that secures the note." Report of the Permanent Editorial Board for the UCC, Application of the UCC to Selected Issues Relating to Mortgage Notes at 14 (Nov. 14, 2011) (emphasis added).

1 recordation of a mortgage assignment, or its legal equivalent, from the servicer to Fannie Mae"
2 Guide at A2-1-03 (emphasis added). Furthermore, the Guide provides that Fannie Mae's servicers
3 "represent[] the interests of Fannie Mae in a foreclosure [action]," *id.* at A2-1-04, and includes an
4 entire chapter regarding how and when servicers should pursue foreclosure, *id.* at E-3 ("Managing
5 Foreclosure Proceedings"). Thus, the provisions of the Guide demonstrate that Fannie Mae and its
6 loan servicers maintain the type of relationship described in the Restatement and *Montierth*.

7 The Guide confirms that ownership always lies with Fannie Mae. For example, "Fannie Mae
8 is at all times the owner of the mortgage note," and "[a]t the conclusion of the servicer's
9 representation of Fannie Mae's interests in the foreclosure . . . possession automatically reverts to
10 Fannie Mae." Guide at A2-1-04. Any servicer retaining documents related to a particular loan, such
11 as a deed of trust, has "no right to possess these documents and records except under the conditions
12 specified by Fannie Mae." *Id.* at A2-5.1-02. Indeed, "[a]ny of these documents and records in
13 possession of the mortgage loan originator, seller, or servicer, any service bureau, or any other party
14 providing services in connection with selling a mortgage loan to, or servicing a mortgage loan for,
15 Fannie Mae are retained in a custodial capacity only." *Id.*; *see also* A2-4-01.

16 As the Guide confirms, the fact that Bank of America was the beneficiary of record of the
17 Deed of Trust at the time of the HOA Sale does not negate the fact that Fannie Mae owned both the
18 note and the Deed of Trust. Accordingly, the Federal Foreclosure Bar protected the Deed of Trust
19 from extinguishment, and Fannie Mae retained its property interest after the HOA Sale.

20 E. FHFA Did Not Consent to Extinguishment of the Deed of Trust

21 While it is not Bank of America's burden to establish this fact, it is undisputed that FHFA has
22 not consented to extinguish Fannie Mae's property interest in this case. Because Fannie Mae had a
23 protected property interest at the time of the HOA foreclosure sale, the Federal Foreclosure Bar
24 precluded Plaintiff from acquiring free-and-clear title unless Plaintiff obtained FHFA's consent to
25 extinguish Fannie Mae's interest. Indeed, "[t]he Federal Foreclosure Bar cloaks the FHFA's
26 'property with Congressional protection unless or until the Agency affirmatively relinquishes it.'
27 *Christine View*, 417 P.3d at 368 (quoting *Berezovsky*, 869 F.3d at 929).

28 ...

1 Plaintiff cannot show that it received such consent. To the contrary, the Conservator has
2 publicly announced that it "has not consented, and will not consent in the future, to the foreclosure or
3 other extinguishment of any Fannie Mae or Freddie Mac lien or other property interest in connection
4 with HOA foreclosures of super-priority liens." See **Exhibit H**.⁸ Thus, "it is clear that FHFA did
5 not consent to the extinguishment of [the Enterprise's] property interest through the HOA's
6 foreclosure sale." *Alessi & Koenig*, 2017 WL 773872, at *3 (citing and relying on cases in which
7 FHFA's statement was sufficient to show FHFA's lack of consent).

8 **F. Bank of America May Assert the Federal Foreclosure Bar to Protect Its Interest**
9 **and Fannie Mae's Interest in the Deed of Trust.**

10 The Federal Foreclosure Bar works automatically by operation of law, protecting the Deed of
11 Trust and thereby limiting the property rights Plaintiff could have acquired in the HOA Sale. When
12 the Federal Foreclosure Bar prevented the extinguishment of the Deed of Trust, it did not merely
13 preserve Fannie Mae's ownership interest; it also preserved Bank of America's parallel interests as
14 the record beneficiary of the Deed of Trust and servicer of the Loan for Fannie Mae.⁹ Accordingly,
15 Bank of America has standing because (1) Bank of America's interest in the Deed of Trust as
16 beneficiary of record is preserved when the Federal Foreclosure Bar applies, and (2) Bank of
17 America has a contractual responsibility as servicer to protect Fannie Mae's interest in litigation
18 relating to the Loan.

19 The Nevada Supreme Court adopted this position in *Nationstar Mortgage, LLC v. SFR*
20 *Investments Pool 1, LLC*, 396 P.3d 754 (2017). The Ninth Circuit found *Nationstar* persuasive and
21 similarly held that servicers may raise the Federal Foreclosure Bar to defend property interests of
22 Fannie Mae and Freddie Mac in litigation. *Flagstar*, 699 F. App'x at 658-59. *Nationstar* holds that
23 "the servicer of a loan owned by [an Enterprise] may argue that the Federal Foreclosure Bar

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25 ⁸ This public statement on a government website is subject to judicial notice. See *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

26 ⁹ For example, in a related case, a federal court granted Fannie Mae's servicer summary judgment against an
27 HOA sale purchaser's claims because, when the "Court determined that Fannie Mae's interest in the Property was not
28 extinguished," this meant that the servicer's interest also "was not affected" by the HOA Sale. See Order, *Saticoy Bay, LLC Series 1702 Empire Mine v. Fannie Mae*, No. 2:14-CV-01975-KJD-NJK, slip op. at 3 (D. Nev. Sept. 29, 2015) (ECF No. 129).

1 preempts NRS 116.3116, and that neither [the Enterprise] nor the FHFA need be joined as a party."
2 396 P.3d at 758. The Nevada Supreme Court cited *Montierth*, which recognizes that when a
3 noteholder authorizes the beneficiary of record of a deed of trust to enforce the deed of trust, the
4 beneficiary of record may do so. *See id.* at 757 (citing *Montierth*, 354 P.3d at 651).

5 The Nevada Supreme Court has since reaffirmed that servicers, like BANA here, can assert
6 the Federal Foreclosure Bar. In *CitiMortgage*, the court held that "evidence that [the servicer] was
7 Fannie Mae's loan servicer, combined with the authorizations in the Fannie Mae Servicing Guide
8 that are generally applicable to Fannie Mae's loan servicers, [is] sufficient to show that [the servicer]
9 was authorized to argue that 12 U.S.C. § 4617(j)(3) (2012) (the Federal Foreclosure Bar) preempts
10 NRS 116.3116." 2019 WL 289690, at *1. Additional evidence, such as "the actual servicing
11 contract," is not necessary for BANA to prove that it has standing to raise the Federal Foreclosure
12 Bar. *Id.*

13 *Nationstar*, *Flagstar*, and *CitiMortgage* are consistent with the holdings of numerous other
14 courts recognizing that Article III standing may be conferred by contract and assignment. *E.g.*,
15 *Sprint Comm'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 271-72 (2008); *CWCapital Asset*
16 *Mgmt., LLC v. Chicago Props.*, 610 F.3d 497, 501 (7th Cir. 2010). Indeed, courts routinely
17 recognize that servicers like BANA have constitutional and prudential standing to bring an action
18 regarding the loan. *See, e.g., Greer v. O'Dell*, 305 F.3d 1297, 1299 (11th Cir. 2002) ("[A] loan
19 servicer is a 'real party in interest' with standing to conduct, through licensed counsel, the legal
20 affairs of the investor relating to the debt that it services.").

21 The evidence in this case confirms that Fannie Mae is the owner of the Loan and that BANA
22 is Fannie Mae's contractually authorized servicer. Pursuant to its contract with Fannie Mae, BANA
23 has the authority to represent Fannie Mae's interests in litigation with respect to the loans it services.
24 *See, e.g., Guide* at A2-1-04, E-1, E-1.3-01. Furthermore, the Conservator has publicly supported
25 invocation of the Federal Foreclosure Bar by servicers in litigation such as this one. *See Exhibit J.*
26 LVDG can present no contrary evidence to create a genuine dispute about these facts. Accordingly,
27 BANA may invoke the Federal Foreclosure Bar in this litigation without joining Fannie Mae or
28 FHFA as a party.

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DATED: April 5, 2019.

/s/ Jared M. Sechrist

Las Vegas, Nevada 89134

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