**PATRICK W. KANG, ESQ.**
Nevada Bar No.: 010381
**ERICA D. LOYD, ESQ.**
Nevada Bar No.: 010922
**KANG & ASSOCIATES, PLLC**
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Las Vegas, Nevada 89146
P: (702) 333-4223
F: (702) 507-1468

*Attorneys for Appellant*
*Property Plus*



**IN THE SUPREME COURT OF NEVADA**
* * * *

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Corporation

Plaintiff,

vs.

BANK OF AMERICA, N.A., a Nevada Association, MORTGAGE ELECTRONIC REGISTRATION SYSTEM; an Illinois Corporation; ARLINGTON RANCH NORTH MASTER ASSOCIATION; a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION; a Nevada Non-Profit Corporation; DOES 1 Through 25 inclusive; and ROE CORPORATIONS, I through X, inclusive.

Defendants.

**Supreme Court No.: 69072**
District Court Case No.: A692200

**DOCKETING STATEMENT CIVIL APPEALS**

**DOCKETING STATEMENT CIVIL APPEALS**

**GENERAL INFORMATION**

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

**WARNING**

This statement must be competed fully, accurately and on time. NRAP 14(c).The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and many result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991)*. Please use tab dividers to separate any attached documents.

**1.** Judicial District: Eighth District Department: VII
County: Clark Judge: Hon. Linda M. Bell

District Ct. Case No.: A-13-692200-C

**2. Attorney filing this docketing statement:**

Attorney: Erica D. Loyd Telephone: 702.333.4223

Firm: Kang & Associates, PLLC

Address: 6480 W. Spring Mountain Road, Suite 1 Las Vegas, Nevada 89146

Client(s): Property Plus Investments, LLC.

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

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**3. Attorney(s) representing respondents(s):**

Attorney: Dana Jonathon Nitz, Esq. Telephone: 702.475.7964

Firm: Wright, Finlay & Zak, LLP.

Address: 7785 W. Sahara Ave., Suite 200, Las Vegas, Nevada 89117

Client(s): Bank of America, Christina Trust and Mortgage Electronic Registration Systems, Inc.

Attorney: Chelsea A. Crowton, Esq. Telephone: 702.475.7964

Firm: Wright, Finlay & Zak, LLP.

Address: 7785 W. Sahara Ave., Suite 200, Las Vegas, Nevada 89117

Client(s): Bank of America, Christina Trust and Mortgage Electronic Registration Systems, Inc.

**4. Nature of Disposition below (Check all that apply):**

- ☐ Judgment after bench trial
- ☐ Judgment after jury verdict
- ☒ Summary judgment
- ☐ Default judgment
- ☐ Grant/Denial of NRCP 60(b) relief
- ☐ Grant/Denial of declaratory relief
- ☐ Review of agency determination
- ☐ Dismissal:
  - ☐ Lack of jurisdiction
  - ☐ Failure to state a claim
  - ☐ Failure to prosecute
  - ☐ Other(specify): __
- ☐ Divorce Decree:
  - ☐ Original ☐ Modification
- ☐ Other disposition (specify): _____

**5. Does this appeal raise issues concerning any of the following? No.** Not Applicable.

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

6. **Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

   **None.**

7. **Pending and prior proceedings in other courts,** List the case names, number and court of all pending and prior proceedings in other courts which are related to this appeal (*e.g.,* bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

   **None.**

8. **Nature of the action:** Briefly describe the nature of the action and the result below:

   **HOA Foreclosure Purchaser seeks a Quiet Title Action Pursuant to N.R.S. 116, *et. al*. The action was summarily dismissed in favor of Defendant Lender.**

9. **Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

   **This appeal presents the two following issues:**

   1. **Whether an HOA's rejection of alleged tender in satisfaction of the super-priority lien amount pursuant to *N.R.S. 116.3116* sets aside a valid HOA lien foreclosure sale.**

   2. **Whether an HOA lien running with the subject property is discharged by a homeowner's Chapter 7 Bankruptcy thus preventing the HOA foreclosure sale on the N>R>S 116.3116 lien.**

10. **Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raise:

    **Plaintiff is unaware of any pending cases with the same issues and factual scenario as the instant appeal.**

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**11. Constitutional Issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

**This appeal does not challenge the constitutionality of a statute.**

**12. Other Issues.** Does this appeal involve any of the following issues?

- ☐ Reversal of well-settled Nevada precedent (identify the case(s))
- ☒ An issue arising under the United States and/or Nevada Constitutions
- ☒ A substantial issue of first impression
- ☐ An issue of public policy
- ☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions.
- ☐ A ballot question

If so, explain:

**This is a first impression appeal regarding a lender's tender in HOA foreclosure sale as well as the Chapter 7 Bankruptcy issue in an HOA foreclosure sale.**

**13. Trial.** If this action proceeded to trial, how many days did the trial last? **Not Applicable.**

Was it a bench or jury trial? **Not Applicable.**

**14. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

**Appellant does not intend to file a motion to disqualify or to have any justice recues themselves from participation in this appeal.**

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**TIMELINESS OF NOTICE OF APPEAL**

**15. Date of entry of written judgment or order appealed from**:

**July 14, 2015.**

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**16. Date written notice of entry of judgment or order was served: July 15, 2015.**

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b) Date of filing _____

☐ NRCP 52(b) Date of filing _____

☒ NRCP 59 Date of filing July 30, 2015

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. *See* AA Primo Builders v. Washington, 126 Nev. ___, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion:

September 30, 2015

(c) Date written notice of entry of order resolving tolling motion was served:

September 30, 2015

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**18. Date notice of appeal filed: October 21, 2015.**

If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**No other party has appealed from the order that is the subject of this appeal.**

**19. Specify statute or rule governing the time limit for filing the notice of appeal,*e.g.*, NRAP 4(a) or other**

**NRAP 4(a)**

**SUBSTANTIVE APPEALABILITY**

**20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

| | |
|---|---|
| ☒NRAP 3A(b)(1) | ☐NRS 38.205 |
| ☐ NRAP 3A(b)(2) | ☐NRS 233B.150 |
| ☐NRAP 3A(b)(3) | ☐NRS 703.376 |
| ☐Other (specify) | |

(b) Explain how each authority provides a basis for appeal from the judgment or order:

**Appellant's appeal is based on a final judgment of the district court summarily dismissing and disposing of all of Appellants claims which was subsequently reaffirmed after Appellant moved for reconsideration, rehearing and vacating of the same summary disposition. The Supreme Court of Nevada has appellant jurisdiction of this claim under NRAP 3A (b)(1).**

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**21. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Appellant: Property Plus Investments, LLC.

Respondents: Bank of America, Christina Trust and Mortgage Electronic Registration Systems, Inc.

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

**22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

No other claims have been raised by any party to this action.

**23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒Yes

☐No

**24. If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐Yes

☐No

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**25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

**26. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third party claims: ***See Exhibit A***
- Any tolling motion(s) and order(s) resolving tolling motion(s): ***See Exhibit B***
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal: ***See Exhibit C***
- Any other order challenged on appeal: ***None.***
- Notices of entry for each attached order: ***See Exhibit D***

**VERIFICATION**

**I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and compete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.**

| | |
|---|---|
| Property Plus Investments, LLC | Erica D. Loyd, Esq. |
| Name of Appellant | Name of Counsel of Record |
| 11.16.15 | **/s/** Erica D. Loyd |
| Date | Signature of Counsel of Record |

State of Nevada, Clark County
State and County Where Signed

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**CERTIFICATE OF SERVICE**

I certify that on the 16th day of November, 2015, I served a copy of this completed docketing statement upon all counsel of record:

☐ By personally serving it upon him/her; or

☐ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.); or

☒ By electronic filing notification where specified on the service list.

TO: Dana Jonathon Nitz, Esq.
Chelsea A. Crowton, Esq.
WRIGHT, FINLAY & ZAK, LLP
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P: 702.475.7964
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*dnitz@wrightlegal.net*
*ccrowton@wrightlegal.net*
*Attorneys for Respondents*

/s/ Heather Caifano
Signature of a Kang & Associates Employee

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# EXHIBIT A

**COMP**
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*Attorneys for Plaintiff*
*Property Plus Investments, LLC*

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Corporation<br><br>Plaintiff,<br><br>vs.<br><br>BANK OF AMERICA, N.A., a Nevada Association, MORTGAGE ELECTRONIC REGISTRATION SYSTEM; an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION; a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION; a Nevada Non-Profit Corporation; DOES 1 through 25 inclusive; and ROE CORPORATIONS, I through X, inclusive.<br><br>Defendants. | Case No.: A-13-692200-C<br>Dept. No.: XIV<br><br>**COMPLAINT TO QUIET TITLE AND DECLARATORY RELIEF**<br><br>**Exempt From Arbitration**:<br>Concerns Title To Property |

**COMPLAINT**

COMES NOW, Plaintiff, PROPERTIES PLUS INVESTMENTS, LLC, by and through its attorneys of record, PATRICK W. KANG, ESQ., and ERICA D. LOYD, ESQ., of the law firm of KANG & ASSOCIATES, PLLC., as and for its complaint against Defendants, BANK OF AMERICA, MORTGAGE ELECTRONIC REGISTRATION SYSTEM, ARLINGTON NORTH MASTER'S ASSOCIATION, and ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, and hereby complains, alleges and avers as follows:

## PARTIES

1. PROPERTIES PLUS INVESTMENTS, LLC was at all times relevant a Nevada Limited Liability Corporation formed under the laws of the state of Nevada, lawfully conducting business transactions in Clark County, Nevada.

2. Upon information and belief, Defendant, BANK OF AMERICA was at all times relevant a Nevada Association doing and conducting business transactions in Clark County Nevada.

3. Upon information and belief, Defendant MORTGAGE ELECTRONIC REGISTRATION SYSTEMS was at all times relevant an Illinois Corporation doing and conducting business transactions in Clark County Nevada.

4. Upon information and belief, Defendant ARLINGTON RANCH NORTH MASTER ASSOCIATION was at all times relevant a Nevada Non-Profit Corporation doing and conducting business transactions as a Homeowner's Association in Clark County Nevada.

5. Upon information and belief, Defendant ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION was at all times relevant a Nevada Non-Profit Corporation doing and conducting business transactions as a Homeowner's Association in Clark County Nevada.

6. The true names and capacities, whether individual, corporate, associate or otherwise of other plaintiff and defendants, hereinafter designated as DOES 1-25 and ROES I-X, inclusive, who are in some manner responsible for injuries described herein, are unknown at this time. Plaintiff, therefore, sues said defendants by such fictitious names and will seek leave of the Court to amend this Complaint to show their true names and capacities when ascertained.

7. Upon information and belief, at all times pertinent, Defendants were agents, servants, employees or joint ventures of every other defendant herein, and at times mentioned herein were acting within the scope and course of said agency, employment, or joint venture, with knowledge and permission and consent of all other Defendants.

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## VENUE AND JURISDICTION

8. Venue is proper in Clark County, Nevada pursuant to NRS 13.040.

9. The exercise of jurisdiction by this Court over the Defendants in this civil action is proper pursuant to NRS 14.065.

10. The allegations for which the Plaintiff claims and complains relates to ownership and title of real property located and situated in Clark County, Nevada. Specifically, property located at 8787 Tom Noon Avenue, No.: 101, Las Vegas, 89178 in Las Vegas, Nevada with APN NO.: 176-20-714-331.

## GENERAL ALLEGATIONS

1. In or around July 17, 2013, Plaintiff purchased real property commonly known as 8787 Tom Noon Avenue, No.:101, Las Vegas, Nevada 89178 with APN NO.: 176-20-714-331 ("subject property") at a properly noticed HOA foreclosure sale in accordance with NRS 116.3116 through NRS 116.31168, inclusive.

2. The Trustee Deed Upon Sale conveyed the subject property to the Plaintiff was recorded on July 30, 2013 with the Clark County Recorder's Office in Book/Instrument Number: 201307300000805. ***A true and correct copy of the Trustee's Deed Upon Sale is attached hereto as Exhibit A***.

3. Plaintiff purchased the property from High Noon at Arlington Ranch Homeowner's Association ("HNARHOA") at a foreclosure auction sale. Plaintiff purchased the property $7,500.00 (Seven Thousand Five Hundred Dollars) which, upon information and belief, $5,979.89 was HNARHOA's super-priority lien amount. ***(see Exhibit A)***

4. Upon information and belief Defendants had notice of the lien on April 08, 2010 and July 20, 2012. ***(see Exhibit B)***

5. Upon information and belief Defendants had notice of the default of the above mentioned lien on July 01, 2010 and October 31, 2012. ***(see Exhibit C)***

6. Upon information and belief Defendants had notice of the trustee sale for satisfaction of the above mentioned lien and default on June 21, 2013. ***(see Exhibit D)***

7. Upon information and belief Defendants failed to cure the lien and default prior to the sale conducted on July 17, 2013.

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8. Upon information and belief, Defendants may have held an interest in the subject property at one time prior to the foreclosure sale.

9. Upon information and belief, none of the Defendants, currently, have any valid interest in the subject property subsequent to the HNARHOA's foreclosure sale commenced pursuant to NRS 116.3116 through NRS 116.31168, inclusive, in order to satisfy HNARHOA's super-priority lien.

10. HNARHOA's foreclosure sale on its super-priority lien pursuant to NRS 116.3116 through NRS 116.31168, inclusive, freed and cleared all liens and encumbrances on the subject property.

11. Therefore, Plaintiff acquired the title to the subject property free and clear of all liens and encumbrances as well.

12. Thus, Plaintiff seeks declaratory and injunctive relief for a determination that Plaintiff is the rightful holder of title to the subject property free of all prior liens and encumbrances.

13. Upon information and belief, Defendants may have held an interest in the subject property at one time prior to the foreclosure sale.

14. Upon information and belief, none of the Defendants, currently, have any valid interest in the subject property subsequent to HNARHOA's foreclosure sale commenced pursuant to NRS 116.3116 and NRS 116.31168 in order to satisfy HNARHOA's super-priority lien.

15. HNARHOA's foreclosure sale freed and cleared all liens and encumbrances on the subject property.

16. Therefore, Plaintiff acquired the title to the subject property free and clear of all liens and encumbrances as well.

17. Thus, Plaintiff seeks declaratory relief for a determination that Plaintiff is the rightful holder of title to the subject property free of all prior liens and encumbrances.

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**FIRST CLAIM FOR RELIEF**
(QUIET TITLE)

18. Plaintiff repeats and realleges every allegation contained in Paragraphs 1 through 17 and reincorporated the same as if fully set forth herein.

19. Plaintiff is the rightful owner of the subject property by virtue of the HNARHOA's Trustee Deed Upon Sale and the conveyance of said Deed to Plaintiff.

20. Here, none of the Defendants had a valid interest in the subject property subsequent to the foreclosure sale pursuant to NRS 116.3116 and NRS 116.31168.

21. Upon information and belief, when HNARHOA foreclosed on its super-priority lien thereby eliminating all junior lien holders, including the original mortgagor holding a first mortgage deed of trust.

22. Plaintiff is entitled to a determination from this Court, pursuant to NRS 40.010, that the Plaintiff is the rightful owner of the Property and that the Defendants, and each of them, have no right, title, or interest in the subject property.

**SECOND CLAIM FOR RELIEF**
(DECLARATORY RELIEF)

23. Plaintiff hereby repleads, realleges and incorporates by reference each and every previous allegation contained in Paragraphs 1 through 22 above, as though fully set forth herein.

24. Plaintiff seeks a declaration from this Court, pursuant to NRS 40.010, that title in the subject property has vested in the Plaintiff free and clear of all liens and encumbrances, that Defendants herein have no estate, right, title or interest in the subject property, and that Defendants are forever enjoined from asserting any estate, title, right or interest in the subject property adverse to the Plaintiff.

**THIRD CLAIM FOR RELIEF**
(PRELIMINARY INJUNCTION)

25. Plaintiff hereby repleads, realleges and incorporates by reference each and every previous allegation contained in Paragraphs 1 through 24 above, as though fully set forth herein.

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26. Plaintiff requests that this Court issue a preliminary injunction prevent any further foreclosure, conveyance or sale of the property by any party in order to preserve peace and the subject property during these quiet title proceedings.

27. At all times herein, relevant Defendants have once held an interest in the subject property, and wrongfully and unlawfully have threatened to take ownership, possession, or other action that may adversely affect Plaintiff's interest in the subject property.

28. Plaintiff has been and will be seriously and irreparably harmed unless Defendants threatened foreclosure, unlawful conveyances and other activities complained of are preliminarily and permanently enjoined and restrained by this Court. Plaintiff will suffer irreparable injury of a continuing nature that cannot be adequately calculated or compensated in money damages.

29. Not only will Defendants' threatened conduct cause great and irreparable harm to Plaintiff unless enjoined or restrained, but the same threatened conduct will cause great and irreparable harm to the Nevada community and housing community as well.

30. If an injunction does not issue restraining and enjoining Defendants, and each of them from interfering with Plaintiff's rights and interests to the subject property, not only will the Plaintiff be harmed but the Nevada community will be irreparably harmed as a result.

31. Plaintiff seeks an injunction to enjoin Defendants from attempting to foreclose non-judicially, conveyance and any other transfer activities of the subject property.

**WHEREFORE**, Plaintiff is entitled to judgment in their favor and against the, Defendants and additional parties as follows:

1. For a determination that HNARHOA lawfully foreclosed on the subject property pursuant to NRS 116.3116 and NRS 116.31168;

2. For a determination and declaration that Plaintiff is the rightful holder of title to the subject property, free and clear of all liens and encumbrances;

3. For a determination and declaration the Defendants have no estate, right or title or interest in the subject property;

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4. For all costs and all attorneys' fees incurred and accrued in these proceedings; and

5. For such other and further relief as the Court may deem just and proper.

Dated this 22nd of November, 2013.

**KANG & ASSOCIATES, PLLC**

**PATRICK W. KANG, ESQ.**
Nevada Bar No. 010381
**ERICA D. LOYD, ESQ.**
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# EXHIBIT B

**MOT**
**PATRICK W. KANG, ESQ.**
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**ERICA D. LOYD, ESQ.**
State Bar No.: 010922
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*Attorneys for Plaintiff*
*Property Plus Investments*

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Corporation

Plaintiff,

v.

BANK OF AMERICA, N.A., a Nevada Association; MORTGAGE ELECTRONIC REGISTRATION SYSTEM; an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION; a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION; a Nevada Non-Profit Corporation; DOES I through X, inclusive; and ROE CORPORATIONS I through X, inclusive;

Defendants.

Case No.: A-13-692200-C
Dept. No.: VII

**MOTION FOR REHEARING OF MOTION FOR SUMMARY JUDGMENT AND TO VACATE SUMMARY JUDGMENT.**

**MOTION FOR REHEARING OF MOTION FOR SUMMARY JUDGMENT AND TO VACATE SUMMARY JUDGMENT.**

COMES NOW, Plaintiff, PROPERTY PLUS INVESTMENTS, by and through its attorneys of record, PATRICK W. KANG, ESQ., and ERICA D. LOYD, ESQ., of the law firm KANG & ASSOCIATES and hereby submits this MOTION FOR REHEARING OF MOTION FOR SUMMARY JUDGMENT AND TO VACATE SUMMARY JUDGMENT pursuant to Eighth District Court Rule 2.24. Plaintiff's Motion For Rehearing of Motion for Summary Judgment and to Vacate Summary Judgment is made based upon the attached points and authorities, paper and pleadings on file herein, as well as any oral arguments deemed necessary.

DATED 30th day, July 2015.

**KANG & ASSOCIATES**

By:

**PATRICK W. KANG, ESQ.**
Nevada Bar No.: 010381
**ERICA D. LOYD, ESQ.**
Nevada Bar No.: 010922
**KYLE R. TATUM, ESQ.**
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P: 702.33.4223
*Attorneys for Plaintiff*

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## NOTICE OF MOTION

TO: Dana Jonathon Nitz, Esq.
Chelsea A. Crowton, Esq.
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
P: 702.475.7964
F: 702.946.1345
*Attorneys for Defendants, Mortgage Electronic Registration Systems, Inc., and Christina Trust.*

Please take notice that the undersigned will bring the above-entitled motion for hearing before the above-entitled Court in the 1 day of September, 2015 at 9 a.m./p.m., in Department 7.

Dated this 30TH day of July, 2015.

Respectfully submitted by:

**PATRICK W. KANG, ESQ**
Nevada Bar No. 010381
**ERICA D. LOYD, ESQ**
State Bar No.: 010922
**KYLE R. TATUM, ESQ.**
State Bar No.: 013264
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LAS VEGAS, NEVADA 89146

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## I.

## POINTS AND AUTHORITIES

### A. INTRODUCTION

On July 14, 2015 this Honorable Court issued a Decision and Order granting Defendant's Motion for Summary Judgment, and denying Plaintiff's Motion for Summary Judgment. That decision was based upon two findings:

1. A finding of fact that the lien was extinguished when the Plaintiff rejected Defendant's tender of payment.
2. That the Plaintiff's lien was discharged in bankruptcy.

Plaintiff requests a rehearing and to vacate summary judgment because Defendant's evidence that Plaintiff rejected its payment of tender was irrelevant as it was tendered to the wrong lien, or a different lien, because Plaintiff, denies High Noon Association or its' agents rejected tender, Plaintiff submitted evidence of that fact, and because Defendant misled the court as to statutes which it claimed discharged the lien in bankruptcy.

Therefore, prior to a hearing on the evidence presented by Plaintiff demonstrating that High Noon Association did not reject tender, and on the issues of law regarding the priority of the HOA's Lien, Summary Judgment cannot stand.

### B. STANDARD FOR A MOTION FOR RECONSIDERATION.

This Honorable Court has inherent authority to reconsider its prior orders, and for sufficient cause, may amend, correct, resettle, modify, or vacate an order previously made and entered. *See, e.g., Trail v. Faretto*, 91 Nev. 401 (1975).

Rehearings are appropriate when substantially different evidence is subsequently introduced or the decision is clearly erroneous. *See Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737 (1997). Here, sufficient cause exists for the Court to vacate its Order, as it is clearly erroneous based on the pints and authorities articulated below.

Finally, a motion for rehearing is timely only if it is filed "…within 10 days after service of written notice of the order or judgment…" *See* E.D.C.R 2.24(b). Notice of Entry of Order regarding the Order Granting Defendant's Motion for Summary Judgment was filed and served on July 20, 2015, therefore this motion is timely.

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### C. HIGH NOON ASSOCIATION DID NOT REJECT BANK OF AMERICA'S TENDER OF PAYMENT FOR THE RELEVANT LIEN.

The Plaintiff agrees with this Honorable Court's findings of law regarding "Tender of Super-Priority Lien Amounts," however, the *Defendant in this case offered no evidence*, that Plaintiff rejected its tender for the *balance* at issue on the superpriority portion of the Lien. Although there were numerous filings regarding delinquent balances against the Property, which were discussed in the motions by the parties, there is only one Lien relevant to this case, which is the lien that was perfected for High Noon at Arlington Ranch Homeowner's Association (the "HOA") when it filed with the Ombudsman's Office to perfect its priority position via the Declaration Filing. *See NRS 116.31158 & 116.311.63.* Similarly there is only one "superpriority lien amount," (hereafter the "Delinquent Balance") on the HOA Lien that the court need consider which is: the Delinquent Balance filed with the Assessor's office on July 20, 2012 as instrument 3175 (hereafter "Delinquency 4").[1]

The Parties agree as to the following timeline of events even if they disagree on the name for the Superpriority Lien Amount (the "Delinquencies"):

**TIMELINE OF EVENTS**[2]

| | | |
|---|---|---|
| February 9, 2009 | "Delinquency 1" Recorded | Instrument 2359 |
| April 20, 2009 | Delinquency **1 Released** | Instrument 4259 |
| April 8, 2010 | "Delinquency 2" (High Noon) Recorded. | Instrument 4587 |
| May 18, 2010 | "Delinquency 3" Recorded | Instrument 2841 |
| September 23, 2010 | Defendant's Payment 1[3] | |
| January 28, 2011 | Defendant's Payment 2[4] | |
| March 21, 2011 | Delinquency **3 Released** | Instrument 1390 |
| August 11, 2011 | Delinquency **2 Released** | Instrument 3249 |
| ***Please note that all HOA liens to this point had been released.** | | |
| July 20, 2012 | Delinquency 4 (High Noon) Recorded | Instrument 3175 |
| October 31, 2012 | Delinquency 4 Default | Instrument 0600 |
| June 3, 2013 | Notice Mailed to Defendant[5] | |

[1] See ***Exhibit A*** – *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit A - Public Records second page; July 20th filing.*
[2] See ***Exhibit A*** – *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Factual Background Pg 3-5; & Public Records in Exhibit A of that Motion.*
[3] See ***Exhibit B*** – *Defendant's Motion for Summary Judgment Page 5 at 14.*
[4] See ***Exhibit B*** - *Defendant's Motion for Summary Judgment Page 5 at 15.*

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| | | |
|---|---|---|
| June 21, 2013 | Delinquency 4 Notice of Trustee's Sale | Instrument 1581 |
| July 30, 2013 | Deed Recorded | Instrument 0805 |
| April 7, 2014 | Property Assigned to Plaintiff | Instrument 0020 |

Defendant has not disputed any of the dates in the preceding timeline, and **Defendant does not assert that it made ANY Payment of Tender for Delinquency 4.**

Defendant's presented evidence of a rejected payment for one of the early Delinquencies in January of 2011; and assert that another payment was rejected in September of 2009.[6] There are serious questions regarding the validity of that evidence; however, *the entire argument is irrelevant* because the delinquent balances filed, which Defendants payments were for, were released prior to the existence of Delinquency 4.

If the Defendants are able to assert evidence regarding tender for Delinquency 4, then there *could* be *triable* issues of material fact as to whether rejection of tender discharged the superpriority lien held by the HOA. Otherwise, summary judgment should be granted to Plaintiffs on this issue.

**D. THE SUPERPRIORITY PORTION OF THE HOA LIEN MAINTAINS PRIORITY OVER DEFENDANTS' FIRST MORTGAGE.**

There there is only one Superpriority lien on a property per HOA, which is part of the lien that was established by the HOA when it filed with the Ombudsman's Office to perfect its priority position via the Declaration Filing. *See NRS 116.31158 & 116.311.63.* As HOA super-priority liens are "unprecedented," and since Defendants (understandably) are therefore at a loss as to how these operate, a brief explanation is merited here. *See* SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412 (Nev.2014).

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[5] See ***Exhibit A*** – *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, at Exhibit D –Evidence of Notice to Secured Lien Holders.*

[6] See ***Exhibit C*** – *Defendant's Evidence from its Motion for Summary Judgment.*



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**E. THE BALANCE ON A LIEN CAN BE EXTINGUISHED, WITHOUT DESTROYING THE LIEN.**

It may be easiest for Defendants to understand the operation of HOA liens by analogy. HOA Liens are similar to "liens for future advances" in that both types of liens are perfected and maintain a priority date that is prior to a later balance, which might become delinquent and cause a later foreclosure. *See NRS 116.3116(2) and NRS 106.37.* Both types of liens have a maximum lien balance, prescribed by statute, which is predetermined based upon either the original balance, as in the case of liens for future advances; or by statutorily prescribed calculation, as in the case of HOA liens. *See NRS 116.3116.*

**F. THERE CAN BE MORE THAN ONE BALANCE ON A LIEN, AND EACH BALANCE MAY HAVE A DIFFERENT PRIORITY DATE**

HOA liens are divided into balances with superpriority and balances without. See NRS 116.3116(2). HOA Liens for future advances are also similar to HOA liens because they may be bifurcated as to balances that maintain different priority dates. The proper, and general rule for determining the priority of lien balances that are bifurcated as to their proper position against an asset in Nevada is best explained in NRS 106.37 in its discussion of lien balances that are bifurcated because the future advances eventually cause the balance to exceed the original balance the lien was filed for:

> 1. The priority of a lien for future advances dates from the time that the instrument is recorded in the office of the county recorder of the county in which the property is located, whether or not the:
>
> (a) Future advances are obligatory or at the option of the lender; or
>
> (b) Lender has notice of an intervening lien.
>
> 2. If an amendment to an instrument is recorded which increases the maximum amount of indebtedness secured by the instrument, the priority of any lien for future advances of principal thereafter which exceed the maximum amount of principal of the original indebtedness dates from the time the amendment is recorded in the office of the county recorder of the county in which the property is located. *See NRS 106.37*

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The original lien priority date remains in force for the new balance up to the maximum balance amount allowed, and balances that exceed that amount, the "sub-priority lien" receive a new Priority Date on the date that they are perfected. Or in other words: **liens may have multiple perfected priority dates against an asset, each relating to separate allocations of the balance.**

**G. THE SUPERPRIORITY BALANCE OF AN HOA LIEN HAS ONE PRIORITY DATE.**

The HOA lien is also perfected by filing as explained by NRS 116.3116(5): "Recording of the [HOA] declaration *constitutes record notice and perfection of the lien*. **No further recordation of any claim of lien for assessment under this section is required."** The Nevada legislature made this point expressly, because many provisions regarding other lien types require secured parties to reassert their perfected security position periodically by refiling, but HOA's only have to do this once, via filing the HOA Declaration with the Ombudsman's Office, which creates a perfected lien, the superpriority portion of which is fixed for all properties within the HOA, and which is prior to all later-filed mortgage liens on the properties within the HOA, **even though at the time of filing, there is no balance on the lien.**

*a. Calculation of Super Priority Lien Balances.*

The HOA super lien balance is calculated by adding The Dues owed and other allowable fees for the nine months preceding the foreclosure proceeding, and may not exceed that *amount. See NRS 116.3116.* The balance can arise at any time that the HOA dues are not paid for a property, but only after the HOA has perfected its superpriority position. If the balance is paid off, the HOA can no longer enforce its superpriority position. If at some later date, the dues *become delinquent* again then the HOA begins foreclosure proceedings again. *(Id.)*

*b. Determination of Maximum Lien Balance*

The maximum balance on the HOA lien on a particular property, as to the superpriority position, is determined by the rules in NRS 116.3116, and includes fees beyond the HOA dues such as costs to collect the dues, and late fees:

> The lien is also prior to all security interests described in paragraph (b) [**A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent**] 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

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of acceleration **during the 9 months immediately preceding institution of an action to *enforce* the lien.** *See NRS 116.3116.*

According to the Nevada Supreme Court the "action to enforce the lien" is the nonjudicial foreclosure proceedings. See *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. Adv. Op. 75, 334 P.3d 408, 415 (2014). Thus the Balance at issue, in the Superpriority Lien, is the Balance, which accrued in the nine months prior to ***the*** nonjudicial foreclosure proceedings, which were the impetus of the case. The NRS does not define "non judicial foreclosure proceedings" however it should be obvious that they begin sometime after notifying the debtor of the delinquency and end after the foreclosure is completed, or the delinquent balance is otherwise extinguished.

**H. IN THE CASE AT BAR, BY AUGUST 11, 2011 NO HOA WAS *ENFORCING* A DELINQUENT BALANCE AGAINST THE PROPERTY VIA ITS SUPERPRIORITY LIEN.**

Here, any balances (not liens) prior to August 11, 2011 were released or extinguished; because Defendant's only assert that they tendered payments on September 23, 2010 and January 28, 2011. During that time period High Noon at Arlington Ranch Homeowner's Association had already released all prior balances on its Lien, except the new balance filed on April 10, 2010 via Instrument 4587. A payment on the account **was apparently not rejected** because **High Noon released the balance via Instrument 3249** with the Assessor's office, on August 11, 2011. [7]

**I. ON JULY 20, 2012 HIGH NOON AT ARLINGTON RANCH HOA FILED NOTICE OF A DELINQUENT BALANCE AS TO ITS SUPERPRIORITY LIEN. DEFENDANTS' CLAIM THAT AN HOA CAN ONLY ASSERT ITS SUPERPRIORITY LIEN ONCE IS MISLEADING.[8]**

Defendants are correct in stating that an HOA can only assert one superpriority lien. They are also correct that it is not a "rolling lien"[9] to the extent that the balance cannot exceed the statutory calculation for the balance. However Defendant's fail to understand that the Superpriority amount of an HOA's lien is prior to the first mortgage, regardless of the date the "amount" arises. This should be obvious to defendants since on the date of filing of an HOA Declaration, which perfects the lien, most HOA's will **not** have a property that owes it nine months of delinquent HOA fees or dues. "The lien is NRS 116.3116(2) does not speak in terms of *payment* priorities. It states that the HOA "lien ... is *prior to* " other liens and encumbrances

[7] ***Exhibit A*** *- Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit A - Public Records.*
[8] ***Exhibit B*** *– Defendant's Motion for Summary Judgment Page 7.*
[9] ***Exhibit B*** *– Defendant's Motion for Summary Judgment Page 7.*

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"except ... [a] first security interest," then adds that, "The lien is *also prior to* [first] security interests" to the extent of nine months of unpaid HOA dues and maintenance and nuisance-abatement charges. *Ibid.* (emphases added). "Prior" refers to the lien, not payment or proceeds." *See* SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412.

**J. DEFENDANTS' ARGUMENT ATTEMPTS TO SECURE FREE SERVICES TO THE DETRIMENT OF THE HOA.**

Moreover, Defendant's argument, that: since Defendants paid off the Balance amount on the Superpriority of the Lien previously, that a new balance amount cannot arise on the Superpriority portion of the Lien later, is like saying that since a person paid their cable bill for 12 months in 2011, that they are not required to pay the cable bill for the 12 months in 2015 if they wish to continue getting the service for all 12 months. But the analogy must end there, because a cable company can withhold its services from the *person* who fails to make ongoing payments. However, an HOA cannot withhold its services from a *property* without damaging the value of the property, as well as the value of the surrounding properties. The Nevada Supreme court explained, citing the UCIOA comments on UCIOA § 3–116:

> An HOA's "sources of revenues are usually limited to common assessments." *414 JEB, *The Six–Month "Limited Priority Lien,"* at 4. This makes an HOA's ability to foreclose on the unpaid dues portion of its lien essential for common-interest communities. *Id.* at 1–2. Otherwise, when a homeowner walks away from the property and the first deed of trust holder delays foreclosure, the HOA has to "either increase the assessment burden on the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities)." *Id.* at 5–6. To avoid having the community subsidize first security holders who delay foreclosure, whether strategically or for some other reason, UCIOA § 3–116 creates a true superpriority lien *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 413-14.

Lest this Honorable court become concerned about the equity of depriving Defendants of the collateral, Justice Pickering also pointed out that the UCIOA comments go further regarding the policy at issue: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine...] months' assessments demanded by the association *rather than having the association foreclose on the unit.*" *See* SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 413. Defendants' argument would destroy the intent of the Nevada Legislature by denying HOAs the dues that are used to protect the value the HOA's properties, including Defendants' collateral.

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*a. Material Issues of Triable Fact as to Rejection of Tender*

Even *if* Defendants had a valid legal argument regarding the impact of rejection of tender for previous Balances on the Superpriority Lien - Delinquency 4, there would still be material issues of triable fact for a jury, because the Defendant's evidence of rejected payment is at best, barely persuasive, and at worst, intentionally misleading.

There were three HOA's with respect to the property in question. At least two of the HOA's had liens on the property for overlapping intervals at the time of the supposed payment.[10] Defendants claim that tender was "rejected without explanation." Yet Defendants' own arguments demonstrate a significant likelihood that the payments were improperly tendered, as the Defendants apparently are not sure which entity the payments were made out to, as demonstrated by the ambiguous language in its Motion for Summary Judgment, as it apparently made the checks out to the same entity, without direction as to which HOA Entity's Lien each check was for.[11] In fact, a careful reading of the motion leaves the reader wondering whether the Defendant is aware, even presently, that there was more than one HOA with a lien on the property.

Since the supposed "evidence" of tender provides no direction to the Trustee as to which lien the payment should be applied to A fact finder could easily find that the payments were not properly tendered because it would be unreasonable to expect the Trustee to *guess* which lien to apply the payments to, especially in light of the fact that the payments do not appear to match the actual balance owed, on either lien, at the time payment would have been received.[12] Even more confounding is the fact **that the "Ref#" on their document does not match any instrument ever recorded against the property.**[13] Finally, the supposed "evidence" of the rejected tender is impermissible as hearsay, since the document was completed by a courier, who didn't sign the document, and the supporting affidavit is by a party who was not present when the payment was *purportedly* rejected.

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[10] *See* the Timeline above.

[11] See ***Exhibit B*** – *Defendant's Motion For Summary Judgment, Pg. 5 at 14 and 15.*

[12] See ***Exhibit C*** – *Defendant's Evidence from its Motion for Summary Judgment.*

[13] See ***Exhibit C*** – *Defendant's Evidence from its Motion for Summary Judgment.*

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Defendants also copied two unexecuted documents onto one page without explanation, so Plaintiffs' Counsel is unclear as to what relevant evidence the Defense intended for the Court to infer from the merged documents. [14]

In Summation, the Defendants' *supposed* tender of payment was for a Balance on the Superpriority Lien, which was released prior to the existence of the Lien - Delinquency 4.[15] Even if there is some legal theory that would make the tender rejection issue relevant, and there isn't, there are material issues of fact as to whether the payment was even properly "tendered" or improperly "rejected" for trial.

**K. *THE LIEN* WAS NOT DISCHARGED IN BANKRUPTCY COURT PRIOR TO THE FORECLOSURE.**

The Superpriority Balance at issue: the Delinquency recorded as Instrument 3175, was not discharged in Bankruptcy court for all of the following reasons:

1) a lien on real property is not discharged in Chapter 7 Bankruptcy; and

2) Plaintiff was not required to refile its lien after Debtor's bankruptcy because NRS 311.116 provides an exact process to be followed in HOA foreclosures, and that process was followed precisely; and

3) because Defendant's misstated controlling, law by asserting that the Balance on the Superpriority Lien changed after or because of the bankruptcy; and

4) because Defendant's misstated controlling, law by asserting a nonexistent requirement for HOA's foreclosing on their liens, to file multiple times.\

**L. A LIEN AGAINST REAL PROPERTY IS NOT DISCHARGED IN CHAPTER 7 BANKRUPTCY.**

As Defendants must be aware, "...a bankruptcy discharge extinguishes only one mode of enforcing a claim-an *in personam* action-while leaving intact another-an *in rem* action. *Johnson v. Home State Bank, 501 U.S. 78, 79 (1991)*. Or, in other words: "A [c]reditor's right to Foreclose on a mortgage survives bankruptcy." (*Id.*) Thus the balance may be discharged, as to the Debtor, however, the lien remains because it is attached to real property. This is the entire reason Defendants even have standing in this suit, because *their* subordinate lien, and balance, survived the bankruptcy. Again NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will ***extinguish a first deed of trust***. *(Emphasis Added). See* ***SFR***

[14] See ***Exhibit C*** – *Defendant's Evidence from its Motion for Summary Judgment.*
[15] ***Exhibit A*** - *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit A - Public Records.*



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***Investments Pool 1 v. U.S. Bank***, 334 P.3d 408, 419. There can be no question that the HOA's superpriority lien, which had priority over the Defendant's lien, survived the bankruptcy if the Defendant's sub-priority lien amount remained against the property.

Defendants misconstrued the argument with a red-herring discussion about the fact that the homeowner had turned over the property in bankruptcy when Defendants cited 11 U.S.C. 523(a)16 in order to show that the fees and costs included on the Notice of default were extinguished by the bankruptcy. It then used this idea to support its claim that the HOA was required to "refile" its notice, and provide an updated balance. Plaintiff does not wish to belabor the point, but since this Honorable Court cited that argument nearly verbatim in its Order, Plaintiff will do so reluctantly.

11 U.S.C. 523(a)16 states:

> A discharge under section 727, 1141 (a), 1228 (b), or 1328 (b) of this title does not discharge **an individual debtor** from any **debt** – for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the ***debt*** of a ***debtor*** for a membership association fee or assessment for a period arising **before entry of the order** for relief in a pending or subsequent bankruptcy case.[16] (*emphasis added)*.

Even though Plaintiff concedes that bankruptcy of the prior homeowner eliminated the balance or "debt" owed by the "*debtor*," the bankruptcy did not destroy Balance on the Superpriority Lien, which runs with the land, and not with the debtor. (*Id.)* *Johnson v. Home State Bank*, 501 U.S. 78, 79 (1991).

**M. PLAINTIFF ASSERTS THAT HIGH NOON ASSOCIATION WAS NOT REQUIRED TO REFILE ITS LIEN, OR TO ITEMIZE THE BALANCES OWED ON THE SUPERPRIORITY BALANCE AMOUNT NOTICE PROVIDED TO DEFENDANTS.**

Plaintiff was not required to refile its lien, or file new disclosures after the Bankruptcy of the homeowner, because 1) the Balances owed on the Lien had already been disclosed in the prior Notice of Default, which were provided to the homeowners; and in the Notice of

[16] See ***Exhibit B*** – *Defendant's Motion For Summary Judgment, Pg. 13.*



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Delinquency, which was filed with the Assessor's office; and 2) the balance on the lien was not impacted by the homeowner's bankruptcy.

The facts of this case are nearly identical to those in the *SFR Investments Pool 1 v U.S. Bank*, as to the notice provided to the Defendant Banks. The Court pointed out that:

> U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. **The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien.** As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. And from what little the record contains, **nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance.** *See SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 418.

Defendants, like US Bank, complain about the notice they received, arguing that the filed notice should have showed only the Superpriority Lien amount. But as in US Bank's situation above, "**The notices went to the homeowner and other junior lienholders, not just [Defendants], so it was appropriate to state the total amount of the lien.**" *(Id.)*

Again this case is exactly like *SFR Investment Pool 1 v. US Bank*, as "**nothing appears to have stopped [Bank of America] from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance.**" *(Id.)*

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**N. THE STATUTORILY ENACTED PROCESS FOR HOMEOWNERS ASSOCIATIONS TO FORECLOSE ON THEIR LIENS IN NRS 116.31158 THROUGH 116.311.63 DOES NOT REQUIRE ADDITIONAL NOTICE.**

The Nevada Legislature was explicit as it lay out the process for an HOA to foreclose on its superpriority lien. NRS Statutes 311.1162 through 116.31164 provide the exact process HOA's must follow, providing for each step the association must follow, including the exact time allowed for each step, thereby eliminating ambiguity regarding the process. The statutes even provide the precise verbiage of all notices, including the font thereof. *See SFR Investments Pool 1 v. U.S. Bank*, 130.

The legislature provided means for mortgage lienholders to protect their interests by ensuring additional opportunity for notice, via strict requirements of the foreclosure process laid out in NRS 116.31162 through NRS 116.31168. *(Id. at 334 P.3d 408, 411)* In doing so the Nevada Legislature departed from following 1982 UCIOA §§ 3–116, by creating significantly more stringent, but also more clear and specific, steps for HOAs initiating foreclosures in the Nevada statute. *(Id.)* Where the UCIOA provides for general third party notice requirements, NRS 116.31168 imposes specific timing and notice requirements. *(Id.)*

By meeting the requirements of NRS 116.31162 through 116.311.62, and reciting compliance with those statutes on the trustee's deed, the HOA ensures that that the sale upon foreclosure "is conclusive" according to NRS 116.31164. *See SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 411-12.

But the Legislature did not stop there, for example: by requiring HOAs to perfect their priority position via the Declaration Filing with the Ombudsman's Office, subordinate lien holders such as Defendants, receive "record notice" of the HOA's priority as to security. Furthermore the Legislature has historically expected lien holders to protect their own interests as to security.[17] *See* NRS 106.210 & 106.220.

**Finally,** the Nevada Legislature provided an additional **failsafe** mechanism to ensure that the Mortgagee is not caught unaware by an HOA's foreclosure in NRS 116.311605, by requiring the HOA to send, "within 10 days after the notice of default is recorded and mailed pursuant to NRS 107.080, cause to be deposited in the United States mail an envelope, registered or certified,

[17] **NRS 116.3116** Recording of the declaration constitutes **record notice** and perfection of the lien. **No further recordation of any claim of lien for assessment under this section is required.**



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return receipt requested and with postage prepaid, containing a copy of the notice."[18] *See* *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408.

**The HOA followed these requirements precisely.**[19]

The "Notice of Default" provided to Defendants listed a contact phone number for the Trustee, and a contact phone number for the Ombudsman's Office, in case the mortgagee had questions as to how to proceed, to determine the Superpriority Balance, or to dispute the balance owed.[20] Plaintiffs provided Defendants notice by certified mail as required by the statute on June 3, 2013, and Defendants had ample opportunity, to ask for itemization of the balances on the Superpriority Lien Balance Amount and subpriority Lien Balance Amounts an updated balance or to otherwise dispute the balance.[21]

**Instead, Defendants did nothing.** Moreover Defendants claim to know how to calculate the Superpriority Lien, had the Defendants acted in good-faith, and paid off the Superpriority Lien Balance amount as the Nevada Legislature intended them to, they would have protected their interest in the property.

But the Defendants' unwillingness to conform with the statutes described above are the actual cause of Defendant's financial detriment in this case. As a result, Plaintiff suggests that the proper course of action for this Honorable Court is to vacate its prior Order, and to grant Summary Judgment in favor of the Plaintiff.

## II.

## CONCLUSION

Therefore, granting Defendant's Motion for Summary Judgment was clearly erroneous because Defendants failed to show that tender was properly tendered, or improperly rejected for the Superpriority Lien Amount or Balance in question, and, there is a genuine issue of material fact as to whether Plaintiff rejected tender by Defendants. The Order granting Summary Judgment was also clearly erroneous because because the Debtor's Bankruptcy could not have eliminated the Plaintiff's lien on the Property as a matter of law. Additionally, this court should

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[18] See ***Exhibit A*** – *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibit D – Notice to Lien Holders.*

[19] ***Exhibit A*** - *Plaintiff's Opposition to Defendant's Motion for Summary Judgment, Exhibits A through F.*

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grant a rehearing because the law regarding HOA foreclosures was severely misconstrued by Defendants, and if allowed to stand destroys equity and confounds the intent of the Nevada Legislature. Thus Plaintiff respectfully requests that this Honorable Court grant its Motion to Reconsider Summary Judgment, and Grant a Rehearing on Summary Judgment

DATED this 30th day of July, 2015.

Respectfully Submitted,

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LAS VEGAS, NEVADA 89146

**CERTIFICATE OF MAILING**

I hereby certify that I am an employee of KANG & ASSOCIATES, over the age of 18, neither a party to nor interested in this matter; that on this 30th day, July 2015, I served a copy of **MOTION FOR REHEARING OF MOTION FOR SUMMARY JUDGMENT AND TO VACATE SUMMARY JUDGMENT**, as follows:

X by **electronic** filing notification where specified on the attached service list:

_____ by **mailing** a copy thereof enclosed in a sealed envelope with postage prepaid in the United States Mail at Las Vegas, Nevada, to the counsel of record at the following address:

_____ by **facsimile** transmission, pursuant to NRCP(5)(b) and EDCR 7.26, to the following fax number:

_____ by **hand delivery**:

TO: Dana Jonathon Nitz, Esq.
Chelsea A. Crowton, Esq.
WRIGHT, FINLAY & ZAK, LLP
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
P: 702.475.7964
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*Attorneys for Defendants, Mortgage Electronic Registration Systems, Inc., and Christina Trust.*

An Employee of KANG & ASSOCIATES

KANG & ASSOCIATES, PLLC.
6480 W SPRING MOUNTAIN ROAD, SUITE 1
LAS VEGAS, NEVADA 89146

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DAO

EIGHTH JUDICIAL DISTRICT COURT

CLERK OF THE COURT

CLARK COUNTY, NEVADA

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Company,

Plaintiff,

*vs.*

BANK OF AMERICA, N.A., a Nevada Association; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION, a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada Non-Profit Corporation; DOES 1 through 25 inclusive; and ROE CORPORATION I through X, inclusive;

Defendant.

Case No. A-13-692200-C

Dep't No. VII

**DECISION AND ORDER**

This case arises from conflicting claimed interests in the real property located at 8787 Tom Noon Avenue, No. 21, Las Vegas, Nevada. Now before the Court is Plaintiff Property Plus Investments, LLC's ("Property") Motion for Rehearing of Motion for Summary Judgment and to Vacate Summary Judgment. Property asks the Court to reconsider its Order issued on July 14, 2015 that granted Defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Christiana Trust's Motion for Summary Judgment. The Court denies Property's Motion for Rehearing and Motion to Vacate because there are no sufficient grounds to reconsider the previous Order.

## I. Procedural Background

Property filed its Complaint in this action on November 25, 2013. Property brought claims for quiet title, declaratory relief, and injunctive relief against the Defendants, including MERS. Property asserted that it bought the Tom Noon Property at a Homeowner

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

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Association's foreclosure sale, thus extinguishing all other parties' interests in the property. The Court subsequently granted Christiana Trust's Motion to Intervene on October 2, 2014, because Cristiana Trust is a current beneficiary under a deed of trust on the Tom Noon property.

MERS and Christiana Trust filed a Motion for Summary Judgment on March 16, 2015. The Court granted the Motion on July 14, 2015. The Court cited two main reasons for granting the Motion: "(1) the homeowners' association lien foreclosed on in this case lost its super-priority portion when the HOA and/or foreclosure agent refused Bank of America's tender of payment, and (2) the HOA lien was discharged by the United States Bankruptcy Court's proceedings regarding Ms. Sulliban prior to foreclosure."

Property filed a Motion for Rehearing of Motion for Summary Judgment and to Vacate Summary Judgment on July 30, 2015. Property asserts that the Court should reconsider its ruling because (1) Property's rejection of Bank of America's tender is irrelevant as it was tendered to the wrong lien and (2) MERS and Christiana Trust misled the Court regarding the statutes that govern discharged liens in bankruptcy. (Property's Mot. for Reh'g. 4: 8-11.) MERS and Christiana Trust filed an Opposition on August 26, 2015. They argue that (1) Property failed to produce new evidence proving that the Court's decision was incorrect, (2) Defendants tendered the proper amount to discharge the super-priority lien, and (3) the foreclosure sale of the Tom Noon property violates Sulliban's bankruptcy discharge. (MERS and Christiana Trust's Opp'n 2: 21-17.)

## II. Discussion

Pursuant to EDCR 2.24, a court may reconsider a matter upon a motion filed by a party and served within ten days of notice of entry of order. However, reconsideration is only appropriate when "substantially different evidence is subsequently introduced or the decision is clearly erroneous." Masonry & Title Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). Established practice does not allow litigants to raise new issues on rehearing. Cannon v. Taylor, 88 Nev. 89, 92, 493 P.2d 1313,

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

1314 (1972). "Rehearings are not granted as a matter of right, and are not allowed for the purposes of reargument..." Geller v. McCowan, 64 Nev. 106, 108, 178 P.2d 380, 381 (1947).

In this case, Property argues that the Court's decision to grant MERS and Christiana Trust's Motion for Summary Judgment was clearly erroneous because MERS and Christiana Trust failed to demonstrate that there was properly attempted tender of the super-priority lien in question. (Property's Mot. for Reh'g. 16: 18-21.) Property also argues that the decision was clearly erroneous because Sulliban's bankruptcy could not have eliminated Property's lien on the Tom Noon property as a matter of law. (Id. at 16: 21-23.) However, these arguments were already raised in Property's Countermotion for Summary Judgment (pp. 7-8, 10-11), and Property has not provided any substantially different evidence or binding legal authority in this Motion. Property is merely arguing that the Court made the wrong decision in granting summary judgment to MERS and Christiana Trust without providing a sufficient basis for the Court to reconsider its decision.

## III. Conclusion

There is no basis for the Court to find that granting summary judgment in favor of MERS and Christiana Trust was clearly erroneous. Therefore, Property's Motion for Rehearing of Motion for Summary Judgment and to Vacate Summary Judgment is denied.

DATED this 29th day of September, 2015.

LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

| Name | Party |
|---|---|
| Patrick Kang, Esq.<br>Kang & Associates, PLLC. | Counsel for Property Plus Investments, LLC |
| Dana Nitz, Esq.<br>Wright, Finlay, & Zak, LLP | Counsel for MERS and Christiana Trust |
| Ryan Hastings, Esq. | Counsel for Arlington Ranch |

SHELBY DAHL
LAW CLERK, DEPARTMENT VII

**AFFIRMATION**
Pursuant to NRS 239B.030
The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A692200 **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date 09/29/15
District Court Judge



LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

**KANG & ASSOCIATES, PLLC**
6480 W. SPRING MOUNTAIN ROAD, SUITE 1
LAS VEGAS, NV 89146

# EXHIBIT C

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ORDR

**EIGHTH JUDICIAL DISTRICT COURT** CLERK OF THE COURT

**CLARK COUNTY, NEVADA**

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Company,

Plaintiff,

vs.

BANK OF AMERICA, N.A., a Nevada Association; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION, a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada Non-Profit Corporation; DOES 1 through 25 INCLUSIVE; and ROE CORPORATION I through X, inclusive;

Defendants.

Case No. A-13-692200-C
Dept No. VII

**DECISION AND ORDER**

This real property dispute arises from conflicting claimed rights and interests of residential property located at 8787 Tom Noon Avenue, No. 21, Las Vegas, Nevada 89178. Now before the Court are competing motions for summary judgment: the first is brought by Defendants Mortgage Electronic Registration Systems, Inc. ("MERS") and Christiana Trust; the second by Plaintiff Property Plus Investments, LLC. Both motions were heard on July 7, 2015. The Court grants the Defendants' Motion for Summary Judgment and denies Plaintiff's Motion for two reasons: (1) the homeowners' association lien foreclosed on in this case lost its super-priority portion when the HOA and/or foreclosure agent refused the bank's tender of payment, and (2) the HOA lien was discharged by the United States Bankruptcy Court prior to foreclosure.

## I. Background

The residential property at 8787 Tom Noon Avenue, No. 21 is subject to the Supplemental Declaration of Covenants, Conditions and Restrictions and Reservation of

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII
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Easements for High Noon Arlington Ranch ("CC&Rs"). High Noon at Arlington Ranch Homeowners Association ("High Noon Association") recorded the CC&Rs on March 25, 2004. In addition to the High Noon Association, the Tom Noon property has at least two additional homeowners' associations—Arlington Ranch North Master Association ("Master Association") and Arlington Ranch Landscape Maintenance Association ("Landscape Association").

On April 27, 2007, three years after the High Noon CC&Rs were recorded, Megan Sulliban purchased the Tom Noon property. Ms. Sulliban's Deed of Trust for $215,000.00 was recorded on April 30, 2007, naming Defendant Bank of America, N.A. ("BofA") as the lender on the Deed of Trust. On August 10, 2010, BofA retained the law firm Miles, Bergstrom & Winters, LLP f/k/a Miles, Bauer, Bergstrom & Winters, LLP ("BofA counsel") to tender payment to the HOAs and/or their agents for the super-priority portion of any lien being claimed on the Tom Noon property.

On April 8, 2010, High Noon Association recorded a notice of lien for unpaid assessments. On May 18, 2010, Master Association recorded a notice of lien for unpaid assessments. Both High Noon Association and Master Association recorded defaults for their liens.

On September 23, 2010, BofA's counsel sent a letter to Alessi & Koenig ("A&K"), High Noon Association's agent, with an enclosed check intended to satisfy the maximum nine months of common assessments that could be claimed as a super-priority lien. On January 28, 2011, BofA's counsel sent a letter to Nevada Association Services, Inc. ("NAS"), Master Association's agent, with an enclosed check to satisfy the maximum nine months of common assessments that could be claimed as a super-priority lien. Both checks were ultimately rejected by A&K and NAS and returned to BofA's counsel without further correspondence or explanation of any amount necessary to cure any super-priority lien. Nonetheless, Master Association and High Noon Association both released their liens within a year after BofA's tender.

Then on July 20, 2012, High Noon Association recorded another notice of lien for unpaid assessments. And, on October 31, 2012, High Noon Association recorded a Notice of Default and Election to Sell under Homeowners Association Lien.

On December 19, 2012, Ms. Sulliban filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the District of Nevada. Ms. Sulliban indicated on her Bankruptcy Petition that she was surrendering the Tom Noon property. Ms. Sulliban listed the High Noon Association lien in her Bankruptcy Petition. Ms. Sulliban received her bankruptcy discharge on March 20, 2013.

On June 21, 2013, High Noon Association recorded a Notice of Trustee's Sale foreclosing on its July 2012 lien. At the non-judicial foreclosure sale, Plaintiff Property Plus paid $7,500.00 for the Tom Noon property. On July 30, 2013, a Trustee's Deed Upon Sale was recorded naming Property Plus as the grantee.

On April 7, 2014, an Assignment of Deed of Trust was recorded. The Assignment of Deed of Trust assigned all beneficial interest in the 2007 Deed of Trust and Note to Defendant Christiana Trust.

## II. Discussion

Nevada Rule of Civil Procedure 56(a) allows a party to move the Court for summary judgment. Summary judgment is only appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. See Wood v. Safeway, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). Materiality depends on the applicable substantive law, and includes only factual disputes that could change the ultimate outcome of the case. Id. 121 Nev. at 730, 121 P.3d at 1030. Furthermore, the court must review and consider all evidence in a light most favorable to the non-moving party. Id. 121 Nev. at 730, 121 P.3d at 1030.

### A. Tender of Super-Priority Lien Amount

"NRS 116.3116(2) . . . splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is 'prior to' a first deed of

trust." SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014), reh'g denied (Oct. 16, 2014); see also 13-01 Op. Dep't. of Bus. & Indus., Real Estate Div. 2 (2012) (super-priority lien is limited to: (1) 9 months of assessments; and (2) [nuisance abatement] charges allowed by NRS 116.310312). On the other hand, "[t]he subpriority piece, consist[s] of all other HOA fees or assessments, [and] is subordinate to a first deed of trust." Id. at 411.

The Nevada Supreme Court's SFR v. U.S. Bank decision made clear that the super-priority portion of the lien is a true super-priority lien, which will extinguish a first deed of trust if foreclosed upon pursuant to the requirements of Nevada Revised Statute chapter 116. See SFR v. U.S. at 419. However, if the super-priority amount has been paid to the association, the remaining sub-priority portion takes a junior position to earlier recorded encumbrances. An association's foreclosure on the remaining amount transfers title to the property subject to the first mortgage or deed of trust.

A party's tender of the super-priority amount is sufficient to extinguish the super-priority character of the lien, leaving only a junior lien. See Segars v. Classen Garage & Serv. Co., 1980 OK CIV APP 9, 612 P.2d 293, 295 ("a proper and sufficient tender of payment operates to discharge a lien"). The common law definition of tender is "an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." Fresk v. Kraemer, 337 Or. 513, 522, 99 P.3d 282, 286-7 (2004); see also 74 Am. Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of Contracts, § 1808 (3d. ed. 1972). A tender which has been made and rejected precludes foreclosure and discharges the mortgage or lien secured by property. See Bisno v. Sax, 175 Cal. App. 2d 714, 724, 346 P.2d 814 (1959) ("Speaking generally, the acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such preexisting



LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

delinquency. The same is true of a tender which has been made and rejected."); see also , Lichty v. Whitney, 80 Cal. App. 2d 696, 701, 182 P.2d 582 (1947) (holding that "[a] tender of the amount of a debt, though refused, extinguishes the lien of a pledgee, and will entitle the pledgor to recover the property pledged . . . [t]he creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or right of distress.")

Here, BofA through its attorneys calculated the maximum nine months of assessments that could have been claimed by the homeowners' associations. BofA then tendered to the homeowners' associations' agents, A&K and NAS, to satisfy the maximum nine months of common assessments that could be claimed. The checks were rejected and returned back to BofA's counsel without further correspondence or explanation. The actions of BofA therefore discharged any super-priority lien that could have been claimed or foreclosed by the High Noon Association, Master Association, or their agents. As such, summary judgment is proper in favor of MERS and Christiana Trust on the ground that the High Noon Association received and rejected tender of the super-priority amount of its lien prior to foreclosing on the Tom Noon property.

**B. Bankruptcy Discharge**

The Bankruptcy Code specifically states that any homeowners' association fees and assessments due and owing prior to the filing of the bankruptcy petition are dischargeable. The United States Bankruptcy Code states,

> (a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
>
> for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership

> association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.

11 U.S.C. § 523(a)(16) (emphasis added).

MERS and Christiana Trust argue that, though 11 U.S.C. § 523(a)(16) does not preclude High Noon Association from foreclosing on its lien, it read in conjunction with Nevada Revised Statute chapter 116 imputed a statutory duty on the High Noon Association to record new notices that accurately reflected the correct lien amount. See NRS 116.1162(1)(b)(1) (association or agent must record notice of default which must "describe the deficiency in payment"); see also NRS 116.311635(3)(a) (before selling the unit, the association or agent must serve unit's owner a copy of the notice of sale that includes "[t]he amount necessary to satisfy the lien as of the date of the proposed sale"). Ms. Sulliban indicated on her Bankruptcy Petition that she was surrendering the Tom Noon property, which allowed for the discharge of HOA fees and assessments that arose before her March 2013 bankruptcy discharge. High Noon Association's July 2012 lien and October 2012 Notice of Default, included fees and costs that were ultimately discharged by Ms. Sulliban's bankruptcy. High Noon Association was therefore required to file new notices reflecting the new lien amounts to comply with the non-judicial foreclosure requirements of Nevada Revised Statute chapter 116. But, High Noon Association failed to record new notices after Ms. Sulliban's bankruptcy discharge; instead, from June to July 2013, High Noon Association moved forward with foreclosure of the discharged lien amounts.

High Noon Association foreclosed on a lien that contained fees and costs which were discharged by the Sulliban bankruptcy, therefore the High Noon Association foreclosure did not comply with the requirements of Nevada Revised Statute chapter 116. Because High Noon Association's foreclosure of the Tom Noon property was improper and illegal, summary judgment is proper in favor of MERS and Christiana Trust.

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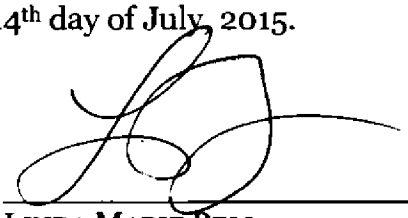
## III. Conclusion

Defendants Mortgage Electronic Registration Systems, Inc.'s and Christiana Trust's Motion for Summary Judgment is granted and Plaintiff Property Plus Investments, LLC's Motion for Summary Judgment is denied because the High Noon Association lien lost its super-priority portion when the High Noon Association rejected Bank of America's tender, and the lien was discharged by the United States Bankruptcy Court prior to foreclosure.

DATED this 14th day of July, 2015.



LINDA MARIE BELL
DISTRICT COURT JUDGE

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 14th of July, 2015, he caused to be served the foregoing Order through the Eighth Judicial District Court EFP system or, if no E-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for counsel as listed below:

| Name | Party | Phone | Contact |
|---|---|---|---|
| Patrick Kang, Esq. | Attorney for Plaintiff Property Plus Investments, LLC | | pkang@alkalaw.com |
| Ryan Hastings, Esq. | Attorney for Defendants Arlington Ranch Master Association and Arlington Ranch Landscape Maintenance Association | | rhastings@leachjohnson.com |
| Dana Nitz, Esq. | Attorney for MERS and Christiana Trust | | dnitz@wrightlegal.net |

M. R. Dickerson

MICHAEL R. DICKERSON
LAW CLERK, DEPARTMENT VII

**AFFIRMATION**

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A-13-692200-C **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date 7/14/15
District Court Judge

LINDA MARIE BELL
DISTRICT JUDGE
DEPARTMENT VII

KANG & ASSOCIATES, PLLC
6480 W. SPRING MOUNTAIN ROAD, SUITE 1
LAS VEGAS, NV 89146

# EXHIBIT D

NOED
WRIGHT, FINLAY & ZAK, LLP
Dana Jonathon Nitz, Esq.
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ccrowton@wrightlegal.net
*Attorneys for Defendants, Mortgage Electronic Registration Systems, Inc. and Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, In c/o Altisource Asset Management Corporation*

**DISTRICT COURT**
**CLARK COUNTY, NEVADA**

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Company,

Plaintiff,

vs.

BANK OF AMERICA, N.A., a Nevada Association; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION, a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada Non-Profit Corporation; DOES 1 through 25 inclusive; and ROE CORPORATIONS I through X, inclusive;

Defendants.

CHRISTIANA TRUST, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, In c/o Altisource Asset Management Corporation,

Intervening Defendant.

Case No.: A-13-692200-C
Dept. No.: 7

**NOTICE OF ENTRY OF DECISION AND ORDER**

TO ALL PARTIES:

PLEASE TAKE NOTICE that a Decision and Order granting Defendants' Motion for Summary Judgment was entered in the above-entitled Court on the 14th day of July, 2015, a copy of which is attached hereto.

DATED this 16th day of July, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathon Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Ave., Suite 200
Las Vegas, Nevada 89117
*Attorneys for Defendants, Mortgage Electronic Registration Systems, Inc. and Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, In c/o Altisource Asset Management Corporation*

**AFFIRMATION**

Pursuant to N.R.S. 239B.030

The undersigned does hereby affirm that the preceding **NOTICE OF ENTRY OF DECISION AND ORDER** filed in Case No. A-13-692200-C **does not** contain the social security number of any person.

DATED this 16th day of July, 2015.

WRIGHT, FINLAY & ZAK, LLP

Dana Jonathan Nitz, Esq.
Nevada Bar No. 0050
Chelsea A. Crowton, Esq.
Nevada Bar No. 11547
7785 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
*Attorneys for Defendants, Mortgage Electronic Registration Systems, Inc., and Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in its individual capacity but as Trustee of ARLP Trust 3, In c/o Altisource Asset Management Corporation*

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of WRIGHT, FINLAY & ZAK, LLP, and that on this 16th day of July, 2015, I did cause a true copy of **NOTICE OF ENTRY OF DECISION AND ORDER** to be e-filed and e-served through the Eighth Judicial District EFP system pursuant to NEFR 9.

**Kang & Associates, Plic.**

| Contact | Email |
|---|---|
| Erica D. Loyd, Esq. | eloyd@acelawgroup.com |
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| Patrick W. Kang, Esq. | pkang@acelawgroup.com |

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An Employee of WRIGHT, FINLAY & ZAK, LLP

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ORDR

CLERK OF THE COURT

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

PROPERTY PLUS INVESTMENTS, LLC, a Nevada Limited Liability Company,

Plaintiff,

vs.

BANK OF AMERICA, N.A., a Nevada Association; MORTGAGE ELECTRONIC REGISTRATION SYSTEM, an Illinois Corporation; ARLINGTON NORTH MASTER ASSOCIATION, a Nevada Non-Profit Corporation; ARLINGTON RANCH LANDSCAPE MAINTENANCE ASSOCIATION, a Nevada Non-Profit Corporation; DOES 1 through 25 INCLUSIVE; and ROE CORPORATION I through X, inclusive;

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Case No. A-13-692200-C
Dept No. VII

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## II. Discussion

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### A. Tender of Super-Priority Lien Amount

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DISTRICT JUDGE
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trust." SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 411 (2014), reh'g denied (Oct. 16, 2014); see also 13-01 Op. Dep't. of Bus. & Indus., Real Estate Div. 2 (2012) (super-priority lien is limited to: (1) 9 months of assessments; and (2) [nuisance abatement] charges allowed by NRS 116.310312). On the other hand, "[t]he subpriority piece, consist[s] of all other HOA fees or assessments, [and] is subordinate to a first deed of trust." Id. at 411.

The Nevada Supreme Court's SFR v. U.S. Bank decision made clear that the super-priority portion of the lien is a true super-priority lien, which will extinguish a first deed of trust if foreclosed upon pursuant to the requirements of Nevada Revised Statute chapter 116. See SFR v. U.S. at 419. However, if the super-priority amount has been paid to the association, the remaining sub-priority portion takes a junior position to earlier recorded encumbrances. An association's foreclosure on the remaining amount transfers title to the property subject to the first mortgage or deed of trust.

A party's tender of the super-priority amount is sufficient to extinguish the super-priority character of the lien, leaving only a junior lien. See Segars v. Classen Garage & Serv. Co., 1980 OK CIV APP 9, 612 P.2d 293, 295 ("a proper and sufficient tender of payment operates to discharge a lien"). The common law definition of tender is "an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." Fresk v. Kraemer, 337 Or. 513, 522, 99 P.3d 282, 286-7 (2004); see also 74 Am. Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of Contracts, § 1808 (3d. ed. 1972). A tender which has been made and rejected precludes foreclosure and discharges the mortgage or lien secured by property. See Bisno v. Sax, 175 Cal. App. 2d 714, 724, 346 P.2d 814 (1959) ("Speaking generally, the acceptance of payment of a delinquent installment of principal or interest cures that particular default and precludes a foreclosure sale based upon such preexisting

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delinquency. The same is true of a tender which has been made and rejected."); see also , Lichty v. Whitney, 80 Cal. App. 2d 696, 701, 182 P.2d 582 (1947) (holding that "[a] tender of the amount of a debt, though refused, extinguishes the lien of a pledgee, and will entitle the pledgor to recover the property pledged . . . [t]he creditor, by refusing to accept, does not forfeit his right to the thing tendered, but he does lose all collateral benefits or securities. The instantaneous effect is to discharge any collateral lien, as a pledge of goods or right of distress.")

Here, BofA through its attorneys calculated the maximum nine months of assessments that could have been claimed by the homeowners' associations. BofA then tendered to the homeowners' associations' agents, A&K and NAS, to satisfy the maximum nine months of common assessments that could be claimed. The checks were rejected and returned back to BofA's counsel without further correspondence or explanation. The actions of BofA therefore discharged any super-priority lien that could have been claimed or foreclosed by the High Noon Association, Master Association, or their agents. As such, summary judgment is proper in favor of MERS and Christiana Trust on the ground that the High Noon Association received and rejected tender of the super-priority amount of its lien prior to foreclosing on the Tom Noon property.

**B. Bankruptcy Discharge**

The Bankruptcy Code specifically states that any homeowners' association fees and assessments due and owing prior to the filing of the bankruptcy petition are dischargeable.

The United States Bankruptcy Code states,

> (a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title does not discharge an individual debtor from any debt—
>
> for a fee or assessment that becomes due and payable after the order for relief to a membership association with respect to the debtor's interest in a unit that has condominium ownership, in a share of a cooperative corporation, or a lot in a homeowners association, for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest in such unit, such corporation, or such lot, but nothing in this paragraph shall except from discharge the debt of a debtor for a membership



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> association fee or assessment for a period arising before entry of the order for relief in a pending or subsequent bankruptcy case.

11 U.S.C. § 523(a)(16) (emphasis added).

MERS and Christiana Trust argue that, though 11 U.S.C. § 523(a)(16) does not preclude High Noon Association from foreclosing on its lien, it read in conjunction with Nevada Revised Statute chapter 116 imputed a statutory duty on the High Noon Association to record new notices that accurately reflected the correct lien amount. See NRS 116.1162(1)(b)(1) (association or agent must record notice of default which must "describe the deficiency in payment"); see also NRS 116.311635(3)(a) (before selling the unit, the association or agent must serve unit's owner a copy of the notice of sale that includes "[t]he amount necessary to satisfy the lien as of the date of the proposed sale"). Ms. Sulliban indicated on her Bankruptcy Petition that she was surrendering the Tom Noon property, which allowed for the discharge of HOA fees and assessments that arose before her March 2013 bankruptcy discharge. High Noon Association's July 2012 lien and October 2012 Notice of Default, included fees and costs that were ultimately discharged by Ms. Sulliban's bankruptcy. High Noon Association was therefore required to file new notices reflecting the new lien amounts to comply with the non-judicial foreclosure requirements of Nevada Revised Statute chapter 116. But, High Noon Association failed to record new notices after Ms. Sulliban's bankruptcy discharge; instead, from June to July 2013, High Noon Association moved forward with foreclosure of the discharged lien amounts.

High Noon Association foreclosed on a lien that contained fees and costs which were discharged by the Sulliban bankruptcy, therefore the High Noon Association foreclosure did not comply with the requirements of Nevada Revised Statute chapter 116. Because High Noon Association's foreclosure of the Tom Noon property was improper and illegal, summary judgment is proper in favor of MERS and Christiana Trust.

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## III. Conclusion

Defendants Mortgage Electronic Registration Systems, Inc.'s and Christiana Trust's Motion for Summary Judgment is granted and Plaintiff Property Plus Investments, LLC's Motion for Summary Judgment is denied because the High Noon Association lien lost its super-priority portion when the High Noon Association rejected Bank of America's tender, and the lien was discharged by the United States Bankruptcy Court prior to foreclosure.

DATED this 14th day of July, 2015.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th of July, 2015, he caused to be served the foregoing Order through the Eighth Judicial District Court EFP system or, if no E-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for counsel as listed below:

| Name | Party | Phone | Contact |
|---|---|---|---|
| Patrick Kang, Esq. | Attorney for Plaintiff Property Plus Investments, LLC | | pkang@alkalaw.com |
| Ryan Hastings, Esq. | Attorney for Defendants Arlington Ranch Master Association and Arlington Ranch Landscape Maintenance Association | | rhastings@leachjohnson.com |
| Dana Nitz, Esq. | Attorney for MERS and Christiana Trust | | dnitz@wrightlegal.net |

MICHAEL R. DICKERSON
LAW CLERK, DEPARTMENT VII

**AFFIRMATION**

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A-13-692200-C **DOES NOT** contain the social security number of any person.

/s/ Linda Marie Bell Date 7/14/15
District Court Judge