A. This is the cashier's check that was used to pay for the purchase of the subject property.

Q. Is that your signature on the cashier's check?

A. No. A bank would do that. It is a bank officer.

Q. And it indicates that you paid $37,200, right?

A. Correct.

Q. Did you attempt to obtain title insurance on the date of the foreclosure sale on this property?

A. No.

Q. Why not?

A. Because we were trying to build a long-term rental portfolio.

Q. Help me out there because I don't do your business.

A. If I have no reason to sell, why go through the effort to try to find title insurance?

Q. So if that's the case, then why would you need to sue the lender for quiet title?

A. Because you are attempting to

foreclose against the property.

Q. So your lawsuit has nothing to do with title insurance then?

A. No.

Q. Have you ever spoken with anyone about obtaining title insurance for the properties in SFR's portfolio?

A. Are we talking about this property or just generally?

Q. We could start generally and then go specific.

A. We have in one instance been awarded default judgment and for that property, we went out, obtained title insurance as an experiment. We have never done it before. We wanted to see how does this work just to see if it could be done, and we successfully completed the entire transaction.

Q. What do you mean by -- I guess what were you trying to see? What were you experimenting?

A. Exploring the market. We are always looking for new and different ways of doing things and so we wanted to see what these houses would actually sell for, could you obtain title

insurance. It is part of being a professional, part of knowing what the marketplace is or is not.

Q. Do you know what you sold the property for?

A. Not offhand, no.

Q. Do you know the address of that property?

A. Not offhand.

Q. What title company did you use, if you remember?

A. I think Nevada Title. I don't remember anymore.

Q. I think you may have said but just so we covered the base, you did not attempt to obtain title insurance on this property?

A. No.

Q. On this particular property, what did you do with the property after the foreclosure sale?

A. I don't remember exact. We have a lot properties so I don't have them all in my head memorized, but I would imagine that we would have repaired any issues that may have been wrong with the property. It could be something

minor just to trimming a bush, putting in an air conditioner, and make sure they are rented.

Q. So that information wasn't contained in the files that you reviewed in preparation for the deposition?

A. If it was, you would know the answer.

Q. Well, we did request quite a bit of information that wasn't provided.

A. I gave you everything I had.

Q. So you don't have any records of repairs that you may have done on the property?

A. Sure. It is in the expense report I gave you.

Q. We didn't receive an expense report.

MS. CLINE: That was -- there was no unjust enrichment claim so there is no reason for us to provide that information, so that is why we objected to the expenses of the property.

MS. SCATURRO: I don't think it was a relevance objection. I think it was a confidentiality objection.

MS. CLINE: It is not relevant and it is confidential.

THE WITNESS: If I trim a bush, why do you care?

MS. CLINE: If you want to ask him a specific question on that, on the interrogatories or something like that.

MS. SCATURRO: He just testified that there was no information so I think that is what his testimony was.

THE WITNESS: It really doesn't matter.

BY MS. SCATURRO:

Q. Did you rent the property?

A. Yes.

Q. Who did you rent the property to?

A. I would need to look at a copy of the lease agreement. I don't know that person's name is really relevant.

Q. How much did you rent the property for?

A. I don't remember. I don't remember.

Q. Is it currently rented?

A. It is.

Q. Is it the same tenant that resided there since you purchased it at the foreclosure sale?

A. I don't know that we had more than one tenant on that property or not.

MS. CLINE: These questions are not listed as topics.

MS. SCATURRO: The disposition of the property is.

MS. CLINE: Is that what that means? I thought that that meant if it was sold or something like that.

MS. SCATURRO: That is what we meant.

MS. CLINE: Disposing of the property.

BY MS. SCATURRO:

Q. Do you plan to sell this property?

A. No.

Q. Are you current on the HOA assessments?

A. I believe we are, yes. I checked my accountants.

Q. In preparing for this deposition, I will let you know that I reviewed the Recorder's website and there is a lien by Summerlin HOA for the assessments.

A. We paid that. We had to get it released. It is old. You notice there has been no action since then.

Q. You previously testified that you, you being SFR, had approximately 600 properties in

your portfolio. Can you give me a breakdown about how many of those were purchased through NAS?

A. Oh, I would have no idea. I would have to go back and research all that.

Q. You can't ballpark an estimate?

A. And be proven incorrect would be worthless. I don't know. Again, I don't know that that really matters.

Q. Have you ever purchased any properties from NAS that were properties that were awarded to the HOA?

A. No.

Q. Do you know anyone who was employed or who is employed at Thoroughbred Management?

A. No.

Q. Or was during at the time of the foreclosure sale in late 2012, early 2013?

A. No.

Q. What's your relationship with NAS?

A. A bidder only. Well, now, we have properties. In the case where the non-foreclosing HOA has yet to be paid, we have to now deal with NAS and on rare occasion to settle out what the non-foreclosing HOA wants as

payment. We did that occasion. So we are a bidder and sometimes we deal with them as a homeowner catching up on assessments that we assumed.

Q. Do you have any agreements contractual or -- I'm sorry, written or oral with NAS?

A. No.

Q. Do you receive any payments from NAS for purchasing properties at their foreclosure sale?

A. No, with one minor exception. If I overpay, they will give me a refund check for the difference; but other than that, no. By the way, the reason I would overpay -- in this case, I went to the bank and got the exact amount, but sometimes I will show up with chunks of $20,000 checks. Unless I bid $50,000 on a property, I would give them three times $20,000, give them $60,000 and they would mail me a check back for $10,000. That would be the rare occasion they would give me money, but it is our own money back to us.

MS. SCATURRO: Let's take a quick break. I think I am pretty much done, but I just want to review my notes.

MS. CLINE: Okay.

(Recessed from 10:00 a.m. to 10:05 a.m.)

BY MS. SCATURRO:

Q. Have you ever communicated with the homeowners, the former homeowners, Corey Schaefer and Charla Schaefer?

A. I don't remember ever doing that, no.

Q. Do you know -- not seeking attorney/client information, but do you know whether your attorney ever had communication with Corey and Charla Schaefer?

A. I don't know.

MS. CLINE: Can you define communication? Are we talking about actually physically speaking to them or sending a letter or filing a lawsuit and serving?

MS. SCATURRO: Sorry.

BY MS. SCATURRO:

Q. Not filing a lawsuit, but a letter, phone call with them or anyone on their behalf, if you know.

A. I don't know.

Q. Are you aware that the Schaefers used SFR?

A. Actually, not offhand I am not, no. We have a lot going on in the company and I don't follow every single detail.

Q. So then I guess it is fair to say you don't know whether you settled that case?

A. I don't know. I could look in the records, but I don't know.

MS. SCATURRO: That is all I have.

EXAMINATION

BY MS. CLINE:

Q. Just following up on the question about communicating with the former homeowners, do you regularly after you purchase properties at a sale send letters to the former home?

A. Yes.

Q. Would you have done so in this case?

A. Yes.

Q. What were those letters about?

A. They are title change of ownership letter and we ask that the former homeowner contact us to work out their status of the property, are they going to continue to stay there and rent or work out to move out of the property.

Q. Other than that letter, you don't recall ever sending another letter or talking on the phone with any of the former homeowners for this property?

A. Correct.

Q. You testified earlier that you don't work with a property manager. Is that the case for all of the properties that SFR owns?

A. No. When I answered that question, I forgot that we do have some properties in northern Nevada, the Reno area, and we can't manage those out of our local office so I retain the property manager for those northern Nevada properties.

Q. You also testified earlier that you don't drive by the properties before you purchase them at sale. Do you ever drive by properties before auctions?

A. In thinking back, I have done so much of this in the past two years, there may have been a rare instance where it might have been a very large house and I just wanted to see what condition it was in before I buy it, but I don't think I have ever actually bought one of those I have driven by because it did come sale. I am

talking about extremely large houses where you are taking on a huge amount of financial risk.

MS. CLINE: That is all I have.

EXAMINATION

BY MS. SCATURRO:

Q. Did you ever receive a response to the letter that you sent to the former homeowners?

A. I don't remember.

Q. What is the name of your northern Nevada property manager?

A. His name is Dave Haskins.

Q. Is he part of the company or is it an individual person?

A. He operates by a company called Gunn Investment Services.

Q. G-U-N?

A. G-U-N-N, and he operates solely as a property manager up there, nothing more.

MS. SCATURRO: Okay. Thank you.

MS. CLINE: E-trans.

(Proceedings concluded at 10:10 a.m.)

CERTIFICATE

OF

CERTIFIED COURT REPORTER

* * * * *

I, the undersigned Certified Court Reporter in and for the State of Nevada, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, at which time the witness was put under oath by me; that the testimony of the witness and all objections made at the time of the proceedings were recorded stenographically by me and were thereafter transcribed under my direction; that the foregoing is a true record of the testimony and of all objections made at the time of the proceedings.

There being no request by the deponent or party to read and sign the deposition transcript, under Rule 30(e), signature is deemed waived. The original transcript will be forwarded Darren Brenner, Esq.

I further certify that I am a disinterested person and am in no way interested in the outcome of said action or connected with or related to any of the parties in said action or to their respective counsel.

The dismantling, unsealing or unbinding of the original transcript will render the reporter's certificate null and void.

In witness whereof, I have subscribed my name on this date, November 17, 2014.

Cindy Huebner
CCR No. 806

DISC
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TENESA SCATURRO, ESQ.
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Attorneys for Defendant Bank of America, N.A.

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company,

Plaintiff,

v.

BANK OF AMERICA, N.A., a national association, successor by merger to BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP; COREY SCHAEFER, an individual; CHARLA SCHAEFER, an individual; and DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-14-694435-C
Dept.: XIV

NOTICE OF RULE 30(B)(6) DEPOSITION OF SFR INVESTMENTS POOL 1, LLC

Deft EXHIBIT A
WITNESS Hoskins SFR
DATE: 11/3/14
CINDY HUEBNER, CCR

PLEASE TAKE NOTICE that defendants Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP (**BANA**) will take the deposition of the Rule 30(b)(6) witness for SFR Investments Pool I, LLC, upon oral examination at the offices of Akerman LLP, 1160 Town Center Drive, Suite 330, Las Vegas, Nevada 89144, on **November 3, 2014**, commencing at **9:00 AM** and continuing thereafter until completed.

Pursuant to Nevada Rule of Civil Procedure 30(b)(6), SFR Investments is required to designate one or more officers, directors, managing agents or other consenting persons most

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LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 -- FAX: (702) 380-8572

knowledgeable to testify on its behalf with respect to the topics set forth in **EXHIBIT A**, attached hereto.

The deposition will be taken before a notary public or other person duly authorized by law to administer oaths, and will be conducted pursuant to the provisions of the Nevada Rules of Civil Procedure for the purpose of discovery, use as evidence at any trial or hearing, and any other purposes allowed by law. The deposition will be recorded stenographically, and may also be recorded by sound-and-visual videography. You are invited to attend and cross-examine.

DATED October 20, 2014.

AKERMAN LLP

DARREN T. BRENNER, ESQ.
Nevada Bar No. 8386
TENESA SCATURRO, ESQ.
Nevada Bar No. 12488
1160 Town Center Drive, Suite 330
Las Vegas, Nevada 89144

Attorneys for Defendant Bank of America, N.A.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
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TEL.: (702) 634-5000 – FAX: (702) 380-8572

EXHIBIT A
TO RULE 30(B)(6) NOTICE OF DEPOSITION FOR SFR INVESTMENTS POOL 1, LLC ("SFR Investments")

TOPICS

1. How SFR Investments obtained its interest in the property that is the subject of this lawsuit;

2. The foreclosure proceedings on or around January 24, 2013, as referenced by the foreclosure deed recorded against the property as instrument no. 201301240001308;

3. Your relationship, if any, with Nevada Association Services and/or any of its principals, including, without limitation:

   a. Any contractual agreements, written or otherwise;
   b. Identification of any payments you made to Nevada Association Services other than amounts tendered at a foreclosure sale (i.e., any payments for services Nevada Association Services rendered to you, any payments for identifying properties that were to be sold at an HOA foreclosure sale, any kickbacks, etc.
   c. Any communications you had with Nevada Association Services related to the property that is the subject of this lawsuit.

4. Your knowledge of Bank of America, N.A.'s interest, or any other entity's interest, in the property that is the subject of this lawsuit.

5. The disposition of the property that is the subject of this lawsuit.

6. The corporate structure of SFR.

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TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 20, 2014 and pursuant to NRCP 5(b), I served and deposited for mailing in the U.S. Mail a true and correct copy of the foregoing **NOTICE OF RULE 30(B)(6) DEPOSITION OF SFR INVESTMENTS POOL 1, LLC,** postage prepaid and addressed to:

Howard C. Kim, Esq.
Jacqueline Gilbert, Esq.
1055 Whitney Ranch Drive, Suite 110
Henderson, Nevada 89014
Attorneys for Plaintiff

An employee of AKERMAN LLP

AKERMAN LLP
1160 TOWN CENTER DR., SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

Inst #: 201301240001308
Fees: $18.00 N/C Fee: $0.00
RPTT: $151.25 Ex: #
01/24/2013 08:15:18 AM
Receipt #: 1470480
Requestor:
NORTH AMERICAN TITLE COMPAN
Recorded By: RNS Pgs: 3
DEBBIE CONWAY
CLARK COUNTY RECORDER

Please mail tax statement and
when recorded mail to:
S F R Investments Pool 1, LLC
5030 Paradise Rd B-214
Las Vegas, NV 89119

(21)

FORECLOSURE DEED

APN # 164-02-112-148
North American Title #10589

NAS # N35108

The undersigned declares:

Nevada Association Services, Inc., herein called agent (for the The Allerton Park Homeowner's Association), was the duly appointed agent under that certain Notice of Delinquent Assessment Lien, recorded August 25, 2008 as instrument number 0001964 Book 20080825, in Clark County. The previous owner as reflected on said lien is Cory Schaefer, Charla Schaefer. Nevada Association Services, Inc. as agent for The Allerton Park Homeowner's Association does hereby grant and convey, but without warranty expressed or implied to: S F R Investments Pool 1, LLC (herein called grantee), pursuant to NRS 116.31162, 116.31163 and 116.31164, all its right, title and interest in and to that certain property legally described as: Summerlin Village 19-Phase 3, Plat Book 117, Page 26, Lot 148 Clark County

AGENT STATES THAT:
This conveyance is made pursuant to the powers conferred upon agent by Nevada Revised Statutes, the The Allerton Park Homeowner's Association governing documents (CC&R's) and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell, recorded on 11/5/2008 as instrument # 0002842 Book 20081105 which was recorded in the office of the recorder of said county. Nevada Association Services, Inc. has complied with all requirements of law including, but not limited to, the elapsing of 90 days, mailing of copies of Notice of Delinquent Assessment and Notice of Default and the posting and publication of the Notice of Sale. Said property was sold by said agent, on behalf of The Allerton Park Homeowner's Association at public auction on 1/18/2013, at the place indicated on the Notice of Sale. Grantee being the highest bidder at such sale, became the purchaser of said property and paid therefore to said agent the amount bid $37,200.00 in lawful money of the United States, or by satisfaction, pro tanto, of the obligations then secured by the Delinquent Assessment Lien.

Dated: January 18, 2013

Misty Blanchard
By Misty Blanchard, Agent for Association and Employee of Nevada Association Services

Deft EXHIBIT B
WITNESS Hardin SER
DATE: 11/17/14
CINDY HUEBNER, CCR

BANA000048

STATE OF NEVADA)
COUNTY OF CLARK)

On January 18, 2013, before me, Elissa Hollander, personally appeared Misty Blanchard personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged that he/she executed the same in his/her authorized capacity, and that by signing his/her signature on the instrument, the person, or the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and seal.

(Seal)

ELISSA HOLLANDER
Notary Public, State of Nevada
Appointment No. 93-1018335-1
My Appt. Expires Nov. 8, 2013

(Signature)

STATE OF NEVADA
DECLARATION OF VALUE

1. Assessor Parcel Number(s)
   a. 164-02-112-148
   b. _____
   c. _____
   d. _____
2. Type of Property:
   a. ☐ Vacant Land b. ☑ Single Fam. Res.
   c. ☐ Condo/Twnhse d. ☐ 2-4 Plex
   e. ☐ Apt. Bldg f. ☐ Comm'l/Ind'l
   g. ☐ Agricultural h. ☐ Mobile Home
   ☐ Other

FOR RECORDERS OPTIONAL USE ONLY
Book _____ Page: _____
Date of Recording: _____
Notes:

3.a. Total Value/Sales Price of Property $ 37,200.00
   b. Deed in Lieu of Foreclosure Only (value of property) ( )
   c. Transfer Tax Value: $ 37,200.00
   d. Real Property Transfer Tax Due $ 191.25

4. **If Exemption Claimed:**
   a. Transfer Tax Exemption per NRS 375.090, Section _____
   b. Explain Reason for Exemption: _____

5. **Partial Interest:** Percentage being transferred: 100 %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature Misty Blanchard Capacity: Agent

Signature _____ Capacity: _____

SELLER (GRANTOR) INFORMATION (REQUIRED)	BUYER (GRANTEE) INFORMATION (REQUIRED)
Print Name: Nevada Association Services	Print Name: SFR Investments Pool 1, LLC
Address: 6224 W. Desert Inn Road	Address: 5030 Paradise Rd. B-214
City: Las Vegas	City: Las Vegas
State: Nevada Zip: 89146	State: Nevada Zip: 89119

COMPANY/PERSON REQUESTING RECORDING (Required if not seller or buyer)

North American Title Company
8485 W. Sunset Road, Suite 111
Las Vegas, Nevada 89113

Escrow # 10689 / AV35108
State: _____ Zip: _____

AS A PUBLIC RECORD THIS FORM MAY BE RECORDED/MICROFILMED

SANA000050

THIS DOCUMENT CONTAINS A TRUE WATERMARK - HOLD TO LIGHT TO VIEW

USbank

N3508

CASHIER'S CHECK

No. 7107504154

93
9

PAY THIRTY SEVEN THOUSAND TWO HUNDRED DOLLARS AND 00 CENTS

DATE: JANUARY 18, 2013

TO THE ORDER OF: NAS

$ 37,200.00

PURPOSE/REMITTER: SFR INVESTMENTS POOL 1, LLC

Location: 7107 RAINBOW & SAHARA

U.S. Bank National Association
Minneapolis, MN 55480

AUTHORIZED SIGNATURE

⑈7107504154⑈ ⑆092900383⑆ 150080235313⑈

Deft EXHIBIT C
WITNESS Hardin SFR
DATE: 11/11/14
CINDY HUEBNER, CCR

NAS000264

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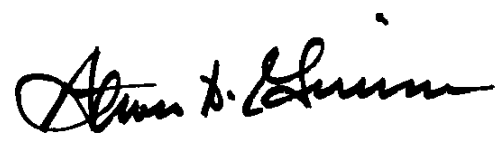
05/24/2016 12:44:21 PM



CLERK OF THE COURT

NOA
ARIEL E. STERN, ESQ.
Nevada Bar No. 8376
THERA A. COOPER, ESQ.
Nevada Bar No. 13468
AKERMAN LLP
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Email: thera.cooper@akerman.com

Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC,

Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Cross-Defendants.

Case No.: A-13-684501-C
Dept.: XXI

BANK OF AMERICA, N.A.'S NOTICE OF APPEAL

AKERMAN LLP
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BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company, SUTTER CREEK HOMEOWNERS' ASSOCIATION, an unknown entity, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

Notice is hereby given that Bank of America, N.A. appeals to the Supreme Court of Nevada from this Court's order of April 18, 2016, for which a notice of entry of order was entered April 27, 2016, granting final judgment in favor of Cross-Defendant SFR Investments Pool 1, LLC and all interlocutory orders incorporated therein.

DATE: May 24, 2016.

AKERMAN LLP

/s/ Thera Cooper
ARIEL E. STERN, ESQ.
Nevada Bar No. 8376
THERA A. COOPER, ESQ.
Nevada Bar No. 13468
AKERMAN LLP
1160 Town Center Drive, Suite 330
Las Vegas, NV 89144

Attorneys for Bank of America, N.A. as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

AKERMAN LLP
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LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 24th day of May, 2016, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing, **BANK OF AMERICA, N.A.'S NOTICE OF APPEAL,** in the following manner:

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

Alessi & Koenig		
	Contact	**Email**
	A&K eserve	eserve@alessikoenig.com
Kim Gilbert Ebron		
	Contact	**Email**
	Diana Cline Ebron	diana@kgelegal.com
	E-Service for Kim Gilbert Ebron	eservice@hkimlaw.com
	Sarah Felts	sarah@kgelegal.com
	Tomas Valerio	staff@kgelegal.com
Law Office of Ladine Oravetz		
	Contact	**Email**
	Ladine Oravetz	ladineo@aol.com

*/s/ Michael Hannon*_____
An employee of AKERMAN LLP

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Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC,

Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Cross-Defendants.

Case No.: A-13-684501-C
Dept.: XXI

BANK OF AMERICA, N.A.'S CASE APPEAL STATEMENT

AKERMAN LLP
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LAS VEGAS, NEVADA 89144
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BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company, SUTTER CREEK HOMEOWNERS' ASSOCIATION, an unknown entity, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

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Bank of America, N.A., by and through its attorneys of record at Akerman LLP, submits its Case Appeal Statement pursuant to NRAP 3(f)(3).

1. The appellant filing this case appeal statement is Bank of America, N.A. (**Appellant**).

2. The order appealed is the Final Judgment for Plaintiff entered April 18, 2016. A Notice of Entry of Final Judgment was entered on April 27, 2016 by the Honorable Judge Valerie Adair.

3. Counsel for Appellants are Ariel E. Stern, Esq. and Thera A. Cooper, Esq. of Akerman LLP, 1160 N. Town Center Drive, Suite 330, Las Vegas, Nevada 89144.

4. Trial counsel for Respondent SFR Investments Pool 1, LLC is Diana Cline Ebron, Esq., Karen L. Hanks, Esq., and Jacqueline A. Gilbert, Esq., of Kim Gilbert, Ebron, 7625 Dean Martin Drive, Suite 100, Las Vegas, NV 89139. Appellant is unaware of whether trial counsel will also act as appellate counsel for Respondent.

5. Counsel for appellant are licensed to practice law in Nevada. Trial counsel for Respondent is licensed to practice law in Nevada.

6. Appellant is represented by retained counsel in the district court.

7. Appellant is represented by retained counsel on appeal.

8. Appellant was not granted leave to proceed in forma pauperis by the district court.

9. The date proceedings commenced in the district court was July 1, 2013.

10. In this action, Respondent alleges that it owns the property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032, Assessor Parcel No. 139-08-410-014 (**Property**) free and clear of all liens as a result of an HOA foreclosure sale. Respondent filed an Answer, Counterclaim and Cross-Claim for Quiet Title and Injunctive Relief to have the court declare that Respondent bought the Property free and clear of Appellant's interests, including the deed of trust held by Bank of America, N.A. (**Deed of Trust**). Appellants alleged that the Deed of Trust was not extinguished by the foreclosure sale because its attempted tender satisfied the tender rule, the foreclosure sale was not commercially reasonable, and NRS 116.3116 is unconstitutional. The district court granted Respondent's motion for summary judgment over Appellants' opposition countermotion for summary judgment. Appellants now appeal the order granting Respondent summary judgment.

11. This case has not previously been the subject of an appeal to or original writ proceeding in the Supreme Court.

12. This appeal does not involve child custody or visitation.

13. This appeal does not involve the possibility of settlement.

DATED: May 24, 2016.

AKERMAN LLP

/s/ Thera Cooper

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 24th day of May, 2016, and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing, **BANK OF AMERICA, N.A.'S CASE APPEAL STATEMENT,** in the following manner:

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

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An employee of AKERMAN LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC, a Nevada limited liability company,

Plaintiff,

vs.

ARMANDO A. CARIAS, an individual; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, an unknown entity; DOES INDIVIDUALS I-X, inclusive; and ROE CORPORATIONS XI-XXX,

Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

vs.

ARMANDO A. CARIA, an individual, SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company; SUTTER CREEK HOMEOWNERS ASSOCIATION, a homeowners association, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS

Case No. A-13-684501-C

Dept. No. XXI

SFR INVESTMENTS POOL 1, LLC'S OPPOSITION TO BANK OF AMERICA, N.A.'S MOTION TO RECONSIDER

Hearing Date: June 20, 2016
Hearing Time: In Chambers

SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association, Third-Party Plaintiff, vs. SFR INVESTMENTS POOL 1, LLC, a domestic limited liability company, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10, Third Party Defendant.	
SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Counter-Claimant, vs. BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a national association; ARMANDO A. CARIAS, an individual; DOES 1 10 and ROE BUSINESS ENTITIES 1 through 10 inclusive, Counter-Defendant/Cross-Defendants.	

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SFR INVESTMENTS POOL 1, LLC ("SFR"), files its Opposition to BANK OF AMERICA, N.A.'s (the "Bank") Motion to Reconsider the Order Granting SFR Investment 1 Pool, LLC's Motion for Summary Judgment and Denying the Bank's Motion for Summary Judgment. This opposition is based on the following memorandum of points and authorities, and all papers and pleadings on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL ARGUMENT

A. Standard for Motion to Reconsider.

"A motion for reconsideration is *not* an avenue to re-litigate the same issues and arguments upon which the court already has ruled." U.S. Aviation Underwriters, Inc. v. WestAir, LLC, No. 208-cv-00891-PMP-LRL, 2010 WL 1462707 *2 (D.Nev. Apr. 12, 2010) (emphasis added). "Reconsideration is appropriate if the district court (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is …

an intervening change in controlling law." Wright v. Watkins & Shepard Trucking, Inc., 968 F.Supp.2d 1092, 1096 (D.Nev. 2013); see also NRCP 60(b).

B. Standard for Motion to Summary Judgment.

The Nevada Supreme Court recently reaffirmed that "[s]ummary judgment may be granted for or against a party on motion therefor 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., ___ Nev.___, ___, 366 P.3d 1105, 1109 (2016) (quoting NRCP 56(c)). The Nevada Supreme Court further instructed **"[t]hat an action seeks declaratory or equitable relief does not prevent its adjudication on summary judgment** Id. (emphasis added). Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (emphasis added). When a Nevada court reviews a motion for summary judgment, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." Id.

"The purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be tried, and the movant is entitled to judgment as a matter of law.'" McDonald v. D.P. Alexander & Las Vegas Boulevard, LLC, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) (quoting Coray v. Home, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964)). "Summary judgment is appropriate if, when viewed in light most favorable to the nonmoving party, the record reveals that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." DTJ Design, Inc. v. First Republic Bank, 130 Nev. ___, ___, 318 P.3d 709, 710 (2014) (citing Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002)).

In response to a Motion for Summary Judgment, the Bank "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial or have summary judgment entered against [it]." Wood, 121 Nev. at 32, 121 P.3d at 1031

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(emphasis added). The Bank "'is not entitled to build a case on the gossamer threads of whimsy, speculation, and conjecture.'" Id. Rather, the Bank must demonstrate specific facts as opposed to general allegations and conclusions. LaMantia v. Redisi, 118 Nev. 27, 29, 38 P.3d 877, 879 (2002); Wayment v. Holmes, 112 Nev. 232, 237, 912 P.2d 816, 819 (1996). Though inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment, like the Bank, must show that it can produce evidence at trial to support its claim. Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414, 417, 633 P.2d 1220, 1222 (1981). Here, the Bank did not produce this evidence. Summary judgment in favor of SFR was appropriate, and the Bank's Motion for Reconsideration of the Order must be denied.

C. The Bank Did Not Make a Tender Offer and Thus Its Interest Was Extinguished in the First Foreclosure Sale.

Regardless of the holding in *Ikon*,[1] the Bank has not presented evidence in its motion that the amount due to satisfy the superpriority portion of the lien was not in dispute at the time of foreclosure, or that the offer to pay was not conditional. In regards to the purported attempted payment by the Bank, this Court had found the following facts:

> 11. On June 28, 2012, Miles Bauer sent Alessi a check for $720.00, representing 9 months' worth of delinquent assessments, and a letter containing the following language:
>
> > Our client has authorized us to make payment to you in the amount of $720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

[1] Horizon at Seven Hills Homeowners Association v. Ikon Holdings, *LLC*, 132 Nev. Adv. Op. 35, 13, ___ P.3d ___, ___, 2016 WL 1704199 *6 (Apr. 28, 2016).

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See Findings of Fact, Conclusions of Law and Order, at 3:22-4:2.

Concerned primarily with the conditional language of the offer to pay, this Court ruled as follows:

> 10. As BANA's payment of $720.00 was conditional, requiring the Association to waive its rights as to a currently undecided matter—namely, what amounts are included in a super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property.

Id. at 7:1-4.

As will be shown below, the conditional offer had to be considered before the foreclosure sale. Thus, the Association did not have the benefit of *Ikon* to make their decision. Furthermore, even if the offer was proper tender, the Bank had a duty to record this interest to put all other parties on notice. Since the Bank failed to do this, this purported tender would have been ineffective to a BFP such as SFR.

1. ***The Bank's Conditional Offer to Pay is not a "Tender."***

"[A]n actual tender of the proper amount due and owing will not operate to discharge a lien where the lienholder in good faith believes that a greater sum is due." *Segars v. Classen Garage and Service Co.*, 612 P.2d 293, 295 (Okla. Ct. App. 1980). As stated in *Shadow Wood*, whether a lender had to pay nine months plus collections costs in order to protect its deed of trust was still "open" during the pertinent time period. 366 P.3d at 1113. At the time of this sale, the two organizations tasked with enforcing NRS 116 had issued diametrically opposite opinions on the inclusion of collection costs in the super-priority portion of the lien. See State, Dept. of Business and Industry, Fin. Inst. Div v. Nevada Ass'n Services, Inc., 128 Nev. ___, __, 294 P.3d 1223, 1227 (2012).

Here, the Bank's alleged attempted payment was impermissibly conditional by providing a check that was a non-negotiable amount in which any endorsement of the check would be strictly construed as an unconditional acceptance that "BANA's financial obligations towards the HOA in

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regards to [the Property] have now been 'paid in full.'" See Bank's Mot. Ex. E-3. This letter did not limit the time or scope of its obligation to the Association. Furthermore, this restrictive language could mean that acceptance of the check meant that the Association would accept all of the facts and arguments posited by the Bank in its letter, or the Bank would never again have to pay the Association further sums after said check. It would be reasonably problematic for the Association to have unconditionally accepted all of these facts and arguments because the issue of amounts was "still open," and the letter could be deemed to absolve the Bank from any future payments in the event that it obtained title or it again lent money on the Property in the future.[2]

Thus, as this Court has already recognized and held, the Bank attached impermissible conditions along with its payment. *Ikon* did not speak a single word in regards to what constitutes an unconditional payment. As such, this Court has not been presented with any new law or fact to reconsider their previous order denying the Bank's MSJ because the alleged attempted payment was conditional. As such the Court must Deny the Bank's Motion. However, to the extent the Court is to proceed further with the "tender" analysis, the Court will see below that the Bank's purported attempted payment was an unrecorded interest in property and not effective against SFR.

2. Any Tender by the Bank Was An Unrecorded Interest In The Property.

Under Nevada law, every interest in property must be recorded. Specifically, NRS 111.315 provides:

> **NRS 111.315 Recording of conveyances and instruments: Notice to third persons.** Every conveyance of real property, and every instrument of writing setting forth an agreement to convey any real property, or whereby any real property may be affected, proved, acknowledged and certified in the manner prescribed in this chapter, to operate as notice to third persons, shall be recorded in the office of the recorder of the county in which the real property is situated or to the extent permitted by NR 105.010 to 105.080, inclusive, in the Office of the Secretary of State, but shall be valid and binding between the parties thereto without such record.

///

[2] In fact, *Shadow Wood* provides an excellent example of how accepting this conditional payment could play out. If the bank there had attempted such a payment, and that association accepted, then, once the property reverted to the bank in *Shadow Wood*, it could have argued that it owed nothing once it took title. Such conditions are not the type contemplated as acceptable.

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If a "conveyance" is not recorded, it will have no effect on a subsequent purchaser. This is confirmed by NRS 111.325, which reads:

> **NRS 111.325 Unrecorded conveyances void as against a subsequent bona fide purchaser for value when conveyance recorded.**
>
> Every conveyance of real property within this State hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for valuable consideration, of the same real property, or any portion thereof, where his or her own conveyance shall be first duly.

(Emphasis added).

NRS 111.010(1) defines conveyance as:

> **NRS 111.010 Definitions.** As used in this chapter:
> 1. "Conveyance" shall be construed to embrace **every instrument in writing**, except a last will and testament, **whatever may be its form**, and by whatever name it may be known in law, by which any estate or interest in lands is **created, alienated, assigned or surrendered**.

Thus, as is demonstrated above, any "tender" by the Bank is a "conveyance" under Nevada law.

a. Equitable Subrogation

If the Bank made a payment of the superpriority portion, various jurisdictions have stated that such payment does not extinguish the lien but instead allows a lien holder to sit in place of the senior creditor: this is called "equitable subrogation." See State Farm Fire & Casualty Co. v. East Bay Municipal Utility Dist., 53 Cal. App. 4th 769, 62 Cal. Rptr. 2d 72 (1997). And this is exactly what took place between the Bank and the Association if a payment was made.

In "equitable subrogation" the holder of a junior mortgage or encumbrance who pays or advances money to pay the debt secured by the prior mortgage or encumbrance is generally entitled to be subrogated to the rights of the senior encumbrancer. Dietrich Industries, Inc. v. U.S., 988 F.2d 568 (5th Cir. 1993); Strike v. Trans-West Discounty Corp., 92 Cal. App. 3d 735, 155 Cal. Rptr. 132 (1979). This rule is particularly important where a foreclosure of a senior lien will erase the security interest of a junior lien. Under this rule, a junior lienholder is entitled to reinstate the loan by making a payment sufficient to cure the default or to pay off the senior lien and becomes

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subrogated to the rights of the senior lienholder as against the owner of the property. Pacific Trust Co. Ttee v. Fidelity Fed Sav. & Loan Assn., 184 Cal. App. 3d 817, 229 Cal. Rptr. 269 (1986). This is true even without express contractual authority. *Id*. This is exactly what occurs when a lender, such as the Bank, purportedly pays the superpriority portion of the Association's lien. The lender becomes "subrogated" to the rights of the Association. However, the lien is not extinguished. Said differently, payment by the guarantor is treated not as creating a new debt and extinguishing the original debt, but as preserving the original debt and merely substituting the guarantor for the creditor. *Putnam v. C.I.R.*, 352 U.S. 82 (1956).

"Equitable, or "legal" subrogation is given a liberal application. St. Paul Fire & Marine Ins. Co. v. Murray Guard, Inc., 37 S.W.3d 180 (Ark. 2001). It applies where one who has discharged the debt of another may, under certain circumstances, succeed to the rights and position of the satisfied creditor if: (1) payment must have been made by the subrogee to protect his or her own interest; (2) the subrogee must not have acted as a volunteer; (3) the debt paid must have been one for which the subrogee was not primarily liable; (4) the entire debt must have been paid; and (5) subrogation must not work any injustice to the rights of others. Sehremelis v. Farmers & Merchants Banks, 6 Cal. App. 4th 767, 7 Cal. Rptr. 2d 903, (1992); Dade County School Bd. v. Radio Station WOBA, 731 S. 2d 638 (Fla. 1999); Wilshire Servicing Com. v. Timber Ridge Partnership, 743 N.E.2d 1173 (Ind. Ct App. 2001).

Ultimately, equitable subrogation creates an assignment of a property interest. Since subrogation effects an assignment by operation of law it is sometimes termed an "equitable assignment." Des Moines Furnace & Stove Repair Co., v. Lemon, 56 N.W.2d 923 (Iowa 1953); Rustad v. Reed, 321 P.2d 1083 (Mont. 1958); D'Angelo v. Cornell Paperboard Products Co., 120 N.W.2d 70 (Wis. 1963). Regardless of whether a transfer is technically called an assignment, subrogation or equitable assignment, this transfer operates the same under the law with the purpose of passing the title to a cause of action from one person to another. Fifield Manor v. Finston, 7 Cal. Rptr. 377, 354 P.2d 1073 (1960). But what cannot be overstated is the fact that **this transfer is an "assignment" of an interest in real property**. And an "assignment" is a conveyance pursuant to

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NRS 111.010 and as such must be recorded pursuant to NRS 111.315 or be held ineffective against a subsequent BFP, such as SFR, pursuant to NRS 111.325.

b. Release or Discharge

Even if the Court were to disagree with the characterization as an assignment/subrogation, any payment of the superpriority lien must still be recorded. As stated above, the definition of "conveyance" is broad and includes extinguishment or discharge of the lien. *See* NRS 111.010(1).

The purported satisfaction of the super-priority portion of the association's lien is a surrender or release of the Association's senior position. Black's Law Dictionary defines "surrender" and "release" as:

> **Surrender, n. (15c) 1.** The act of yielding to another's power or control. 2. The giving up of a right or claim.
>
> **Release, n. (14c)** Liberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced. 2. The relinquishment or concession of a right, title or claim. 3. A written discharge, acquaintance, or receipt; specifically a writing - either under seal or supported by sufficient consideration. 4. A written authorization or permission for publication. 5. The act of conveying an estate or right to another, or of legally disposing of it. 6. A deed or document effecting a conveyance. 7. The action of freeing of the fact of being freed from restraint or confinement. 8. A document giving formal discharge from custody.
>
> **Release of mortgage.** A written document that discharges a mortgage upon full payment by the borrower and that is publicly recorded to show that the borrower has full equity in the property.

(Emphasis added).

Because the satisfaction of a lien is a form of conveyance, "surrender" or discharge, NRS 111.315 requires that the Bank's satisfaction be recorded in order to be effective as to SFR. Without such a recording, purchasers like SFR would be completely oblivious to any such release and will be harmed without any way to protect itself.

3. Any change in Priority must be recorded under NRS 106.220.

Further, because any purported tender would have the effect of changing the priority of the Association's lien, versus the deed of trust, it is required to be recorded as well.

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NRS 106.220 provides:

NRS 106.220 Filing and recording of instruments subordinating or waiving priority of mortgages or deeds of trust; constructive notice; effect of unrecorded instruments.

1. **Any instrument by which any mortgage or deed of trust of, lien upon or interest in real property is subordinated or waived as to priority, must**, ..., **be recorded in the office of the recorder of the county in which the property is located**, and from the time any of the same are so filed for record operates as constructive notice of the contents there of to all persons. The instrument is not enforceable under this chapter or chapter 107 of NRS unless and until it is recorded.

(Emphasis added).

Thus, to the extent the Bank alleges that any alleged attempted payment cured the Association's superpriority portion of the lien, this would be an interest in property required by law to be recorded in accordance with the above-referenced statutes if it is to survive a properly recorded subsequent purchaser's interest.

The appropriate action that the Bank was required to take was the recording of a Notice of Partial (or full) Payment against Lien on the Property, indicating satisfaction of the notices recorded by the Association. The Bank did nothing, making the Bank's alleged interest void against the Foreclosure Deed as a matter of law.

As shown above, whether regarded as an assignment, subrogation or subordination, the instrument must be recorded with the Clark County Recorder's office in order to be effective as to subsequent purchasers, such as SFR. The Bank has not shown any evidence that the Bank recorded this property interest. As such, the Bank's claim that it paid the superpriority portion of the Association's lien is void against SFR by virtue of the recording statutes which state that an unrecorded deed or other instrument required to be recorded is not valid and effective against a subsequent bona fide purchaser. As a result, any alleged "tender" by the Bank would be ineffective against SFR and the resulting foreclosure sale. As such, even if "tender" was effectuated, the Bank's interest in the property would still be extinguished.

…

…

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D. The Court Has Already Found SFR Was a BFP, and No New Evidence or Law Has Been Presented that Would Allow this Court to Reconsider this Finding.

This Court held as follows:

> c. SFR is a bona fide purchaser ("BFP").
>
> d. The fact that SFR had record notice of the First Deed of Trust does not defeat its BFP status, particularly when there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion of the Association's lien prior to Association Foreclosure Sale.
>
> e. Additionally, as SFR purchased the Property for value, low price alone is not enough to deprive it of its status as a BFP.

See Findings of Fact, Conclusions of Law and Order, at 7:13-19.

Ultimately, this Court has already decided the issue that SFR was a BFP. In doing so the Court reviewed -- and rejected -- the Bank's arguments that SFR was not a BFP because it was aware of the First Deed of Trust. See Bank's Opp. to MSJ, pp. 15-16. Yet, the Bank double-downs on the argument in its motion for reconsideration.

In a desperate attempt to bolster this defeated argument, the Bank has attached the deposition of the NRCP 30(b)(6) witness of Christoper Hardin. See Bank's Mot. Ex. 1. This is not "newly discovered evidence" as required by NRCP 60(b). This deposition was taken on November 11, 2014, more than a year prior to this Court's decision on the issue. Furthermore, this deposition was taken by the very same party that filed this Motion to Reconsider, thus defeating any argument that this deposition was just discovered. As such, this Court is barred by law from considering the contents of this deposition. However, even if an inquiry of SFR's BFP status was completed, no evidence has been presented that would suggest that SFR was anything other than BFP.

E. SFR is a Bona Fide Purchaser for Value; Equity Lies in SFR's Favor.

A BFP is one who "takes the property 'for a valuable consideration and without notice of the prior equity. . . .'" Shadow Wood, 366 P.3d at 1115 (internal citations omitted). The fact that SFR "paid 'valuable consideration' cannot be contested.'" Id. (citing Fair v. Howard, 6 Nev. 304,

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308 (1871). Further, notice by a potential purchaser that an association is conducting a sale pursuant to NRS 116, and that the potential exists for challenges to the sale "post hoc[,]" do not preclude that purchaser from BFP status. Shadow Wood, 366 P.3d at 1115-1116.

Additionally, the experience of the purchaser does not automatically defeat bona fide purchaser status. Melendrez v. D & I Inv., Inc., 127 Cal. App. 4th 1238, 1252-1253, 26 Cal.Rptr.3d 413, 425-426 (2005). In Melendrez, the California Court of Appeals concluded, "[W]e see no reasoned basis for a blanket rule that would preclude a buyer from being a BFP simply because he or she has experience in foreclosure sales and purchases property at less than fair market value." Id. at 1253, 426. The Melendrez court went on to state,

> [a] holding that an experienced foreclosure buyer perforce cannot receive the benefits of the law as a BFP if he or she buys property for substantially less than its value would chill participation at trustees' sales by this entire class of buyers, and, ultimately, could have the undesired effect of reducing sales prices at foreclosure. We conclude therefore that the proper standard to determine whether a buyer at a foreclosure sale is a BFP is whether the buyer (1) purchased the property for value, and (2) had ***no knowledge or notice of the asserted rights of another***.

Melendrez, 26 Cal.Rptr.3d at 427 (emphasis added).

General knowledge by a purchaser is not enough to defeat BFP – it is the **specific facts** of that sale.

The Bank cites to several cases in which purchasers were privileged with insider knowledge of specific facts of the foreclosure which, in their jurisdiction, put the purchaser on inquiry notice. For example, in Berge, the dispute pertained to title to property where the first conveyance was executed first but not recorded until after the second conveyance was executed and recorded. Berge v. Fredericks, 591 P.2d 246, 247 (Nev. 1979). There, the Court held that the second purchaser did not have the benefit of Nevada's "first in time" recording statute (and was not a purchaser in good faith) because she was on notice that a person without a recorded interest in the property was residing on the property (the first purchaser), and that the conveyance to her was made by a grantor who had a "reason to conceal" the prior unrecorded interest. Id. at 249-250. **Armed with these facts**, the second purchaser had a duty of inquire as to whether there was a prior unrecorded interest. Id. at 249 (emphasis added).

Allison Steel is similarly unpersuasive and inapplicable to this situation, as that case dealt

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with the priority of liens where a creditor subsequently purchased property at a sheriff's sale with constructive knowledge of the existence of two prior recorded tax liens. See Allison Steel Manufacturing Co. v. Bentonite, Inc., 471 P.2d 666 (Nev. 1970). There the Court held that the subsequent purchaser did not have superior title, despite having recorded its deed before the prior purchaser at the tax lien sale. Id. at 497. This was because the tax liens had priority over the lien being foreclosed.

The common thread that ties these cases together is the insider knowledge of specific facts that the purchaser had in the purchasing situation. In contrast to these cases, no facts existed here which "would lead a reasonable man in [SFR's] position to make an investigation that would advise him of the existence of prior unrecorded rights." Id. The public records only showed (1) that a deed of trust was recorded **after** the Association perfected its lien by recording its declaration of CC&Rs; (2) that there was a delinquency by the homeowner, which resulted in the Association instituting foreclosure proceedings, and after complying with NRS Chapter 116, it sold the Property at a public auction. Additionally, the Bank did not file an action challenging the superpriority amount or the sale, and it did not record a release of superpriority lien or a lis pendens. Nothing was recorded to lead SFR to believe the Bank's priority had changed in relation to the Association's. Further, any inquiry SFR may have made to the Association's Agent, a party with which it has no special relationship, would have revealed exactly that which was the case here – there was no tender made by the Bank prior to the sale.

Here, the Bank has provided no evidence that SFR had any knowledge of specific facts of a superior interest, or that a superior interest survived the sale. In regards to SFR's duty of inquiry regarding the association sale, Shadow Wood provides guidance:

> [W]hen an association's foreclosure sale complies with the statutory foreclosure rules, as evidenced by the recorded notices, such as is the case here, and without any facts to indicate the contrary, th**e purchaser would have only "notice" that the former owner had the ability to raise an equitably based post-sale challenge**, the basis of which is unknown to that purchaser.
>
> That [the Bank] retained the ability to bring an equitable claim to challenge [the association's] foreclosure sale **is not enough in itself to demonstrate that [the purchaser] took the property with notice of any potential future dispute as to title.**

Shadow Wood, 316 P.3d at 1116. SFR did not have a duty to inquire further than investigating

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the recorded documents on the Property. Despite the fact that SFR has purchased many properties at foreclosure sales, the Bank has failed to present any facts that should be imputed to SFR that go to show that the Bank's interest in the property would have survived the foreclosure. In fact, even today, the Bank has failed to present any facts that would challenge the validity of the foreclosure sale.

F. <u>This Court Has Already Balanced the Equities and Found that They Tip in Favor of SFR; No Issue of Fact Remains that Would Require a Trial.</u>

This Court held as follows regarding the equities of this case:

> 11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this case.
>
> a. BANA was in a better position than SFR, a mere purchaser at a public sale, and could have done more to protect its interest in the Property.
>
> b. After it submitted its payment to the Association, BANA should have done something to put potential purchasers, such as SFR, on notice of its attempted payment and corresponding belief that the super-priority lien was extinguished prior to the Association Foreclosure Sale.
>
> c. SFR is a bona fide purchaser ("BFP").
>
> d. The fact that SFR had record notice of the First Deed of Trust does not defeat its BFP status, particularly when there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion of the Association's lien prior to Association Foreclosure Sale.
>
> e. Additionally, as SFR purchased the Property for value, low price alone is not enough to deprive it of its status as a BFP.

Findings of Fact, Conclusions of Law and Order, at 7:5-19.

Should a Court decide to balance the equities, ss this Court did, , a court "must consider the entirety of the circumstances that bear upon the equities[,]" including the actions and inactions of the parties and "whether an innocent party [a BFP] may be harmed by granting the desired relief." Shadow Wood, 336 P.3d at 1114 (citing In re Petition of Nelson, 495 N.W.2d 200, 203 (Minn. 1993) and Smith v. United States, 373 F.2d 419, 424 (4th Circ. 1966)). This is true ***even***

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when there are potential irregularities in the foreclosure process, such as pre-sale disputes between the association and the lender, ***where the buyer has no knowledge or participation in the irregularities***. Shadow Wood, 336 P.3d at 1115-1116 (emphasis added). Such consideration of harm is particularly important where the lender has failed to avail itself of the legal remedies available to it to prevent the foreclosure sale. Id. at 1114, n.7. In Shadow Wood, even when the bank made an attempt to pay, the Court noted it still had remedies it did not take. Id. Here, **the Bank**— with notice—**did nothing** after its purported attempt to conditionally pay. It did not attend the sale and announce a dispute, nor did it file a lis pendens or otherwise put the world on notice that it disputed the superpriority amount of the lien or the Association foreclosure sale. As a result, title properly vested in SFR at the Association foreclosure sale.

The Bank has provided no evidence that SFR was anything other than a BFP. Specifically, the Bank has presented no evidence of **any** such knowledge or participation, fraudulent or otherwise, by SFR. SFR would be harmed by any claim to set aside the sale on those grounds. Therefore, SFR was entitled to summary judgment. This Court must deny the Bank's Motion to Reconsider.

II. CONCLUSION

The Bank has not shown this Court any newly discovered evidence or that *Ikon* represented an intervening change in controlling law that would warrant reconsideration of this case. As such, the Bank has not presented any authority that would justify the Reconsideration of this Court's Order Granting Plaintiff's Motion for Summary Judgment and as such should DENY the Bank's Motion herein.

DATED June 3rd, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of June, 2016, pursuant to NRCP 5(b), I served via the Second Judicial District Court's electronic filing system the foregoing, **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO RECONSIDER ORDER GRANTING SFR INVESTMENT 1 POOL, LLC'S MOTION FOR SUMMARY JUDGMENT**, to the following parties:

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Attorneys for Defendant Bank of America, N.A., as successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP

DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC, Plaintiff, v. BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive, Defendants.	Case No.: A-13-684501-C Dept.: XXI **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**
BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association, Cross-Claimant, v. ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive, Cross-Defendants.	

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BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company, SUTTER CREEK HOMEOWNERS' ASSOCIATION, an unknown entity, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

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Defendant Bank of America, N.A. (**Bank of America**), by and through its attorneys at the law firm AKERMAN LLP, hereby submits this Reply Memorandum in Support of Motion for Reconsideration of the Order granting summary judgment in favor of SFR Investments Pool 1, LLC (**SFR**) and denying Bank of America's motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nevada Revised Statute 116.3116(1) creates a statutory lien for unpaid assessments that a unit owner owes to an HOA. The statute also creates a "super-priority" portion of this statutory lien in which nine months of HOA assessments have priority over a senior deed of trust. Based on the plain language of the statute that creates the HOA lien, the Nevada Supreme Court confirmed in *SFR Investments* that nine months of unpaid HOA assessments constitute the statutory super-priority portion of this statutory lien. Since this Court granted SFR's Motion for Summary Judgment, the Nevada Supreme Court held in *Ikon Holdings* that the super-priority amount is limited to nine-months of assessments prior to an HOA foreclosure and does not include an amount for collection fees or foreclosures costs.

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In its Response in Opposition to Bank of America's Motion to Reconsider, SFR attempts to rely on contract principles such as accord and satisfaction and equitable subrogation to invalidate the legal effect of Bank of America's tender of the super-priority portion of the statutory HOA assessment lien. None of these contract principles are applicable to whether the statutory HOA lien was satisfied. It is *undisputed* in this case that Bank of America tendered the amount necessary to satisfy the super-priority portion of this statutory lien. Because Bank of America's tender satisfied, and thus extinguished, the super-priority portion of the statutory HOA lien. To the extent SFR obtained any interest in the Property through the HOA foreclosure sale, then that interest is subject to Bank of America's Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

III. ARGUMENT

A. Bank of America's Tender of Nine-Months of Assessments Satisfied the HOA's Super-Priority Lien.

Under NRS 116.3116(1), an HOA has a statutory lien for unpaid assessments. Also by statute, only nine-months of HOA assessments are entitled to this "super-priority" status. NRS 116.3116(2)(b)-(c). The Nevada Supreme Court in *SFR Investments*, applying the plain language of the statute, explained that "[a]s to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece." *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 411 (Nev. 2014). As explained by the *SFR Investments* Court, "NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowners' property for up to nine months of unpaid HOA dues." *Id.* at 409 (emphasis added). *SFR Investments* further provides that the beneficiary of record of a deed of trust can preserve its interest by "determining the precise superpriority amount" and tendering it "in advance of the sale." *Id.* at 418.

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Since this Court granted SFR's Motion for Summary Judgment, the Nevada Supreme Court held – again as a matter of statutory interpretation – that the super-priority portion of an HOA lien does *not* include collection fees and foreclosure costs incurred by an HOA. *Horizons at Seven Hills v. Ikon Holdings*, 2016 WL 1704199, at *1 (Nev. April 28, 2016). The *Ikon Holdings* court confirmed that the super-priority amount is "limited to an amount equal to the common expense assessments due during the nine months before foreclosure." *Id.* at *6.

In this case, pursuant to NRS 116.3116(3)(b), Bank of America tendered the amount of the super-priority portion of the statutory HOA lien prior to the HOA foreclosure sale. Shortly after receiving the Notice of Default and Election to Sell, Bank of America, through counsel, contacted the HOA Trustee and requested a payoff ledger detailing the super-priority amount of the HOA's lien. Bank's Mot., at **Ex. E-1**. This payoff ledger showed the amount of the last nine months' delinquent assessments—the super-priority amount under *Ikon Holdings*—was $720.00. *Id.*, at **Ex. E-2**. Accordingly, Bank of America sent a check to the HOA Trustee in the amount of $720.00 on June 28, 2012 and explained that the check was sent to "satisfy [Bank of America's] obligation . . . as a holder of the first deed of trust against the property." *Id.*, at **Ex. E-3**. Even though the HOA Trustee rejected this payment, Bank of America tendered, and thus satisfied the super-priority portion of the statutory HOA lien.

1. SFR's Reliance on Contract Principles to Challenge Satisfaction of a Statutory Lien Fail As a Matter of Law.

SFR improperly claims that Bank of America's "conditional offer to pay is not a tender" and that Bank of America's check constitutes an "unconditional" payment. SFR attempts to argue that Bank of America's tender did not satisfy the statutory super-priority portion of the statutory HOA lien because "alleged attempted payment was impermissibly conditional by providing a check that was a non-negotiable amount." SFR's Opp., at 5. SFR's argument improperly relies on contract law principles of accord and satisfaction as a basis for arguing that Bank of America's tender of the nine-month super-priority amount could not satisfy a statutory lien.

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Contrary to SFR's assertion, and as set forth in the letter accompanying Bank of America's check to the HOA Trustee, Bank of America's tender was made pursuant to NRS 116.3116(2)(b) and was remitted to satisfy the nine-months of delinquent assessments (based on the HOA's assessment ledger) that the HOA was entitled to collect from the beneficiary of the Deed of Trust. SFR's assertion fails because it is based on the faulty premise that the amount Bank of America tendered was an attempt to resolve a disputed contractual debt. As set forth below, contract principles such as accord and satisfaction are inapplicable in this context where the HOA and Bank of America are not in privity of contract and where the obligations of the parties are determined not by contract, but by statute.

Under Nevada law, accord and satisfaction is an affirmative defense to a breach of contract claim. *See Nev. R of Civ. P. 8(c)*; *Pierce Lathing Co. v. ISEC, Inc.*, 114 Nev. 291, 956 P.2d 93, 95 (Nev. 1998); *Casarotto v. Mortensen*, 99 Nev. 392, 663 P.2d 352, 353 (Nev. 1983). The Nevada Suprema Court has explained that "principles of accord and satisfaction, subtending those of compromise and settlement dealing only with the disputed or unliquidated amounts, are contractual in nature." *Pederson v. First Nat'l Bank*, 93 Nev. 388, 392, 566 P.2d 89, 91-92, 1977 Nev. LEXIS 573, *7 (Nev. 1977) (quotation and citation omitted). As noted above, the HOA lien for assessments is a statutory lien, and the obligations, if any, that Bank of America may have to the HOA, are determined by statute, not by contract. Because Bank of America and the HOA are not in privity of contract, principles such as accord and satisfaction are not applicable and cannot render Bank or America's tender a nullity.

Moreover, even if principles of accord and satisfaction were applicable to the instant case, Bank of America's check sent to the HOA still constitutes tender sufficient to satisfy the super-priority portion of the HOA lien. SFR claims that "conditional" or "non-negotiable" language in the letter accompanying Bank of America's tender of the super-priority portion of the statutory HOA lien negates the effect of that tender (SFR Opp. at 6). The Nevada Supreme Court has rejected this analysis.

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In *Pederson v. First Nat'l Bank*, 93 Nev. 388(Nev. 1977), the Court acknowledged that even if a check contains "conditional" language, acceptance of that check does not necessarily resolve a dispute, and remittance of that check still constitutes tender. The alleged breaching party in *Pederson* asserted that "the trial court was compelled to sustain his affirmative defense since he tendered a check . . . in 'full settlement' of the Bank's claim against him, which check was accepted by the Bank." *Id.* at 392-393. The *Pederson* Court rejected this argument and explained that while "tender of that check and acceptance by the Bank is evidence supporting his defense of compromise and settlement, other evidence presented shows that the Bank accepted the check to be credited against the full sum due it." *Id.* at 393. Although Bank of America was not attempting to resolve a debt,[1] the rationale in *Pederson* applies – Bank of America's remittance of the check, even with conditional language, does not defeat the legal effect of the tender.

By tendering the super-priority amount prior to the foreclosure sale, Bank of America preserved the first-priority position of its Deed of Trust. Since the super-priority portion of the HOA's lien was extinguished prior to the foreclosure sale, Plaintiff's interest in the Property, if any, is subject to the Deed of Trust pursuant to NRS 116.31164(3)(a), which provides that the purchaser at an HOA foreclosure receives "a deed without warranty which conveys to the grantee *all title of the unit's owner to the unit*." NRS 116.31164(3)(a) (emphasis added). Under Nevada law, the HOA lost the ability to pass title free of the Deed of Trust when Bank of America's tender extinguished the super-priority lien.

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[1]The fact that Bank of America's counsel included "conditional" and "non-negotiable" language in its cover letter to the HOA Trustee does not transform the tender of the super-priority portion of a statutory HOA lien into an offer to enter into a contract or an accord and satisfaction. The balance of the cover letter makes clear than Bank of America is remitting payment of nine-months of delinquent assessments pursuant to NRS 116.3116(2)(b) and that the HOA Trustee should not interpret the payment of these nine-months as any admission that Bank of America should, or will, remit additional payment as to any collections costs or foreclosure fees.

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2. Contract Principles Cannot Convert Bank of America's Tender of the Super-priority Portion of the Lien into a Conveyance That Must Be Recorded.

SFR also asserts, improperly, that "tender by the Bank was an unrecorded interest[2] in the Property." SFR Opp. At 6. As with the claim that Bank of America was attempting to resolve a disputed contract, SFR's argument on the alleged necessity of recording a tender offer similarly lacks any legal or factual basis. As its argument that tender of the super-priority portion of a statutory lien is a conveyance requiring recordation, SFR cites only the statute requiring recordation of conveyance and the statutory definition of conveyance and concludes, solely on the basis of these statutes, that a tender payment is a conveyance in real property that must be recorded.

First, Nevada's statutory recording act provides: "Every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser, in good faith and for a valuable consideration . . . ." NRS 111.325. The statute further provides that "conveyance shall be construed to embrace every instrument in writing, except a last will and testament, whatever may be its form, and by whatever name it may be known in law, by which any estate or interest in lands is created, aliened, assigned or surrendered." NRS 111.010(a). Based solely on these statutory references, SFR makes the conclusory, and completely unsupported determination, that "any 'tender' by the Bank is a 'conveyance' under Nevada law." SFR does not even attempt to explain how the delivery of a check that satisfies (as a matter of law) the super-priority portion of a statutory lien could either create, alienate, assign or surrender Bank of America's security interest in the Property.

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[2]In more than one place in its brief, SFR concludes that if Bank of America desired to protect the Deed of Trust, Bank of America should have recorded notice of its tender payment. At one point, SFR goes so far as to assert that Bank of America "was required" to record a "Notice of Partial (or full) Payment against Lien on the Property." SFR cites no authority for the proposition that a party who tenders payment to satisfy a statutory lien has an obligation, or even the authority, to record any document in the public record associated with that lien.

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SFR even acknowledges the fallacy of its conclusory pronouncement that tender equals conveyance by devoting the next several pages of its memorandum to an analysis of the doctrine of equitable subrogation in an apparent attempt to demonstrate that "equitable subrogation creates an assignment of a property interest." SFR Opp. at 8. SFR's reliance on the doctrine of equitable subrogation fails as a matter of well-established Nevada law. Although the Nevada Supreme Court has addressed the doctrine of equitable subrogation extensively, SFR does not cite a single case from either the Nevada Supreme Court or the federal District of Nevada. Instead, SFR relies on cases from at least five other states – from Arkansas to Wisconsin and from California to Iowa to support its conclusion that application of equitable subrogation requires this Court to find that Bank of America's tender constitutes a recordable conveyance.

A review of the Nevada case law on the doctrine of equitable subrogation reveals why SFR failed to cite any Nevada precedent. The Nevada Supreme Court has explained that equitable subrogation is a doctrine "created to accomplish what is just and fair as between the parties" and that arises "when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another." *AT & T Technologies v. Reid*, 109 Nev. 592, 855 P.2d 533, 535 (Nev. 1993) (citations omitted); *Houston v. Bank of Am. Fed. Savings Bank*, 488, 78 P.3d 71, 73 (Nev. 2003) (adopting section 76 of the Restatement (Third) of Property: Mortgages and explaining that equitable subrogation "permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance").

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Of relevance to the instant case, however, the Nevada Supreme Court has specifically held that principles of equitable subrogation have no application where the lien at issue is a creation of statute. *In re Fontainebleau Las Vegas Holdings, LLC*, 289 P.3d 1199, 1212 (2012) (quoting *Lamb v. Goldfield Lucky Boy Mining Co.*, 37 Nev. 9, 16, 138 P. 902, 904 (1914) and concluding that "equitable principles will not justify a court's disregard of statutory requirements"). In the context of statutorily created mechanic's liens, the *Fontainebleau* Court concluded, "the plain and unambiguous language of NRS 108.225 precludes application of the doctrine of equitable subrogation, as it unequivocally places mechanics' lien claimants in an unassailable priority position." Important to its analysis, the *Fontainbleau* Court explained that a mechanic's lien "is a statutory creature designed to provide contractors secured payment for their work and materials because they are generally in a vulnerable position." *Id.* at 1210 (quotation and citation omitted). The Nevada Supreme Court has refused to apply equitable subrogation as a means of changing any priority associated with the statutory mechanic's lien. This Court should do the same as to the statutory HOA lien.

B. <u>SFR Has Not Established Status as a Bona Fide Purchaser.</u>

In its response, SFR did not deny that it knew there were competing interests to the 600 or more properties that it has purchased at HOA foreclosure sales or that knew it would have to litigate against those holding these competing interests after it purchased a property. Rather, SFR claims that each of the 600 properties it has purchased at HOA foreclosure sales must be considered individually and that Bank of America has "provided no evidence that SFR had any actual knowledge of specific facts of a superior interest or that a superior interest survived the sale." SFR's claim to be a bona fide purchaser fails.

First, under Nevada law, bona fide purchaser status is an affirmative defense for which the asserting party bears the burden of proof. Nev. Rev. Stat. § 111.325. Thus, SFR has the burden of proof in establishing that it is a bona fide purchaser for value. *Berge v. Fredericks*. 591 P.2d 246, 248 (Nev. 1979). Contrary to SFR's conclusory assertion, Bank of America does not have the burden of proving whether SFR is a bona fide purchaser. Second, SFR has not, and cannot, claim that it did not have actual and constructive knowledge of Bank of America's Deed of Trust.

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SFR also fails to address substantively its duty to investigate whether Bank of America had tendered payment to satisfy the super-priority portion of the HOA lien. At the time of the HOA foreclosure sale, SFR knew: (1) Bank of America had recorded a deed of trust on the Property in the amount of $74,642.00 on October 27, 2010; (2) just 16 months after the Deed of Trust was recorded (and thus likely would not have realized a significant decrease in the amount of indebtedness secured), the HOA recorded a Notice of Delinquent Assessment Lien in the amount of $965; (3) by the time the HOA filed its Notice of Foreclosure Sale, the HOA was purporting to foreclose on a $4,285 statutory lien; (4) the statute creating the HOA lien stated that nine months of assessments were superior to the Deed of Trust; (5) as of the date of the HOA foreclosure sale, the Deed of Trust had not been released. Based on these facts, at a minimum, SFR had a duty to investigate whether Bank of America had tendered the nine months of assessments.

Under Nevada law, "a duty of inquiry" arises "when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence." *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 471 P.2d 666, 668. (Nev. 1970). Moreover, a party has "constructive notice of [the facts at issue] whether he does or does not make the investigation." *Id.* To rebut this presumption, a party claiming to be a bona fide purchaser must show that it "made due investigation without discovering the prior right or title he was bound to investigate." *Berge v. Fredericks*, 95 Nev. 183, 591 P.2d 246, 249 (Nev. 1979). As the party claiming to be a bona fide purchaser, *SFR* has the burden of presenting evidence that it inquired as to whether Bank of America had tendered the nine-month super-priority portion of the HOA statutory lien. SFR has not presented such evidence, and SFR is presumed to know that Bank of America tendered the super-priority portion of the statutory HOA lien.[3] SFR has not satisfied its burden of proof as to whether it was a bona fide purchaser for value.

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[3]Because SFR has a duty of inquiry, it cannot challenge whether the HOA should have recorded a release of the super-priority portion of its statutory lien after Bank of America tendered payment for the nine months of assessments.

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IV. CONCLUSION

As a matter of law, Bank of America's tender extinguished the super-priority portion of the HOA statutory lien. The Court should reconsider its Order granting summary judgment in favor of SFR and instead grant summary judgment in favor of Bank of America.

DATED this 13th day of June, 2016.

AKERMAN LLP

/s/ Thera A. Cooper, Esq.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 13th day of June, 2016 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **BANK OF AMERICA, N.A.'S REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION**, in the following manner:

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

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Attorney for SFR Investments Pool 1, LLC

Steven T. Loizzi, Jr. Esq.
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Attorney for Alessi & Koenig LLC & Sutter Creek Homeowners Association

/s/ Allen G. Stephens
An employee of AKERMAN LLP

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REGISTER OF ACTIONS

CASE NO. A-13-684501-C

Alessi & Koenig LLC , Plaintiff(s) vs. Armando Carias , Defendant(s)	§	Case Type:	**Other Civil Filing**
	§	Subtype:	**Other Civil Matters**
	§	Date Filed:	**07/01/2013**
	§	Location:	**Department 21**
	§	Cross-Reference Case Number:	**A684501**
	§	Supreme Court No.:	**70501**

PARTY INFORMATION

		Lead Attorneys
Counter	**SFR Investments Pool 1 LLC**	**Diana S. Cline**
Counter Defendant	**Bac Home Loans Servicing LP *Formerly Known As* Countrywide Home Loans Servicing LP**	**Darren T. Brenner** *Retained* 702-634-5000(W)
Counter	**Bank of America N A**	**Darren T. Brenner**
Counter	**Carias , Armando A**	
Cross Claimant	**Bac Home Loans Servicing LP *Formerly Known As* Countrywide Home Loans Servicing LP**	**Darren T. Brenner** *Retained* 702-634-5000(W)
Cross	**Bank of America N A**	**Darren T. Brenner**
Cross	**Alessi & Koenig LLC**	**Huong Lam**
Cross	**SFR Investments Pool 1 LLC**	**Diana S. Cline**
Cross	**Sutter Creek Homeowners Association**	**Steven T. Loizzi, Jr.**
Defendant	**Bank of America**	**Darren T. Brenner**
Defendant	**Carias , Armando A**	
Defendant	**Home Loans Servicing LP *Formerly Known As* Countrywide Home Loans Servicing LP**	
Plaintiff	**Alessi & Koenig LLC**	**Huong Lam**
Third Party	**SFR Investments Pool 1 LLC**	**Diana S. Cline**
Third Party Plaintiff	**Bac Home Loans Servicing LP *Formerly Known As* Countrywide Home Loans Servicing LP**	**Darren T. Brenner** *Retained* 702-634-5000(W)

Third Party **Bank of America N A** **Darren T. Brenner**

EVENTS & ORDERS OF THE COURT

06/20/2016 **Motion For Reconsideration** (3:00 AM) (Judicial Officer Adair, Valerie)
Bank of America, N.A.'s Motion for Reconsideration

Minutes
06/20/2016 3:00 AM
- COURT ORDERED, Motion for Reconsideration DENIED, as the amount of the super priority portion was in dispute at the time the tender was made, and Bank of America made its tender conditional. CLERK'S NOTE: A copy of this Minute Order was placed in the attorney folder of: Huong Lam, Esq., Darren Brenner, Esq., and Diana Cline, Esq. -se6/21/16

Return to Register of Actions

Nevada Supreme Court clearly stated that a first deed of trust holder's pre-foreclosure tender prevents the first deed of trust from being extinguished. 334 P.3d 408, 414 ("[A]s junior lienholder, [the holder of the first deed of trust] could have paid off the [HOA] lien to avert loss of its security[.]"); *id.*, at 413 ("As a practical matter, secured lenders will most likely **pay the [9] months' assessments** demanded by the association **rather than having the association foreclose on the unit**.") (emphasis added).

As instructed by *SFR Investments* and *Ikon Holdings*, Bank of America tendered the super-priority amount prior to the foreclosure sale. Shortly after receiving the Notice of Default and Election to Sell, Bank of America, through counsel, contacted the HOA Trustee and requested a payoff ledger detailing the super-priority amount of the HOA's lien. Bank's Mot., at **Ex. E-1**. This payoff ledger showed the amount of the last nine months' delinquent assessments—the unequivocal super-priority amount under *Ikon Holdings*—was $720.00. *Id.*, at **Ex. E-2**. Accordingly, Bank of America sent a check to the HOA Trustee in the amount of $720.00 on June 28, 2012. *Id.*, at **Ex. E-3**. While the HOA Trustee inexplicably rejected the super-priority payment, the super-priority payment still discharged the super-priority lien under the doctrine of tender.

2. Bank of America's super-priority payment discharged the super-priority lien as a matter of law.

Tender is complete when "**the money is offered** to a creditor who is entitled to receive it." *Cladianos v. Friedhoff*, 69 Nev. 41, 45, 240 P.2d 208, 210 (1952) (emphasis added). After the money owed is offered to the creditor, "nothing further remains to be done, and the transaction is completed and ended." *Id.* Other jurisdictions agree that tender is defined as "**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. Kramer*, 99 P.3d 282, 286-87 (Or. 2004) (emphasis added); *see also* 74 Am. Jur. 2d *Tender* § 22 (2014). In its opposition to Bank of America's motion for summary judgment, SFR stated that tender required "an unconditional offer of payment, consisting in actual production, in current coin of realm, of a sum not less than the amount due." SFR's Opp., at 5 (quoting *Equitable Life Assur. Soc. of United States v. Boothe*, 86 P.2d 960, 962 (Or. 1939). Bank of

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America satisfied this standard by producing a check for the full amount due—$720.00—the statutory super-priority amount. Bank's Mot., at **Ex. E-3**. Under the tender doctrine as stated by SFR, Bank of America is entitled to summary judgment.

SFR argues Bank of America's tender offer was "conditional" because it was "dispute[d] as to what is included in the super-priority amount, and Nevada has not ruled on this issue." SFR's Opp., at 3. Nevada has now ruled on this issue, unequivocally holding that the super-priority amount "is limited to an amount equal to the common expense assessments due during the nine months before foreclosure." *Ikon Holdings*, 132 Nev. Adv. Op. 35, at 13. Bank of America tendered an amount equal to the last nine months' delinquent assessments, as this Court found. MSJ Order, at Findings of Fact ¶ 11. Because the full super-priority amount was offered to the creditor entitled to receive it, the super-priority lien was discharged as a matter of law. This Court's analysis should end here—Bank of America is entitled to summary judgment because the super-priority lien was discharged prior to the foreclosure sale.

Bank of America expects that SFR will argue the tender was conditional because the proper calculation of the super-priority amount was unclear at the time of tender. This argument is a non-starter. When a court interprets a statute, "it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994). Put simply, when the Nevada Supreme Court held the super-priority amount of an HOA's lien is limited to nine months' delinquent assessments in *Ikon Holdings* on April 28, 2016, it also held that was the super-priority amount when Bank of America submitted the $720.00 to the HOA Trustee on June 28, 2012. The HOA Trustee's incorrect interpretation of the super-priority amount at that time is irrelevant—"ignorance of the law is no excuse." *U.S. v. Int'l Minerals and Chemical Corp.*, 402 U.S. 558, 563 (1971).

In any event, the plain language of the super-priority statute is unambiguous, and the agency charged with interpreting the statute confirmed the meaning of the unambiguous language well before the HOA's foreclosure sale in this case. NRS 116.3116(2) states the super-priority amount is equal to the amount of assessments that "would have become due in the absence of acceleration during the nine months immediately preceding institution of an action to enforce the lien. . . ." In

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2012, the Nevada Real Estate Division of the Department of Business and Industry (**NRED**), the agency charged with administering the HOA Lien Statute, explained that the "super priority lien based on assessments may not exceed 9 months of assessments as reflected in the association's budget, and it may not include penalties, fees, late charges, fines or interest." 13-01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012); *see also Folio v. Briggs*, 656 P.2d 842, 844 (Nev. 1983) (explaining that courts "are obligated to attach substantial weight to [an] agency's interpretation" of a statute it is charged with administering). The HOA and HOA Trustee's decision to conduct a counter-textual interpretation of NRS 116.3116(2) to increase their profits does not effect on the validity of Bank of America's tender.

By tendering the super-priority amount prior to the foreclosure sale, Bank of America preserved the first-priority position of its Deed of Trust, "avert[ing] the loss of its security" according to the Nevada Supreme Court. *See SFR Investments*, 334 P.2d at 414. Since the super-priority portion of the HOA's lien was extinguished prior to the foreclosure sale, SFR's interest in the Property, if any, is subordinate to Bank of America's senior Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

B. <u>SFR is not a bona fide purchaser.</u>

Bank of America is entitled to summary judgment because SFR is not a bona fide purchaser for value. As SFR correctly set forth in its motion for summary judgment, to qualify as a bona fide purchaser, a party must purchase property "(i) for value, and (ii) without notice of a competing or superior interest in the same property." SFR's Mot., at 11 (citing *Berge v. Fredericks*, 95 Nev. 183, 185, 591 P.2d 246, 247 (1979). SFR cannot satisfy this second element, and thus cannot be a bona fide purchaser, because: (1) its managing member has admitted under oath that SFR knew litigation was necessary to attempt to clear title to properties purchased at HOA foreclosure sales, and (2) Bank of America's Deed of Trust provided SFR with inquiry notice of Bank of America's super-priority tender.

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1. SFR's deposition testimony reveals it is not a bona fide purchaser.

SFR cannot be a bona fide purchaser because its managing member testified under oath that it knew it would have to litigate against those with competing interests to the properties SFR purchased at fire-sale prices at HOA foreclosure sales. SFR's managing member, Christopher Hardin, as a 30(b)(6) representative in another case, testified that beginning in December 2012—before SFR purchased the Property—SFR sought to keep its HOA foreclosure auction purchases at prices "as small as possible because [we] knew [we] needed to expend a bunch of money in litigation." **Declaration of Steve Shevorski**, **Exhibit 1**, at 18:12-21; 20:5-11. In that same deposition, taken on November 11, 2014, Hardin testified that SFR owned over 600 properties. *Id.*, at 15:14.

Put simply, SFR cannot be a bona fide purchaser when it knew there were competing interests to the properties it purchased at foreclosure sales, and it knew it would have to litigate against those holding these competing interests after it purchased a property. Further, having purchased hundreds of properties at HOA foreclosure sales, SFR was well aware of the risk attendant to purchasing these properties at deep discounts, like its purchase of the Property in this case. In light of its institutional knowledge of the HOA foreclosure sale industry, and the particular knowledge that it would have to litigate against those with competing interests in the properties it purchased, SFR's argument that it is a bona fide purchaser is without merit.

2. Bank of America's Deed of Trust put SFR on inquiry notice of the super-priority tender.

Even setting aside its institutional knowledge and sworn testimony, SFR still cannot claim to be a bona fide purchaser because Bank of America's Deed of Trust put it on inquiry notice of Bank of America's super-priority tender. A party cannot qualify as a bona fide purchaser if the party was under a duty of inquiry prior to purchasing the property at issue. *Berge v. Fredericks*, 95 Nev. 183, 188, 591 P.2d 246, 249 (1979). The *Berge* Court explained that this duty arises:

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> when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding **that he has notice of whatever the search would disclose**.

Berge, 95 Nev. at 189 (emphasis added). The Nevada Supreme Court has clarified that "[a] recital in an instrument of record charges subsequent purchasers with notice of all material facts which an inquiry suggested by that recital would have disclosed." *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 499, 471 P.2d 666, 669 (1970).

Here, the recorded Deed of Trust contained the following provision, which put SFR on inquiry notice of Bank of America's super-priority tender:

> If Borrower does not pay [HOA] dues and assessments when due, Lender may pay them.

Bank's Mot., **Ex. A**. This provision of the publicly-recorded Deed of Trust put SFR on inquiry notice that Bank of America could pay off a lien which had priority over the Deed of Trust. Whether SFR actually knew of Bank of America's tender is thus irrelevant, as it was under a duty to inquire if Bank of America had tendered, and it is "charge[d] … with notice of all material facts which" this inquiry would have disclosed. *See Allison Steel*, 86 Nev. at 498.

Inquiring whether any party had tendered the super-priority amount prior to the sale would have been far from onerous—SFR could have simply asked the auctioneer at the HOA foreclosure sale if the super-priority lien had been paid off prior to the foreclosure sale. It could have called the HOA Trustee prior to the sale and made the same inquiry. The fact that SFR chose to bury its head in the sand here is irrelevant, however, because it is charged with knowledge of all facts this simple inquiry would have revealed. For this reason, while SFR may not have had actual knowledge of Bank of America's super-priority tender, as this Court found, it did have inquiry notice of Bank of America's tender, which is sufficient to defeat its bona fide purchaser claim. *See* MSJ Order, at Conclusions of Law ¶ 11(d).

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SFR cannot qualify as a bona fide purchaser, as it had actual and constructive knowledge of the senior Deed of Trust, and inquiry notice of Bank of America's tender offer. Because SFR is not a bona fide purchaser, it is not shielded from the effect of Bank of America's super-priority tender, which extinguished that portion of the HOA's lien prior to the foreclosure sale. Consequently, to the extent SFR has any interest in the Property, that interest is subject to Bank of America's Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in favor of SFR, and instead grant summary judgment in Bank of America's favor.

C. At minimum, there is an issue of fact for trial regarding the balancing of equities.

Even if this Court disagrees that Bank of America's super-priority tender extinguished the super-priority lien as a matter of law, this Court should still reconsider its Order granting summary judgment in favor of SFR, as issues of fact remain regarding equitable balancing. In *Shadow Wood Homeowners Ass'n v. New York Comm. Bancorp*, the Nevada Supreme Court explained that trial courts must balance the equities between a foreclosure-sale purchaser and a party seeking to set aside the sale to determine if the sale should be set aside. *Shadow Wood*, 132 Nev. Adv. Op. 5, at 19. To be clear, Bank of America's tender argument does not require the sale to be set aside. Rather, Bank of America argues that because the super-priority lien was extinguished prior to the sale, the interest SFR purchased at the sale is encumbered by Bank of America's Deed of Trust. Under this argument, equitable balancing is unnecessary, because this Court is not asked to invalidate the sale under its equitable authority.

If Bank of America's super-priority tender did not extinguish the super-priority lien prior to the sale, however, this Court must balance the equities to determine whether the sale should be set aside. Here, the equities favor setting aside the sale. Bank of America provided a $74,462.00 loan to allow the Borrower to purchase a home. Bank's Mot., at **Ex. A**. When the Borrower fell behind on his HOA dues, Bank of America offered to pay the super-priority amount to the HOA, which would help alleviate some of the HOA's financial stress arising from homeowners failing to pay their dues themselves. MSJ Order, at Findings of Fact ¶ 11. The HOA's agent, the HOA Trustee, wrongfully rejected this super-priority tender, and proceeded to sell the Property for 21.8% of its fair market value.

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In contrast, SFR simply purchased the Property at a fire-sale price. Despite its significant institutional knowledge, it did nothing to determine if the super-priority lien had been satisfied prior to the sale. This inquiry would have consisted of a simple phone call to the HOA Trustee. The HOA Trustee's failure to disclose Bank of America's super-priority tender may provide SFR with claims for monetary damages against the HOA or HOA Trustee if the sale is deemed invalid. However, SFR's failure to investigate the Property it purchased and the HOA Trustee's failure to disclose material facts regarding the quality of title it was conveying through the foreclosure sale should not cause Bank of America to lose is secured interest in the Property. As the Nevada Supreme Court stated throughout *SFR Investments*, an animating purpose of the super-priority provision is to encourage lenders to pay off the super-priority lien to provide HOAs with much-needed delinquent assessments. 334 P.3d at 413 ("As a practical matter, secured lenders will most likely **pay the [9] months' assessments** demanded by the association **rather than having the association foreclose on the unit**."). Bank of America did so here. Accordingly, at minimum, this Court should reconsider its Order granting summary judgment in SFR's favor, and allow this matter to proceed to trial to resolve the issues of material fact surrounding the balancing of equities between Bank of America and SFR.

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IV. CONCLUSION

This Court should reconsider its Order granting summary judgment in favor of SFR, and instead grant summary judgment in favor of Bank of America, as Bank of America's super-priority tender extinguished the super-priority lien as a matter of law under *Ikon Holdings*. Alternatively, this Court should allow this matter to go to trial, as issues of material fact remain regarding the balancing of equities between Bank of America and SFR.

DATED this 16th day of May, 2016.

AKERMAN LLP

/s/ *Ariel S. Stern, Esq.*

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DECLARATION OF STEVE SHEVORSKI, ESQ.

1. I make this declaration based on my personal knowledge.

2. I am an associate with Akerman LLP and legal counsel for Bank of America in this action.

3. Attached as **Exhibit 1** to this declaration is a true and correct copy of the transcript of the deposition of Christopher Hardin, the managing member of and 30(b)(6) Witness for SFR Investments Pool 1, LLC in the case styled *SFR Investments Pool 1, LLC v. Bank of America, N.A.*, Case No. A-14-694435-C.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 16th day of May, 2016.

/s/ Steve Shevorski, Esq.
STEVE SHEVORSKI, ESQ.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 16th day of May, 2016 I caused to be served a true and correct copy of foregoing **BANK OF AMERICA, N.A.'S MOTION FOR RECONSIDERATION**, in the following manner:

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

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

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Plaintiff, vs. BANK OF AMERICA, N.A., a national association, successor by merger to BAC HOME LOANS SERVICES, LP FKA COUNTRYWIDE HOME LOANS SERVICES, LP; COREY SCHAEFER, an individual; CHARLA SCHAEFER, an individual; and DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	No. A-14-694435-C Dept. No. XIV

DEPOSITION OF CHRISTOPHER HARDIN
30(b)(6) SFR Investments

Taken on Tuesday, November 11, 2014
By a Certified Court Reporter
At 9:06 a.m.
At Akerman, LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada

Reported By: Cindy Huebner, CCR 806

APPEARANCES:

For the Plaintiffs:

DIANA S. CLINE, ESQ.
Howard Kim & Associates
1055 Whitney Ranch Drive
Suite 110
Henderson, NV 89014

For Bank of America and BAC Home Loans:

TENESA SCATURRO, ESQ.
Akerman, LLP
1160 Town Center Drive
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INDEX OF EXAMINATIONS

INDEX OF EXHIBITS

INFORMATION TO BE PROVIDED

None

(Court reporter's opening statement was waived.)

* * * * *

(Deposition Exhibits A - C marked.)

(Witness sworn.)

WHEREUPON:

CHRISTOPHER HARDIN

having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. SCATURRO:

Q. Could you please state your name for the record?

A. Christopher John Hardin.

Q. Can you please spell that?

A. C-H-R-I-S-T-O-P-H-E-R, J-O-H-N, Hardin, H-A-R-D-I-N.

Q. Have you ever had your deposition taken before?

A. Yes.

Q. About how many times?

A. Maybe four.

Q. When was the last time?

A. Three months ago.

Q. Was that here?

MS. CLINE: I can't remember if it was here.

THE WITNESS: I think it was at another property.

BY MS. SCATURRO:

Q. So it sounds like you probably know the ground rules as they say.

A. Very basically, but remind me.

Q. We will go over them so we are on the same page.

We have a court reporter here who is transcribing everything we are saying so it is important for you to say yes or no instead of an uh-huh or uh-uh. It is also important that we talk only one at a time. She can only get what each person is saying one at a time.

If you have a question or if you don't understand a question that I ask, let me know and I will try to clarify the question. If there is a word that I use that you don't understand, ask me to define it so we are on the same page, we are talking about the same thing.

If you need a break, let me know. I will just ask that you answer any pending question before we take a break. It is not a

marathon. Any time you need a break is fine.

Are you on any medications that would impact your ability to testify today?

A. No.

Q. Have you had any alcohol or other drugs in the last 24 hours?

A. No.

Q. Is there any other reason why you cannot competently testify today?

A. No.

Q. I have handed you what we are marking as Exhibit A, which is a notice of deposition of the Rule 30(b)(6) witness for SFR Investments.

Have you seen this notice before?

A. Yes.

Q. Have you been designated by SFR to provide testimony concerning the topics listed in the notice?

A. Yes.

Q. How did you prepare for today's deposition?

A. By reviewing the records that were held in the SFR office and reviewing public records at the Clark County Recorder's Office, as well as tax records.

Q. So you have a file for this property in your office that you reviewed?
A. We do. We provided it to you.
Q. Did you speak with anyone about your case or testimony in preparation for the deposition other than communications with counsel? I don't want to know anything that is privileged.
A. Other than counsel, no.
Q. How long have you worked for SFR?
A. Since October of 2012.
Q. And what is your title?
A. I am manager.
Q. Is that a corporate manager or like an office manager type designation?
A. Both.
Q. You referenced SFR's office. Where is their office located?
A. The office is located at 5030 Paradise Road, Suite B-214, Las Vegas.
Q. And how many employees are employed with SFR?
A. Approximately eight.
Q. And do those employees work out of that Paradise Road office?

A. Yes.
Q. Do you have an in-house legal person?
A. No.
Q. Who handles SFR's legal matters?
A. Howard Kim & Associates.
Q. Are they the only counsel that SFR utilizes?
A. We have used in the past an attorney by the name of David Rosenburg, but minimally.
Q. What kind of matters was that, did he handle for SFR?
A. Same type of matters that Howard & Associates does.
Q. About how long ago was that?
A. Maybe a little over a year ago perhaps. I can't remember the exact dates, but it has been a while.
Q. What are your job duties as a manager of SFR?
A. I am the sole manager for the company. It is a manager managed company per the Secretary of State. My job is to run all aspects of the company, including the researching and buying of properties, the handling of money, the hiring and firing of

employees, any and all aspects of the company.

Q. So do you report to anybody?

A. No. Under the operating agreement, I have total authority of the company and so I do what I -- the company has been very successful under my leadership so I am left alone to do what I need to do.

Q. So do you own SFR then?

A. No. I am a manager. I am an employee.

Q. So who owns SFR?

A. The company -- the sole member of the company is SFR Investments, LLC.

Q. And is that a Nevada LLC?

A. It is.

Q. Who are the members of that LLC?

A. I believe it is a company named SFR Funding, LLC.

Q. Is that also a Nevada LLC?

A. I believe that is a Delaware LLC.

Q. And who are the members of SFR Funding, LLC?

A. I am not sure. It is a Delaware LLC so I would have to go look at those records.

Q. Do you know if it continues on beyond

that substructure once we get to the next Delaware LLC?

A. I wouldn't know because I don't know the next level, I wouldn't know the steps beyond.

Q. So you stated you have sole responsibility for all of the business functions of SFR Investments then?

A. Right.

Q. How is SFR Investments funded?

A. When I need money, I ask the attorney for SFR to deposit money into the SFR account and he does.

Q. Where does that money come from, do you know?

A. I don't know. You would have to ask him.

MS. CLINE: Just for the record, that wasn't one of the topics listed.

MS. SCATURRO: I believe that is part of the corporate structure.

MS. CLINE: I don't know that it is, but my understanding is that the funding was not included.

THE WITNESS: It is also not relevant.

BY MS. SCATURRO:

Q. So are you paid a salary for your responsibilities as manager?

A. I pay myself a salary, yes.

Q. Are you a manager, officer, or director of any other entity?

A. I am the manager of SFR Investments, LLC.

Q. And what are your responsibilities and role with that entity?

A. The company has no operations so although I am the manager, it doesn't perform any business functions. Although I think one property might be titled in SFR Investments, but except for one property titled under that LLC, it has no operations.

Q. I just want to talk briefly about your background. What is your highest level of education?

A. College.

Q. Did you graduate?

A. Yes.

Q. What is your degree?

A. Political science.

Q. Have you had any legal training?

A. No.

Q. So getting back to SFR, what exactly is SFR? I guess when we are talking SFR so we are on the same page, we are talking SFR Investments Pool, the Plaintiff in this case.

What is SFR's business purpose?

A. To build a long-term rental portfolio.

Q. And how does it go about building that rental portfolio?

A. To be clear, the long-term rental portfolio would consist of single family houses, condos as opposed to other types of rental property, and so we would go out and look around the state of Nevada for investment deals, like many other investors do, nothing new or unusual, and we buy when we see opportunities.

Q. Do you purchase properties outside of the state of Nevada?

A. No.

Q. And do you do anything other than purchase properties and then lease them or rent them out?

A. No.

Q. Does it manage the properties?

A. We do.

Q. So do you have in-house people that manage it or do you work with a property manager?

A. In-house employees.

Q. So it is fair to say that SFR earns rental income from the properties, right?

A. That would be accurate.

Q. Does SFR sell any of the properties?

A. As a general policy, no. However, we have in the past either traded some back for various reasons, but very few.

Q. What do you mean trade some back?

A. There was an instance involving Wells Fargo Bank, a property we had bought, we found out after the sale, we didn't know before the sale obviously, was occupied by a little old lady with dementia and she had difficulty understanding what happened and refused to cooperate with us. I was left with the decision whether I wanted to evict a little old lady or work out a deal to stay in the house. Certainly it is not SFR's policy to harm people, so I got a hold of Wells Fargo Bank who would have been extinguished in that sale and we worked out an arrangement whereby title would be transferred

back to the little old lady and she could stay there. In a case like that where it is a matter of doing the right thing morally, we would do something like that.

Q. Did Wells Fargo pay you to convey the property back?

A. Well, I think the terms of the deal are probably confidential, but let's just say we agreed on an arrangement where the little old lady could stay in the house.

Q. So when we first started talking, you said that SFR has been -- I forget your exact words now -- very successful under your leadership. Is SFR profitable then?

A. I think until the litigation clears up, I think it would be not appropriate to talk about profits because the end is not in sight.

Q. And by the litigation, what are you referring to, this particular litigation?

A. Yes. As you are aware, there was a victory by SFR in the Supreme Court. The banks continue to fight for reasons which are beyond me, and so until we clear that out, I think discussing profits are premature.

Q. What's your definition of success

then?

A. I don't think I have one. I think I will know when I get there.

Q. I was just wondering what you meant when you said they have been successful under your leadership.

A. We have bought a very large number of homes, we fixed them, we rented them, we had court victories. It has not been a terrible two years. Work to be done still, risk ahead of us still, expense ahead of us still.

Q. About how many homes does SFR have in its portfolio?

A. A little over 600.

Q. You referenced the recent what you called court victory. You'll understand if I don't agree with that; but in any case, we are talking about the same recent Supreme Court decision. You were quoted in the Wall Street Journal stating you expected to make a significant return. What exactly is your expectation and what did you mean by significant return?

A. First of all, let's clarify what appears in the press is not always accurate. I

don't think that is quite the phrasing I was using. I think I was misquoted there.

Q. So do you expect to make a significant return?

A. I don't know yet. I know that's what everyone is out in the marketplace discussing, but I don't think we could even talk about that right now.

Q. So I want to go back and talk about SFR's procedures for purchasing properties at HOA foreclosure sales. In 2013, what was SFR's procedure for purchasing properties at HOA foreclosure sales? By procedure, I mean what did you do to prepare for purchasing a property?

A. I would investigate what might be coming up for sale, say, perhaps in the next five business days, by going on websites such as Foreclosure Radar, websites such as Nevada Legal News, I would call collection companies to see what they might be bringing to sale, I would -- I think that is most of what I would do. There are occasions where I would attempt to buy directly from an investor who purchased a property, there were occasions where I reached out to HOA's that I knew had property revert

back to them and try to buy directly off of them. I was using a broad methodology of finding properties. We didn't buy everything. Some we buy, some we didn't. It depends on what I felt like at the time.

Q. How did you make that decision about what you would buy and what you wouldn't buy?

A. Just like any real estate investor would. Is it something that would fit into a long-term rental portfolio, what are the expenses involved, what part of town is it in, does it have a pool, not a pool, what condition is the property in, what legal risk I think might be involved with regard to expenses, how large, how small the house is, is it a condo. Condos typically have higher HOA fees so that is a consideration when you go rental properties. So I would make just a real estate investor decision on these houses, like investors across town do every single day.

Q. So part of that consideration would also be, and I think you said as much, what you could earn from that property, right?

A. In terms of rental income.

Q. And you mentioned the legal risk.

What legal risk were you considering when determining whether to purchase or not purchase a property?

A. I would say --

MS. CLINE: I was just going to ask if you could specify a time frame.

MS. SCATURRO: We were talking about 2013. That is the time of the --

MS. CLINE: The foreclosure sale was in January of 2013?

MS. SCATURRO: That's correct.

THE WITNESS: As you are aware, in December of 2012, the Nevada Real Estate Division came out with an advisory opinion stating that an HOA foreclosure would extinguish a bank lien. As you are also aware, the Nevada Real Estate Division was granted authority by the Nevada Supreme Court to be the regulator of real estate law in this state prior to that. Therefore, when their opinion came out, it was a very powerful opinion.

Unfortunately, some didn't take it seriously, to their detriment. We were wise to take it seriously. When that decision came out, we realized that indeed the bank lien had been

extinguished, we were perplexed why nobody else saw that. It was clear as day to us. Our mission then going forward was to try to explain to people how and why it was extinguished; and so going to these auction on these properties, I had to take into account how long was it going to take me to explain to people what risks, what lawsuits, what expenses, and what if a judge here or a judge there doesn't quite understanding what we are trying to explain to them, what kind of risk does that put us into.

It was really an estimation. We knew we were right. There is no doubt we were right early on. We knew it. The question was how do you convince the rest of Nevada we are right, and it just took time for that to happen and expense.

Q. So that consideration factored in to whether you purchase a property or not?

A. Yes, because it takes a large amount of money. As we are doing the explaining, we are having to stave off foreclosure attempts by lenders, and that is very, very expensive, and so I have to estimate well, gee, if it is going to take me a year and a half to explain this to

the powers that be in Nevada, in the meantime, I may face 150 bank foreclosures, what is it going to cost me to stave off these foreclosures while I do the explaining.

Q. Is it fair to say the price you were willing to pay needed to be as small as possible because you knew you needed to expend a bunch of money in litigation?

A. Yes. Bear in mind in addition to a large and uncertain legal expense I was facing, I have other costs. I had at the time not eight employees but basically built up to eight employees, I had to pay for an office, I had to pay for repairs, I had to pay for leasing efforts, I had to pay off utility liens, I had to pay off second, third HOA's which are the non-foreclosing HOA's, I had to maintain the properties, put toilets in, air conditioners, hot water heaters. The expense is tremendous, so it was a very expensive effort.

Q. You knew when you were purchasing, we can talk specifically about this property, that you were likely also purchasing a lawsuit at that point?

A. No. Because bear in mind, not all of

our properties were in lawsuits. I was purchasing the possibility of a lawsuit and I don't know if one would occur or not.

Q. So let's talk a little bit about -- I guess to back up for a second, so the procedure that you just outlined, has that changed since 2013? Do you have a different procedure that you follow today?

A. No. It is standard real estate investment underwriting. It has been around for a hundred years and won't change for another hundred years. Across the valley, I do the same thing that everybody else does.

Q. When you talk about how you investigate and review the various attributes of properties, do you review like, for example, Zillow when you are researching a property?

A. I will look at a number of websites to try to get a broad view of a property end to end. Zillow is one of the sites I look at. You can't trust any one site because it is off the internet. It is as accurate as the internet is. I will look at it and see if anything pops out that might catch my eye.

One thing I noticed on Zillow is you

will look at a property on Zillow and you will see a section off to the right side that says auctions.com, going into lender foreclosure in two weeks. Well, that is something I have to take into my underwriting.

Q. In that same vein, do you review the recorded documents before you purchase?

A. Yes.

Q. So do you review your understanding -- it sounds like, and I am extrapolating from what you said, so tell me if I am wrong, but you take into account what the market value of the property is and I know you are probably going to say something about the definition of market value.

A. It is real. I am not playing games. The value of things are tricky, and I think you know that; but if you are out spending real money on real assets, you will find that values could move quite a bit depending on situations.

I know people like to go look at Zillow and say this is what it is worth. It is not. It is important to understand that Zillow is something off the internet. It is very important to understand that retail pricing

is -- the highest retail price that people like to quote is if the property had title insurance, if the property was able to obtain bank financing, if the property were purchased by a mom and pop who went out and got traditional financing. There are other values.

Do you use replacement value -- with an appraisal, you have MAI appraisal so you have income approach, you have replacement approach, you have comp approach. There are also conditions of these properties. Zillow does not take into account conditions. Some of these properties are disastrous. The insides are torn apart, the pool pumps are gone, the air conditioners are gone, there are squatters living in there, there are grow houses in there, the yards are destroyed, they need all new irrigation systems, and it's typical -- so a lot of times you don't know this because you can't get into these houses and can't get into these communities so you are taking a tremendous risk when you buy these houses. If I can't see the house or the inside of the house, I have no idea what I am walking into, so I fight that risk as well.

Q. So do you get appraisals done ever?
A. No.
Q. But you could though, right?
A. No, you couldn't because how is an appraiser going to get inside the house?
Q. Don't they have drive-by appraisals that you could do?
A. What is that worth?
Q. I don't know.
A. Nothing. It is worthless. What if the entire kitchen is gone in the house? That is $20,000, $30,000.
Q. So at the time that you purchase a property, you know that regardless of the definition that we are going to use as far as market value is concerned, you know that what you are paying isn't market value, right?
A. No. You don't understand what market value is. Market value is if you put the property up for sale and told everybody in Nevada to come bid on it, what would it go for? That is what a value is, period.
Q. Using that definition.
A. Using that definition in the case of this property, NAS told everybody in the state

of Nevada, everyone in the world on this day at this time the property is going to sale, everyone in the world, all 7 billion people come bid on this property, what would you bid? I bid whatever I bid. That is the value. If you think it is worth more, you should have bid $1 more.

Q. If you listed this property for sale, and I guess we are getting ahead of ourselves here, you agree with me you paid $37,000 for this particular property, right -- actually, let's go ahead and look at the foreclosure deed which is Exhibit B.

A. I paid -- well, on behalf of SFR, I paid $37,200.

Q. If you took this property today and listed it on the market, would you expect to get more than $37,000 for it?

A. Since the day of this purchase, a number of things have occurred which have changed what the numbers may be. You had the Nevada Bar Association, what their opinion is in our favor, you had Clark County come out with the opinions in our favor, you had the CAI come out, you had the law commission come out, the

Supreme Court decision come out in our favor.

If this was purchased today, a number of significant events occurred which have reduced the amount of risk involved in holding these kind of properties. As risk-reducing prices rise, it is basic finance, so I would expect that since risk has been compressed greatly since it was purchased, it would sell for more than this. It still wouldn't sell the highest possible retail value because there is still risk sitting out there, title insurance not obtainable at this time, although we will work on that in the future, so it should sell for more than this.

Q. At the time you purchased this property, again, we will keep in mind the parameters you say, you don't know what the inside of the house looks like so hypothetically it is destroyed inside, but it still has got value, right? It is still land, it is still a structure, if need be for repairs, right?

A. Well, I have had properties where from the outside looked fine, open the front door, they are burned out on the inside, plumbing is gone, wiring is gone, all of the appliances are

burned, it is an absolute disaster.

Q. Let's assume a situation like that, you go in and make those repairs?

A. I don't make those repairs. It is way too much money. We are not built for that. We generally hold them in the portfolio and figure out what to do with them. I think we traded one back with the cooperation of the bank and the bank doesn't want them either. Nobody wants those properties. We are holding them until we figure out what to do with them.

Q. Let's talk about a situation that is not so extreme. Let's say it needs some repair work but it is not a complete dud on the inside, you fix those up?

A. Because --

Q. Generally speaking.

A. Generally, yes. Unless the repairs get to the point where I think it is just too much money to put out right now relative to the ongoing fight, I still have tremendous expense, there is still litigation to be had, thanks to your group, and so I had to plan -- I had to budget out months in advance how much money I want to spend on maintenance versus repairs

versus running the office, salaries. I have to pay HOA assessments every month. I have lots and lots of bills to pay every month so I have to budget things out. And so as I believe it is warranted, I may repair some of the lower value repair jobs. Some of the houses have significant repairs needed and I will let those sit for right now until I figure out where the litigation is going to go on this.

Q. In a situation where there is minimal repairs, let's say you go and make the repairs, I understand this isn't your business model to resell the properties, but if you wanted to resell the property at the time, you know, let's say within a few months of your purchase at the foreclosure sale, would you expect to have the property sell for an increased value than what you paid for it?

MS. CLINE: Objection. Incomplete hypothetical. Do you want to talk about maybe this property specifically?

MS. SCATURRO: Yeah, we will get there.

THE WITNESS: I will say that I don't think this has anything to do with the fact that

your bank did not handle its responsibilities prior to the sale. It has zero to do with your case.

As you probably know, prices were rising and falling with the legal situation. As judges ruled in favor of our position, prices might rise a little bit. As a judge might rule against it, the price might fall down a little bit. As the Nevada Bar Association and Supreme Court come out with a decision in our favor, price went back up. It depends on the legal setting at the time.

So to say the value would be more or less at any one time, it would depend on what period of time we are talking about and what the legal environment was at that moment because prices have been fluid for two years.

BY MS. SCATURRO:

Q. Let's go ahead and talk about this property. How did you learn about this property? For clarification, the property address is 1354 Manorwood Street, Las Vegas, Nevada, 89135, and it is located in the Allerton Park HOA.

A. How did I learn of it?

Q. Yes.

A. I believe in this case, I would have utilized perhaps three different sources. I am going on distant memory. I believe I would have noticed it was going to sale by using Foreclosure Radar, I would have noticed it was going to sale by using Nevada Legal News, and probably just prior to the sale, I would have reached out to NAS and asked for the sale list for that week and they would email it to me just like they do for any investor, you call right now and get the list for Friday and it is available to anybody.

Based on those three sources, I zeroed in on the property. When I went to the auction, as it turns out, I was lucky enough to get a bite.

Q. We talked about your general procedures for purchasing properties. What did you do in this case prior to the sale to determine that SFR wanted to bid on the property?

A. I reviewed public records, I reviewed various real estate websites to see if there is anything interesting about the property I should

be aware of. Some of it I don't know what I am looking for sometimes, just anything that pops out of interest. I reviewed the SID's and LID's website for Nevada, amgnv.com. I reviewed the tax records just to see if there is anything I need to be aware of or cautious about, as any investor would.

Q. When you were reviewing the Recorder's website -- I believe you testified you were reviewing the Recorder's website. I am not sure if you were that specific.

A. Yes, I did.

Q. Did you obtain any copies of the recorded documents or did you just look at the listing on the website?

A. Based on what I saw on the Recorder's website, there is no need for me to get copies of the documents. They were fairly obvious what they were.

Q. Did you see any deeds of trust on the Recorder's website?

A. I am sure I did.

Q. So at the time you purchased the property, you were aware of Bank of America's deed of trust?

A. I was aware it would be extinguished by the foreclosure sale.

Q. So is that a yes?

A. Yes.

Q. Did you review the CC & R's before the foreclosure sale?

A. No.

Q. Is that something that you would do as part of your process generally?

A. No.

Q. Why wouldn't you review the CC & R's?

A. Because they don't have any real relation to the investment of the property.

Q. So you wouldn't want to know if there were certain restrictions on a given property that maybe required some sort of maintenance or compliance that you, you being SFR, wasn't willing to incur the expense or have the obligation to do?

A. For example, what are you referring to?

Q. For example, if the CC & R's say that the yard has to have three date palms in it and you don't know that and let's just say -- because I don't even know. But let's just say

date palm trees are a couple thousand dollars each because they have to be mature ones or something and this one had the yard totally gutted out and you needed to incur the expense of bringing it up to the maintenance set forth on the CC & R's, isn't that something you would want to know?

A. No. As we discussed, part of my calculations in looking at how much I am willing to pay for these properties go back to as we discussed earlier, the yard may be destroyed, may not be destroyed, the house may be destroyed inside or not, so it is a risk I take.

Q. Do you view the properties prior to the auction, you drive by and check them out?

A. No. It is very difficult to get into those communities and certainly into the house.

Q. Did you review the County Assessor website for this property prior to the sale?

A. I don't remember.

Q. Is that something that you would typically do?

A. Typically. I may not do it every single time, but it is not unusual for me to do it.

Q. The Assessor's website indicates the assessed value of the property, right?

A. Yes.

Q. So you would have an indication of what at least the taxing authority thinks the assessed value is prior to the time of the sale, right?

A. Yes. But again, it is meaningless because the County has no idea what the condition the property is in or what the status of the property is, so you can't use assessed value as having any real worth.

Q. I reviewed some testimony that you previously gave in another lawsuit in a deposition and it is my understanding that when you are doing the research for the properties that you were trying to determine whether you want to purchase or not, you maintain a spreadsheet; is that correct?

A. Ask the question again.

Q. It is my understanding that when you are researching the property prior to the foreclosure sale, you put together a spreadsheet of the property that lists basic information and kind of ballparks where you want to start the

building at that you take with to foreclosure sales; is that right?

A. No. What I do is I will get the spreadsheet I am given by the foreclosure company or off of Nevada Legal News and that will list what is going to sale. I will then plug in things that I am interested in such as the date the house is built, how much bedrooms, what community, how many HOA's are involved, things that I mentioned about those houses. That is kind of what I work with. And then when the auction is over, I just throw it away. I don't have a need for it. Otherwise, I will have hundreds of them sitting around for no reason.

Q. So you don't have the one for this property then?

A. No. Just close up my files.

Q. So on this particular property, when did you learn of the opening bid price?

A. At the auction.

Q. So is it fair to say that the auctioneer told you what the opening bid price was?

A. Well, me and everyone else who was

attending the auction, yes.

Q. And do you recall what the opening bid price was?

A. I don't recall from memory, although I could look on the deed and the paperwork and surmise what it was.

Q. If you could do that, please.

A. It may be on the receipt, not the deed.

Q. I probably have that information somewhere.

A. I don't think it matters. It is an irrelevant piece of information.

Q. I believe it was around $8,900. Does that sound accurate?

A. Yeah, I think it was a few thousand more, but a little over $8,900 sounds correct.

Q. Do you remember what your opening bid was?

A. No. I don't know when I got into the biding. I may have watched it for a bit before I jumped in. Sometimes I will be the first bidder and sometimes I will hang back and see how the energy of the auction is going.

Q. In light of that, how do you determine

your bid price? I have never been to an auction.

A. I will be very honest with you. A lot of it is gut instinct. It is a feel. I know a lot of people think it is a science and you hire a college kid and you give them a credit line. Some days, bidders are really aggressive and bid up high and some days, they are very quiet and not biding up high at all and you jump in and you take a property.

It is just the feel of the day, the energy of the day, who is there, who is not, my confidence level and how the court procedures are going, how much risk I am incurring. I will sometimes not place a bid on a property until literally halfway into the biding. I will show up and not expect to bid on a property and then I will see biding surprisingly to be very soft and I will just jump in and take it and had no intention of doing that a minute ago.

Q. I don't know if on this property you have a specific recollection, but do you walk into the auction knowing for this Manorwood property, I am not willing to go over $50,000, let's say?

A. I think every investor goes to every auction has on their mind what they are willing to pay, but I also think some investors are more hard on that line than others on that line.

Where bidders are provided a hard credit limit, they can't go into the credit limit. I can do what I want. I could bid anything I want on any property I want. I could not bid, bid, go to auction, not go to auction, do whatever I want to do. I go in with some thoughts that gee, I hope I get it for this kind of a price, but sometimes I will get it for less than what I hoped and sometimes I will pay more.

Q. Do you remember how many bidders were at this foreclosure sale?

A. I don't, no.

Q. Do you think it was -- can you estimate? Was it like 20?

A. I really don't know. It was enough that the biding went from, let's say, $8,900 to $37,200, so it was an active biding session.

Q. Again, keeping in mind I have never been to one, how many bidders typically I guess would show up at an auction?

A. Depends on what auction, and perhaps

you should go to some auctions. It might save you some questions at these depositions.

It depends on which auction you go to. There is auctions -- there is several auctions that occur in town. There is one at 4th Street, there is one at NAS. Anywhere from I have seen as high as -- well, the day after the decision came out, NAS was -- probably sixty bidders showed up and so it was a full house. Other days, it might be eight or nine.

Q. Are there people that you know at these auctions or is there sort of like oh, I see you at auctions all the time?

A. Admittedly, I do see some of the same people every single day. We are competitors. We are not mean to each other, but it is business and it is money and we compete against each other.

Q. Turning back to the foreclosure deed, about the fourth line from the bottom, the foreclosure deed states it is without warranty expressed or implied, right?

A. Go to the sentence you are looking for.

Q. The first paragraph, four lines up

from the bottom.

A. I am looking for the word warranty.

Q. First paragraph.

A. Thank you. I was in the wrong paragraph. Okay, yes, I found it.

Q. So that would be the foreclosure deed lists without warranty expressed or implied, right?

MS. CLINE: Objection. He is not an attorney.

THE WITNESS: Yes, the words are there.

BY MS. SCATURRO:

Q. Do you know what that means as a real estate person and layperson, do you know what that means?

A. Well, I would rather not get into trying to define what legal things mean.

Q. I am just asking what it means to you.

A. As far as I am concerned, what this deed in general means is I am taking this free of anything that occurred prior to the sale so I walk away -- what happens to the monies, what happens to the parties before the sale, it is none of my business and I take the property as

is.

Q. What do you mean by "as is"?

A. Possibly missing a kitchen, possibly having no yard, possibly having utility liens against it.

Q. Turning to the third page of this packet, this Declaration of Value form, who completes the Declaration of Value?

A. In this case, NAS.

Q. Did they consult with you at all to complete this?

A. No.

Q. Do you know why they indicated the value of the property at $37,200?

A. No.

Q. But that is what SFR pays taxes on, right, that value?

A. Yes, uh-huh.

MS. CLINE: The transfer tax, right?

THE WITNESS: Yes, transfer tax.

BY MS. SCATURRO:

Q. And then turning to what was marked as Exhibit C, have you seen this before?

A. Yes.

Q. What is it?

THE COURT: So, but it has to be an impropriety --

MR. STERN: No.

THE COURT: -- that -- that the purchaser was aware of, or should have been aware of, or something like that.

MR. STERN: And that's -- and that's -- and that's the key thing; should have been aware of. And SFR should have been aware of, and actually was aware of --

THE COURT: Well, knew or should have known. I mean, that's --

MR. STERN: -- and actually was aware of --

THE COURT: -- kind of the standard.

MR. STERN: The other thing, Your Honor -- and this is unique to SFR. And I'm blanking on the dates here, but I believe since the sale took place on -- in February of 2013, SFR would have a separate and very specific to them reason to know that Bank of America, at least, was tendering. And that is, one of the lawyers who works for SFR used to work for Akerman, and she was in charge of making these tenders. And so, she has the knowledge --

MS. GILBERT: Your Honor, I object to this entire comment. He has never brought this up before; has no right to bring it up now.

THE COURT: Okay.

MS. GILBERT: We're on summary judgment.

THE COURT: Right. Well, it's not part of the --

the record in the case.

MR. STERN: It's not part of the record --

THE COURT: So --

MR. STERN: -- in the case, but I'd be happy to make it part of the record, Your Honor.

THE COURT: Well, you don't need to, because, again, that's only relevant -- okay, I mean, I knew --

MR. STERN: SFR would have reason to know --

THE COURT: Okay.

MR. STERN: -- is what I'm saying.

THE COURT: Well, I know. And that's only relevant as to the timing of the sales.

MR. STERN: Right.

THE COURT: And right now, we're not -- because the earlier sales, SFR really -- and all of these other purchasers didn't really know what the extent of the litigation would be. They -- I mean, and they don't -- we still don't know. When is there going to be other rulings for the -- from the Supreme Court on this federal preemption thing? You know, there may be a ruling from the -- there's a division between the federal District Court judges, as we discussed last time.

MR. STERN: Yes, Your Honor.

THE COURT: And so, you know, I don't know. Certainly, early on, they may have been buying litigation, but I don't think it was foreseeable, the extent of the litigation

and the uncertainty that's -- that's I guess gone on for the length of time it's gone on for.

MR. STERN: I mean --

THE COURT: That was a poorly constructed sentence, but you got what I meant.

MR. STERN: I mean, I think, Your Honor, if what you're saying is that they didn't know that there would be hundreds of cases --

THE COURT: Well, they didn't know --

MR. STERN: -- that that's one thing --

THE COURT: Well, no, they didn't know --

MR. STERN: -- or whether this would be an issue.

THE COURT: -- how long it was going to take the Supreme Court to issue rulings. They didn't know -- I mean, one possibility could have been what Judge Crockett has been ruling, and I think some other judge ruled this, that it was conclusive -- a conclusive presumption, and that was it, and there was no other inquiry.

I know of at least -- I think there were two District Court judges, but I know for sure Judge Crockett was ruling that way. So, I mean, they didn't know. You know, we could have had a different decision from the Supreme Court that would have put a lot of this to bed. So, all I'm saying is, yes, they knew they were buying litigation --

MR. STERN: Yeah.

THE COURT: -- but I don't think any of us know -- can say that it was foreseeable the --

MR. STERN: But --

THE COURT: -- extent of the litigation.

MR. STERN: But whether it was foreseeable or not, Your Honor, does not mean that they were -- the fact that they didn't foresee it doesn't mean that they're BFP.

THE COURT: Right. No, but all I'm saying is -- just, I was making a comment. Anything else, Mr. Stern?

MR. STERN: I don't disagree with that -- the comment, Your Honor, about the extent of the -- yes, Your Honor.

Just in conclusion, the Court did not really do anything here to indicate that you've been ruling on these tender cases incorrectly. To the contrary, they simply want detailed, factual records. And we have this here on the issue of tender.

So, our position -- I don't -- I've been taking a while here and I think some of my statements can probably serve as opposition to Ms. Gilbert's argument as well.

THE COURT: Right, so I don't think we need to hear from you again. Is that what you're saying?

MR. STERN: That's exactly what I'm saying. Because of what Shadow Wood said and didn't say, we believe that at this point, summary judgment in favor of SFR is improper,

because all of those issues, to the extent that the Court has doubt about commercial reasonableness, and adequacy of price, all that I think needs to be tried.

THE COURT: Well, the only thing I would say there is, to me, once you've done discovery, unless you can make a showing that there was some kind of collusion, or impropriety, or something like that, in my view, we don't get to commercial reasonableness.

Now, if you can make that showing, first of all, that would give you the right to do discovery, which is something maybe I haven't been allowing the Banks to do. But once you've done the discovery, and gotten the file, and figured out the relationships, and what notice of the sale was given --

MR. STERN: Yes.

THE COURT: -- if you don't have anything to put up to show that, hey, there was an impropriety here, there's -- you know, the HOA's cousin is the one who noticed the sale, and his brother-in-law is the only guy that -- you know, the cousin -- you know, they were cousins, that's the point, or something like that, then I don't know that we get to that question.

MR. STERN: Well --

THE COURT: But I could be wrong on that.

MR. STERN: Your Honor, given that, I would --

THE COURT: But, you know, again, that gives you the right to do discovery to see, who are these people? And I think that's what that last case --

MR. STERN: Given that commentary, Your Honor, if -- I think I'll close on this. I think you should grant the Bank summary judgment based on the tender. If you're not inclined to do that, and on the other hand are inclined to give SFR, based on the fact that this is a brand new case, Shadow Wood, I think there's grounds for us to take limited 56(f) -- I haven't done an affidavit on this, but I would ask for it orally, that we allowed to take the discovery into those issues if you're leaning in their favor.

THE COURT: Well, that would be the only, I think, thing at that point in time. The only way you would get summary judgment is if the Court found, and consistent with what I've been finding in the past, that your tender was sufficient --

MR. STERN: Um-hum.

THE COURT: -- and that they take subject to your Deed of Trust. That would be the only thing.

On the other arguments that you've made, the Court has previously rejected them, and I didn't see anything in the Shadow Hills (sic) decision that would cause me to now accept those on a summary judgment basis. So --

MR. STERN: And -- and -- and I'm not going to talk

-- I'm not going to try and talk you any further out of it, Your Honor, but again, we believe that Shadow Wood now makes it improper to grant SFR or the other buyers summary judgment, really, on any case. I think the signal was, these things need to be tried, because it's intentionally equitable, and that's not appropriate for summary judgment. So --

THE COURT: But if all of the facts have been fleshed out -- again, to me, more of the message there was you need to let discovery happen. But if everything's been fleshed out through discovery, then the Court's the one that's going to make an equitable determination.

So, if there's a record before the Court for the Court to make the equitable determination, there's no dispute of facts; all of the facts are in agreement.

Now, obviously, if there's an issue of impropriety, or fraud, or something like that, that is a triable issue, and I don't know how that could ever be resolved on summary judgment, because -- unless the -- you know, the other side says, oh, yeah, I did commit fraud, but you're never going to get that.

So, those issues are always going to be triable, because it's always going to boil down to credibility. Those are always going to mandate a trial. But in those cases where you don't have that --

MR. STERN: Yeah.

THE COURT: -- to me, we're back to summary judgment where the numbers are all fleshed out.

Now, if there's a dispute on the numbers -- not the meaning of the numbers, but the numbers themselves, you might have to have a trial to figure out, well, this was the correct assessment, or they did get notice of this assessment.

Let's just say, for example, they gave you the wrong sheet, okay? And you say, oh, this is the sheet they gave me, and they say, no, this is not the -- the ledger, I guess. By sheet, I mean ledger.

MR. STERN: Right.

THE COURT: That might be a factual dispute that you would have to flesh out at trial. But if everybody's in agreement, this is the ledger, this is the numbers, we did discovery, there was no collusion here, I don't know what -- I'm still kind of wondering what -- what are you going to try? I know some judges are having trials on everything, and I'm sitting there thinking, well, what are we trying here? But --

MR. STERN: Well, Your Honor, we --

THE COURT: You know, like I said, fraud is always going to be a triable issue.

MR. STERN: We --

THE COURT: Collusion's pretty much always going to be a triable issue.

MR. STERN: There was a number of instances, maybe

two or three times where the Court in Shadow Wood said expressly, this isn't appropriate for summary judgment, and I don't think they were expressing --

THE COURT: Right. Well, I think one --

MR. STERN: -- dissatisfaction with the factual record.

THE COURT: -- of the things they were saying was that the -- that there's not enough of a factual record on some of these issues.

Now, again, that doesn't mean that you have to go to trial on them if there's been discovery, and there's no question of fact based on the discovery and the evidence before the Court.

MR. STERN: Right.

THE COURT: But we don't need to resolve that today.

MR. STERN: The only thing I would ask, again, is if you're inclined to deny the Bank's Motion for Summary Judgment, that discovery be reopened.

THE COURT: We also deny SFR's motion?

MR. STERN: Well, yes, I think -- I think that goes without saying, Your Honor.

THE COURT: It goes without saying.

MR. STERN: Certainly, we want you to do that. But we additionally would ask that you allow us a brief limited of reopened discovery so that we could flesh out some of the

issues in this new decision, and we believe that's good cause. I apologize I don't have a 56(f) affidavit given the timing here. But, certainly, the Shadow Wood decision, if your thoughts on it are the way we're going to go, I think that certainly would have been useful guidance in the discovery process, and because of the timing here, we believe it's good cause --

THE COURT: Okay.

MR. STERN: -- for us to take another --

THE COURT: Let's hear --

MR. STERN: -- month or two on some of the discovery. Thank you, Your Honor.

THE COURT: Let's hear from Ms. Gilbert.

MS. GILBERT: Well, Your Honor, obviously, I disagree with Mr. Stern.

First, as to discovery -- I agree with Your Honor as to summary judgment can be granted. And I believe what happened in Shadow Wood and why they had to remand is because the District Court summarily, without making findings, determined there is no BFP, et cetera.

This Court can look at the record before today and make those -- make those decisions, and SFR can be granted summary judgment. They can't, because they have produced no evidence of fraud, collusion, or unfairness. They have produced no evidence that SFR is not a BFP.

It's not enough to know that somebody may come in equity -- Shadow Wood said this -- that not enough to know that somebody may come in equity and seek to overturn title or something like that, to know that that might possibly happen. You have to know something beyond that.

SFR, in February of 2013, was just starting its litigation, and it wasn't over things like tender. It was, the statute couldn't possibly mean what the statute means; the prior can't mean prior. And so, to sit here today and say that we knew -- just because we knew there was litigation -- in fact, the cases they rely on --

THE COURT: And I've rejected that.

MS. GILBERT: Yeah.

THE COURT: I mean, like I said --

MS. GILBERT: And the cases they've relied on --

THE COURT: -- I don't think anyone could have foreseen this.

MS. GILBERT: -- were expressly returned from the Supreme Court saying -- saying that because they knew there was litigation, or that because there was a Senior Deed of Trust that existed is not enough to defeat BFP status.

First, you don't even have to deal with the Restatement here, because the price here -- if we accept, arguendo, that their expert is correct, the price is over 20 percent, so you don't even have to deal with the Restatement

here.

So, now you're looking at fraud, oppression, and fairness, something they have produced nothing of. There is no question of notice. There is no -- they didn't raise anything about whether they had the right to sell it. None of those things were brought out.

To say that they need more discovery is disingenuous. We have been raising the issue of fraud, unfairness, and oppression consistently to their arguments of commercial reasonableness. We have been citing Long v. Towne throughout the whole thing.

To now say, I need to go back and look for this; you had a chance, you blew it, you don't have it, you don't get to do more. It's just -- it's wrong to allow them to go on a fishing expedition for something they have no genuine right to at this point, or can even sit here and say under Rule 11 that they believe it existed, because there isn't any.

As far as whether this -- the tender was sufficient, the Supreme Court has left that open. And it had nothing to do with whether or not this was a homeowner for this part of it, because on page 17, it expressly says, the question of whether, and if so, to what extent costs and fees are recoverable in the context of an HOA super priority lien --

THE COURT: Right.

MS. GILBERT: -- is open, particularly as to

foreclosures that predate the 2015 amendments. So, they produce a check for 720, and a letter that says, cashing this check conclusively says this, and you're agreeing to it. It's the same letter that they always produce. So, there's a dispute.

Now, my -- SFR's position is that if there is a -- CC&Rs, there is an HOA lien, there is a first Deed of Trust, and the first Deed of Trust believes that it has paid or done something to elevate its -- its Deed of Trust over the HOA lien, it absolutely under the recording statutes needs to record something.

In fact, now it's required, because that puts the world on notice that the status of those liens has changed. And so, we believe that they would have to do something.

The other part of this is, whether you're looking at equity or not, I would challenge that there may not be a right to an equity. This is a homeowner, and it does talk about a homeowner having a right in equity. As a Deed of Trust holder, what they have a right to is money. They have a right to sell the property for money. They may take title to it, in which case they become a homeowner, but their right is to sell the property.

Have -- they have a remedy at law, so I don't know that equity applies. But if it applies, then they have to use some of their vast resources to put the world on notice that

they've done something, and here, they didn't do any of that. They sent a letter, they sent a check; it got rejected. They didn't show up at the sale, they didn't record something, they didn't do what SFR was forced to do in the beginning of all these litigations a few years ago, which is to run into court and get -- get an injunction to prevent the sale from happening when they wanted to sell out from under SFR. So, to say that, you know, all we have to do is one thing and we're protected I think is wrong. It's simply wrong.

And BFP -- they've provided nothing to show that SFR isn't a BFP; that we had any knowledge that they had offered a tender; that we had done any of those things. Again, we're at summary judgment. Discovery's closed. I don't think there's a need to reopen it.

If they have a remedy, and if they were somehow wronged, then they have -- they have relief. They have relief at law, but it doesn't -- shouldn't be taking the title away from SFR, who came in, paid significantly more than what was owed on the property at that time for the HOA lien, and was more than 20 percent of -- of the -- their expert's value, assuming that for the purposes of this motion --

THE COURT: Was correct.

MS. GILBERT: -- was correct. I think there was a dispute in the amount that's collectable. If there wasn't a dispute, they wouldn't put in the letter, this -- by cashing

this, you are saying that we are right. I think that shows that they had a dispute.

So, I think at this stage that you -- the tender, when you actually are looking at it, if you're going to look at balancing equities, it's not automatic anymore.

THE COURT: Yeah. I think in the past when they've done the letter -- and the Bank, Mr. Stern, to my recollection, doesn't always do the letter. In the past when the Bank has done the letter, I've said, well, you know what, there is a dispute here, and it's sort of unfair to condition the tender upon the HOA's inability then to try to collect additional funds under the super priority lien statute.

I think we've had one case like that in the past. But am I correct, the Bank doesn't always do the letter? That was eliminated after some period of time, and the Bank just does the tender without the letter; isn't that true?

MR. STERN: There -- yeah, Your Honor.

THE COURT: Right.

MR. STERN: And it isn't always --

THE COURT: Because I think I was sort of annoyed by the -- by the letter; that the Bank didn't just tender, but made their tender conditional on the HOA's acceptance that the Bank was right. And I think we've had one case where that happened, and I -- and I ruled against the Bank, or on that one.

And so, isn't it true that the Bank only did the letter in some cases; the Bank didn't do the letter in every case?

MR. STERN: I believe that's true, Your Honor, although I would add that the letter wasn't intended to say that the HOA -- that the HOA was right or wrong; it was basically saying we're paying the super priority, and --

THE COURT: And this is the amount, and so, I mean --

MR. STERN: And this is the amount --

THE COURT: -- implicit in that though is that our calculation is right.

MR. STERN: Well, that's not a condition, Your Honor. And the other -- the other important -- it's not saying that you -- you know, by taking this amount, you agree to this, this, or this. It's basically saying, the Bank has tendered the super priority amount. It's basically a statement of what the purpose of the payment is. The other issue -- and this is -- I don't know if this --

THE COURT: But doesn't it say something -- and I'm paraphrasing; I don't have the letter in front of me.

MS. SCHIMMING: We'll read --

THE COURT: Your acceptance of this indicate -- resolves the issue, or is conclusive, something --

MS. SCHIMMING: Do you want me to read the actual

sentence?

THE COURT: I've got it here somewhere, but --

MS. SCHIMMING: "This is a nonnegotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein, and express agreement that BANA's financial obligation towards the HOA in regard to the real property located at 3617 Diamond Spur Avenue has now been paid in full," along with, on the check, it's saying, "to cure HOA deficiency". And the entire letter is saying, our obligation is only nine months, which is clearly --

THE COURT: Right.

MS. SCHIMMING: -- in question.

THE COURT: Anyway, I'm sorry to cut you off. But I just wanted to make sure that that -- my understanding of this letter business was correct.

MR. STERN: There's another important piece of this, Your Honor.

THE COURT: Mr. Stern, your turn is over. I wanted to make sure that my factual impression was correct. It seems to be correct. The Bank does the letters in some cases, and not in other cases.

MR. STERN: I'll sit down, Your Honor.

THE COURT: All right.

MS. GILBERT: So --

THE COURT: Ms. Gilbert?

MS. GILBERT: -- basically, what SFR would say is that we believe that the factuals -- the facts in this case have -- they're before you, Your Honor. There's nothing in the record that shows that SFR knew about whatever dispute was going on with the HOA. They have proffered no evidence of that. They've -- they have deposed SFR, they've gotten the information from --

THE COURT: The file.

MS. GILBERT: -- from the file, they've gotten that. There is no other discovery that they actually need to do, other than go on a fishing expedition. And we believe that you can't. I believe that you have read this right, is the -- the problem with the record before the Court in this one was that the Court didn't say why there wasn't a BFP; it didn't say why certain things existed.

Again, I don't even know that equity exists here for them to be able to come in under equity, because they have an adequate remedy at law, and that has been the law in this state since the 1800s.

But if they do, then the equities I think weigh -- if you take all the facts that are before you, and include the fact that the price paid was more than 20 so you don't have to take the Restatement into consideration, I think you can rule

in SFR's favor.

THE COURT: All right.

MS. GILBERT: Do you have any other questions for me?

THE COURT: No. I'm going to just re-read -- I've read the case; I'm going to read it again. I'm going to issue a decision from chambers.

MS. SCHIMMING: With -- just -- well, I'm sorry, but with regard to the HOA, they did file a Joinder in this case to both the summary judgment motion --

MS. SCHIMMING: -- and the Opposition, and I just would like to be heard briefly on the --

THE COURT: Okay.

MS. SCHIMMING: -- fact that the cause of action against the Homeowners Association that has not already been something decided, constitutionality, what have you, is the tender issue. And to the extent that that issue exists, I want it to be known that the Homeowners Association is seeking summary judgment in that respect, as well. And the same argument applies.

In this -- in situations where a check is given and it's unconditional, we will absolutely accept a check, apply it, and say, hey, this amount was paid. Nine months of the assessments were paid. Nine months plus this were paid. Two months of assessments were paid, what have you. But when you

have a --

THE COURT: Yeah. And as I said, I've been ruling that if it's an unconditional tender and it's the right amount, that the purchaser takes subject to the Deed of Trust. I've only had it one time, and maybe I overlooked a letter in another case, but to my recollection, I've been ruling that when there's a conditional -- well, if it's the wrong amount, then certainly if there's a letter that it's unconditional, certainly the Bank loses.

If -- you know, I'm a little -- I guess -- I don't know. I'm a little unsympathetic, I guess, to the Bank when they -- when they make their tender conditional upon the HOA's exception -- acceptance of the unconditionality of the tender. So, by that, I mean, you know, take this, negotiate it, and by the way, you waive any other claims that this is the wrong amount.

MS. SCHIMMING: And the only thing I want to --

THE COURT: And I've been a little put off by that, frankly --

MS. SCHIMMING: The only thing --

THE COURT: -- and I've said that in other cases, so.

MS. SCHIMMING: The only thing I want to add to that is, if Alessi & Koenig did in fact accept that amount with those conditions on it, they're opening themselves up to

liability as the HOA, and opening themselves up to waiving the HOA's rights where they shouldn't be waived.

THE COURT: Right. And that's why I've been somewhat -- even though I don't agree with the HOA's calculation of the amount, I've been somewhat sympathetic to the HOAs on the argument that we don't negotiate these checks because of the letters. And some banks were tendering without the letters.

MS. SCHIMMING: And we -- as you can see, we have absolutely accepted. If payment is just made, it's accepted, and applied, and announced at the sale, so.

THE COURT: In any event, I think I understand everybody's position. I don't have any other factual questions. I think if I misstated some of the facts, you guys had an opportunity to correct that, so I think I have a good understanding of what facts have been developed in this case. Yes?

MR. STERN: Your Honor, I'd like to ask for just a very -- and I mean a very brief response to -- not Ms. Gilbert's, but Alessi's argument.

THE COURT: Okay.

MR. STERN: Because I think it's --

THE COURT: And that, to me, is just regarding a letter, and --

MR. STERN: Yes, it is regarding the letter.

THE COURT: Didn't we talk about that already?

MR. STERN: Yes, Your Honor, but that was before there was this additional presentation, so.

THE COURT: Okay. Well, just briefly, because I think you had an opportunity to discuss the letter --

MR. STERN: Yeah, the --

THE COURT: -- and the nature of the fact that the letter required them waiving -- sort of waiving their rights.

MR. STERN: The law on this, Your Honor, we believe is --

THE COURT: Didn't you brief this?

MR. STERN: Yes, I think so, Your Honor.

THE COURT: But in any event, it's faster for you just to make your argument than find out whether you briefed it or not.

MR. STERN: The argument, Your Honor, is that the --

THE COURT: If you didn't brief it in this case, and I think you did, it's been briefed in other cases. I think you did brief it though.

MR. STERN: The issue is, that it's not a bright-line rule as to whether it's unconditional or not. I mean, certainly, the cases talk about conditions and the fact that it has to be unconditional. But if you -- if you place a condition that you have a right to insist on, that does not defeat tender.

THE COURT: Yeah. I guess my point would be, if the law were established, and the law established that you had this right, then you can insist on it. But when the law is open and there hasn't been any decision on it, I'm a little put off by your insistence on something that's still an open question of law.

MR. STERN: But what do we --

THE COURT: That was my point.

MR. STERN: But what do we do, Your Honor, when you decide it way or the other, and then it goes up on appeal, and maybe the Supreme Court comes to a different decision? I think --

THE COURT: Well, I mean, they could have written a letter that says, this is our opinion as to what is required in this case, and therefore, we are tendering the amount that we calculate is required.

MR. STERN: That's essentially what they did.

THE COURT: They could've done that letter.

MR. STERN: That's essentially what they did.

THE COURT: Well, I read the letter --

MR. STERN: It's --

THE COURT: Okay. Number one, the letter speaks for itself. Number two, if my interpretation of the letter is incorrect, the letter speaks for itself, and so someone else is free to interpret it however they want to interpret it.

The way I read the letter is I think pretty evident by its plain language, that it is an unconditional acceptance.

And so, what I -- what my point is, you could have done, meaning, your client, could have done a different letter that said, this is our calculation and that's why we're tendering this amount. Thank you, good day. That wasn't done. And so, you know, the import of that remains to be seen, but I interpret the import one way, and somebody else --

MR. STERN: And our only point, Your Honor, is to the extent that you do find it's a condition, we -- it's a condition that -- consistent with what you believe the law is, it would have been a condition we were entitled to insist on.

THE COURT: And again, my only point is the law's unsettled, and so I hate to make people waive their rights on an area of unsettled law. And there are plenty of District Court judge -- well, I think the majority of the District Court is in the same camp I am on that assessment, and -- but there are other judges who disagree with that. And so it's clearly unsettled. That's my opinion, and I think that's true, because it's on -- you know, the judges don't all agree, so it's --

MR. STERN: Yeah.

THE COURT: -- unsettled. And the Supreme Court hasn't told us what the answer is yet.

So, thank you. Look for something Monday from

chambers.

MR. STERN: Thank you, Your Honor.

MS. SCHIMMING: Thank you, Your Honor.

MS. GILBERT: Thank you, Your Honor.

(Proceeding concluded at 11:15 A.M.)

* * * * *

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC, a Nevada limited liability company, Plaintiff, vs. ARMANDO A. CARIAS, an individual; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS I-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive, Defendants. AND RELATED CLAIMS.	Case No. A-13-684501-C Dept. No. XXI **ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP's ("BANA") Motion for Summary Judgment ("BANA MSJ"), filed on October 30, 2015, and SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment ("SFR MSJ"), filed on November 2, 2015. Alessi & Koenig, LLC ("Alessi") and Sutter Creek Homeowners Association ("Association") filed a Joinder to the SFR MSJ on November 20, 2015. SFR filed an Opposition to the BANA MSJ on November 20, 2015, to which Alessi and the Association filed a Joinder on November 21, 2015.

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BANA filed its Opposition to the SFR MSJ on December 17, 2015, to which SFR filed its Reply on January 27, 2016.[1] BANA filed its Reply to the SFR Opposition and Alessi and the Association's Joinder on January 28, 2016. This Court heard arguments on the BANA MSJ, the SFR MSJ, and Alessi and Association's Joinder on February 3, 2016 at 9:30 a.m. Ariel E. Stern, Esq. appeared on behalf of BANA. Jacqueline A. Gilbert, Esq. appeared on behalf of SFR. Chantel M. Schimming, Esq. appeared on behalf of Alessi and the Association.

Having reviewed and considered the full briefing and arguments of counsel, for the reasons stated on the record, and good cause appearing, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT[2]

1. In 1991, Nevada adopted the Uniform Common Interest Ownership Act as NRS 116.

2. On July 15, 1998, the Association recorded its Declaration of Covenants, Conditions & Restrictions and Reservation of Easements ("CC&Rs"). Pursuant to NRS 116.3116, the recordation of the CC&Rs constituted record notice and perfection of the Association's lien.

3. On November 3, 2010, a Grant, Bargain and Sale Deed was recorded in the Official Records of the Clark County Recorder as Instrument No. 201011030002713 transferring real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-014 (the "Property") to Armando A. Carias.

4. On November 3, 2010, a Deed of Trust in favor of W.J. Bradley Mortgage Capital Corp. was recorded in the Official Records of the Clark County Recorder as Instrument No. 201011030002714 ("First Deed of Trust").

5. On January 26, 2012, an Assignment was recorded in the Official Records of the Clark County Recorder as Instrument No. 201201260003419 transferring the First Deed of Trust to BANA.

[1] SFR filed an Errata to its Reply on January 27, 2016.

[2] Any finding of fact that should be a conclusion of law is deemed a conclusion of law.

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6. On February 23, 2012, Alessi, on behalf of the Association, recorded a Notice of Delinquent Assessment (Lien) in the Official Records of the Clark County Recorder as Instrument No. 201202230001691.

7. On May 8, 2012, Alessi, on behalf of the Association, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Official Records of the Clark County Recorder as Instrument No. 201205080002884 ("NOD"). Pursuant to the NOD, the amount due as of April 4, 2012 was $2,290.00.

8. Alessi, on behalf of the Association, mailed the NOD to BANA.

9. On June 5, 2012, BANA, through its counsel Miles Bauer Bergstrom & Winters ("Miles Bauer"), sent a letter Alessi, as the Association's agent, in response to the NOD, which contained the following language:

> Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated April 4, 2012. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

10. On June 15, 2012, Alessi, as agent for the Association, sent a letter to Miles Bauer, BANA's counsel, stating that the foreclosure process would continue unless $2,930.00 was paid. Alessi also sent Miles Bauer a ledger setting forth the unpaid assessments to date.

11. On June 28, 2012, Miles Bauer sent Alessi a check for $720.00, representing 9 months' worth of delinquent assessments, and a letter containing the following language:

> Our client has authorized us to make payment to you in the amount of $720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein

and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

12. On or around July 16, 2012, Alessi rejected and returned the check for $720.00 to Miles Bauer.

13. After its check was rejected on or around July 16, 2012, BANA did nothing further to protect its interest in the Property.

14. On January 22, 2013, Alessi, on behalf of the Association, recorded a Notice of Trustee's Sale in the Official Records of the Clark County Recorder as Instrument No. 20130122000310 7 ("NOS"). Pursuant to the NOS, the Property was to be sold on February 20, 2013 at 2:00 p.m. at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147 (Alessi & Koenig, LLC Office Building, 2nd Floor).

15. Alessi, on behalf of the Association, mailed the NOS to BANA.

16. On February 20, 2013, SFR was the highest bidder at the Association's public non-judicial foreclosure auction and purchased the Property for $21,000.00 ("Association Foreclosure Sale").

17. On February 26, 2013, a Trustee's Deed Upon Sale was recorded in the Official Records of the Clark County Recorder as Instrument No. 201302260003889 ("Foreclosure Deed"). The Foreclosure Deed contains the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on February 20, 2013 at the place indicated on the Notice of Trustee's Sale.

18. No release of the super-priority lien or lis pendens was recorded by BANA against the Property prior to the Association Foreclosure Sale.

19. As such, SFR was not aware of BANA's attempt to pay a portion of the Association's lien prior to the Association Foreclosure Sale.

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20. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in the Association other than owning property within the community.

21. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in Alessi outside its attendance at auctions, bidding, and occasionally purchasing properties at publicly-held auctions conducted by Alessi.

22. On September 18, 2014, the Nevada Supreme Court issued its opinion in SFR Investments Pool 1 v. U.S. Bank, concluding that NRS 116.3116(2) gives associations a true super-priority lien, the non-judicial foreclosure of which extinguishes a first deed of trust. SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014), reh'g denied (Oct. 16, 2014).

23. On January 28, 2016, the Nevada Supreme Court issued its opinion in Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 (2016) (herein after "Shadow Wood").

24. BANA argued that the noticing provisions of NRS 116.3116 et seq. for non-judicial foreclosure are facially unconstitutional as they do not require notice to the holder of a first deed of trust. Further, BANA also argued that the loan that underlies the first deed of trust is FHA insured and, therefore, HUD has an interest in the deed of trust. Therefore, BANA argued that federal law preempts state law and precludes extinguishment of the insured first deed of trust.

25. SFR argued that the statutes are constitutional both as applied and facially, requiring notice to recorded first security lienholders through the incorporation of NRS 107.090 through NRS 116.31168. SFR also argued that BANA lacks standing to assert the Supremacy Clause as it is not HUD or the FHA and that preemption does not apply because the federal and state policies are not in conflict.

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CONCLUSIONS OF LAW[3]

1. Summary judgment is appropriate where there is no remaining question of material fact such that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. NRS 116 is facially constitutional.

3. NRS 116 is not preempted by federal law.

4. The Association Foreclosure Sale was conducted pursuant to the Association's lien, which contained super-priority amounts.

5. Pursuant to Shadow Wood, the recitals set forth in the Foreclosure Deed that notices were properly provided is conclusive proof of the same. Alternatively, SFR has provided evidence that the Association Foreclosure Sale was properly noticed in this case.

6. In considering the price paid for the Property, one must also consider the market at the time, including but not limited to, the increased expenses purchasers at NRS 116 foreclosure sales faced after buying properties at these sales.

7. A sale pursuant to NRS 116 cannot be commercially unreasonable as a matter of law based on price alone.

8. NRS 116 has no requirement that sales be commercially reasonable. As such, purchasers at NRS 116 foreclosure sales have no burden to prove the commercial reasonableness of any such sale.

9. A commercial reasonableness analysis would only come into play if there was evidence that the sale was not properly noticed, that the bidding at the public auction was in some way chilled, or if there was evidence of fraud, collusion, or some other impropriety in the sale process. In those situations, commercial reasonableness may come into play under the Shadow Wood balancing of the equities test.

///

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[3] Any conclusion of law that should be a finding of fact is deemed a finding of fact.

10. As BANA's payment of $720.00 was conditional, requiring the Association to waive its rights as to a currently undecided matter—namely, what amounts are included in a super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property.

11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this case.

a. BANA was in a better position than SFR, a mere purchaser at a public sale, and could have done more to protect its interest in the Property.

b. After it submitted its payment to the Association, BANA should have done something to put potential purchasers, such as SFR, on notice of its attempted payment and corresponding belief that the super-priority lien was extinguished prior to the Association Foreclosure Sale.

c. SFR is a bona fide purchaser ("BFP").

d. The fact that SFR had record notice of the First Deed of Trust does not defeat its BFP status, particularly when there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion of the Association's lien prior to Association Foreclosure Sale.

e. Additionally, as SFR purchased the Property for value, low price alone is not enough to deprive it of its status as a BFP.

12. As BANA has provided no admissible evidence of fraud, collusion, or other impropriety with the Association's non-judicial foreclosure process, it cannot show that there is a question of material fact remaining for trial.

Good cause appearing therefore,

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the BANA MSJ is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the SFR MSJ is GRANTED.

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Alessi and the Association's Joinder to the SFR MSJ is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-014 is quieted in favor of SFR Investments Pool 1, LLC.

IT IS SO ORDERED.

Dated this 31st day of March, 2016.

DISTRICT COURT JUDGE

Respectfully Submitted By: **KIM GILBERT EBRON** Jacqueline A. Gilbert, Esq. Nevada Bar No. 10593 7625 Dean Martin Drive, Suite 110 Las Vegas, Nevada 89139 *Attorney for SFR Investments Pool 1, LLC*	Approved as to Form and Content: **AKERMAN LLP** Ariel E. Stern, Esq. Nevada Bar No. 8276 1160 Town Center Drive, Suite 330 Las Vegas, Nevada 89144 *Attorney for Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP*
Approved as to Form and Content: **ALESSI & KOENIG, LLC** Chantel M. Schimming, Esq. Nevada Bar No. 8886 9500 W. Flamingo Road, Suite 205 Las Vegas, Nevada 89147 *Attorney for Alessi & Koenig, LLC and Sutter Creek Homeowners Association*	

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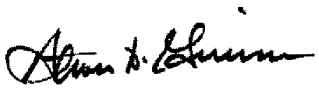

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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC, a Nevada limited liability company, Plaintiff, vs. ARMANDO A. CARIAS, an individual; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS I-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive, Defendants. AND RELATED CLAIMS.	Case No. A-13-684501-C Dept. No. XXI **NOTICE OF ENTRY OF ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**

PLEASE TAKE NOTICE that on April 18, 2016 this Court entered an **Order Denying Bank of America, N.A.'s Motion for Summary Judgment and Granting SFR Investments**

///

Pool 1, LLC's Motion for Summary Judgment. A copy of said Order is attached hereto.

DATED this 27th day of April, 2016.

KIM GILBERT EBRON

/s/ Diana Cline Ebron
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139
Attorney for SFR Investments Pool 1, LLC.

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2016, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY OF ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT** to the following parties:

Akerman LLP	
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Brieanne Siriwan	brieanne.siriwan@akerman.com
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/s/ Tomas Valerio
An Employee of Kim Gilbert Ebron

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Attorneys for SFR Investments Pool 1, LLC

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CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC, a Nevada limited liability company, Plaintiff, vs. ARMANDO A. CARIAS, an individual; BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS I-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive, Defendants. AND RELATED CLAIMS.	Case No. A-13-684501-C Dept. No. XXI **ORDER DENYING BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing, LP's ("BANA") Motion for Summary Judgment ("BANA MSJ"), filed on October 30, 2015, and SFR Investments Pool 1, LLC's ("SFR") Motion for Summary Judgment ("SFR MSJ"), filed on November 2, 2015. Alessi & Koenig, LLC ("Alessi") and Sutter Creek Homeowners Association ("Association") filed a Joinder to the SFR MSJ on November 20, 2015. SFR filed an Opposition to the BANA MSJ on November 20, 2015, to which Alessi and the Association filed a Joinder on November 21, 2015.

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BANA filed its Opposition to the SFR MSJ on December 17, 2015, to which SFR filed its Reply on January 27, 2016.[1] BANA filed its Reply to the SFR Opposition and Alessi and the Association's Joinder on January 28, 2016. This Court heard arguments on the BANA MSJ, the SFR MSJ, and Alessi and Association's Joinder on February 3, 2016 at 9:30 a.m. Ariel E. Stern, Esq. appeared on behalf of BANA. Jacqueline A. Gilbert, Esq. appeared on behalf of SFR. Chantel M. Schimming, Esq. appeared on behalf of Alessi and the Association.

Having reviewed and considered the full briefing and arguments of counsel, for the reasons stated on the record, and good cause appearing, this Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT[2]

1. In 1991, Nevada adopted the Uniform Common Interest Ownership Act as NRS 116.

2. On July 15, 1998, the Association recorded its Declaration of Covenants, Conditions & Restrictions and Reservation of Easements ("CC&Rs"). Pursuant to NRS 116.3116, the recordation of the CC&Rs constituted record notice and perfection of the Association's lien.

3. On November 3, 2010, a Grant, Bargain and Sale Deed was recorded in the Official Records of the Clark County Recorder as Instrument No. 201011030002713 transferring real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-014 (the "Property") to Armando A. Carias.

4. On November 3, 2010, a Deed of Trust in favor of W.J. Bradley Mortgage Capital Corp. was recorded in the Official Records of the Clark County Recorder as Instrument No. 201011030002714 ("First Deed of Trust").

5. On January 26, 2012, an Assignment was recorded in the Official Records of the Clark County Recorder as Instrument No. 201201260003419 transferring the First Deed of Trust to BANA.

[1] SFR filed an Errata to its Reply on January 27, 2016.

[2] Any finding of fact that should be a conclusion of law is deemed a conclusion of law.

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6. On February 23, 2012, Alessi, on behalf of the Association, recorded a Notice of Delinquent Assessment (Lien) in the Official Records of the Clark County Recorder as Instrument No. 201202230001691.

7. On May 8, 2012, Alessi, on behalf of the Association, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien in the Official Records of the Clark County Recorder as Instrument No. 201205080002884 ("NOD"). Pursuant to the NOD, the amount due as of April 4, 2012 was $2,290.00.

8. Alessi, on behalf of the Association, mailed the NOD to BANA.

9. On June 5, 2012, BANA, through its counsel Miles Bauer Bergstrom & Winters ("Miles Bauer"), sent a letter Alessi, as the Association's agent, in response to the NOD, which contained the following language:

> Based on Section 2(b), a portion of your HOA lien is arguably senior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of your notice of delinquent assessment dated April 4, 2012. For purposes of calculating the nine-month period, the trigger date is the date the HOA sought to enforce its lien. It is unclear, based upon the information known to date, what amount the nine months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is the amount BANA should be required to rightfully pay to fully discharge its obligations to the HOA per NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of the same by the HOA.

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11. On June 28, 2012, Miles Bauer sent Alessi a check for $720.00, representing 9 months' worth of delinquent assessments, and a letter containing the following language:

> Our client has authorized us to make payment to you in the amount of $720.00 to satisfy its obligations to the HOA as a holder of the first deed of trust against the property. Thus, enclosed you will find a cashier's check made out to Alessi & Koenig, LLC in the sum of $720.00, which represents the maximum 9 months worth of delinquent assessments recoverable by an HOA. This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein

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and express agreement that BANA's financial obligations towards the HOA in regards to the real property located at 3617 Diamond Spur Avenue have now been "paid in full".

12. On or around July 16, 2012, Alessi rejected and returned the check for $720.00 to Miles Bauer.

13. After its check was rejected on or around July 16, 2012, BANA did nothing further to protect its interest in the Property.

14. On January 22, 2013, Alessi, on behalf of the Association, recorded a Notice of Trustee's Sale in the Official Records of the Clark County Recorder as Instrument No. 201301220003107 ("NOS"). Pursuant to the NOS, the Property was to be sold on February 20, 2013 at 2:00 p.m. at 9500 W. Flamingo Rd., Suite #205, Las Vegas, Nevada 89147 (Alessi & Koenig, LLC Office Building, 2nd Floor).

15. Alessi, on behalf of the Association, mailed the NOS to BANA.

16. On February 20, 2013, SFR was the highest bidder at the Association's public non-judicial foreclosure auction and purchased the Property for $21,000.00 ("Association Foreclosure Sale").

17. On February 26, 2013, a Trustee's Deed Upon Sale was recorded in the Official Records of the Clark County Recorder as Instrument No. 201302260003889 ("Foreclosure Deed"). The Foreclosure Deed contains the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on February 20, 2013 at the place indicated on the Notice of Trustee's Sale.

18. No release of the super-priority lien or lis pendens was recorded by BANA against the Property prior to the Association Foreclosure Sale.

19. As such, SFR was not aware of BANA's attempt to pay a portion of the Association's lien prior to the Association Foreclosure Sale.

20. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in the Association other than owning property within the community.

21. Neither SFR nor its manager, Christopher Hardin, has any relationship or interest in Alessi outside its attendance at auctions, bidding, and occasionally purchasing properties at publicly-held auctions conducted by Alessi.

22. On September 18, 2014, the Nevada Supreme Court issued its opinion in SFR Investments Pool 1 v. U.S. Bank, concluding that NRS 116.3116(2) gives associations a true super-priority lien, the non-judicial foreclosure of which extinguishes a first deed of trust. SFR Investments Pool 1 v. U.S. Bank, 130 Nev. Adv. Op. 75, 334 P.3d 408, 419 (2014), reh'g denied (Oct. 16, 2014).

23. On January 28, 2016, the Nevada Supreme Court issued its opinion in Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 (2016) (herein after "Shadow Wood").

24. BANA argued that the noticing provisions of NRS 116.3116 et seq. for non-judicial foreclosure are facially unconstitutional as they do not require notice to the holder of a first deed of trust. Further, BANA also argued that the loan that underlies the first deed of trust is FHA insured and, therefore, HUD has an interest in the deed of trust. Therefore, BANA argued that federal law preempts state law and precludes extinguishment of the insured first deed of trust.

25. SFR argued that the statutes are constitutional both as applied and facially, requiring notice to recorded first security lienholders through the incorporation of NRS 107.090 through NRS 116.31168. SFR also argued that BANA lacks standing to assert the Supremacy Clause as it is not HUD or the FHA and that preemption does not apply because the federal and state policies are not in conflict.

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CONCLUSIONS OF LAW[3]

1. Summary judgment is appropriate where there is no remaining question of material fact such that the moving party is entitled to judgment as a matter of law. Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

2. NRS 116 is facially constitutional.

3. NRS 116 is not preempted by federal law.

4. The Association Foreclosure Sale was conducted pursuant to the Association's lien, which contained super-priority amounts.

5. Pursuant to Shadow Wood, the recitals set forth in the Foreclosure Deed that notices were properly provided is conclusive proof of the same. Alternatively, SFR has provided evidence that the Association Foreclosure Sale was properly noticed in this case.

6. In considering the price paid for the Property, one must also consider the market at the time, including but not limited to, the increased expenses purchasers at NRS 116 foreclosure sales faced after buying properties at these sales.

7. A sale pursuant to NRS 116 cannot be commercially unreasonable as a matter of law based on price alone.

8. NRS 116 has no requirement that sales be commercially reasonable. As such, purchasers at NRS 116 foreclosure sales have no burden to prove the commercial reasonableness of any such sale.

9. A commercial reasonableness analysis would only come into play if there was evidence that the sale was not properly noticed, that the bidding at the public auction was in some way chilled, or if there was evidence of fraud, collusion, or some other impropriety in the sale process. In those situations, commercial reasonableness may come into play under the Shadow Wood balancing of the equities test.

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[3] Any conclusion of law that should be a finding of fact is deemed a finding of fact.

10. As BANA's payment of $720.00 was conditional, requiring the Association to waive its rights as to a currently undecided matter—namely, what amounts are included in a super-priority lien pursuant to NRS 116—this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property.

11. Pursuant to Shadow Wood, equity does not favor granting BANA relief in this case.

a. BANA was in a better position than SFR, a mere purchaser at a public sale, and could have done more to protect its interest in the Property.

b. After it submitted its payment to the Association, BANA should have done something to put potential purchasers, such as SFR, on notice of its attempted payment and corresponding belief that the super-priority lien was extinguished prior to the Association Foreclosure Sale.

c. SFR is a bona fide purchaser ("BFP").

d. The fact that SFR had record notice of the First Deed of Trust does not defeat its BFP status, particularly when there is no evidence to suggest SFR had actual knowledge of BANA's attempt to pay a portion of the Association's lien prior to Association Foreclosure Sale.

e. Additionally, as SFR purchased the Property for value, low price alone is not enough to deprive it of its status as a BFP.

12. As BANA has provided no admissible evidence of fraud, collusion, or other impropriety with the Association's non-judicial foreclosure process, it cannot show that there is a question of material fact remaining for trial.

Good cause appearing therefore,

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the BANA MSJ is DENIED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the SFR MSJ is GRANTED.

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IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Alessi and the Association's Joinder to the SFR MSJ is GRANTED.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that title to real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032; Parcel No. 139-08-410-014 is quieted in favor of SFR Investments Pool 1, LLC.

IT IS SO ORDERED.

Dated this 31st day of March, 2016.

DISTRICT COURT JUDGE

Respectfully Submitted By: **KIM GILBERT EBRON** Jacqueline A. Gilbert, Esq. Nevada Bar No. 10593 7625 Dean Martin Drive, Suite 110 Las Vegas, Nevada 89139 *Attorney for SFR Investments Pool 1, LLC*	Approved as to Form and Content: **AKERMAN LLP** Ariel E. Stern, Esq. Nevada Bar No. 8276 1160 Town Center Drive, Suite 330 Las Vegas, Nevada 89144 *Attorney for Bank of America, N.A., Successor by Merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP*
Approved as to Form and Content: **ALESSI & KOENIG, LLC** Chantel M. Schimming, Esq. Nevada Bar No. 8886 9500 W. Flamingo Road, Suite 205 Las Vegas, Nevada 89147 *Attorney for Alessi & Koenig, LLC and Sutter Creek Homeowners Association*	

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC,

Plaintiff,

v.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, unknown entity, DOES INDIVIDUALS 1-X, inclusive, and ROE CORPORATIONS XI-XXX, inclusive,

Defendants.

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Cross-Defendants.

Case No.: A-13-684501-C
Dept.: XXI

BANK OF AMERICA, N.A.'S MOTION FOR RECONSIDERATION

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BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company, SUTTER CREEK HOMEOWNERS' ASSOCIATION, an unknown entity, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

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Defendant Bank of America, N.A. (**Bank of America**), by and through its attorneys at the law firm AKERMAN LLP, hereby submits this Motion for Reconsideration of the Order granting summary judgment in favor of SFR Investments Pool 1, LLC (**SFR**) and denying Bank of America's motion for summary judgment. This Motion for Reconsideration is made and based upon the Memorandum of Points and Authorities attached hereto and such oral argument as may be entertained by the Court at the time and place of the hearing of this matter.

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NOTICE OF MOTION

PLEASE TAKE NOTICE that Defendant Bank of America will bring the foregoing, **BANK OF AMERICA'S MOTION FOR RECONSIDERATION**, for hearing before the Eighth Judicial District Court, located at the Regional Justice Center, 200 Lewis Avenue, Las Vegas, Nevada 89155, on the 20 day of JUNE 2016, at the hour of CHAMBERS :_____ o'clock ___.m.

DATED this 16th day of May, 2016.

AKERMAN LLP

/s/ Darren T. Brenner, Esq.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This Court should reconsider its Order granting summary judgment in SFR's favor. On April 18, 2016, this Court found that Bank of America tendered an amount equal to nine months' delinquent assessments, but held that this payment "did not constitute a sufficient tender to protect [Bank of America's] interest in the Property." Ten days later, the Nevada Supreme Court unequivocally held that the super-priority amount of an HOA's lien is limited to nine months' delinquent assessments. Because Bank of America's tender was equal to the super-priority amount of the HOA's lien as a matter of law, the tender was sufficient to discharge the super-priority lien. Consequently, to the extent SFR obtained any interest in the Property through the HOA foreclosure sale, that interest is subject to Bank of America's Deed of Trust. Accordingly, this Court should reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

II. STATEMENT OF FACTS

1. On or about October 27, 2010, Armando Carias (**Borrower**) purchased real property located at 3617 Diamond Spur Avenue, North Las Vegas, Nevada 89032 (the **Property**) via a loan in the amount of $74,642.00, which was secured by a Deed of Trust (the **Deed of Trust**). On October 27, 2010, Borrower executed this Deed of Trust in favor of W.J. Bradley Mortgage Corp. (**Bradley Mortgage**), with Mortgage Electronic Registration System, Inc. (**MERS**) as the beneficiary. Bradley Mortgage recorded the Deed of Trust on November 3, 2010. Bank's Mot., at **Exhibit A**.

2. On March 2, 2012, MERS assigned the Deed of Trust to Bank of America, N.A., successor by merger to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP. Bank of America recorded the Assignment of Deed of Trust on January 26, 2012. Bank's Mot., at **Exhibit B**.

3. On February 23, 2012, Sutter Creek Homeowners Association (**HOA**), through its agent Alessi & Koenig, LLC (**HOA Trustee**), recorded a Notice of Claim of Delinquent Assessment Lien (**Lien**). The Lien stated that the amount due to the HOA was $965.00, which included assessments, late fees, interest, and fees. Bank's Mot., at **Exhibit C**. The Lien neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

4. On May 8, 2012, the HOA, through the HOA Trustee, recorded a Notice of Default and Election to Sell Under Homeowners Association Lien. The Notice stated the amount due to the HOA was $2,290.00, which included assessments, dues, interest, and fees. Bank's Mot., at **Exhibit D**. The Notice neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

5. By letter dated June 5, 20102, after the Notice of Default was recorded, Bank of America, through its counsel at Miles Bauer Bergstrom & Winters (**Miles Bauer**), contacted the HOA Trustee, and requested a payoff ledger detailing the amounts owed to the HOA in an attempt to determine the super-priority amount. Bank of America sought this information so that it could tender the full super-priority amount to the HOA Trustee. Bank's Mot., at **Exhibit E-1**.

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6. The HOA Trustee responded on June 15, 2012, attaching a ledger showing the monthly assessment amount was $75.00 per month through January 1, 2012 and $80.00 per month after January 1, 2012. Bank's Mot., at **Exhibit E-2**.

7. On June 28, 2012, Bank of America, through Miles Bauer, tendered payment of $720.00 (representing 9 months assessments at $80.00 per month) to the HOA Trustee. Bank's Mot., at **Exhibit E-3**.

8. The HOA, through the HOA Trustee, received and then ultimately rejected Bank of America's full super-priority tender. Bank's Mot., at **Exhibits E-4** & **E-5**.

9. Instead, the HOA, through the HOA Trustee, recorded a Notice of Trustee's Sale on January 22, 2013, setting the sale for February 20, 2013. The Notice stated the amount due to the HOA was $4,285.00. Bank's Mot., at **Exhibit F**. The Notice of Sale neither identified the super-priority amount claimed by the HOA, nor described the "deficiency in payment" required by NRS 116.31162(1)(b)(1).

10. On February 20, 2013, the HOA, through the HOA Trustee, non-judicially foreclosed on the Property, selling the Property to SFR for $21,000.00. SFR recorded the Trustee's Deed Upon Sale on February 26, 2013. Bank's Mot., at **Exhibit G**.

11. On October 30, 2015, Bank of America moved for summary judgment, arguing that it was entitled to summary judgment for three reasons: (1) Bank of America's super-priority tender extinguished that potion of the HOA's lien prior to the foreclosure sale; (2) the HOA Lien Statute is facially unconstitutional under the Due Process Clause; and (3) the HOA's sale of the Property was commercially unreasonable. Bank's Mot., at 7.

12. On November 2, 2015, SFR moved for summary judgment, arguing that it was entitled to summary judgment because: (1) the recitals in the foreclosure deed conclusively show SFR obtained title to the Property free and clear; (2) the sale vested title to the Property in SFR without equity or right of redemption; (3) it was a bona fide purchaser; and (4) the foreclosure sale was commercially reasonable. SFR's Mot., at 6–19.

13. On April 18, 2016, this Court issued an Order granting SFR's motion for summary judgment, and denying Bank of America's motion for summary judgment. MSJ Order, at 7. This

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Court found that Bank of America's June 28, 2012 payment to the HOA Trustee was equal to "9 months' delinquent assessments." MSJ Order, at Findings of Fact ¶ 11. However, this Court held that this payment of nine months' delinquent assessments "did not constitute a sufficient tender to protect [Bank of America's] interest in the Property." *Id.*, at Conclusions of Law ¶ 10.

III. LEGAL STANDARD

A district court has the inherent authority to reconsider its prior orders. *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d 1026, 1027 (1975). "A court may for sufficient cause shown, amend, correct, resettle, modify or vacate, as the case may be, an order previously made and entered on the motion and the progress of the cause of proceeding." *Id.* A district court retains jurisdiction to reconsider a matter unless the order at issue is appealed. *Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118 (1980). When a decision is clearly erroneous, or a party introduces materially different evidence, rehearing is appropriate. *Masonry & Tile Contractors v. Jolley, Urga & Wirth*, 113 Nev. 737, 941 P.2d 486 (1997); *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976).

Here, this Court should reconsider its Order granting summary judgment in SFR's favor. After this Court issued the Order, the Nevada Supreme Court held that the super-priority amount of an HOA's lien is limited to nine months' delinquent assessments—the exact amount Bank of America tendered to the HOA Trustee prior to the foreclosure sale here. While this Court did not have the benefit of the *Ikon Holdings* decision when it issued the Order, that decision shows the Court's Order is due to be reconsidered. In light of *Ikon Holdings*, this Court should reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America, because Bank of America's tender of nine months' delinquent assessments extinguished the super-priority portion of the HOA's lien as a matter of law, and SFR is not a bona fide purchaser. Even if this Court holds that Bank of America's tender did not extinguish the super-priority lien prior to the sale, this Court should still reconsider its Order and allow this case to go to trial, as issues of material fact surround the balancing of equities this Court must conduct to determine whether to set aside the foreclosure sale.

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III. ARGUMENT

A. Bank of America's tender of nine months' delinquent assessments satisfied the super-priority lien as a matter of law.

This Court should reconsider its Order granting SFR's motion for summary judgment, and instead grant summary judgment in Bank of America's favor, because Bank of America's super-priority tender extinguished the super-priority lien prior to the foreclosure sale. **First**, Bank of America's tender of nine months' delinquent assessments was equal to the super-priority amount as a matter of law under the Nevada Supreme Court's recent decision in *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*. **Second**, this tender extinguished the super-priority lien as a matter of law, as tender is complete when the money is offered to a creditor entitled to receive it. Stated simply, when Bank of America submitted payment for nine months' delinquent assessments, the super-priority lien was discharged. Accordingly, Bank of America is entitled to summary judgment.

1. Bank of America's pre-foreclosure payment equaled the full super-priority amount as a matter of law.

After this Court entered summary judgment in SFR's favor, the Nevada Supreme Court "conclude[d] the superpriority lien granted by NRS 116.3116(2) does not include an amount for collection fees and foreclosure costs incurred; rather **it is limited to an amount equal to the common expense assessments due during the nine months before foreclosure**." *Horizon at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, at 13 (Nev. Apr. 28, 2016). While this Court found that Bank of America tendered "9 months' worth of delinquent assessments," it held that "this payment attempt did not constitute a sufficient tender to protect BANA's interest in the Property." MSJ Order, at Findings of Fact ¶ 11, and Conclusions of Law ¶ 10. *Ikon Holdings* requires this Court to reconsider its Order granting summary judgment in SFR's favor, and instead grant summary judgment in favor of Bank of America.

Coupling the Nevada Supreme Court's holding in *Ikon Holdings* with its holding in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.* shows that Bank of America is entitled to summary judgment based on its super-priority tender. In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, the

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DISTRICT COURT

CLARK COUNTY, NEVADA

ALESSI & KOENIG, LLC,

Plaintiff,

v.

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BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

Cross-Claimant,

v.

ARMANDO A. CARIAS, an individual, DOES INDIVIDUALS 1 through 10, inclusive, and ROE BUSINESS ENTITIES 1 through 10, inclusive,

Cross-Defendants.

Case No.: A-13-684501-C
Dept.: XXI

DEFENDANT BANK OF AMERICA, N.A.'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association,

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SFR INVESTMENTS POOL 1, LLC, a domestic Limited Liability Company, SUTTER CREEK HOMEOWNERS' ASSOCIATION, an unknown entity, and DOES 1 through 10 and ROE BUSINESS ENTITIES 1 through 10,

Cross-Defendants.

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Defendant Bank of America, N.A.'s (**BANA**) files this reply to Cross-Defendant SFR Investments Pool 1, LLC's (**SFR**) opposition to BANA's motion for summary judgment.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

First, the HOA had no lien to foreclose upon in February 2013 because BANA, as servicer, delivered a check to the HOA for an amount greater than the super-priority portion of the HOA's lien. SFR's argument, that a servicer must pay whatever an HOA asks, regardless of the amount of the limited lien, is contrary to the express language of NRS 116.3116(2)(c), the comments of the drafters of the Uniform Common Interest Ownership Act, and foreign to lien law.

Second, the February 2013 HOA foreclosure sale was commercially unreasonable. It is an undisputed fact that the HOA's foreclosure trustee, Alessi & Koenig, LLC withheld material information from bidders at the auction.

Third, Nevada designed its super priority notice scheme to be "opt-in," which does not meet the procedural due process clause's command for a foreclosure scheme that is designed to ensure actual notice to affect parties such as BANA.

There is state action here. Chapter 116's non-judicial super priority foreclosure scheme is not analogous to government acquiescence to a private commercial remedy. Plaintiff's arguments in this case demonstrate that Nevada granted an HOA a roving commission to threaten senior mortgagees, lienholders with no relationship to the HOA or the debt owed, with foreclosure if mortgagees do not pay whatever the HOA demands. *Worse still*, Nevada disrupted the private commercial world to prevent HOAs and mortgagees from subordinating the super priority lien.

II.

LEGAL STANDARDS

Summary judgment may be granted if the moving party demonstrates that the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact, entitling the moving party to judgment as a matter of law. *See Zoslow v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982). In order to carry its burden of production, "the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmoving party to set forth specific facts demonstrating a genuine factual issue for trial. *See Lucas v. Bell*, 773 F. Supp. 2d 930, 934 (D. Nev. 2011) (denying motion for summary judgment).

III.

LEGAL DISCUSSION

A. The Bona Fide Purchaser Rule is Not Applicable to Chapter 116 Foreclosures.

Nevada's Supreme Court has held that the bona fide purchaser rule is not applicable to foreclosure sales, absent explicit statutory language. The case of *Allison Steel Manufacturing Co. v. Bentonite, Inc.*, 86 Nev. 494, 499, 471 P.2d 666, 669 (1970) is instructive as to the quality of title that a buyer receives at a foreclosure sale. In that case, the IRS had recorded two tax liens against a property and sold the property to an individual, Moore, who failed to record his deed. Subsequent to the recording of those tax liens, Allison Steel Manufacturing obtained a judgment against the owner

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of the property and bought the property at a sheriff's sale. The Nevada Supreme Court held that Moore held valid title as opposed to Allison Steel Manufacturing:

> We think that appellant's position as a purchaser at a judgment sale is controlled by the rule announced in 8 Thompson on Real Property, § 4313, at 371 (1963), which holds: 'The leading rule in absence of statute is that the doctrine of caveat emptor applies to a sale under execution, and a purchaser ordinarily acquires no better title than the debtor could have conveyed at the time the lien attached.'

Allison Steel Manufacturing Co., 86 Nev. at 499, 471 P.2d at 669. The rule at foreclosure sales in Nevada is *caveat emptor*.

Here, there is no statutory provision in Chapter 116 which mentions the *bona fide* purchaser doctrine. NRS 116.31164 imposes a duty on a buyer to do its own research as to the quality of title it is buying:

> 3. After the sale, the person conducting the sale shall:
>
> (a) Make, execute and, after payment is made, deliver to the purchaser, or his or her successor or assign, **a deed without warranty** which conveys to the grantee all title of the unit's owner to the unit;

NRS 116.31164(3)(a) (Emphasis Added). Likewise, the trustee's deed SFR received in this case was "without warranty." (**Ex. G** to MSJ, pg. 1).

The burden of evidence to establish bona fide purchaser status is on the purchaser. *Berge v. Fredericks*, 95 Nev. 183, 188, 591 P.2d 246, 248 (Nev. 1979) ("In order to be entitled to the status of a bona fide purchaser without notice under NRS 111.325, respondent Valdez was required to show that legal title had been transferred to her before she had notice of the prior conveyance to appellant.") SFR has provided this Court with no admissible evidence demonstrating that it is a bona fide purchaser. SFR did not even provide this Court with an affidavit stating it did not know of BANA's tender and interest in the Property.

The only admissible evidence in this case shows that SFR was on inquiry notice of BANA's continuing interest in the Property. To qualify as a bona fide purchaser, one cannot have actual or constructive notice of another party's unrecorded interest in the subject property. *Huntington v. Mila, Inc.*, 119 Nev. 355, 75 P.3d 354 (2003). "A duty of inquiry arises 'when the circumstances are such that a purchaser is in possession of facts which would lead a reasonable man in his position to make

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an investigation that would advise him of the existence of prior unrecorded rights. He is said to have constructive notice of their existence whether he does or does not make the investigation. The authorities are unanimous in holding that he has notice of whatever the search would disclose." *Id.* (quoting *Allison Steel Mfg. Co. v. Bentonite, Inc.*, 86 Nev. 494, 498, 471 P.2d 666, 668 (1970)).

Here, SFR was certainly on inquiry notice of BANA's continuing interest in the Property. The Deed of Trust and Assignment of Deed of Trust were both recorded prior to the February 2013 foreclosure. (**Ex. A** and **Ex. B** to MSJ). Plaintiff could have called the foreclosure trustee. Whether or not Plaintiff did either, Plaintiff cannot disclaim knowledge of what a reasonable investigation would have revealed.

Similarly, BANA was not required to record its payment of the super-priority amount. SFR's argument is nonsensical. The Deed of Trust and Assignment were recorded in the land records (**Ex. A** and **Ex. B** to MSJ). BANA's interest in the Property stems from these documents. Nevada law does not further require that a party record every action it takes to maintain its interest in the Property. Nowhere in NRS 116 *et seq.* does it state that tender attempts must be recorded in the land records.

D. The HOA had No Lien to Foreclose in February 2013.

1. BANA's Delivery of a Check for 9 Months' Assessments Extinguished the HOA's Lien by Satisfying the Putative Debt Supporting the Lien.

A lien has no separate existence from the debt it secures. NRS 116.3116(1); *see also* 51 Am.Jur.2d, Liens § 1. SFR does not dispute that BANA delivered a check to Alessi & Koenig, LLC for 9 months' of assessments before the February 2013 foreclosure sale. Plaintiff concedes, by failing to argue otherwise, that the sum delivered was more than the super priority amount. Plaintiff merely argues that BANA's act of delivering a check to Alessi & Koenig, LLC was not a tender. Plaintiff argues that BANA should have delivered more than the lien amount, whatever the HOA demanded.

The super priority portion of the lien is not subject to debate. It's sum is fixed by statute. It is potentially two fixed amounts. The first line of *SFR Investments Pool 1 v. U.S. Bank*, 334 P.3d 408, 414 (Nev. 2014) reads as follows:

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> NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for **up to nine months of unpaid HOA dues**.

Id. at 409. (Emphasis added). Contrary to plaintiff's argument, the "full amount due" is not whatever an HOA demands, but rather what is the statutory sum entitled to priority. BANA delivered a check for 9 months to Alessi & Koenig, LLC. (**Ex. E** to MSJ).

Further, SFR's claim that BANA's tender was invalid because it was not "unconditional" lacks merit. SFR claims that BANA "conditioned the proposed payment by putting forth the condition that any endorsement of the cashier's check will be strictly construed as an unconditional acceptance and an express agreement that the lien has been paid in full." SFR Opp. at 5. Clearly this is not the sort of condition that limits the validity of a tender. BANA simply made clear that its tender was for payment of the lien. To rule that this constituted an improper condition invalidating BANA's tender would mean that no party could specify the purpose of their tender.

2. SFR's Citation to *Moeller* is Not on Point.

SFR throughout its brief mistakenly cites to *Moeller v. Lien*, 25 Cal.App.4th 822 (Cal. Ct. App. 1994). This case is not on point. **First**, the case does not involve a creditor's right to redeem the priority of its mortgage prior to a non-judicial HOA foreclosure. **Second**, it does not involve the doctrine of tender. While *Moeller* mentions the doctrine of tender, the borrower in *Moeller* merely alleged that it had he did not know he had a right to a one day postponement. *Id*. at 784. Any attempt to stretch *Moeller* beyond its facts is unpersuasive because such a reading conflicts with decades of California foreclosure law. **Third**, Bank of America is not seeking to use the doctrine of tender to disturb the sale. Bank of America seeks an order from this Court to hold that, if Plaintiff has title, Plaintiff holds title subject to Bank of America's senior deed of trust.

Fourth, Plaintiff's reading of *Moeller*, that a foreclosure sale cannot be disturbed is far too broad. The rule in California is not that the *bona fide* purchaser rule, even if it was applicable here which it isn't, trumps the tender rule. Courts in California have always held that where a party cures a putative obligation to pay, there is no statutory right to initiate foreclosure in the first place and such a sale would be *void ab initio*. *Chavez v. Indymac Mortg. Servs*., 219 Cal.App.4th 1055, 1063 (Cal. App., 2013) (citing *Bank of America v. La Jolla Group II*, 129 Cal.App.4th 706 (Cal. Ct. App.

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2005) (trustor and beneficiary entered into agreement pursuant to which trustor would cure default but trustee mistakenly conducted foreclosure sale at which third party purchased property). A foreclosure sale conducted after a trustee rejects such a tender would be void, not voidable. (*Bisno v. Sax* (1959) 175 Cal.App.2d 714, 724 ("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 delinquency. The same is true of a tender which has been made and rejected.").

E. The HOA Sale Was Commercially Unreasonable.

An HOA's obligation to act in good faith with respect to all of its obligations and rights under NRS Chapter 116 is found at NRS 116.1113. Nevada's legislature created a spreadsheet that details where each section of its unique version of the Uniform Common Interest Ownership Act was derived. Nevada based its version of NRS 116.1113 on NRS 104.1203. Thus, Nevada's legislature specifically intended that the concept of good faith found in Chapter 116 be informed by the Uniform Commercial Code concept of good faith.

Alessi & Koenig sold the Property at a price far below market value. It is an undisputed fact that Alessi & Koenig, LLC did not inform bidders at the sale that the lender had delivered the super priority amount prior to the sale. SFR certainly does not argue that it would have proceeded with bidding at the auction regardless of the tender. No bidder could conceivable know the quality of title it was bidding upon at the auction. This uncertainty is not solely due to the legal uncertainty prior to the *SFR* decision. There was also uncertainty regarding the property's title due to the HOA's foreclosure agent not disclosing to bidders that a tender occurred. The result was a sale for far less than the Property's fair market value. This Court should set the sale aside as void.

F. Chapter 116 of NRS's Non-Judicial Foreclosure Scheme Violates the Procedural Due Process Clause Requirement of A Statutory Scheme Designed to Guarantee Meaningful Notice and Meaningful Opportunity to be Heard.

1. *SFR Investments Pool 1, LLC v. US Bank's* Brief Procedural Due Process Analysis Does Not Resolve the Issue.

Contrary to the SFR Decision, the enactment of Nevada's version of UCIOA certainly did not put BANA on notice that its deed of trust could be extinguished. **First**, Bank of America's secured

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loan did not exist until October 2010. (**Ex. A** to MSJ). **Second**, The HOA's lien did not exist until February 2012 (**Ex. C** to MSJ). **Third**, Nevada's Supreme Court could not, and did not cite, to any state law that adopted the UCIOA to demonstrate that an HOA could use a non-judicial process to foreclose upon a super priority lien for assessments. In fact, while the court did cite to *Summerhill Village Homeowners Ass'n v. Roughley*, —— Wash.App.——, 289 P.3d 645, 647–48 (2012), the court ignored that Washington expressly disallowed non-judicial foreclosure of HOA super priority liens.[1] **Fourth**, *In re Medaglia*, 52 F.3d 451, 455 (2nd Cir. 1995) is not relevant. *In re Medaglia* is not a facial challenge case. In that case, the Second Circuit held a bankruptcy court's particular application of 11 USC 523(a)(3)(B) to bar a secured creditor's claim filed after the bar date did not offend procedural due process.

2. State Action Exists.

State action exists where the state has used coercive power, whether covert or overt, or provided significant encouragement to the private actor such that the challenged action can be fairly attributable to the state. *Blum v. Yaretsky*, 457 U.S. 991, 104, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). The question of whether actions of a private actor are fairly attributable to the state is a fact bound inquiry. *Brentwood Academy v. Tennessee Secondary School Athletic Association*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001).

SFR is correct that traditionally, a state's acquiescence in the remedy of non-judicial foreclosure to enforce a private bargain between two private parties is not state action. *Flagg Brothers, Inc v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978):

> Respondent Brooks has never alleged that state law barred her from seeking a waiver of Flagg Brothers' right to sell her goods at the time she authorized their storage. Presumably, respondent Jones, who alleges that she never authorized the storage of her goods, could have sought to replevy her goods at any time under state law. See N.Y.Civ.Prac.Law § 7101 et seq. (McKinney 1963). The challenged statute itself provides a damages remedy against the warehouseman for violations of its provisions. N.Y.U.C.C. § 7-210(9) (McKinney 1964). This system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships in the commercial

[1] "If an association forecloses its lien under this section nonjudicially pursuant to chapter 61.24. RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section." RCW 64.34.364(5).

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> world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign.

Id. at 160. Similarly, in *Apao v. Bank of New York*, 324 F.3d 1091, 1094-1095 (9th Cir. 2003) the Ninth Circuit found no state action where Nevada had merely recognized a power of sale conferred by the borrower's private agreement with her lender.

The contrast between *Flagg Brothers* and *Apao* could not be more stark. The following facts taken from the public record of AB 221, AB 204, and the scholarly articles explaining the government purpose behind the rise of HOAs nationally cannot be disputed. **First**, Nevada mandated the creation of this particular HOA, and all HOAs in Nevada, because they govern common open space. **Second**, HOAs had supplanted traditional state actors in providing services commonly enjoyed such as maintenance of private streets, providing recreational resources, and maintenance of common areas such as street lights and sidewalks. **Third**, the source of the super priority lien is not a private agreement. **Fourth**, Nevada barred HOAs and deed of trust beneficiary's from subordinating the HOA's super priority lien. **Fifth**, in 2009, Assemblyperson Spiegel stated that the super priority had to be lengthened to ensure that the HOAs, who had supplanted local governments in providing services, did not fail. **Sixth**, the scholarly authority concerning rise in the number of HOAs nationally can be explained in large part because HOAs supplanted public actors in providing commonly enjoyed services at no cost to local governments.

Moreover, an HOAs board member's powers are circumscribed by statute. NRS 116.3102. The declarant had no choice but to create a homeowner's association because the community had common open space. NRS 278A.130. Under Nevada law, the HOA had no choice but to have a super priority lien that could not be subordinated. *See* NRS 116.1104; *see also SFR Investments Pool 1, LLC*, 334 P.3d at 418-419. An HOAs powers with respect to super priority and super priority foreclosure are circumscribed by state law.

Finally, SFR's analysis to challenge the state action finding in *Culbertson v. Leland*, 528 F.2d 426 (9th Cir. 1975) is not persuasive. Contrary to SFR's analysis, BANA does not cite *Culbertson* to argue that Nevada's creation of a right that did not exist at common law is

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determinative. There is state action because Nevada has displaced the rules of priority and given HOAs the whip of non-judicial foreclosure to compel lenders to satisfy a unit owner's debt.

3. The Facial Due Process Violation is Nevada's Design of a Foreclosure Notice Scheme That Does Not Guarantee Actual Notice to Lienholders Such as BANA.

The HOA Lien Statute is unconstitutional because it does not ensure mortgagees with a potential loss of their property interests will receive notice and an opportunity to be heard.[2] The Due Process Clause of the U.S. Constitution requires that, "at a minimum, [the] deprivation of life, liberty, or property by adjudication be preceded by notice and an opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (emphasis added). An "elementary and fundamental requirement of due process … is notice reasonably calculated, *under all circumstances*, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Tulsa Prof'l Collection Services, Inc. v. Pope*, 458 U.S. 478, 484 (1988) (quoting *Mullane*, 339 U.S. at 314) (emphasis added). Put more simply, state action may not extinguish an interest in real property unless the holder of that interest is afforded notice of that action.

Here, SFR cites to NRS 116.31168 to argue that Nevada designed a statutory scheme to require actual notice to the first position beneficiary. (**Opp MSJ** at 15). SFR takes great pains to argue that this shows Nevada's legislature intended to incorporate NRS 107.090(3)(b)'s notice provisions to Chapter 116 non-judicial foreclosure. (*Id.*). This argument fails because it ignores the AB 221 spreadsheet where the legislature explained that the source of NRS 116.31168 was the request for notice provision for lienholders of NRS 107.090.

Plaintiff's argument ignores the Nevada legislature's amendments to its notice of foreclosure scheme in 1993. In 1993, Nevada's legislature extensively revised its version of the Uniform Common Interest Ownership Act through AB 612. AB 612, at section 6, created a new section of Chapter 116, NRS 116.31163:

---

[2] A foreclosure under the HOA Lien Statute alleged to have extinguished a first deed of trust is state action subject to a due-process challenge. *See Culbertson*, 528 F.2d 426 (holding that private innkeeper's seizure of property without notice pursuant to state innkeeper's lien statute constituted state action and violated due process).

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> The association or other person conducting the sale shall also mail, within 10 days after the notice of default and election to sell is recorded, a copy of the notice by first-class mail to:
>
> 1. *Each person who has requested notice pursuant to NRS 107.090 or 116.31168*;
>
> 2. Any holder of a recorded security interest encumbering the unit's owner's interest *who has notified the association*, 30 days before the recordation of the notice of default, of the existence of the security interest; and
>
> 3. A purchaser of the unit, if the unit's owner has notified the association, 30 days before the recordation of the notice, that the unit is the subject of a contract of sale and the association has been requested to furnish the certificate required by NRS 116.4109.

1993 Statutes of Nevada, Page 2355. (Italics in original). Next, AB 612 then amended NRS 116.31166(3):

> 3. The sale of a unit pursuant to NRS 116.31162 and 116.31164 *and section 6 of this act* vests in the purchaser the title of the unit's owner without equity or right of redemption.

1993 Statutes of Nevada, Page 2373. (Italics in original). Finally, AB 612, section 40, revised NRS 116.31168(1), the provision cited by plaintiff. However, Nevada's revisions in 1993 to this section was to strip lienholders of actual notice:

> 116.31168 1. The provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community. [The association must also give reasonable notice of its intent to foreclose to all holders of liens in the unit who are known to it.]

1993 Statutes of Nevada, Page 2373.

Finally, NRS 107.090(3)(b) was created in 1989. *See* 1989 Statutes of Nevada, Page 644. Nevada's legislature could have simply incorporated NRS 107.090(3)(b) into Chapter 116, but they did not. Nevada's legislature specifically only incorporated the request notice provision of NRS 107.090 and not the provision cited by plaintiff. SFR's argument violates the rule is only "every *reasonable* construction must be resorted to, in order to save a statute from unconstitutionality.' " *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)) (Emphasis added).

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That Chapter 116 is a request notice scheme by legislative design is easily shown by comparing Chapter 116's foreclosure scheme with the actual notice scheme Nevada's legislature designed and made applicable to property tax foreclosures. Before a property can be sold for delinquent property taxes, the county treasurer must mail via certified mail a notice of sale to the owner and any lienholder. NRS 316.595(3)(b). If the notice of sale is returned unsigned, the county treasurer must make a "reasonable attempt" to notify the owner or lienholder prior to the sale. *Id.* Nevada's legislature knew how to design an foreclosure scheme granting lienholders a guaranteed right of actual notice, but chose not to do so through NRS Chapter 116.

V.

CONCLUSION

This Court should grant BANA's motion for summary judgment. BANA acted precisely according how the drafters of the Uniform Common Interest Ownership Act intended. BANA delivered a check for 9 months' of assessments. Alessi & Koenig, LLC's nondisclosure demonstrates a lack of honesty in fact and renders the sale commercially unreasonable. Finally, this Court should decline SFR's invitation to take out a blue pencil to the NRS Chapter 116's notice provisions in order to save them. NRS Chapter 116's notice provisions violate the federal procedural due process clause by requiring BANA to opt-in to notice when actual notice is BANA's due.

DATED this 28th day of January, 2016.

AKERMAN LLP

/s/ *Steve Shevorski, Esq.*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 14th day of January, 2016 I caused to be served a true and correct copy of foregoing **DEFENDANT BANK OF AMERICA, N.A.'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**, in the following manner:

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

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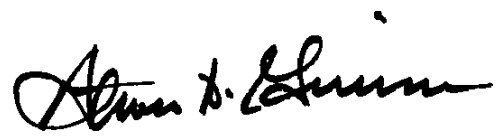

CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

ALESSI & KOENIG, LLC,	.	CASE NO. A-13-684501-C
Plaintiff,	.	DEPT. NO. XXI
vs.	.	**TRANSCRIPT OF PROCEEDINGS**
ARMANDO A. CARIAS, et al.,	.	
Defendants.	.	
. . . . .	.	

And all related claims.

BEFORE THE HONORABLE VALERIE P. ADAIR, DISTRICT COURT JUDGE

DEFENDANT BANK OF AMERICA, N.A.'S MOTION FOR SUMMARY JUDGMENT; SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT; ALESSI & KOENIG, LLC AND SUTTER CREEK HOMEOWNERS ASSOCIATION'S JOINDER TO SFR INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT

WEDNESDAY, FEBRUARY 3, 2016

APPEARANCES:

FOR ALESSI & KOENIG, LLC AND SUTTER CREEK HOMEOWNERS ASSOCIATION:	CHANTEL M. SCHIMMING, ESQ.
FOR SFR INVESTMENTS POOL 1, LLC:	JACQUELINE A. GILBERT, ESQ.
FOR BANK OF AMERICA:	ARIEL S. STERN, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
SUSIE SCHOFIELD District Court	VERBATIM DIGITAL REPORTING, LLC Englewood, CO 80110 (303) 798-0890

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

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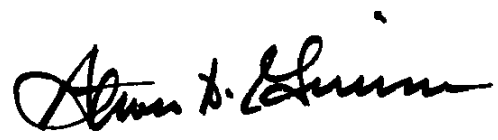

CLERK OF THE COURT

TRAN

DISTRICT COURT
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LAS VEGAS, NEVADA, WEDNESDAY, FEBRUARY 3, 2016, 10:10 A.M.

THE COURT: Would everyone -- well, you all can fight amongst yourselves as to who you represent, but notwithstanding that, everyone's going to have to state their appearances for the record. So, we'll start with you, Mr. Stern.

MR. STERN: Good morning, Your Honor. Ariel Stern on behalf of Bank of America.

MS. GILBERT: Jacqueline Gilbert on behalf of SFR Investments Pool 1, LLC.

MS. SCHIMMING: Chantel Schimming on behalf of Alessi & Koenig and Sutter Creek Homeowners Association, Bar No. 8886.

THE COURT: All right. We're used to seeing SFR standing at that table.

MS. GILBERT: I know.

MR. STERN: That's what we were having a little colloquy about, are we on the right side.

THE COURT: All right. I had one question on this, and whoever wants to pipe up on this answer is welcome to do so. My question is this: Bank of America tendered a particular amount, 760-something change; is that right?

MR. STERN: I thought it was 720.

THE COURT: I'm relying on memory. Whatever it was -- oh, it's $720 --

MR. STERN: Right.

THE COURT: -- was the amount that -- of the check. And in -- and this wasn't quite clear to me, so maybe I should have gotten this but I didn't. The Bank seems to be asserting, oh, this is absolutely undisputed. This is the correct amount, 100 percent, 720, it's the nine months worth of assessment and, in fact, it looks like they used a slightly higher amount of the 86 and change or whatever it was --

MR. STERN: Right.

THE COURT: -- again. So, my question is, is this truly undisputed that this was the correct amount of the nine months?

MR. STERN: I suppose, Your Honor, there is a factual and a legal dispute. And if you're asking factually --

THE COURT: Yeah. Factually, if you say -- well, the legal dispute is what number -- what do you use. That's to --

MR. STERN: Right.

THE COURT: -- me, the legal dispute.

MR. STERN: Right.

THE COURT: The factual dispute is, if we say that your theory, for lack of a better word, is correct --

MR. STERN: Yes.

THE COURT: -- is your number right?

MR. STERN: Yes, and --
THE COURT: Or is there even a dispute about that? And you didn't add fees or anything. You just did the basic monthly assessment --
MR. STERN: Right. We followed --
THE COURT: -- is that correct? And then you added for when it changed, I guess, it was some -- right? Am I correct, or am I confusing this --
MR. STERN: Yes.
THE COURT: -- with another case? It was like $79, and then went up to $86, but you used the $86 for the entire nine-month period, right?
MR. STERN: Right.
THE COURT: That's essentially what you did?
MR. STERN: Correct, Your Honor. And this is -- we followed the practice that we typically did, and I'm sure you've seen it in other cases, which is to offer the payment in the amount that the statute says, in our view, is the correct amount, nine months. We in this case calculated that amount after Alessi provided a ledger that itemized the monthly amount, and so it was a simple math error that we actually erred on and overpaid.
THE COURT: Right.
MR. STERN: I think the error was that the monthly assessment changed from 75 to -- or whatever it was --

THE COURT: Whatever it was. It was 70-something --
MR. STERN: And --
THE COURT: -- to 80-something.
MR. STERN: And so, a significant portion of the nine-month period predated that change, but the tender amount assumed more. It assumed that it had been the new amount throughout the nine-month period, so that's what was tendered. I don't believe that there's been any dispute.

Certainly, there's argument as to the legal significance of that. And Alessi is present here and I suppose they can dispute it. I think they would be the correct party to dispute if the monthly assessment was a different amount.

THE COURT: Right, so that's undisputed.
MR. STERN: I believe that that -- you know, other counsel can speak to this. Obviously, there's going to be argument as to what that means legally, but I think --
THE COURT: Right.
MR. STERN: -- if you were to -- your question is, what is nine times --
THE COURT: Yeah, so that's undisputed.
MR. STERN: -- the monthly assessments, that's not disputed.
THE COURT: Well, I guess my question isn't, what's 9 times 86, because we could all sit with -- you know, do it;

figure that one out. My question is, is there any dispute that that is the monthly amount, exclusive or not including fees, and costs, and interests, and other things? Because what you did was just a straight calculation. So, I guess my question to you, is there any dispute that the $86 and change is greater to -- greater than or equal to the straight monthly assessment?

MR. STERN: I don't believe there's --

THE COURT: That's my question.

MR. STERN: I don't believe so, Your Honor.

THE COURT: Does that make sense? Now, because we could do --

MR. STERN: I think Alessi can speak to this.

THE COURT: -- the math. That's easy.

MR. STERN: I think Alessi can speak to this, but as far as we -- as far as we can tell, that's undisputed -- that part of it is undisputed.

MS. SCHIMMING: I actually don't think Alessi is the correct entity to speak to it, but based on what the --

THE COURT: Well, I mean, I'm assuming discovery's been --

MS. SCHIMMING: -- based on what the ledger states here --

THE COURT: Right.

MS. SCHIMMING: -- the assessment amount was $80

through the majority of the -- the actual assessment itself amount was $80 for that time period, yes.

THE COURT: Okay. Any -- all right, that was my only -- I thought that was undisputed, and I just wanted to make sure that that was -- that itself was undisputed.

(Pause in the proceedings)

MR. STERN: Right. So, there's competing motions, Your Honor.

THE COURT: Um-hum.

MR. STERN: We say a lot about constitutionality that I don't want to repeat.

THE COURT: Right. I mean --

MR. STERN: I think the focus of our hearing today --

THE COURT: And I've already rejected the constitutional argument, right or wrong.

MR. STERN: That's why I don't want to repeat all that.

THE COURT: I think I'm right, so -- and I think, you know, last time, you talked extensively on the preemption argument.

MR. STERN: Right.

THE COURT: Not on this case, a different case. So, you really don't need to rehash that.

MR. STERN: And I appreciate the --

THE COURT: I mean, I think, really -- and the commercially reasonable, you know, argument, I've already rejected that --

MR. STERN: So --

THE COURT: -- for various reasons.

MR. STERN: So, what I'd like to start with, Your Honor --

THE COURT: And I'm sorry to cut you off. Go ahead.

MR. STERN: No, any guidance --

THE COURT: So, I think those three, we can take off the table.

MR. STERN: Okay, I --

THE COURT: And go on.

MR. STERN: I would like to circle back in commercial reasonableness because of the new decision that came out last week --

THE COURT: Right.

MR. STERN: -- which I think --

THE COURT: I saw that as well.

MR. STERN: Obviously, that's not in the papers because of --

THE COURT: But let me -- let me cut to the chase. The new decision that came out last week, wouldn't that suggest that even if commercial reasonableness were a factor, it's something that we can evaluate in summary judgment?

Isn't that what that -- that -- to me, that's what that suggests.

MR. STERN: Well, Your Honor, there's two ways to look at that.

THE COURT: Because if you look at the decision, Judge Silver ruled in favor of the Bank and found that the sale wasn't commercially reasonable, correct?

MR. STERN: I think so, Your Honor.

THE COURT: Right. And so --

MR. STERN: It was a mess.

THE COURT: -- to me, I mean, the gist of it was -- I thought the takeaway was that, well, this isn't something that she can just -- the district court can't just automatically say, oh, $7,000 isn't commercially reasonable.

And that's what I've been saying all along, because how do you evaluate this with all of the uncertainty? There is no expert who can come in and say, this is how I evaluate the correct price, and that you can't just say, well, as a matter of law, a low price means it wasn't, A, a purchase for a value, and B, that the person was a bona fide -- was not -- was not --

MR. STERN: So --

THE COURT: -- a bona fide purchaser.

MR. STERN: Your Honor --

THE COURT: So --

MR. STERN: The --

THE COURT: I'm interested to hear what you thought it said.

MR. STERN: I think it said a lot of things, and I think it likely had two authors, even though one signed it. And it reflects I think a -- this is just personal interpretation of this -- a baseline of unanimity.

And there may be some additional work that has to be done to get some of the remaining issues fully resolved. But the baseline of unanimity includes, first of all, a confirmation that commercial reasonableness is a factor. It's not a factor that, as you --

THE COURT: Well, see, I didn't read it that way. I didn't read it as saying commercial -- that it has to be commercially reasonable. The way I read that, it was a rejection of the district court's decision that because it wasn't, you know, commercially reasonable, that it wasn't a bona fide purchaser. That's how I read that.

MR. STERN: Well, Your Honor --

THE COURT: That -- because she ruled -- let's not forget, the District Court ruled for the Bank. And so --

MR. STERN: Correct, Your Honor, but --

THE COURT: -- to me, it was saying, well, you can't automatically say without anymore information that 7,000 or whatever it was that they paid for that property, meant that

it wasn't -- so, I didn't read it that you -- you're entitled to prove it; I read it the opposite way. I read it that the District Court was wrong in saying, oh, because it was a low price, that's one of the factors that means that the Bank should -- should -- that it was -- that the Bank should prevail on their Motion for Summary Judgment.

MR. STERN: The --

THE COURT: That's how I read that.

MR. STERN: And I don't necessarily disagree with a lot of what you just said.

THE COURT: Right.

MR. STERN: However, I think this case is a watershed in providing directive to the courts -- or, you know, to the judges that believe that commercial reasonableness was basically a nonissue. It is an issue. It may not be an issue that the Bank can offensively in summary judgment get.

THE COURT: Well, except, to me, you want us to say, oh, well, if they don't prove commercial reasonableness, the Bank should prevail, however that's calculated. But that decision doesn't say that.

What that decision says is, well, to me, maybe that's a factor that you can consider in evaluating the equities. Again, evaluating the equities, that's something that you can weigh. You can weigh anything. I mean, you

know, I can't say you can't weigh anything. I can't weigh against the Bank that you're wearing a blue necktie, but we can weigh various factors. So, that may be important in weighing the equities, number one.

And number two, that might be a consideration in determining whether or not somebody was a bona fide purchaser or not, but they -- but they clearly say -- Justice Pickering clearly says, look, you know, it's not reasonable value, it's -- it's not -- it's for a valuable consideration that you don't put a number on that. So --

MR. STERN: It's not market value. I think --

THE COURT: -- to me, I read it -- I read it differently than you do.

MR. STERN: And I don't -- I don't know --

THE COURT: I mean, I don't think it says, oh, the purchaser has to prove commercial reasonableness. I don't -- that's what you want it to say, but it doesn't say that.

MR. STERN: Well --

THE COURT: To me, that may be --

MR. STERN: I haven't --

THE COURT: -- a factor. As I said, I'm weighing the equities.

MR. STERN: It's --

THE COURT: And they talk -- you know.

MR. STERN: It's -- it's -- if I could start with

the purchase price, Your Honor, there is a long history of argument in your court and others as to whether you need something additional to an adequate -- an inadequate purchase price in order for the Bank --

THE COURT: And clearly, you do.

MR. STERN: The Court I think confirmed that.

THE COURT: Right.

MR. STERN: But --

THE COURT: That clearly, you do.

MR. STERN: But before we get into the nitty-gritty of this case, the Court also opened the door, we believe, to a second inquiry into the purchase price by mentioning twice the Restatement of Property analysis, which is not commercial reasonableness; it's a different source of law.

So, commercial reasonableness emanates from Chapter 116. It emanates from the incorporation of the good faith standard from the Uniform Commercial Code. That's --

THE COURT: Right. Yeah, I mean, candidly, I didn't read it that way. I read it that that's a factor that you can consider, and that you're allowed to inquire as to whether or not, you know, there was any fraud in the sale, and anything like that.

Now, if you're trying to prove fraud in the sale, then one of the things you're going to use as evidence of fraud is the purchase price. You're going to use the adequacy

of notice to potential buyers. You're going to use the adequacy of notice to the Bank. I mean, that was kind of an unusual case, because the Bank had purchased already the home and they stood in the position of the homeowner, which, to me, I would have maybe rather seen a decision that's more analogous to the cases most of us are getting, which is where the Bank doesn't own the home outright; the Bank stands as the holder of the Deed of Trust.

MR. STERN: And the reason that I think the Court was quite -- the Supreme Court was very annoyed at that, because they --

THE COURT: Right. Because you're standing as the homeowner. You're getting --

MR. STERN: Right.

THE COURT: I mean, so you -- I mean, basically balancing the equities. What I took away from that is the Bank should have been paying their Homeowners Association assessments as the homeowner all that time. But --

MR. STERN: Exactly.

THE COURT: -- to get back to commercial reasonableness, that's a factor. If you're trying to prove fraud, then you're going to look to commercial reasonableness, and that's a factor that you might prove. I mean, because, you know, if -- if people are all paying say $10,000 for these homes that are worth 200,000, and they're paying $500, then

that's a factor that looks for -- to -- to fraud. That's how I took that away.

MR. STERN: There's two lines, Your Honor. And with the Court's indulgence, I would like to read from page 15 of the opinion, which says towards the bottom quarter, "See also." So, they cite a case, and then the Supreme Court says, "See also Restatement Third of Mortgages, Section 8.3, Comment B," parentheses -- and this is where it's interesting, stating that, quote, "Gross inadequacy cannot be precisely defined in terms of a specific percentage of fair market value, but generally, a Court is warranted in invalidating a sale where the price is less than 20 percent of fair market value."

And if you go to the Restatement -- so, the Supreme Court says, "See the Restatement." You look at the Restatement, and there isn't a word in the Restatement about factors other than inadequacy of price.

So, this to us is a strong signal that, apart from commercial reasonableness, if you've got a sale price where it's less than 20 percent of market value, you've got a separate and standalone analysis under the Restatement of Property. Separate source of law; not commercial reasonableness under Section 116.

THE COURT: Right, I get what you're saying, I just --

MR. STERN: That's how we see it.

THE COURT: I -- I -- my -- my -- the -- I --
MR. STERN: And I think another --
THE COURT: It's curious, because when I read that, I mean, I'm just -- this is somewhat irrelevant, but you took it away, I guess, that, oh, this strengthens the Bank's position. And I read that and I thought, oh, oh, no, I've been granting summary judgment in favor of the Banks way too much. That's what I took away from reading that.

And I mean, I think my -- the message I took away from that was, look, there are many factors, and maybe we need to be fleshing all this stuff out more than granting summary judgment on it.

MR. STERN: Actually, I agree with that part of it. On that part of it --
THE COURT: And that's --
MR. STERN: -- you and I are in complete agreement.
THE COURT: And that's what I took away -- one of the thing -- I took several things away from it, but that's one of the things I took away. But I definitely -- notwithstanding the fact that they cited the Restatement, you know, I took the commercial reasonableness away as maybe a factor that you could consider, again, in weighing the equities, and in determining whether or not there was fraud or collusion, or something like that between the Homeowners Association --

MR. STERN: Right.

THE COURT: -- and the ultimate purchaser. That's what I saw as the relevancy there; not that you could automatically say, oh, well, it's 20 percent of fair market value, it -- or it's, you know, 12 percent of fair market value, it's not commercially reasonable and the Bank should win. You know, again, it's a factor.

Well, if it's a factor that we can consider in making these determinations, then maybe the suggestion is we shouldn't be granting summary judgment on all this stuff.

MR. STERN: I think --

THE COURT: Although, you know, again, that's kind of what I took away from it.

MR. STERN: I think in terms of the procedure and the directive on summary judgment, I do agree with you on that, Your Honor. If you've got a -- a situation where there's various factors, and we as the Bank assert commercial reasonableness as a defense, and SFR and others say, not there, I think you are justified, and the guidance here is that you should deny their summary judgments --

THE COURT: See, I didn't read it --

MR. STERN: -- and send us to trial on that.

THE COURT: -- that way. What I read is if -- is, look, we shouldn't be -- here's the way -- where I -- what I took away is I -- you know, I -- my feeling is that the

legislature wanted the Homeowners Association s to be able to sell these properties when, you know, the owners aren't paying for them, and maybe to encourage the Banks to be paying the homeowners assessments, or to conduct their foreclosures ahead of time. That may have been the undercurrent, I don't know. But, you know, to -- to increase the expenses for the ultimate purchasers then makes these less attractive options to purchase.

And so, to me, you know, the more discovery you have to do on both sides, you know, I think the cost of litigation is -- it's bad for everybody, but, you know, I think that, again, commercial --

MR. STERN: There's a lot at stake --

THE COURT: If you had --

MR. STERN: -- on both sides, Your Honor.

THE COURT: And so, I took away, well, maybe we need to let more discovery occur. But my takeaway then is, okay, if you've done discovery, and there's nothing to suggest that it wasn't properly noticed, that you didn't have an opportunity for various entities or individuals to bid, and there's nothing to suggest fraud or collusion, then we don't need to look to commercial reasonableness.

Now, let's just say you've done discovery and there was something to suggest, oh, SFR's the only party that showed up, or SFR was the only party that was noticed, all of these

other entities that are out there buying this stuff didn't bid --

MR. STERN: Yeah.

THE COURT: -- didn't show up, didn't know about it, then -- then I think commercial reasonableness would come into play. That's kind of what I took away from that.

MR. STERN: We -- Your Honor --

THE COURT: But -- but my -- the message I took also as a judge was, well, maybe I need to let more discovery happen, because now the Banks -- to me, the message was -- and this is more pro bank -- is they have an opportunity now to assert the fraud, collusion, and I've been kind of saying, oh, well, it's probably fine.

MR. STERN: Your Honor, I think -- first of all, I tend to agree that more discovery is going to be necessary here, and --

THE COURT: Right.

MR. STERN: -- I agree --

THE COURT: Which is a benefit, frankly, to the Banks.

MR. STERN: Well, I don't know that -- probably. I mean, I think the more we find here, the -- the more factors are going to see --

THE COURT: Well, I mean, and I think the judges --

MR. STERN: -- become relevant.

THE COURT: -- are consistent in this view. Let's face it, the Bank of America can drag this thing through and fund discovery way, way better than a Homeowners Association and the purchasers.

MR. STERN: I don't know that that's --

THE COURT: But in any event, that --

MR. STERN: I don't know that that's --

THE COURT: We don't need to debate that.

MR. STERN: -- actually what's been decided. I --

THE COURT: Well, I think that's just the general consensus.

MR. STERN: It's -- that may be what it is, Your Honor. I think --

THE COURT: But in any event, that's --

MR. STERN: We do --

THE COURT: -- not really relevant.

MR. STERN: We do, I think --

THE COURT: I brought it up, but it's not necessarily relevant.

MR. STERN: It's certainly the case that a lot of these cases where commercial reasonableness was not as -- they didn't get the traction are probably -- in our view, probably going to require trials. I think that was a message that the Supreme Court was clear on when they spoke several times about the inappropriateness of summary judgment when there's a lot

of factors. I don't think they -- I --

THE COURT: So, wait. Can I cut to the chase? This is your Motion for Summary Judgment.

MR. STERN: Yes.

THE COURT: Now, we all know --

MR. STERN: We tendered --

THE COURT: -- that this was fully briefed --

MR. STERN: Yes.

THE COURT: -- prior to the time --

MR. STERN: That's one problem.

THE COURT: -- the decision came out. I guess it was, what --

MR. STERN: Thursday. Last Thursday.

THE COURT: Thursday, right.

MR. STERN: Yeah.

THE COURT: Less than a week ago.

MR. STERN: So, that's one problem, Your Honor.

THE COURT: So, are you now saying, well, maybe summary judgment isn't appropriate based on your reading of that decision?

MR. STERN: Yes and no. It's inappropriate for SFR; it's appropriate for Bank of America, because what this decision -- yes, I said it.

(Pause in the proceedings)

MR. STERN: But we are entitled to summary judgment

in this case, because we tendered; we paid the lien. And as I think you've already determined --

THE COURT: Well, let me cut to this, and I'm interested to hear your opinion on this -- this one.

MR. STERN: Yes, I think I know what the question's going to be.

THE COURT: Do you know where I'm going?

MR. STERN: I think, yes.

THE COURT: Well, when I read that, you know, I'd been saying, oh, the nine months is just -- and I think a lot of judges have been saying the nine months is just the assessments themselves; not all of this other stuff. But if you read the decision, it seems to contemplate, to me, that, oh, it's more than the nine months, because we need to have them -- you know, we can't --

MR. STERN: Here's the problem.

THE COURT: -- we need to -- but don't you read it that way?

MR. STERN: No.

THE COURT: Because Justice Pickering talks about, well, we don't really know what the fees and the costs are, but I thought there was a little bit of an ambiguity there.

MR. STERN: Here's --

THE COURT: And the ambiguity may be in the fact that the Bank was the owner --

MR. STERN: Exactly.

THE COURT: -- in that case. So, did it mean that we look to the -- all these fees and costs, because the Bank's the owner? And if you weigh the equities, why the heck should they profit when they were the owner? Or do we say -- I mean, again, I wish they used another case, frankly. That might have been --

MR. STERN: And I think that's what they --

THE COURT: Or do we say --

MR. STERN: -- were saying, Your Honor.

THE COURT: Or do we say, no, the Supreme Court is clearly contemplating that the nine months isn't just the nine months of the actual assessments --

MR. STERN: They didn't say that either.

THE COURT: -- that it is fees and costs?

MR. STERN: They didn't say that either.

THE COURT: So, what is it? What do you think?

MR. STERN: So, I think two things, Your Honor.

THE COURT: I had a question on that one.

MR. STERN: I think two things. And firstly, you said, I wish they had used another case for this and, I think, essentially, that's what they said there; we wanted another case. And this case --

THE COURT: Oh my God, there's like 200 --

MR. STERN: And we've --

THE COURT: -- out there.

MR. STERN: And this issue is slowly working its way through the -- you know, moving the pig through the --

THE COURT: And the only reason I say I wish they'd used another case is that case was very dissimilar from most of the cases.

MR. STERN: Yeah, so --

THE COURT: I mean, I'm not criticizing the Supreme Court, I just want to make it clear.

MR. STERN: Well --

THE COURT: That case is very factually dissimilar --

MR. STERN: Right.

THE COURT: -- from most of the cases I've had.

MR. STERN: Yeah, and what you have specifically in that case, Your Honor, I think -- so, in that case, the Bank forecloses first, they win the race to the finish line. They --

THE COURT: Right. And then they're the -- they --

MR. STERN: And then they think they've got a super priority issue.

THE COURT: Right.

MR. STERN: And so --

THE COURT: Which it really wasn't, because --

MR. STERN: The Bank wasn't --

THE COURT: -- they're the owner.

MR. STERN: In that case, the Bank was not thinking right. And then, without intending to criticize the Bank's counsel in that case, they continued to prosecute it as a super priority case, and they presented the record in that manner to the Supreme Court.

And so, I think what they said is, the record was such a mess that we don't know anything about amounts, or even times, because the time frame then becomes important, because when the Bank forecloses and becomes the owner, anything that was incurred --

THE COURT: Then they just stand in the shoes --

MR. STERN: -- before that --

THE COURT: -- of an ordinary owner who could --

MR. STERN: Correct. And so any -- any amount that was incurred before that would present the Supreme Court with the -- with the --

THE COURT: The super priority issue.

MR. STERN: -- with a justiciable issue is that super priority given that is costs. And until they can even determine that -- what amount or if any amount at all constituting costs was incurred before the Bank's foreclosure, that issue was not factually presented to the Court. And I think that's why they remanded with that language.

Having -- so, the first -- the first thing is, I

think they agreed, this is not the right case to decide that super priority is a cost issue. The other thing, they said they wanted -- they wanted a factual record on how much, and when, and what constitutes.

Certainly, the Court prefaced everything by saying it's an open issue. And they declined to decide it either way. They didn't also say all of these other amounts are part of the super priority lien.

And there's another issue, Your Honor. It's a nuanced issue, because the Court could come out and say, well, maybe some costs and fees are part of the lien, but not part of the super priority portion, because the statute --

THE COURT: Which is what we've --

MR. STERN: -- cuts it off at nine months.

THE COURT: Which is what I've been saying; that you can have fees and costs in the lien, but what's the super priority amount?

MR. STERN: And --

THE COURT: Because I've been, as you know, ruling that if the Bank tendered, and they tendered the correct amount, that that should protect their interest in the property. That's how I've been ruling. Or if they didn't get notice.

MR. STERN: Right.

THE COURT: And I think I had one case where they

sent it to the wrong address or something, so there wasn't any really evidence that the Bank had gotten notice.

MR. STERN: Right. And -- and I think that --

THE COURT: But now I'm thinking, well, maybe that's wrong.

MR. STERN: No.

THE COURT: Maybe --

MR. STERN: It's not wrong, Your Honor. You've been correct.

THE COURT: Maybe -- because I also kind of thought there was this suggestion in that, that when the Bank tenders, they should tender the whole amount and fight about it later. That if you're going to weigh the equities, the Bank should have tendered the whole amount instead of just tendering their own calculation and saying, well, that protects our interest.

MR. STERN: They didn't say that.

THE COURT: That's what I kind of thought that was a suggestion to.

MR. STERN: That was --

THE COURT: I'm glad I read this thing.

MR. STERN: -- not a response to the tender amount. It couldn't have been, because the Bank was a homeowner.

THE COURT: Right. So, that's why I thought it was ambiguous, because the Bank was the homeowner. But there's also the suggestion -- they didn't say -- I mean, they could

have done an easy decision in a page and said, the Bank stands in the position of a homeowner, and they were obligated to pay the full amount due, and they didn't. And it was foreclosed upon properly, and end of day -- end of story.

So, why did they go through this whole analysis talking about everything else if they weren't trying to give us some sort of guidance?

MR. STERN: I think, Your Honor, because they were trying to give the District Court guidance on the specific remand. I mean, that's -- in fact, they said that. They actually did say that. They said, on remand, we want --

THE COURT: Yeah, but then they didn't have to publish it if it was just to give guidance --

MR. STERN: Well, there's a lot more here. There's a lot more here in this opinion about the commercial reasonableness, about the inadequacy of the price, about how this theory about the trust deed recitals being sacrosanct at the level that it can then be assailed, that's out the door as well. Those are all important issues --

THE COURT: Right. Well, except --

MR. STERN: -- that require the published decision.

THE COURT: Except I still took it, yes, those are sacrosanct, unless you've got some of these other issues that aren't in the deed recital, such as, there was -- there's notice -- it's conclusively presumed there was notice, but if

you've tendered, then that's not in the deed recital. It doesn't say --

MR. STERN: Right.

THE COURT: -- the Bank didn't tender.

MR. STERN: I think --

THE COURT: So, I mean --

MR. STERN: I think the Court's going to go further than that, Your Honor, because they published -- they published this decision. There was an unpublished order on that same date in which --

THE COURT: Oh, I didn't see that.

MR. STERN: Well, we -- you know, the ones in the industry, we look at this stuff obsessively. They -- they published the -- excuse me -- they had an unpublished order in which they said -- in which they remanded, basically saying -- they didn't say, you look at the trust deed recitals, but there was a question of notice, and that all was in the deed recitals.

THE COURT: Right.

MR. STERN: And they reversed on that. And so, while they didn't say it, I think that's -- the Court's probably heading that way.

THE COURT: Let me ask -- I'm -- oh, never mind. I'm sorry, go on.

MR. STERN: So, Your Honor, here, what we have is no

ambiguity as to what amount the Bank tendered. The Bank tendered nine months. There's no reason for the Court to have a trial on that issue, because you've got agreement from the HOA. I don't think -- I don't think SFR has challenged that part of it. And so, having -- and there's also no dispute here that Alessi received the check and then rejected it.

I think all of the factual determination that the Supreme Court wanted done in terms of what constitutes the amount is properly presented to you at summary judgment. I don't think there's anything that we're going to add to that at trial in terms of what amount -- what amounts constitute what. You've got it.

And so, the court didn't in Shadow Wood say, that's not sufficient. It said, we're not resolving this issue. And it didn't provide any guidance even when -- when it said that your -- that all of these other things have to determine it, about what the amount is. It didn't provide any guidance as to how you should, as a trial judge, determine what the legal significance of that is.

So, we're really left in the same universe in terms of what the legal significance is as we were beforehand. We've got some directive that the Court wants very precise, factual records on this, but you've got that here on summary judgment. We've got a statute. The statute is clear. It says nine months. It doesn't say nine months, comma, plus.

And I think --

THE COURT: Well, that's how I've been reading it in the past, but;.

MR. STERN: And there's nothing in Shadow Wood that contradicts that. All Shadow Wood says is, we want clear records. And on this clear -- on this very messy case where everybody thought they were dealing with a super priority, when, clearly, they're not, we want you all to get it right factually. And that's really what they said there. Your Honor, Justice Pickering was the author of both SFR, and now Shadow Wood.

THE COURT: Who do you think the Shadow author was?

MR. STERN: I think --

THE COURT: Pardon the pun, or semi-pun.

MR. STERN: Was that deliberate? That was good.

THE COURT: No.

MR. STERN: I think -- I don't know, Your Honor. There's certainly -- if you -- we also listened to the tape of the argument, and it seemed like Justice Douglas was asking some questions, and Justice Hardesty was asking some questions. And Justice Hardesty was concerned with the Bank's -- well, why didn't the Bank do more.

And I think one of the questions that is going to have to get resolved at some point is, at what point has the Bank done enough to satisfy the pre-sale tender rights? Is it

enough to do what the Bank did here, or when Alessi improperly rejects the payment, does the Bank now have to do more?

THE COURT: Well, to me, they seem to suggest that the Bank ought to do more; that the Bank ought to put the purchaser on --

MR. STERN: But here's the problem.

THE COURT: -- on notice at that point. And they say the Bank could have done this.

MR. STERN: Here's the problem. They say the Bank could have done this, but they say that in the context of BFP; they say that in the context of the inadequacy of price. They do not say that in the context of a tender.

And there is to the -- as we're -- and we've researched this exhaustively, and I'd be happy to provide more briefing on this. If you've got as a -- if you as a junior lien holder make a payment and it gets rejected, under the pre-sale common law right of tender, you do not have -- you do not have a further obligation.

I think one of the things that SFR said here is that we should have recorded this as a property interest as if it were an easement, or a fee, or some -- you don't have that obligation. That's one of the issues that was left unresolved here, and you've been correctly deciding this. You know, once we make the payment and pay, if the secured party -- if the lien holder rejects the payment, that's the end of it. And

nothing in Shadow Wood contradicts that.

And so -- and there's two parts of this, right? So, there's, what's the proper amount, but there's also, what's the consequence? And Shadow Wood did not get at all into the consequence.

And we're not talking about the consequence of the Bank not doing more on sufficiency of price or anything else, but on payment. And the clear tradition here from time immemorial under the common law is, if you have made your payment, that discharges your obligation. You don't have -- it would be like if -- you know, let's say that you're my credit card bank --

THE COURT: No, I mean, I was agreeing with you, and I -- I mean, that made sense to me. As you know, I was ruling that way.

MR. STERN: Yeah.

THE COURT: But, you know, again, there's certainly a suggestion that, well, maybe the Bank ought to do more. Maybe the Bank is in the best position --

MR. STERN: Yeah.

THE COURT: -- to protect its interests, because certainly SFR, the purchaser, they don't know --

MR. STERN: Well --

THE COURT: -- what the Bank may or may not have done.

MR. STERN: Well, of course they know.
THE COURT: As they --
MR. STERN: Of course they know.
THE COURT: How do they know that?
MR. STERN: They know that for a couple of reasons. I heard some rustling over there.
THE COURT: Well, she's looking at you like, how do they know?
MR. STERN: Because they know -- and they've testified in depositions on this in many cases -- they know that they're buying litigation. They know that the Banks are doing this. And --
THE COURT: Well, yeah, but what the issue is --
MR. STERN: -- depending on the time frame, Your Honor --
THE COURT: What the issue is, is do they know that the Bank has tendered? And sometimes, the Bank doesn't tender. Sometimes the Bank tenders the wrong amount. Sometimes the Bank tenders the wrong amount and sends a letter, you better take this wrong amount or you people are out of luck, or whatever those letters say. And I know your bank has sent those letters.
MR. STERN: Yes, and --
THE COURT: Because Mr. Brenner has stood over there defending the letters.

MR. STERN: Oh, yeah, the letters are fine.

THE COURT: And so, all I'm saying is -- you know, or sometimes the Bank doesn't tender, or, you know, whatever. So, how on earth is the purchaser supposed to know in each instance -- and I'm -- you know, don't even tell me, oh, well, if it's Bank of America, they know that there's a tender, because that's not always true. We've had cases with the Bank of America where they've tendered the wrong amount. They didn't get the calculation. So --

MR. STERN: How does -- how do they know? Your Honor, there's a couple of ways that they can know. Firstly -- and but before we get there, I would suggest that we're -- it's the wrong question with -- you know --

THE COURT: Well, you brought it up. You said they ought to -- right?

MR. STERN: I --

THE COURT: Did you hear that?

MR. STERN: I perhaps --

THE COURT: I heard, like, well, they ought to know. And then I said, well, how would they know?

MR. STERN: I perhaps --

THE COURT: I mean, so you --

MR. STERN: I perhaps stated it --

THE COURT: You brought it up.

MR. STERN: -- inartfully, Your Honor. What -- what

happens in these situations is that SFR and others like it know that there's a senior lien. They know -- and that's a matter of public record.

They also know that the Bank is going to claim a -- an interest in that. And they also know that they were going to be buying litigation on this. They've admitted this; they've said it. They know all of these things.

Now, when the Bank makes a tender and makes the payment, it -- it's argued, anyway, that it is at that point the obligation of the trustee to either accept it, or if they don't accept it, to inform -- and Alessi & Koenig has informed buyers that there was a super priority tender.

We don't know when they started doing that. There was a -- I don't think they've done that in this case, but it's -- on SFR's perspective, the bona fide purchaser analysis is not about whether they had actual knowledge that there was a tender. It's really about whether they knew, or had reason to know, or would have known based on inquiry --

THE COURT: Knew -- right.

MR. STERN: -- that they were -- that they were coming into a problem. And that was the whole business model here; buy cheap, litigate. And they said -- and this is their defense to the commercial reasonableness, why their -- why the price they paid was adequate, is because they knew that they were buying a problem. That's not an innocent buyer. An

innocent buyer is somebody who actually doesn't know what they're getting into. SFR knows it's getting into a risky situation.

And so, you combine that with, in this case, Your Honor, Alessi's, I think. undisputed failure to inform anybody that there -- that they had rejected a tender, and that's -- that's the additional factor you have on the commercial reasonableness balance.

So, it's -- it's certainly problematic that Alessi would not take this money, and then not tell anybody about it. They said that it was our responsibility. Well, Alessi's the trustee here. It's their -- it's actually their responsibility to do that.

THE COURT: Well, except, right now, we're looking -- we're weighing you against -- you, not literally, obviously -- against SFR. I mean, whether Alessi did something inappropriate really isn't the issue at the moment.

MR. STERN: And it is going to be an issue on the commercial reasonableness of the sale, Your Honor, we think, but -- because it's not just price plus --

THE COURT: Well --

MR. STERN: -- collusion or fraud; it's any impropriety, we think --

THE COURT: Well, okay.

MR. STERN: -- on the sale.

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO BAC HOME LOANS SERVICING, LP FKA COUNTRYWIDE HOME LOANS SERVICING, LP, a National Association. Appellant, vs. SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.	Case No. 70501

APPEAL

from the Eighth Judicial District Court, Department XXI
The Honorable Valerie Adair, District Judge
District Court Case No. A-13-684501-C

APPELLANT'S INDEX TO APPENDIX

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 7th day of October, 2016, I caused to be served a true and correct copy of foregoing **APPELLANT'S INDEX TO APPENDIX**, in the following manner:

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

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