Case No. 71325

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,
Appellant,
vs.
FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, N.A., a national association,
Respondent.

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable GLORIA STURMAN, District Judge
District Court Case No. District Court Case No. A-13-679329-C

JOINT APPENDIX VOLUME 4

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1	1	4/2/13	Complaint	JA_0001
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1	6	4/30/14	Default Against Ana Torres	JA_0032
1&2	7	3/2/16	First Horizon Home Loans Motion for Summary Judgment	JA_0037
2&3	8	3/2/16	SFR's Motion for Summary Judgment	JA_0361
3	9	3/3/16	Notice on Hearing on SFR's Motion for Summary Judgment	JA_0543
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4	16	9/16/16	Case Appeal Statement	JA_0801
4	17	6/21/16	Transcript of Proceedings Motion for Summary Judgment	JA_0807
4	18	9/13/16	Transcript of Proceedings Status Check	JA_0873

The following excerpt from the Preamble helps the reader understand the relevance and applicability of the specific portions of the USPAP referenced in the report that follows.

USPAP addresses the ethical and performance obligations of appraisers through DEFINITIONS, Rules, Standards, Standards Rules, and Statements.

- The DEFINITIONS establish the application of certain terminology in USPAP.
- The ETHICS RULE sets forth the requirements for integrity, impartiality, objectivity, independent judgment, and ethical conduct.
- The RECORD KEEPING RULE establishes the workfile requirements for appraisal, appraisal review, and appraisal consulting assignments.
- The COMPETENCY RULE presents pre-assignment and Assignment Conditions for knowledge and experience.
- The SCOPE OF WORK RULE presents obligations related to problem identification, research, and analyses.
- The JURISDICTIONAL EXCEPTION RULE preserves the balance of USPAP if a portion is contrary to law or public policy of a jurisdiction.
- The ten Standards establish the requirements for appraisal, appraisal review, and appraisal consulting service and the manner in which each is communicated.
    - STANDARDS 1 and 2 establish requirements for the development and communication of a real property appraisal.
    - STANDARD 3 establishes requirements for the development and communication of an appraisal review.
    - (Note: STANDARDS 4 and 5 have been retired)
    - STANDARD 6 establishes requirements for the development and communication of a mass appraisal.
    - STANDARDS 7 and 8 establish requirements for the development and communication of a personal property appraisal.
    - STANDARDS 9 and 10 establish requirements for the development and communication of a business or intangible asset appraisal.
- Statements on Appraisal Standards clarify, interpret, explain, or elaborate on a Rule or Standards Rule.
- Comments are an integral part of USPAP and have the same weight as the component they address. These extensions of the DEFINITIONS, Rules, and Standards Rules provide interpretation and establish the context and conditions for application.

It is important to note that the USPAP make a significant distinction between the *Development* of an appraisal or appraisal review and the *Communication* (reporting) of an appraisal or appraisal review. Standards Rule 1 (SR-1) applies to the *Development* of an appraisal of real property whereas SR-2 applies to the *Communication* of the appraisal. SR-3 is one of two Standards Rules where both development and communication are addressed in the same rule. However, the sections of SR-3 that apply to the development of an appraisal review are clearly labeled and the sections that apply to communication are clearly labeled.

This review focuses on compliance with generally accepted appraisal methodology and the USPAP – specifically the Preamble, Definitions, General Rules, Standards Rule 1, and Standards Rule 2 for the Development and Reporting of a Real Property Appraisal.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Howard/Lubawy report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions, and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

The table on the following page provides a summary of the Standards Rules applicable to the Howard/Lubawy appraisal and a brief summary of my findings related to each specific USPAP rule. Green cells indicate compliance. Red cells indicate a lack of compliance. Yellow cells indicate either; technical violations of USPAP that do not significantly influence the overall credibility of the appraisal; or issues that are subject to interpretation.

Appraisal Report Std-3 Review Checklist (2014-2015 USPAP)				
USPAP Reference	**Item**	**Location**	**Notes**	**Compliance**
2-1(a)	Clear, Accurate, Not Misleading		False information. Inconsistent conclusions. Utilized definition of Market Value is inappropriate.	N
2-1(b)	Sufficient Information for Understanding		Failure to report relevant aspects of the case. Failure to indicate how the utilized definition applies to the problem to be solved.	N
2-1(c)	Disclose all Assumptions & Limiting Conditions	Form, Addenda		Y
2-2	Report Type Prominently Disclosed	Form		Y
Identify Problem and Determine Adequate Scope of Work				**Compliance**
2-2(a)(vi)	Transmittal Date	0000032, 015		Y
	Effective Date 1-2(d)			
	Report Date			
2-2(a)(i) 1-2(a)	Client Identity	000002, 004		Y
2-2(a)(i); 1-2(a)	Intended User(s)	000001, 004		Y
2-2(a)(ii); 1-2(b)	Intended Use	000001, 004	Statement-9	Y
2-2(a)(iii); 1-2(e)	Legal Description or Other Property ID	000001		Y
2-2(a)(iv); 1-2(e)(ii)	Property Interest	000001		Y
2-2(a)(v) 1-2(c)	Type of Value	000001, 015	Utilized definition is disclosed, but is not applicable to the facts of the case.	N
	Definition of Value	000015		
	Source of Definition	000015		
	Applicability/Application of Definition	No		
	Reasonable Exposure Time (if developed)	000001		
2-2(a)(vii) 1-2(h)	Scope of Work	000004, 014	Proper disclosure.	Y
Analysis and Development				**Compliance**
2-2(a)(ix); 1-3(a)(b)	Use Existing, Use Appraised	000001		Y
2-2(a)(x)	Summarize HABU (if developed)	000001		Y
2-2(a)(xi) 1-2(f) 1-2(g)	Standard Assumptions and Limiting Conditions	000014		Y
	- Extraordinary Assumptions	00001, 003, 014		
	Disclosure of Affect	Yes		
	- Hypothetical Conditions	-		
	Disclosure of Affect	-		
2-2(a)(viii) 1-4	Collect/Verify/Analyze Info for Credible Results		Sales are located in Age Restricted community. Subject is not. Questionalble adjustment methodology.	N
	(a) Sales Comparison Approach	000002		
	(b) Cost Approach	-		
	(c) Income Approach	-		
1-5(a)&(b)	Sales, Contracts and Listing History	000003	No disclosure of prior Foreclosure and HOA sale.	N
1-6	Reconcile Data/Analysis and Approaches	000003		Y
1-1(a)	Be Aware of, Understand, Correctly Employ	-	Value not applicable.	Y
1-1(b)	Substantial Error: Omission or Commission	-	Value not applicable, errors.	Y
1-1(c)	Carelessness or Negligence		Totality of errors. Negligent performance.	Y
Certification				**Compliance**
2-2(a)(xii)	Include a Signed Certification (SR 2-3)	000015		Y
2-3	USPAP Certification	000015		Y
General Rules				**Compliance**
ETHICS RULE — Conduct	Avoid Bias or Advocacy; Gross Negligence; Disclosure of Prior Work	-	The use of an inappropriate definition may be an indication of bias.	Y
ETHICS RULE — Management	Disclosure of Payment to Procure; Contingent Compensation; Proper Advertising; Signature Issues	-		
ETHICS RULE — Confidentiality	Protect Appraiser-Client Relationship	-		
RECORD KEEPING RULE	Prepare and maintain a workfile. Must exist prior to issuance of any report. Must contain name of client/intended users; true copies of all reports; summaries of oral reports; and all data, info, docs to support opinions/conclusions and show compliance with USPAP.	workfile	Unknown. Workfile not provided.	-
COMPETENCY RULE	Applies to factors such as, but not limited to, an appraiser's familiarity with a specific type of property or asset, a market, a geographic area, an intended use, specific laws and regulations, or an analytical method.		Lack of competent performance.	N
SCOPE OF WORK RULE	Problem Identification	00004, 014	Failure to properly identify the problem. Failure to use an appropriate type/definition of value. Results are not credible in context of Intended Use.	N
	SOW Acceptability	00004, 014		
	Disclosure	00004, 014		
JURISDICTIONAL EXCEPTION RULE		-		N/A

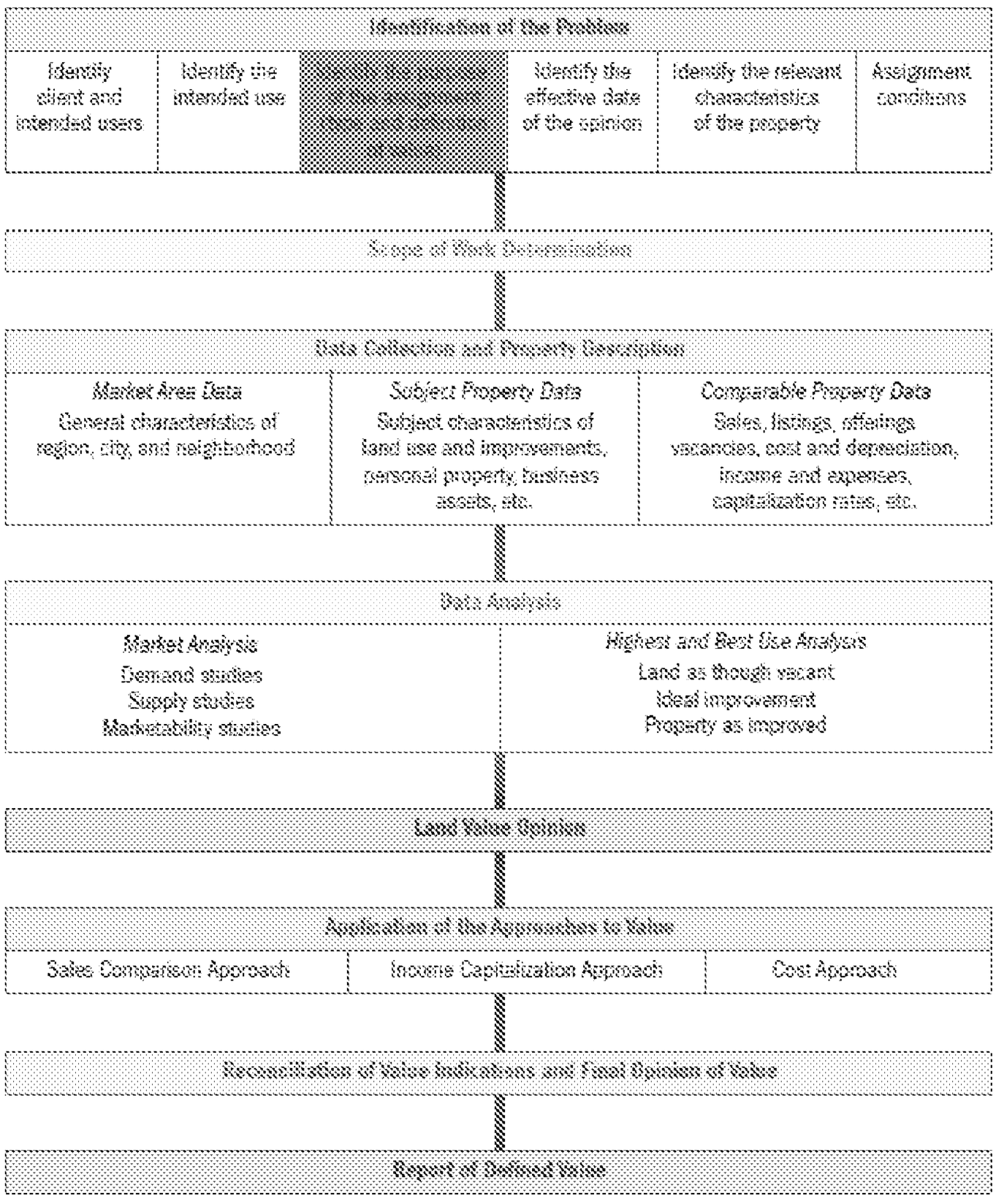
FINDINGS - Howard/Lubawy Appraisal

Finding No. 1:

The Howard/Lubawy report contains numerous errors and inconsistencies. The most significant being the failure to identify a type and definition of value applicable in the context of the assignment. This demonstrates a lack of competent performance. It also causes the Howard/Lubawy report to be misleading and to lack credibility.

Key Observations:

The diagram below comes from The Appraisal of Real Estate, 14th Edition. It shows the 8-step valuation process. The added highlight in step-1 shows that the type and definition of value are part of the first step.[18]



[18] The Appraisal of Real Estate, 14th Edition, p 37 (Chicago: Appraisal Institute, 2013).

The Fair Market Value definition from the Howard/Lubawy report appears below:

Fair Market Value[19]

The price which a purchaser, willing but not obliged to buy, would pay an owner *willing but not obliged to sell*, taking into consideration all the uses to which the property is adapted and might in reason be applied. (*Emphasis* added)

Source: Unruh v. Streight, 96 Nev. 684, 686, 615 P.2d 247 (1980)

The 14th Edition states:

One essential task that the appraiser must complete at the very onset of the valuation process is identifying and defining the type of value that will be the focus of the appraisal assignment. The type of value should be one of the terms of engagement between the client and appraiser. The appraiser should be certain of this at the time the assignment is accepted, notwithstanding certain unusual situations.[20]

...

Properties in distressed markets often do not meet the conditions specified in the definition of market value. Other types of value might be more appropriate for properties when a forced sale or some other form of distress is influencing the decisions of the buyer or seller.[21]

In 1Q 2013, the Las Vegas market was still recovering from the bursting of the housing bubble. Nevada's robosigning law (AB284) was under scrutiny leading into the 2013 legislature. Appraisers working in this retrospective market were balancing a market showing rapid appreciation due to a lack of supply - with the issue of an undetermined number abandoned or technically abandoned houses. The potential of 12+ months of *shadow* inventory had many real estate professionals questioning the sustainability of the market. Following the most significant rise and fall of any housing market in the nation, Las Vegas was most certainly a distressed market.

"The intended use of an appraisal dictates which definition of market value is applicable."[22] Howard/Lubawy note the intended use as *"litigation."* [23]

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[19] LUBAWY000015.
[20] The Appraisal of Real Estate, 14th Edition, p 57 (Chicago: Appraisal Institute, 2013).
[21] The Appraisal of Real Estate, 14th Edition, p 65 (Chicago: Appraisal Institute, 2013).
[22] The Appraisal of Real Estate, 14th Edition, p 60. (Chicago: Appraisal Institute, 2013).
[23] LUBAWY000001 and 000004.

As noted, the utilized definition of market value requires *that the buyer and seller be typically motivated*. The subject sold at auction under NRS 116 on the effective date of the Howard/Lubawy appraisal. The HOA foreclosure sale is a central fact in this case. To ignore it is inappropriate and potentially unethical. Clearly, the chosen definition is inappropriate based on the circumstances of the case.

It is possible that the client imposed the utilized definition of Market Value upon Howard/Lubawy. If that were the case, proper use of this definition requires the use of a Hypothetical Condition[24] regarding the motivation of the seller and the rights involved in the sale. Both the USPAP and generally accepted appraisal methodology require *clear, accurate, and conspicuous* disclosure of all such assumptions. Furthermore, when an appraisal uses a Hypothetical Condition, their report *must* include a statement that its use might have affected the assignment results. The purpose of the disclosure and the warning is to avoid misleading the intended users. Lacking such disclosure, the Hardy/Lubawy report is misleading.

Lacking disclosure of any hypothetical conditions regarding the motivation of the seller, it is clear that Howard/Lubawy utilized an improper and inapplicable definition of value. This is an indication of incompetent performance (a violation of the competency Rule of USPAP) and/or bias in favor of the cause of the client (a violation of the Ethics Rule of USPAP).

Howard/Lubawy base their opinion of market value on the sales comparison approach to value. The premise of this approach is the economic principle of Substitution. This principle states that when comparably equivalent goods or services are available, a buyer in an open market will choose the one with the lowest price. The sales comparison approach also considers the secondary principles of Supply and Demand, Balance, and Externalities. An indicated value is developed by analyzing closed sales, listings, and/or pending sales of properties similar to the subject, using relevant units of comparison.

A key factor in the validity of the sales comparison approach is that the comparables are truly similar to the subject. In this case, the subject is a HOA foreclosure acquired at auction. It is distinctly different from a traditional, owner-seller, equity sale. Because of the unique circumstances associated with a property acquired at an HOA auction, it is also distinctly different from a typical foreclosure sale or short sale.

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[24] As cited in my original review, a Hypothetical Condition is defined as *that which is contrary to what exists but is supposed for the purpose of analysis.*

The sales comparison uses elements of comparison to explain the differences in price between properties. Generally accepted appraisal methodology requires transactional adjustments be applied before property adjustments **and** in the specific sequence shown below.

1. Real property rights conveyed
2. Financing terms
3. Conditions of sale
4. Expenditures made immediately after purchase
5. Market conditions

The 14th edition states, *Before a comparable sale property can be used in sales comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to property rights that are similar to those being appraised.*[25]

Such is the case with traditional sales compared to HOA foreclosure sales.

Howard/Lubawy use three sales in the sales comparison analysis. All of the sales are "traditional." Howard/Lubawy fail to provide any analysis of the transactional differences between properties sold at an HOA auction and traditional sales. Differences in motivation and transactional characteristics *can* and *must* be qualified and/or quantified for an appraisal based on the sales comparison approach to be credible.

Howard/Lubawy report that the subject is an age-restricted community. The recognition of the importance of such restrictions is both proper and critical to a credible opinion of value. However, the subject is ***not*** located in the age-restricted portion of the community. Under their false belief that the subject is age-restricted, they *properly* (but incorrectly) use comparable sales that are age-restricted. While ultimately an error, this demonstrates their knowledge that properties must be similar in the rights conveyed in order to be truly comparable.

The age-restricted section of the community also has lease restrictions. However, the Howard/Lubawy report contains no mention of this fact.

Like all prior cases involving HOA foreclosure sales, Howard/Lubawy fail to report or consider the HOA foreclosure sale that took place on the effective date. In this specific case, they also fail to report or consider a prior traditional foreclosure sale. The subject sold at a traditional (non-HOA) foreclosure sale 8 days prior to the effective date on 02/26/2013. This sale recorded one day after the effective date on March 7, 2013.

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[25] The Appraisal of Real Estate, 14th Edition, p 406. (Chicago: Appraisal Institute, 2013).

The entire Howard/Lubawy appraisal is based on a definition of value that does not apply to the circumstances of this case. It also fails to recognize and consider the significant difference between the transactional characteristics of an HOA foreclosure sale and those of a traditional sale.

Conclusion:

The Howard/Lubawy report contains issues, errors, and contradictions[26] that individually could be benign, but in aggregate cause the credibility of the report to suffer. This fact is significant, but secondary in light of the use of a type and definition of value that is not applicable to the central facts of the case.

Based on the above information; the purpose of the assignment; and details of the case: an alternate definition of value is warranted. Failure to utilize an appropriate type and definition of value causes the report to lack credibility and to be misleading.

Conclusion – Howard/Lubawy Expert Appraisal Report

The appraisal report completed by Howard/Lubawy ignores central facts of the case. The report contains numerous errors, violations of the Uniform Standards of Professional Appraisal Practice, and fails to use generally recognized appraisal methodology. These errors of omission and commission cause the overall appraisal report to be misleading and to lack credibility.

Documents relevant to my opinions and conclusions, including but not limited to the workfile for the Howard/Lubawy report, have not been produced. While I can properly review the report, I cannot fully evaluate whether the analyses, opinions and conclusions were properly *developed*. Additional findings may apply once the workfile is made available. Future stages of the assignment may include additional valuation services, including but not limited to an independent retrospective appraisal. I reserve my right to amend my findings based on future production of relevant documents.

-- END OF REVIEW --

[26] Refer to the Appraisal Report Std-3 Review Checklist on page 16 of this report.

Appraisal Report

All assignment characteristics from the review are extended to the independent opinion of value. Information from the Howard/Lubawy appraisal regarding physical characteristics are assumed accurate. The retrospective condition is assumed to have been *average*. ***The use of these assumptions is reasonable but may have affected the assignment results.***

Detrimental Conditions

Classification: In the study of Real Estate Damages, specific circumstances, known as Detrimental Conditions (DC), are categorized into ten classes. This assignment deals with the HOA foreclosure of the subject under NRS 116.

Class II Detrimental Condition – Transactional Conditions:

> *Class II transactional conditions relate to situations in which some particular and unique issue impacted a specific transaction. This classification includes transactions in which a buyer pays than necessary to acquire a property or a seller disposes of a property at a discount.*[27]

Type and Definition of Value

Generally accepted appraisal methodology indicates, "The intended use of an appraisal dictates which definition of market value is applicable."[28] The intended use of this appraisal is litigation in the matter of SFR Investments Pool 1, LLC v First Horizon Home Loans, et al (Case #A-13-679329-C). The deed indicates that after appropriate notices, disclosures, and waiting periods, the subject sold at auction as an HOA foreclosure sale in compliance with NRS 116.

The seller was under compulsion to sell. Therefore, the traditional definition of Market Value cannot apply. In fact, the forced sale under NRS 116 precludes *any* definition of value that includes a requirement that neither party is under compulsion to sell, or any similar requirement that buyer and seller are typically motivated.

Professional appraisers recognize that *"other types of value might be more appropriate for properties when a forced sale or some other form of distress is influencing the decisions of the buyer or seller."*[29] Appraisers familiar with real estate damages know

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[27] Randall Bell; with Orell C. Anderson, Michael V. Sanders, Real Estate Damages: Applied Economics and Detrimental Conditions, 2nd ed. (Chicago: Appraisal Institute, 2008), p. 62

[28] The Appraisal of Real Estate, 14th Edition, p 60. (Chicago: Appraisal Institute, 2013).

[29] The Appraisal of Real Estate, 14th Edition, p 65 (Chicago: Appraisal Institute, 2013).

that, *"liquidation value is often associated"*[30] with transactions that contain some sort of duress, non-market motivation, and/or limited exposure. The current definition of Liquidation Value appears below.

Liquidation Value[31]

> The most probable price that a specified interest in real property should bring under the following conditions:
> 1. Consummation of a sale within a *short* time period.
> 2. The property is subjected to market conditions prevailing as of the date of valuation.
> 3. Both the buyer and seller are acting prudently and knowledgeably.
> 4. The seller is under extreme compulsion to sell.
> 5. The buyer is typically motivated.
> 6. Both parties are acting in what they consider to be their best interests.
> 7. A normal marketing effort is not possible due to the *brief* exposure time.
> 8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
> 9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

A *short* exposure time and the lack of a "normal marketing effort due to *brief* exposure" are the relevant components of this definition. A trustee's deed under NRS 107 requires 21 days between the public notice of sale and the auction. In the context of trustees deed auction properties (under either NRS 107 or NRS 116), investors (the typical buyer) consider the property *on the market* as of the notice of sale. Therefore, the contextual marketing/exposure time of the subject is identical to other trustee's deed transactions and cannot be considered *brief*.

As of the retrospective effective date, reasonable exposure for owner-seller transactions of comparable housing was between 0 and 120 days (with a mean of 52 days and a median of 21 days). Trust deed foreclosures (under either NRS 107 or NRS 116) have a 90-day mandatory period following the notice of default and 21 days between the notice of sale and the auction. Howard/Lubawy use sales with exposure of 48, 55, and 162 days.[32]The subject exposure cannot be considered *short*. Based on the above analysis, liquidation value is not an appropriate definition of value to measure the worth of an HOA foreclosure property.

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[30] Randall Bell with Orell C. Anderson and Mike V. Sanders, Real Estate Damages: Applied Economics and Detrimental Conditions – 2nd Edition (Chicago: Appraisal Institute, 2008), p. 65.
[31] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).
[32] LUBAWY000002.

The current definition of Disposition Value appears below.

Disposition Value[33]

The most probable price that a specified interest in real property should bring under the following conditions:

1. Consummation of a sale within a future exposure time specified by the client.
2. The property is subjected to market conditions prevailing as of the date of valuation.
3. Both the buyer and seller are acting prudently and knowledgeably.
4. The seller is under compulsion to sell.
5. The buyer is typically motivated.
6. Both parties are acting in what they consider to be their best interests.
7. An adequate marketing effort will be made during the exposure time specified by the client.
8. Payment will be made in cash in U.S. dollars or in terms of financial arrangements comparable thereto.
9. The price represents the normal consideration for the property sold, unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

A *specified* exposure time and *adequate marketing effort* are the relevant components of this definition. Under NRS 116, the exposure time of the subject was specified by statute. As noted earlier, the marketing effort was similar to any other trust deed property. In the context of this case, this represents an adequate marketing effort. Based on these facts, this definition most closely captures the circumstances of the subject HOA foreclosure sale under NRS 116.

[33] The Dictionary of Real Estate Appraisal, 5th Edition, (Chicago: Appraisal Institute, 2010).

VALUATION METHODOLOGY

Approach to Value and Selection of Comparable Sales

Neither the income approach nor the cost approach are necessary for credible assignment results. Neither approach is part of the scope of work for this assignment. The sales comparison approach represents the most reasonable methodology for this assignment.

The premise of the sales comparison approach is the economic principle of Substitution. This principle states that when comparably equivalent goods or services are available, a buyer in an open market will choose the one with the lowest price. The sales comparison approach also considers the secondary principles of Supply and Demand, Balance, and Externalities. An appraiser develops an indicated value by analyzing closed sales, listings, and/or pending sales of properties similar to the subject, using relevant units and elements of comparison.

Units of comparison represent the way that typical buyers measure and compare similar properties. Elements of comparison explain the differences in price between properties based on transactional and property characteristics. Generally accepted appraisal methodology requires transactional adjustments be applied before property adjustments **and** in the specific sequence shown below.

1. Real property rights conveyed
2. Financing terms
3. Conditions of sale
4. Expenditures made immediately after purchase
5. Market conditions

The 14th edition states: *Before a comparable sale property can be used in sales comparison analysis, the appraiser must first ensure that the sale price of the comparable property applies to property rights that are similar to those being appraised.*[34]

The bundle of rights is a common way of referencing the components of interest in real estate. A proper understanding of the bundle of rights is foundational to a properly developed and communicated appraisal. The interest or rights associated with real estate ownership include the right to: use the real estate; sell it; lease it; enter it; and give it away. Each stick has value and can be separated and traded in the market. As shown on the following page, they are often illustrated as a bundle of sticks.

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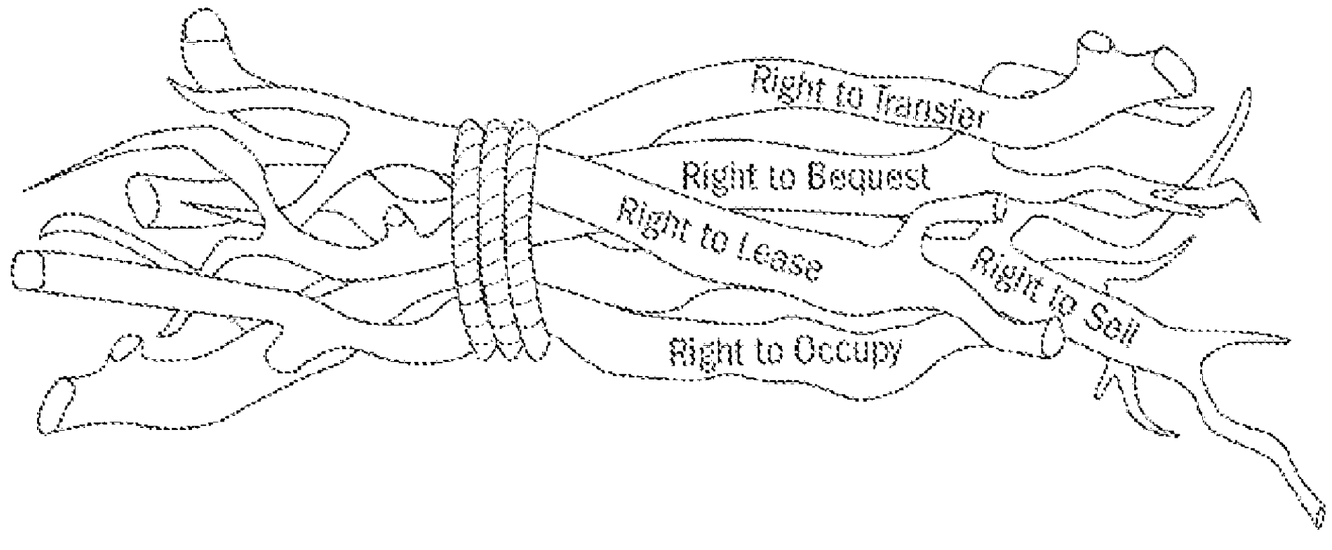
[34] The Appraisal of Real Estate, 14th Edition, p 406. (Chicago: Appraisal Institute, 2013).

The Bundle of Rights



In this assignment, the interest appraised is fee simple. However, there were limitations on the bundle of rights that must be considered. Buyers of HOA foreclosures can face limitations on any or all of the rights including but not limited to restrictions on occupancy, possession, or use of the property. This risk to the rights was not present in traditional, short-sale, REO, or non-HOA foreclosure transactions.

Another consideration is the limitation on salability and financing. The retrospective effective date is March 6, 2013 (the date of acquisition at public auction). As of that date, there was no title company in Southern Nevada willing to issue title insurance following an HOA foreclosure sale. The lack of insurable clear title would have precluded traditional financing options to a typical buyer. This represents risk to the right of transfer and precludes typical financing options. These issues were not present in traditional, short-sale, REO, or non-HOA foreclosure transactions.

An additional risk in the purchase of HOA lien properties was the likelihood of litigation. As of the retrospective effective date, the typical buyer would have been aware that the Nevada Supreme Court case regarding HOA liens was still under appeal. They also would have been aware of numerous district court cases that ended with decisions both against and in favor of a buyer's position.

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[35] The Appraisal of Real Estate, 14th Edition, p 5 (Chicago: Appraisal Institute, 2013).

The 14th Edition states:

> *The real property rights to be appraised are singled out among the relevant characteristics of the property because, like the appropriate type and definition of value for the assignment, the property rights appraised are a fundamental element of the assignment. An oversight in the analysis of some other characteristic of the property may or may not have a noticeable effect on the ultimate opinion of value, but a poor understanding of what precisely is being valued guarantees a critical error in the development of the appraisal.*[1] *... Real property appraisal involves not only the identification and valuation of a variety of different rights, but also the analysis of the many limitations on those rights, and the effect that the limitations have on value.* [36]

The cited Appraisal Journal article deals solely with commercial property. However, the concept, that the bundle of rights is fundamental to an appraisal assignment, applies.

Conclusion

The most likely buyer was an investor. The risk noted above represents a Class II Detrimental Condition - Transactional Conditions.[37] The risk and associated costs would have affected a typical investor's decision to purchase. Thereby, reducing the number of potential buyers.

Traditional sales are so different that they cannot be used as comparable measures of worth for HOA lien properties. Short sales, REO sales and non-HOA foreclosures should not be used as comparable measures of worth for HOA lien properties without analysis and adjustment of the transactional elements of comparison.

Based on the above analysis, the most logical definition of value would be Disposition Value. The most similar transactions, and therefore the best comparable sales, are other HOA foreclosures.

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[36] The Appraisal of Real Estate, 14th Edition, p 69-70. (Chicago: Appraisal Institute, 2013).

1 See David Lennhoff, "You Can't Get the Value Right If You Get the Rights Wrong," *The Appraisal Journal* (Winter 2009): 60-65.

[37] Randall Bell with Orell C. Anderson and Mike V. Sanders, Real Estate Damages: Applied Economics and Detrimental Conditions – 2nd Edition (Chicago: Appraisal Institute, 2008), p. 61

Sales Comparison Analysis

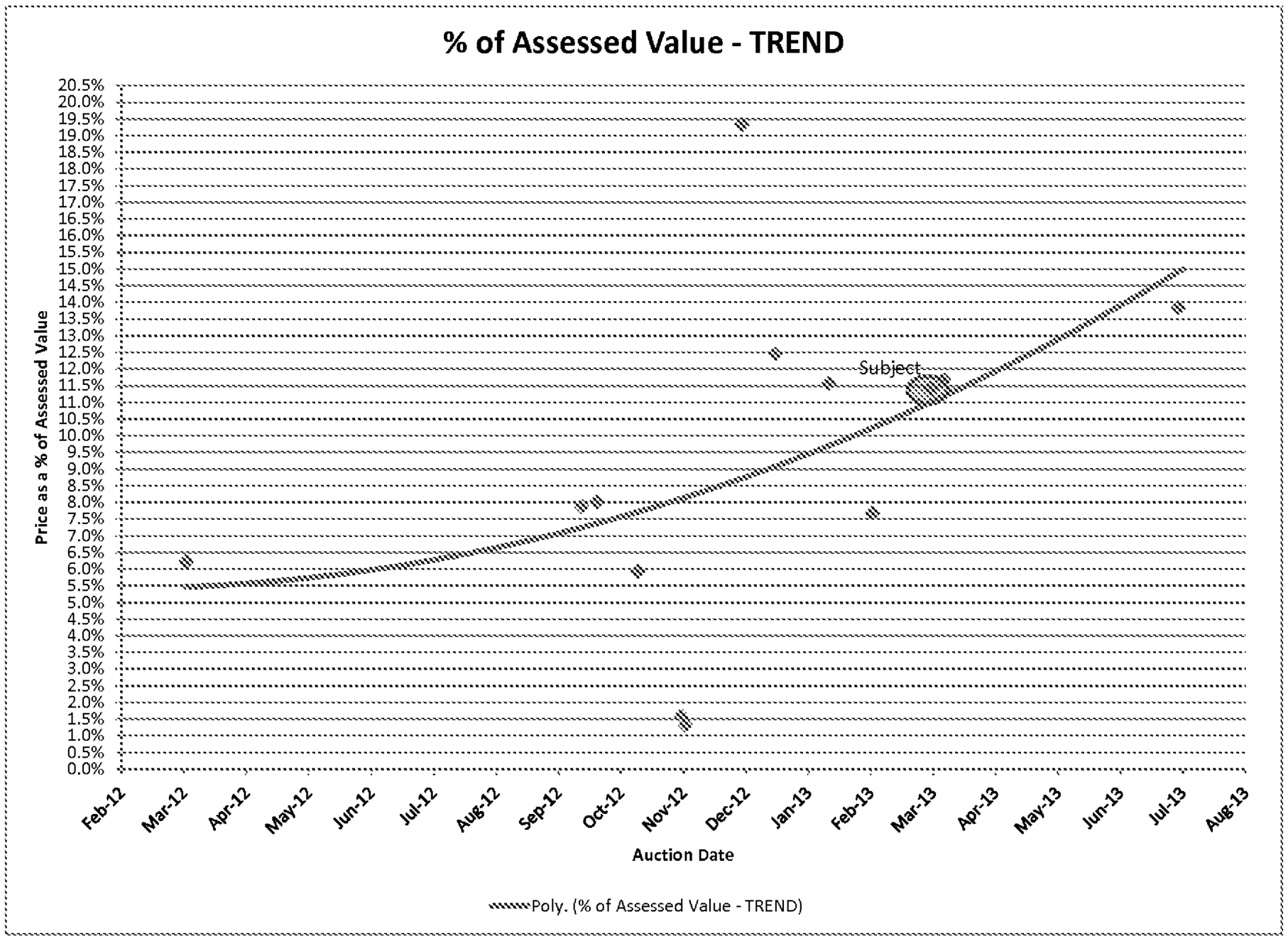
Research of historical foreclosures and trustees deeds in the MLS tax assessor's database revealed 29,295 transactions, recorded in Clark County, between March 1, 2012 and July 1, 2013. Restricting the search criteria to detached, single-family houses between 1,000 and 1,500 square feet of GLA, and built between 1995 and 2007 reduced the number of transactions to 6,602. Further restricting the search to MLS area 204 and 603 revealed 108 potential transactions.

Based on prior analysis, the best comparable sales will be similar HOA foreclosures. Research into the deeds found that 13 of those properties (including the subject) were HOA foreclosures under NRS 116. Those transactions appear in the table below. They are sorted by auction date with the most current transactions on top. The subject is highlighted in green.

Address	Type-Style	GLA	Beds	Baths	Year Built	Lot SqFt	Garage	Assessed Value	Auction Price	% of Assessed Value	Auction Date	Buyer
6947 DANCING CLOUD AV	2 STORY	1209	2	2.5	2007	1742	206	$83,058	$11,500	13.8%	7/3/2013	SFR INVESTMENTS POOL
6525 BLOOMING SUN CT	1 STORY	1261	3	2	2002	4792	405	$73,646	$8,600	11.7%	3/12/2013	AUCTION R/E SERVICES
5069 MIDNIGHT OIL DR	1 STORY	1183	3	2	2001	3485	387	$61,303	$7,000	11.4%	3/6/2013	SFR INVESTMENTS POOL
6327 BUSHKILL CREEK CT	1 STORY	1056	3	2	2000	4356	410	$65,031	$5,000	7.7%	2/6/2013	WILLISTON INVESTMENT
4952 MINERS RIDGE DR	1 STORY	1183	3	2	2001	3485	387	$61,303	$7,100	11.6%	1/16/2013	4952 MINERS RIDGE DR T
3863 SQUIRREL ST	1 STORY	1367	3	2	2005	5227	400	$74,763	$9,300	12.4%	12/21/2012	SFR INVESTMENTS POOL
4980 DROUBAY DR	1 STORY	1183	3	2	2003	3485	387	$63,160	$12,200	19.3%	12/5/2012	DROUBAY DR TRUST
6838 NICKEL MINE AV	2 STORY	1362	3	2	2006	2614	231	$72,194	$948	1.3%	11/8/2012	NICKEL MINE AVE TRUS
6777 TRAVERTINE LN	2 STORY	1362	3	3	2005	3485	231	$70,840	$1,140	1.6%	11/6/2012	TRAVERTINE LANE TRU
6455 SHINING SAND AV	1 STORY	1261	3	2	2001	5227	405	$72,591	$4,301	5.9%	10/16/2012	SHINING SAND AVE TRU
5023 DROUBAY DR	1 STORY	1183	3	2	2003	3485	387	$63,754	$5,100	8.0%	9/26/2012	GDS FINANCIAL SERVICI
4946 DROUBAY DR	1 STORY	1348	3	2	2003	3920	380	$68,014	$5,358	7.9%	9/19/2012	SFR INVESTMENTS POOL
6513 DUCK HILL SPRINGS DR	1 STORY	1325	3	2	2006	3920	399	$78,791	$4,900	6.2%	3/13/2012	DUCK HILL SPRINGS DR

[illegible]	9.1%
[illegible]	8.0%
[illegible]	#N/A
[illegible]	5.0%
[illegible]	1.3%
[illegible]	19.3%

In many HOA lien transactions, the assessed value was used to calculate the real property transfer tax. Assessed value becomes a constant point of reference for comparison. Looking at the auction price as a percentage of the assessed value reveals a range from 1.3% to 19.3%. The subject auction price of $7,000 is 11.4% of the retrospective assessed value. The trend indicated by the data appears on the following page.



The subject, falls just above the overall trend and is well within the range of contemporaneous transactions.

Reconciliation

The subject auction price of $7,000 (11.4% of the retrospective assessed value) is within the range of contemporaneous transactions. The conditions of the auction sale meet the conditions of the definition of disposition value. Therefore, my professional opinion is that the subject's acquisition price is equivalent to the retrospective disposition value.

As an HOA foreclosure property, affected by a Class II detrimental condition, the impaired, fee simple, disposition value as of March 6, 2013 was:

$7,000
Seven Thousand Dollars

-- END OF APPRAISAL --
-- END OF REPORT --

Addenda

A. Qualifications of Michael Brunson
B. Expert Disclosure for Michael Brunson

Addendum A: Qualifications of Michael Brunson

Michael L. Brunson, SRA, MNAA

AQB Certified USPAP Instructor
Nevada Certified General Appraiser #A.0207222-CG
Member of the Nevada Real Estate Division Appraisal Advisory Review Committee
Collateral Valuation Specialist
mike@brunson-jiu.com www.brunson-jiu.com

VALUATION BUSINESS BACKGROUND

Brunson-Jiu, LLC (Partner, 2011 – Present) Founding partner of a firm providing real property valuations, consulting and expert witness services. Areas of specialty include: real estate damages analysis for residential, commercial, vacant land and multi-family properties; and business valuation and exit planning strategies.

Bell Anderson & Sanders LLC (Contract Appraiser, 2008 – 2014) Engagement involved studying the economic impact of detrimental conditions, including issues such as environmental contamination, construction defects, legal conditions such as eminent domain, and proximity effects.

Columbia Institute (Instructor, 2009-Present) Approved to teach pre-licensing and continuing education courses related to residential appraisal

Ascent Appraisal, Inc. (Principle/Chief Appraiser, 1997 – 2011) An independent real estate valuation and consulting firm providing a comprehensive range of professional valuation products and services. We specialize in expert witness services; litigation support and consulting; forensic review; and complex valuation assignments.

Institute for Real Estate and Appraisal Studies (Instructor, 2003 – 2009) Approved to teach both pre-licensing and continuing education courses related to residential appraisal.

Ascent Inspection, Inc. (Owner/Primary Inspector, 2001 – 2003) An independent residential and commercial inspection firm providing both pre-purchase and pre-listing property inspections.

Berry & Associates (Registered Intern/Office Manager, 1995 – 1997) Performed single and multi-family residential appraisal assignments in form reports on various property types; conducted extensive market research & due diligence; performed internal appraisal review function; and appraisal office management.

EXPERT WITNESS / CONSULTING

AQB Certified USPAP Instructor The Uniform Standards of Professional Appraisal Practice (USPAP) are the recognized standard of care for professional appraisers. Michael is one of only six certified appraisers qualified as an AQB Certified USPAP Instructor in Nevada. He teaches USPAP courses and provides USPAP consultation to attorneys, appraisers, and lending clients. Michael has completed assignments for civil, probate, real estate damages, and divorce cases. He has qualified as an expert witness in real estate valuation in the 8th Judicial District Court of Clark County, Nevada.

Assignments in which an expert has provided deposition or court testimony are disclosed in compliance with state/federal law. Cases lacking such testimony are confidential.

Cases with Court Testimony: Johnson et al v Stanpark, A-606013

Santos Probate, P-068058

Dennett v Miller, A-459131

Cases with Deposition: Sunlight Trust v Brogan, A-691473

Wells Fargo v SFR, 2:15-cv-00576-RFB-CWH

SFR v Green Tree Servicing, A-680704

FDIC v CoreLogic, SACV11-704 DOC

Nguyen v Taylor, A-644936

Aguirre v American Nevada, A-600566

Copper Sands HOA v Copper Sands Realty A-560139

Deutsche Bank National Trust Co. v Mha, A-532836

Carlisle v Pardee, A-421939

Demby v Chamberlin, A-443513

INTERVIEWS, PUBLICATIONS AND PUBLIC TESTIMONY

Local and national media recognize Michael as an expert in the Las Vegas Real Estate market.

- Panel Member, Spring 2015 Housing Outlook, Homebuilders Research (May 29, 2015)
- Panel Member, Lied Institute and Nevada Department of Business and Industry - Nevada Housing Forum (September 22, 2014)
- Panel Member, Using the Cost Addendum for High Performance Homes (October, 16, 2013)
- Panel Member, The Green Home Valuation Summit, Phoenix, AZ (September 23, 2013)
- Appraisal Industry Representative, Special City Council Meeting of the City of North Las Vegas, Regarding the underwater mortgage crisis (June 11, 2013)
- Panel Member, Spring 2013 Housing Outlook, Homebuilders Research (April 12, 2013)
- Interviewed by Diana Olick of CNBC (March 5, 2013 published on cnbc.com and aired on the NPR Nightly Business Report)
- Panel Member and Presenter, 2012 High Performance Home & Building Summit (August 15-16, 2012)
- Panel Member, Spring 2012 Housing Outlook, Homebuilders Research (April 27, 2012) Quoted by Hubble Smith of the Las Vegas Review Journal.
- Real Estate Panel Member, Spring 2011 Economic Outlook, UNLV Center for Business and Economic Research, (June 20, 2011)
- Interviewed by Jason Morgan of *Valuation Review*, Appraisers caught in the middle of Las Vegas housing market tensions, Online: March, 31, 2011, Print: April 25, 2011
- Interviewed by Calvert Collins of KLAS-TV (aired March 28, 2011)
- Author, Growing Business: Giving Clients What They Need, Vol. 217, February 16, 2011, *Working RE Magazine*
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (August 5, 2010).
- Interviewed by Calvert Collins of KLAS-TV (aired May 5, 2010)
- Interviewed by Dana Gentry of Las Vegas 1 (aired March 27, 2009)
- Interviewed by Chris Saldana of KLAS-TV (aired March 9, 2009)
- Interviewed by Stephanie Dhue of the Nightly Business Report (aired October 62, 2007).
- Interviewed by Hubbel Smith of the Las Vegas Review-Journal (June 7, 2007).

Michael has provided public comment and testimony before the Nevada Commission of Real Estate Appraisers, the Nevada Assembly Committee on Commerce and Labor and the Nevada Senate Committee on Commerce and Labor on numerous occasions.

MEMBERSHIPS

National Association of Appraisers: 2013, 2014 President; 2010-2012 Vice President,

Coalition of Appraisers in Nevada: 2011, 2010 President; 2009 Vice President; Government Relations Committee Chair 2009-2014.

SRA Designated Member, Appraisal Institute

National Association of Realtors

Greater Las Vegas Association of Realtors

TEACHING EXPERIENCE

Approved by the State of Nevada to teach both pre-licensing and continuing education appraisal courses. Michael has also been approved to teach courses in California, Arizona, Indiana, Michigan, Wisconsin, and Utah. A partial list of classes includes:

Fundamentals of Real Estate Appraisal
Applied Residential Appraisal Techniques I
Appraisal Law in Nevada
Highest & Best Use Analysis I
Appraising Small Residential Income Properties
Cost Approach Revisited
Communicating the Appraisal I, II, III and IV
7 and 15 Hour National Uniform Standards of Professional Appraisal Practice
How Finance affects Value
Advanced Neighborhood and Market Area Analysis
Appraising 2-4 & Multi-Family Properties
Foreclosures & Short Sales: Dilemmas and Solutions

Private seminars authored and instructed by Mr. Brunson:

Neighborhood and Market Analysis I and II
Cost Approach – The Square Foot Method
Mortgage Fraud – An Appraiser's Perspective (NV CLE Seminar)
Residential Real Estate Appraisal (For Brokers/Agents)
How to Select & Evaluate an Expert Witness (NV CLE Seminar)

EDUCATION

Professional Education

University of Nevada, Las Vegas, Introductory and Intermediate Statistics
Clark County Community College, Principles of Real Estate Appraisal
Appraisal Institute, Standards of Professional Practice, Part A (410)
Appraisal Institute, Standards of Professional Practice, Part B (420)
Appraisal Institute, Standards of Professional Practice, Part C (430)
Appraisal Institute, Nevada Appraisal Statutes
Appraisal Institute, FHA and the Appraisal Process
Appraisal Institute, Complex Litigation Appraisal Case Studies
Appraisal Institute, Analyzing the Effects of Environmental Contamination on Real Estate
Appraisal Institute, Advanced Income Capitalization
Appraisal Institute, Advanced Spreadsheet Modeling for Valuation Applications
Appraisal Institute, General Appraiser Site Valuation and Cost Approach
Appraisal Institute, General Appraiser Sales Comparison Approach
Appraisal Institute, General Appraiser Market Analysis and Highest and Best Use
Appraisal Institute, Real Estate Finance, Statistics, and Valuation Modeling
Appraisal Institute, Advanced Residential Report Writing, Part I and II
Nevada Commission of Appraisers, Valuing Residential Energy Efficiency
Chicopee Group, Impact of Financing on Appraisals
TWI Systems, 50 hours of Professional Inspection Training
Clark County Community College, 60 hours of home Inspectors Training
Institute for Real Estate and Appraisal Studies, Applied Residential Appraisal Techniques I
Institute for Real Estate and Appraisal Studies, Highest and Best Use Analysis I
Institute for Real Estate and Appraisal Studies, Introduction to Business Appraisal
Institute for Real Estate and Appraisal Studies, Small Residential Income Properties I
Institute for Real Estate and Appraisal Studies, Introduction to Commercial Appraisal
Institute for Real Estate and Appraisal Studies, Income Capitalization I and II
IRWA, Principles of Real Estate Engineering
IRWA, Understanding Environmental Contamination in Real Estate
IRWA, Environmental Due Diligence and Liability
(Current Continuing Education course list available upon request)

Other Education

University of Nevada at Las Vegas, Las Vegas, NV - 1991
B.A. in Psychology. Emphasis on experimental psychology and methodology.

Chaparral High School, Las Vegas, NV ▪ 1987
Graduated with High Honors.

REFERENCES

- Available upon request

Addendum B: Expert Disclosure Requirements

Compensation for Study and Testimony:

Michael L. Brunson charged an hourly rate of $300 per hour for this stage of the assignment. Michael's hourly rate is $300 for non-testimony time and $350 for testimony time. Non-testimony time is billed for research, consultation, meetings, field inspections, travel, analysis, deposition preparation, and court preparation.

Publications:

Author, Growing Business: Giving Clients What They Need, February 16, 2011, Vol. 217, *Working RE Magazine*

National Association of Appraisers, Appraisal 4-1-1 e-newsletters

Summary of Recent Testimony:

Court testimony:	Johnson v Stanpark, A-606013
	Santos Probate, P-068058
	Dennett v Miller, A-459131
Deposition Testimony:	Sunlight Trust v Brogan, A-691473
	Wells Fargo v SFR, 2:15-cv-00576-RFB-CWH
	SFR v Green Tree Servicing, A-680704
	FDIC v CoreLogic, SACV11-704 DOC
	Nguyen v Taylor, A-644936
	Aguirre v American Nevada, A-600566
	Copper Sands HOA v Copper Sands Realty, A-560139
	Deutsche Bank v Mha, A-532836
	Carlisle v Pardee, A-421939
	Demby v Chamberlin, A-443513

EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARTIN CENTENO,
Appellant,
vs.
JP MORGAN CHASE BANK, N.A.,
Respondent.

No. 67365

FILED

MAR 18 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER VACATING AND REMANDING

This is a pro se appeal from a district court order denying a motion for a preliminary injunction in a quiet title action. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

The district court denied appellant's request for a preliminary injunction, reasoning that appellant lacked a likelihood of success on the merits of his quiet title claim because (1) the Supremacy Clause prevented the HOA foreclosure sale from extinguishing respondent's deed of trust, which secured a federally insured loan; and (2) the purchase price at the HOA sale was commercially unreasonable.

Having considered the parties' arguments that were made in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), we conclude that the district court underestimated appellant's likelihood of success on the merits and therefore abused its discretion in denying injunctive relief.[1] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009) (recognizing that a district court may abuse its discretion in denying

[1]We disagree with respondent's suggestion that this appeal is moot, as appellant's request for injunctive relief sought more than to simply prevent respondent from selling the subject property at foreclosure.

injunctive relief if its decision is based on an error of law). In particular, the district court summarily based its Supremacy Clause analysis on non-binding, non-uniform precedent. *Compare Washington & Sandhill Homeowners Ass'n v. Bank of Am.*, 2014 WL 4798565, at *6 (D. Nev. Sept. 25, 2014), *with Freedom Mortg. Corp. v. Las Vegas Dev. Grp.*, 106 F. Supp. 3d 1174, 1183-86 (D. Nev. 2015).[2] Similarly, this court's reaffirmation in *Shadow Wood Homeowners' Ass'n v. New York Community Bancorp, Inc.*, 132 Nev., Adv. Op. 5, ___ P.3d ___ (2016), that a low sales price is not a basis for voiding a foreclosure sale absent "fraud, unfairness, or oppression," undermines the second basis for the district court's decision. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Saitta

_____, J.
Pickering

cc: Hon. Kathleen E. Delaney, District Judge
Martin Centeno
Smith Larsen & Wixom
Ballard Spahr, LLP
Eighth District Court Clerk

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[2]We recognize that the *Freedom Mortgage* decision was not issued until after the district court entered the order being challenged in this appeal.

EXHIBIT 3

RESTATEMENT OF THE LAW THIRD

THE AMERICAN LAW INSTITUTE

RESTATEMENT OF THE LAW

PROPERTY

Mortgages

As Adopted and Promulgated

BY

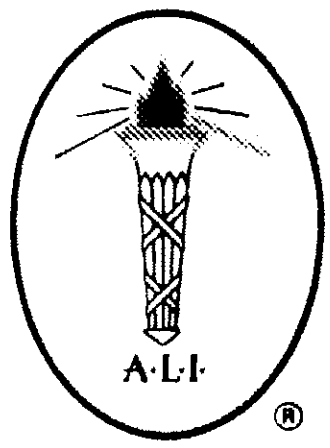
THE AMERICAN LAW INSTITUTE

AT WASHINGTON, D.C.

May 14, 1996

§§ 1 – End

Tables and Index



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1997

trap for the unwary, and often to be Draconian in its consequences. See, e.g., Security Pacific National Bank v. Wozab, 800 P.2d 557 (Cal. 1990); Conley, The Sanction for Violation of California's One–Action Rule, 79 Cal. L. Rev. 1601 (1991); Hetland & Hanson, The "Mixed Collateral" Amendments to California's Commercial Code—Covert Repeal of California Real Property Foreclosure and Anti-deficiency Provisions or Exercise in Futility?, 75 Cal. L. Rev. 185 (1987); Hirsh, Arnold, Rabin & Sigman, The U.C.C. Mixed Collateral Statute—Has Paradise Really Been Lost?, 36 U.C.L.A. L. Rev. 1, 6, 10 (1988); Munoz & Rabin, The Sequel to Bank of America v. Daily: Security Pac. Nat'l Bank v. Wozab, 12 Real Prop. L. Rep. 204 (1989).

For a consideration of the characteristics of judicial and power of sale foreclosure, see 1 G. Nelson & D. Whitman, Real Estate Finance Law §§ 7.11–7.14, 7.19–7.30 (3d ed. 1993).

Limitations on mortgagee's remedies, Comment b. Some states permit the mortgagee to sue on the mortgage obligation and simultaneously to bring a judicial foreclosure action or power of sale proceeding. See, e.g., Hartford National Bank & Trust Co. v. Kotkin, 441 A.2d 593 (Conn.1981); Eastern Illinois Trust & Sav. Bank v. Vickery, 517 N.E.2d 604 (Ill. App. Ct. 1987); First Indiana Federal Sav. Bank v. Hartle, 567 N.E.2d 834 (Ind. Ct.App.1991); Kepler v. Slade, 896 P.2d 482 (N.M.1995); Elmwood Federal Savings Bank v. Parker, 666 A.2d 721 n.6 (Pa. Super. Ct. 1995); In re Gayle, 189 B.R. 914 (Bankr. S.D.Tex.1995). This section prohibits such a course of action. This reflects a policy of judicial economy and against harassment of the mortgagor by forcing him or her to defend two proceedings at once. This approach is supported by legislation in over a dozen states. See Alaska Stat. § 09.45.200; Ariz. Rev. Stat. § 33–722; Fla. Stat. Ann. § 702.06; Idaho Code § 45–1505(4); Iowa Code Ann. § 654.4; Mich. Comp. Laws Ann. §§ 600.3105(1), (2), .3204(2); Minn. Stat. Ann. § 580.02; Neb. Rev. Stat. §§ 25–2140,–2143; N.Y. Real Prop. Acts. & Proc. L. §§ 1301, 1401(2); N.D. Cent. Code § 32–19–05; Or. Rev. Stat. §§ 86.735(4), 88.040; S.D. Comp. Laws Ann. §§ 21–47–6,–48–4; Wash. Rev. Code Ann. § 61.12.120; Wyo. Stat. § 34–4–103.

For authority that an election of remedies statute similar to the language of this section does not prohibit a mortgagee from foreclosing on a guarantor's real estate after having obtained a judgment against the principal debtor, see Ed Herman & Sons v. Russell, 535 N.W.2d 803 (Minn. 1995).

§ 8.3 Adequacy of Foreclosure Sale Price

(a) A foreclosure sale price obtained pursuant to a foreclosure proceeding that is otherwise regularly conducted in compliance with applicable law does not render the foreclosure defective unless the price is grossly inadequate.

(b) Subsection (a) applies to both power of sale and judicial foreclosure proceedings.

Cross-References:

Section 7.1, Effect of Mortgage Priority on Foreclosure; § 8.4, Foreclosure: Action for a Deficiency; § 8.5, The Merger Doctrine Inapplicable to Mortgages.

Comment:

a. Introduction. Many commentators have observed that the foreclosure process commonly fails to produce the fair market value for foreclosed real estate. The United States Supreme Court recently emphasized this widely perceived dichotomy between "foreclosure sale value" and fair market value:

> An appraiser's reconstruction of "fair market value" could show what similar property would be worth if it did not have to be sold within the time and manner strictures of state-prescribed foreclosure. But property that *must* be sold with these strictures is simply *worth* less. No one would pay as much to own such property as he would pay to own real estate that could be sold at leisure and pursuant to normal marketing techniques. And it is no more realistic to ignore that characteristic of the property (the fact that state foreclosure law permits the mortgagee to sell it at a forced sale) than it is to ignore other price-affecting characteristics (such as the fact that state zoning law permits the owner of the neighboring lot to open a gas station).

BFP v. Resolution Trust Corp., 511 U.S. 531, 539, 114 S.Ct. 1757, 1762, 128 L.Ed.2d 556 (1994).

There are several reasons for low bids at foreclosure sales. First, because the mortgage lender can "credit bid" up to the amount of the mortgage obligation without putting up new cash, it has a distinct bidding advantage over a potential third party bidder. Second, while foreclosure legislation usually requires published notice to potential third party purchasers, this notice, especially in urban areas, is frequently published in the classified columns of legal newspapers with limited circulation. Moreover, because the publication is usually highly technical, unsophisticated potential bidders have little idea as to the nature of the real estate being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty in ascertaining whether the sale will produce a good and marketable title and the absence of any warranty of title or of physical quality from the foreclosing mortgagee. Finally, when a mortgagee forecloses on improved real estate, potential bidders may find it difficult to inspect the premises prior to sale. Even though it may be in the self-interest of the mortgagor to allow such persons to inspect the premises, mortgagors who are about to lose their real estate through a foreclosure sale understandably are frequently reluctant to cooperate.

Given the nature of the foreclosure sale process, courts have consistently been unwilling to impose a "fair market value" standard on the price it produces. Courts are rightly concerned that an increased willingness to invalidate foreclosure sales because of price inadequacy will make foreclosure titles more uncertain. When a foreclosure sale is set aside, the court may upset third party expectations. A third party may have acquired title to the foreclosed real estate by purchase at the sale or by conveyance from the mortgagee-purchaser. Thus, a general reluctance to set aside the sale is understandable and sensible. This reluctance may be especially justifiable when price inadequacy is the only objection to the sale. Consequently, the end result of additional judicial activism on this issue might well be further exacerbation of the foreclosure price problem. This section largely reflects this judicial concern.

However, close judicial scrutiny of the sale price is more justifiable when the price is being employed to calculate the amount of a deficiency judgment context. This is especially the case where the mortgagee purchases at the sale and, in addition, seeks a deficiency judgment. The potential for unjust enrichment of the mortgagee in this situation may well demand closer judicial scrutiny of the sale price. Moreover, the interests of third parties are not prejudiced by judicial intervention in an action for a deficiency judgment. Because a deficiency proceeding is merely an *in personam* action against the mortgagor for money, the title of the foreclosure purchaser is not placed at risk. Consequently, a more intensive examination of the foreclosure price in the deficiency context is appropriate. This view is reflected in § 8.4 of this Restatement.

Ultimately, however, price inadequacy must be addressed in the context of a fundamental legislative reform of the entire foreclosure process so that it yields a price more closely approximating "fair market value." In order to ameliorate the price-suppressing tendency of the "forced sale" system, such legislation could incorporate many of the sale and advertising techniques found in the normal real estate marketplace. These could include, for example, the use of real estate brokers and commonly used print and pictorial media advertising. While such a major restructuring of the foreclosure process is desirable, it is more appropriate subject for legislative action than for the Restatement process.

b. Application of the standard. Section 8.4 deals with the question of adequacy of the foreclosure price in the deficiency judgment context. This section, on the other hand, applies to actions to nullify the foreclosure sale itself based on price inadequacy. This issue may arise in any of several different procedural contexts, depending on whether the mortgage is being foreclosed judicially or by power of

sale. Where the foreclosure is by judicial action, the issue of price typically will arise when the mortgagee makes a motion to confirm the sale.

On the other hand, where foreclosure is by power of sale, judicial confirmation of the sale is usually not required and the issue of price inadequacy will therefore arise only if the party attacking the sale files an independent judicial action. Typically this will be an action to set aside the sale; it may be brought by the mortgagor, junior lienholders, or the holders of other junior interests who were prejudiced by the sale. If the real estate is unavailable because title has been acquired by a bona fide purchaser, the issue of price inadequacy may be raised by the mortgagor or a junior interest holder in a suit against the foreclosing mortgagee for damages for wrongful foreclosure. This latter remedy, however, is not available based on gross price inadequacy alone. In addition, the mortgagee must be responsible for a defect in the foreclosure process of the type described in Comment *c* of this section.

This section articulates the traditional and widely held view that a foreclosure proceeding that otherwise complies with state law may not be invalidated because of the sale price unless that price is grossly inadequate. The standard by which "gross inadequacy" is measured is the fair market value of the real estate. For this purpose the latter means, not the fair "forced sale" value of the real estate, but the price which would result from negotiation and mutual agreement, after ample time to find a purchaser, between a vendor who is willing, but not compelled to sell, and a purchaser who is willing to buy, but not compelled to take a particular piece of real estate. Where the foreclosure is subject to senior liens, the amount of those liens must be subtracted from the unencumbered fair market value of the real estate in determining the fair market value of the title being transferred by the foreclosure sale.

"Gross inadequacy" cannot be precisely defined in terms of a specific percentage of fair market value. Generally, however, a court is warranted in invalidating a sale where the price is less than 20 percent of fair market value and, absent other foreclosure defects, is usually not warranted in invalidating a sale that yields in excess of that amount. See Illustrations 1–5. While the trial court's judgment in matters of price adequacy is entitled to considerable deference, in extreme cases a price may be so low (typically well under 20% of fair market value) that it would be an abuse of discretion for the court to refuse to invalidate it.

Foreclosures subject to senior liens can sometimes pose special problems in assessing price adequacy. For example, where one or

more senior liens are also in default and their amount substantial or controverted, a court may properly recognize the added uncertainties facing the foreclosure purchaser and refuse to invalidate a sale even though it produces a price that is less than 20 percent of the fair market value of the mortgagor's equity. This problem may be particularly acute where a senior mortgage has a substantial prepayment fee or if it is uncertain whether the senior mortgage is prepayable at all. See Illustration 6.

Moreover, courts can properly take into account the fact that the value shown on a recent appraisal is not necessarily the same as the property's fair market value on the foreclosure sale date, and that "gross inadequacy" cannot be precisely defined in terms of a specific percentage of appraised value. This is particularly the case in rapidly rising or falling market conditions. Appraisals are time-bound, and in such situations are often prone to error to the extent that they rely on comparable sales data, for such data are by definition historical in nature and cannot possibly reflect current market conditions with complete precision. For this reason, a court may be justified in approving a foreclosure price that is less than 20 percent of appraised value if the court determines that market prices are falling rapidly and that the appraisal does not take adequate account of recent declines in value as of the date of the foreclosure. See Illustration 7. Similarly, a court may be warranted in refusing to confirm a sale that produces more than 20 percent of appraised value if the court finds that market prices are rising rapidly and that the appraisal reflects an amount lower than the current fair market value as of the date of foreclosure. See Illustration 8.

Illustrations:

1. Mortgagee forecloses a mortgage on Blackacre by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $19,000. The fair market value of Blackacre at the time of the sale is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. A court is warranted in finding that the sale price is grossly inadequate and in refusing to confirm the sale.

2. The facts are the same as Illustration 1, except the foreclosure proceeding is by power of sale and Mortgagor files a judicial action to set aside the sale based on inadequacy of the sale price. A court is warranted in finding that the sale price is grossly inadequate and in setting aside the sale, provided that the property has not subsequently been sold to a bona fide purchaser.

3. The facts are the same as Illustration 2, except that the Mortgagee is responsible for conduct that chills bidding at the

sale. Blackacre is purchased at the foreclosure sale by a bona fide purchaser. Mortgagor files a suit against the Mortgagee to recover damages for wrongful foreclosure. A court is warranted in finding that the sale price is grossly inadequate and in awarding damages to Mortgagor.

4. Mortgagee forecloses a mortgage on Blackacre by judicial action. The foreclosure is subject to a senior lien in the amount of $50,000. Blackacre is sold at the foreclosure sale for $19,000. The fair market value of Blackacre free and clear of liens at the time of the sale is $150,000. The foreclosure proceeding is regularly conducted in compliance with state law. A court is warranted in finding that the sale price is grossly inadequate and in refusing to confirm the sale.

5. The facts are the same as Illustration 1, except that Blackacre has a fair market value of $60,000 at the time of the foreclosure sale. The court is not warranted in refusing to confirm the sale.

6. Mortgagee forecloses a mortgage on Blackacre by power of sale. The foreclosure is subject to a large (in relation to market value) senior lien that is in default, carries an above market interest rate, and provides for a substantial prepayment charge. At the time of the foreclosure sale, the current balance on the senior lien is $500,000. Blackacre is sold at the foreclosure sale for $10,000. The fair market value of Blackacre free and clear of liens at the time of the sale is $600,000. The foreclosure proceeding is regularly conducted in compliance with state law. Mortgagor files suit to set aside the sale. A court is warranted in refusing to set the sale aside.

7. Mortgagee forecloses a mortgage on Blackacre, a vacant lot, by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $10,000. The appraised value of Blackacre, based on an appraisal performed shortly before the sale, is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. The real estate market in the vicinity of Blackacre has been declining rapidly, and this is especially the case with respect to raw land. If the court finds that, notwithstanding the appraisal, the actual fair market value of Blackacre at the date of sale was $50,000 or less, the court is warranted in confirming the sale.

8. Mortgagee forecloses a mortgage on Blackacre, a residential duplex, by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $35,000. The appraised value of Blackacre, based on an appraisal per-

formed shortly before the sale, is $100,000. The foreclosure proceeding is regularly conducted in compliance with state law. The real estate market in the vicinity of Blackacre has been rising rapidly, and this is especially the case with respect to residential rental real estate. If the court finds that, notwithstanding the appraisal, the actual fair market value of Blackacre at the date of sale was $175,000 or more, the court is warranted in refusing to confirm the sale.

c. Price inadequacy coupled with other defects. Even where the foreclosure price for less than fair market value cannot be characterized as "grossly inadequate," if the foreclosure proceeding is defective under local law in some other respect, a court is warranted in invalidating the sale and may even be required to do so. Such defects may include, for example, chilled bidding, an improper time or place of sale, fraudulent conduct by the mortgagee, a defective notice of sale, or selling too much or too little of the mortgaged real estate. For example, even a slight irregularity in the foreclosure process coupled with a sale price that is substantially below fair market value may justify or even compel the invalidation of the sale. See Illustrations 9 and 10. On the other hand, even a sale for slightly below fair market value may be enough to require invalidation of the sale where there is a major defect in the foreclosure process. See Illustration 11.

Illustrations:

9. Mortgagee forecloses a mortgage on Blackacre by judicial action. The mortgage is the only lien on Blackacre. Blackacre is sold at the foreclosure sale for $15,000. The fair market value of Blackacre at the time of the sale is $50,000. The foreclosure proceeding is regularly conducted in compliance with state law except that at the foreclosure sale the sheriff fails to read the foreclosure notice aloud as required by the applicable statute. A court is warranted in refusing to confirm the sale.

10. The facts are the same as Illustration 9, except that the foreclosure is by power of sale. The foreclosure proceeding is regularly conducted in compliance with state law except that notice of the sale is published only 16 times rather than 20 times as required by the applicable statute. Mortgagor files suit to set aside the sale. A court is warranted in setting the sale aside.

11. Mortgagee forecloses a deed of trust on Blackacre by power of sale. Blackacre is sold at the foreclosure sale for $85,000. The fair market value of Blackacre as of the time of the sale is $100,000. Although the foreclosure proceeding is otherwise regu-

larly conducted in compliance with state law, the trustee at the sale fails to recognize a higher bid from a junior lienor who is present at the sale. Mortgagor files suit to set aside the sale. The sale should be set aside.

REPORTERS' NOTE

Introduction, Comment a. Numerous commentators point out that foreclosure sales normally do not generally produce fair market value for the foreclosed real estate. See, e.g., Goldstein, Reforming the Residential Foreclosure Process, 21 Real Est. L.J. 286 (1993); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959 (1993) (observing that there is a "disparity in values between the perceived fair market value of the foreclosed premises prior to foreclosure and amount actually realized upon foreclosure"); Ehrlich, Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives, 71 Va. L. Rev. 933 (1985) ("contemporary foreclosure procedures are poorly designed to maximize sales price"); Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 S. Cal. L. Rev. 843 (1980); G. Nelson & D. Whitman, Real Estate Finance Law § 8.8 (3d ed. 1994). In an empirical study of judicial foreclosure prices and resales in one New York county, Professor Wechsler has gone so far to conclude that

> foreclosure by sale frequently operated as a meaningless charade, producing the functional equivalent of strict foreclosure, a process abandoned long ago. Mortgagees acquired properties at foreclosure sales and resold them at a significant profit in a large number of cases.... In short, ... foreclosure by sale is not producing its intended results, and in many cases is yielding unjust and inequitable results.

Wechsler, Through the Looking Glass: Foreclosure by Sale as *De Facto* Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale, 70 Cornell L. Rev. 850, 896 (1985). See Resolution Trust Corp. v. Carr, 13 F.3d 425 (1st Cir. 1993) ("It is common knowledge in the real world that the potential price to be realized from the sale of real estate, particularly in a recessionary period, usually is considerably lower when sold 'under the hammer' than the price obtainable when it is sold by an owner not under distress and who is able to sell at his convenience and to wait until a purchaser reaches his price.").

For a consideration of why foreclosure sales do not normally bring fair market value, see Nelson, Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals, 47 Mo. L. Rev. 151, 152 (1982); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959, 966–72 (1993); Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 848–851 (1980); Carteret Savings & Loan Ass'n v. Davis, 521 A.2d 831, 835 (N.J.1987) ("[I]t is likely that the

low turnout of third parties who actually buy property at foreclosure sales reflects a general conclusion that the risks of acquiring an imperfect title are often too high").

Until recently, claims of foreclosure price inadequacy commonly arose in the context of mortgagor bankruptcy proceedings. Debtors in possession and bankruptcy trustees frequently challenged pre-bankruptcy foreclosure sales as constructively fraudulent transfers under § 548 of the Bankruptcy Code. See 11 U.S.C. § 548. Under the latter section, a trustee or a debtor in possession may avoid a transfer by a debtor if it can be established that (1) the debtor had an interest in property; (2) the transfer took place within a year of the bankruptcy petition filing; (3) the debtor was insolvent at the time of the transfer or the transfer caused insolvency; and (4) the debtor received "less than a reasonably equivalent value" for the transfer. 11 U.S.C. § 548(a)(2)(A). In Durrett v. Washington National Ins. Co., 621 F.2d 201 (5th Cir.1980), a controversial decision by the United States Court of Appeals for the Fifth Circuit, the court used the predecessor to § 548(a) to find, for the first time, that a foreclosure proceeding that otherwise complied with state law could be set aside if the sale price did not represent "reasonably equivalent value." In dictum the court suggested that a foreclosure price of less than 70 percent of fair market value failed to meet the "fair equivalency" test. Several other federal courts adopted *Durrett*. See, e.g., In re Hulm, 738 F.2d 323 (8th Cir.1984); First Federal Savings & Loan Ass'n of Warner Robbins v. Standard Building Associates, Ltd., 87 B.R. 221 (N.D.Ga.1988); 1 G. Nelson & D. Whitman, Real Estate Finance Law § 8.17 & notes 10–17 (3d ed. 1993).

Other courts, while rejecting a "bright line" 70 percent test, endorsed *Durrett* as a general principle, but adopted the view that "in defining reasonably equivalent value, the court should neither grant a conclusive presumption in favor of a purchaser at a regularly conducted, noncollusive foreclosure sale, nor limit its inquiry to a simple comparison of the sale price to the fair market value. Reasonable equivalence should depend on all the facts of each case." Matter of Bundles, 856 F.2d 815, 824 (7th Cir. 1988). *Durrett* was the subject of significant scholarly commentary. See, e.g., Baird & Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829 (1985); Henning, An Analysis of *Durrett* and Its Impact on Real and Personal Property Foreclosures: Some Proposed Modifications, 63 N.C. L. Rev. 257 (1984); Zinman, Noncollusive Regularly Conducted Foreclosure Sales: Involuntary Nonfraudulent Transfers, 9 Cardozo L. Rev. 581 (1987). The Ninth Circuit, however, rejected *Durrett* and its variations and held, in a case where the foreclosure price was allegedly less than 60 percent of the real estate's fair market value, "that the price received at a noncollusive, regularly conducted foreclosure establishes irrebuttably reasonably equivalent value" under § 548. In re BFP, 974 F.2d 1144 (9th Cir.1992). See also Matter of Winshall Settlor's Trust, 758 F.2d 1136 (6th Cir.1985).

The United States Supreme Court, in a 5–4 decision, affirmed the Ninth Circuit and rejected *Durrett* and its progeny:

> [W]e decline to read the phrase "reasonably equivalent value" . . .

> to mean, in its application to foreclosure sales, either "fair market value" or "fair foreclosure price" (whether calculated as a percentage of fair market value or otherwise). We deem, as the law has always deemed, that a fair and proper price, or a "reasonably equivalent value," for foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State's foreclosure law have been complied with.

BFP v. Resolution Trust Corp., 511 U.S. 531, 545, 114 S.Ct. 1757, 1765, 128 L.Ed.2d 556 (1994). As a result, § 548 of the Bankruptcy Code now provides no basis for invalidating state foreclosure sales based on inadequacy of the price.

The *Durrett* principle has been rejected in another important context, the Uniform Fraudulent Transfer Act (UFTA), promulgated by the National Conference of Commissioners on Uniform State Laws in 1984. Because of a fear that bankruptcy judges and state courts would interpret state fraudulent conveyance law as incorporating *Durrett* principles, the UFTA provides that "a person gives a reasonably equivalent value if the person acquires an interest of the debtor in an asset pursuant to a regularly conducted, noncollusive foreclosure sale or execution of a power of sale ... under a mortgage, deed of trust or security agreement." U.F.T.A. § 3(b). The UFTA has been adopted by at least 30 states. See 7A Uniform Laws Ann. 170 (1993 Supp.).

For suggestions for statutory reform of the foreclosure process, see Goldstein, Reforming the Residential Foreclosure Process, 21 Real Est. L. J. 286 (1993); Johnson, Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy, 79 Va. L. Rev. 959 (1993); Nelson, Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals, 47 Mo. L. Rev. 151 (1982).

The United States Supreme Court has yet to resolve whether an inadequate foreclosure sale price may under some circumstances be the basis for a preference attack under § 547 of the Bankruptcy Code. At least four cases hold that, assuming the mortgagor was insolvent at the time of foreclosure, a mortgagee foreclosure purchase for the amount of the mortgage obligation or less within 90 days of a mortgagor bankruptcy petition is a voidable preference to the extent that real estate was worth more than the mortgage obligation at the time of the foreclosure sale. See In re Park North Partners, Ltd., 80 B.R. 551 (N.D.Ga.1987); In re Winters, 119 B.R. 283 (Bankr.M.D.Fla.1990); In re Wheeler, 34 B.R. 818 (Bankr.N.D.Ala. 1983); Matter of Fountain, 32 B.R. 965 (Bankr.W.D.Mo.1983). Cf. In re Quinn, 69 B.R. 776 (Bankr.W.D.Tenn. 1986) (foreclosure sale not a preference because mortgagor was not insolvent at time of the foreclosure sale). On the other hand, the United States Court of Appeals for the Ninth Circuit and at least one other court have rejected this use of § 547. See In re Ehring, 900 F.2d 184 (9th Cir. 1990); First Federal Savings & Loan Assoc. of Warner Robbins v. Standard Building Associates, Ltd., 87 B.R. 221 (D.Ga.1988). See generally 1 G. Nelson & D. Whitman, Real Estate Finance Law 785–788 (3d ed. 1993). For criticism of the use of the preference approach in this context, see Kennedy, Involuntary Fraudulent Transfer, 9 Cardozo L. Rev. 531, 563–564 (1987).

Application of the standard, Comment b. An action to set aside a power of sale foreclosure may be brought not only by the mortgagor or other holder of the equity of redemption, but also by junior lienors. See generally 1 G. Nelson & D. Whitman, Real Estate Finance Law 537–540 (3d ed. 1993). This is also true with respect to actions for damages for wrongful foreclosure. Id. at 540–544.

All jurisdictions take the position that mere inadequacy of the foreclosure sale price, not accompanied by other defects in the foreclosure process, will not automatically invalidate a sale. See, e.g., Security Savings & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz.Ct.App.1990); Gordon v. South Central Farm Credit, ACA, 446 S.E.2d 514 (Ga.Ct.App.1994); Boatmen's Bank of Jefferson County v. Community Interiors, Inc., 721 S.W.2d 72 (Mo.Ct.App.1986); Greater Southwest Office Park, Ltd. v. Texas Commerce Bank, N.A., 786 S.W.2d 386 (Tex. Ct. App. 1990); Kurtz v. Ripley County State Bank, 785 F.Supp. 116 (E.D.Mo.1992).

In general, courts articulate two main standards for invalidating a foreclosure sale based on price. First, many courts require that, in the absence of some other defect or irregularity in the foreclosure process, the price be "grossly inadequate" before a sale may be invalidated. See, e.g., Estate of Yates, 32 Cal.Rptr.2d 53 (Cal. Ct. App. 1994); Moody v. Glendale Federal Bank, 643 So.2d 1149 (Fla.Dist.Ct.App.1994); Gordon v. South Central Farm Credit, ACA, 446 S.E.2d 514 (Ga.Ct.App.1994); Union National Bank v. Johnson, 617 N.Y.S.2d 993 (N.Y.App.Div.1994); United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla. 1990); Vend–A–Matic, Inc. v. Frankford Trust Co., 442 A.2d 1158 (Pa. Super. Ct. 1982). Second, other courts require a disparity between the sale price and fair market value so gross as to "shock the conscience of the court or raise a presumption of fraud or unfairness." See, e.g., Allied Steel Corp. v. Cooper, 607 So.2d 113 (Miss.1992); Armstrong v. Csurilla, 817 P.2d 1221 (N.M.1991); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991); Trustco Bank New York v. Collins, 623 N.Y.S.2d 642 (N.Y.App.Div.1995); Key Bank of Western New York, N.A. v. Kessler Graphics Corp., 608 N.Y.S.2d 21 (N.Y.App.Div.1993); Bascom Construction, Inc. v. City Bank & Trust, 629 A.2d 797 (N.H.1993); Crossland Mortgage Corp. v. Frankel, 596 N.Y.S.2d 130 (N.Y.App.Div.1993); Verex Assurance, Inc. v. AABREC, Inc., 436 N.W.2d 876 (Wis.Ct.App.1989). A few courts seem to conflate the foregoing standards by holding that a sale will be set aside only where the price is so "grossly inadequate as to shock the conscience." United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla.1990).

At least one jurisdiction takes the position that "[i]f the fair market value of the property is over twice the sales price, the price is considered to be grossly inadequate, shocking 'the conscience of the court' and justifying the setting aside of the sale." Burge v. Fidelity Bond & Mortgage Co., 648 A.2d 414, 419 (Del.1994). At the other extreme, one state supreme court, in dealing with a price that was "shockingly inadequate" abandoned the "conscience shocking" standard as "impractical" and instead held that "[i]f a foreclosure sale is legally held, conducted and consummated, there must be some evidence of irregularity, misconduct, fraud, or unfairness

on the part of the trustee or mortgagee that caused or contributed to an inadequate price, for a court of equity to set aside the sale." Holt v. Citizens Central Bank, 688 S.W.2d 414, 416 (Tenn.1984). See also Security Savings & Loan Ass'n v. Fenton, 806 P.2d 362 (Ariz.Ct.App.1990).

It is unlikely that the "grossly inadequate" and "shock the conscience" standards differ materially. However, this section adopts the former standard on the theory that in form, if not in substance, it may afford a court somewhat greater flexibility in close cases to invalidate a foreclosure sale than does its "shock the conscience" counterpart.

Illustrations 1–4 establish that only rarely will a court be justified in invalidating a foreclosure sale based on substantial price disparity alone. Courts routinely uphold foreclosure sale prices of 50 percent or more of fair market value. See, e.g., Danbury Savings & Loan Ass'n v. Hovi, 569 A.2d 1143 (Conn. App. Ct. 1990); Moody v. Glendale Federal Bank, 643 So.2d 1149 (Fla.Dist.Ct.App.1994); Guerra v. Mutual Federal Savings & Loan Ass'n, 194 So.2d 15 (Fla.Ct.App. 1967); Union National Bank v. Johnson, 617 N.Y.S.2d 993 (N.Y.App.Div. 1994); Long Island Savings Bank v. Valiquette, 584 N.Y.S.2d 127 (N.Y.App.Div.1992); Glenville & 110 Corp. v. Tortora, 524 N.Y.S.2d 747 (N.Y.App.Div.1988); Zisser v. Noah Industrial Marine & Ship Repair, Inc., 514 N.Y.S.2d 786 (N.Y.App.Div. 1987); S & T Bank v. Dalessio, 632 A.2d 566 (Pa. Super. Ct. 1993); Cedrone v. Warwick Federal Savings & Loan Ass'n, 459 A.2d 944 (R.I.1983); Federal Deposit Ins. Corp. v. Villemaire, 849 F.Supp. 116 (D.Mass. 1994); Kurtz v. Ripley County State Bank, 785 F.Supp. 116 (E.D.Mo. 1992). But see Murphy v. Financial Development Corp., 495 A.2d 1245 (N.H.1985) (sale price of 59% of fair market value indicated failure of due diligence on part of foreclosing mortgagee in exercising power of sale).

Moreover, courts usually uphold sales even when they produce significantly less than 50 percent. See, e.g., Hurlock Food Processors Investment Associates v. Mercantile–Safe Deposit & Trust Co., 633 A.2d 438 (Md.Ct. App.1993) (35% of fair market value (FMV)); Frank Buttermark Plumbing & Heating Corp. v. Sagarese, 500 N.Y.S.2d 551 (N.Y.App.Div.1986) (30% of FMV); Shipp Corp., Inc. v. Charpilloz, 414 So.2d 1122 (Fla.Dist. Ct.App.1982) (33% of FMV); Moeller v. Lien, 30 Cal.Rptr.2d 777 (Cal.Ct. App.1994) (25% of FMV). See generally Dingus, Mortgages—Redemption After Foreclosure Sale in Missouri, 25 Mo. L. Rev. 261, 262–63 (1960).

On the other hand, there are cases holding that a trial court is warranted in invalidating a foreclosure sale that produces a price of 20 percent of fair market value or less. See United Oklahoma Bank v. Moss, 793 P.2d 1359 (Okla.1990) (approximately 20% of FMV); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991) (15% of FMV); Rife v. Woolfolk, 289 S.E.2d 220 (W.Va.1982) (14% of FMV); Ballentyne v. Smith, 205 U.S. 285, 27 S.Ct. 527, 51 L.Ed. 803 (1907) (14% of FMV); Polish National Alliance v. White Eagle Hall Co., Inc., 470 N.Y.S.2d 642 (N.Y.App. Div.1983) ("foreclosure sales at prices below 10% of value have consistently been held unconscionably low"). According to the New Mexico Supreme Court, when the price falls into the 10–40 percent range, it should not be confirmed "absent good reasons why it should be." Armstrong v. Csurilla,

817 P.2d 1221, 1234 (N.M.1991). A Mississippi decision takes the position that a sale for less than 40 percent of fair market value "shocks the conscience." Allied Steel Corp. v. Cooper, 607 So.2d 113, 120 (Miss.1992). One commentator maintains that there "is general agreement at the extremes as to what constitutes gross inadequacy. Sale prices less than 10 percent of value are generally held grossly inadequate, whereas those above 40 percent are held not grossly inadequate." Washburn, The Judicial and Legislative Response to Price Inadequacy in Mortgage Foreclosure Sales, 53 So. Cal. L. Rev. 843, 866 (1980).

On rare occasions, a trial court may abuse its discretion in confirming a grossly inadequate price. See First National Bank of York v. Critel, 555 N.W.2d 773 (Neb.1996) (reversing trial court's confirmation of a foreclosure sale that yielded 14% of appraised value).

Illustration 6 takes the position that a court may properly take into account that senior liens under some circumstances may make bidding at a junior foreclosure sale an especially precarious enterprise, and may thus be warranted in upholding the sale of the mortgagor's equity for an amount that would otherwise be deemed grossly inadequate. Support for this approach is found in Allied Steel Corp. v. Cooper, 607 So.2d 113, 120 (Miss.1992). See also Deibler v. Atlantic Properties Group, Inc., 652 A.2d 553, 558 (Del.1995); Briehler v. Poseidon Venture, Inc., 502 A.2d 821, 822 (R.I.1986).

The "grossly inadequate" standard applied by this section is measured by reference to the fair market value of the mortgaged real estate at the time of the foreclosure sale. The definition of fair market value is derived from BFP v. Resolution Trust Corp., 511 U.S. 531, 537–538, 114 S.Ct. 1757, 1761, 128 L.Ed.2d 556 (1994), which itself relies on Black's Law Dictionary 971 (6th ed. 1990):

> The market value of . . . a piece of property is the price which it might be expected to bring if offered for sale in a fair market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . piece of property.

The formulation of "fair market value" used in this section also finds support in the definition used by the Internal Revenue Service. Under this approach, "fair market value" is defined as:

> the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property . . . is not to be determined by a forced sale price. Nor is the fair market value . . . to be determined by the sale price of the item in a market other than that which such item is most commonly sold to the public.

Treas. Reg. § 20.2031–1(b).

Price inadequacy coupled with other defects, Comment c. Even if the price is not so low as to be deemed "grossly inadequate," the foreclosure sale may nevertheless be invalidated if it is otherwise defective under state

law. See, e.g., Rosenberg v. Smidt, 727 P.2d 778 (Alaska 1986) (sale for 28% of fair market value set aside where trustee failed to use due diligence to determine last known address of mortgagor); Bank of Seoul & Trust Co. v. Marcione, 244 Cal.Rptr. 1 (Cal.Ct.App.1988) (sale set aside where foreclosure price was for one third of fair market value and trustee refused to recognize a higher bid from a junior lienholder who was present at the sale); Estate of Yates, 32 Cal.Rptr.2d 53 (Cal. Ct. App. 1994) (sale for 12% of fair market value set aside where trustee failed to mail notice of default to executor); Whitman v. Transtate Title Co., 211 Cal.Rptr. 582 (Cal.Ct.App.1985) (sale for 20% of FMV set aside where trustee refused request for one-day postponement of sale); Federal National Mortgage Ass'n v. Brooks, 405 S.E.2d 604 (S.C.Ct.App.1991) (sale for 3% of FMV set aside where improper information supplied to bidders); Kouros v. Sewell, 169 S.E.2d 816 (Ga.1969) (sale for 3% of FMV set aside where mortgagee gave mortgagor incorrect sale date). Conversely, more than nominal price inadequacy must exist notwithstanding other defects in the sale process in order to establish the requisite prejudice to sustain an attack on the sale. See Cragin Federal Bank For Savings v. American National Bank & Trust Co. of Chicago, 633 N.E.2d 1011 (Ill. App. Ct. 1994).

Illustration 11 is based in part on Bank of Seoul & Trust Co. v. Marcione, 244 Cal.Rptr. 1 (Cal.Ct.App. 1988).

It is not uncommon for the *mortgagee*, rather than the mortgagor or a junior lienor, to attempt to set aside a sale based on an inadequate price. Note that in this setting, the real estate not only will be sold for less than fair market value, but usually, though not always, for a price that will not qualify as "grossly inadequate." Moreover, the foreclosure proceeding itself is normally not defective under state law. Rather, the mortgagee intends to enter a higher bid at the sale, but because of mistake or negligence on its part, actually makes a lower bid and a third party becomes the successful purchaser. Courts are deeply divided on this issue. Some take the position that mistake or negligence on the mortgagee's part should be treated as the functional equivalent of a defect under state law. As a result, these courts reason, the inadequate price plus the mistake or negligence are sufficient to justify setting aside the sale. See Burge v. Fidelity Bond & Mortgage Co., 648 A.2d 414 (Del. 1994) (sale for 71% to 80% of FMV set aside based on mistaken bid by mortgagee); Alberts v. Federal Home Loan Mortgage Corp., 673 So.2d 158 (Fla.Dist.Ct.App.1996) (affirming trial court that set aside a foreclosure sale after mortgagee's agent, through a mistake in communications, entered a bid of $18,995, instead of $118,995 and property was sold to third party for a grossly inadequate $19,000); RSR Investments, Inc. v. Barnett Bank of Pinellas County, 647 So.2d 874 (Fla.Dist.Ct.App.1994) (sale for 6% of FMV set aside because mortgagee inadvertently failed to appear at the sale); Crown Life Insurance Co. v. Candlewood, Ltd., 818 P.2d 411 (N.M.1991) (sale for 15% to 23% of FMV set aside based on mistaken bid by mortgagee). Other courts, however, have less sympathy for the mortgagee in this setting. See Wells Fargo Credit Corp. v. Martin, 605 So.2d 531 (Fla.Dist.Ct.App.1992) (trial court refusal to set aside sale affirmed even though mortgagee's agent, through a

misunderstanding, entered bid of $15,500 instead of $115,000 and property was sold to another for the grossly inadequate amount of $20,000); Mellon Financial Services Corp. #7 v. Cook, 585 So.2d 1213 (La.Ct.App.1991) (sale upheld even though attorney for mortgagee, who was deaf in his right ear, failed to bid higher against a third party because he "contributed to the problem by not positioning himself in a more favorable position, considering his hearing disability."); Crossland Mortgage Corp. v. Frankel, 596 N.Y.S.2d 130 (N.Y.App.Div.1993) (sale to mortgagor's father for 28% to 34% of FMV upheld even though erroneous bidding instructions to mortgagee's agent caused him to cease bidding prematurely). According to the *Crossland* court, "[mortgagee's] mistake was unfortunate, [but] it did not provide a basis to invalidate the sale which was consummated in complete accord with lawful procedure ... since the mistake was unilateral on [mortgagee's] part." Id. at 131.

On balance, the latter approach to mortgagee mistake seems preferable. In general, third party bidding should be encouraged, and this section reflects that policy by making it extremely difficult to invalidate foreclosure sales based on price inadequacy alone. Where the foreclosure process itself complies with state law and the other parties to the process have not engaged in fraud or similar unlawful conduct, courts should be especially hesitant to upset third party expectations. This is especially the case where, as here, mortgagees can easily protect themselves by employing simple common-sense precautions.

§ 8.4 Foreclosure: Action for a Deficiency

(a) If the foreclosure sale price is less than the unpaid balance of the mortgage obligation, an action may be brought to recover a deficiency judgment against any person who is personally liable on the mortgage obligation in accordance with the provisions of this section.

(b) Subject to Subsections (c) and (d) of this section, the deficiency judgment is for the amount by which the mortgage obligation exceeds the foreclosure sale price.

(c) Any person against whom such a recovery is sought may request in the proceeding in which the action for a deficiency is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale.

(d) If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

TAB 13

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CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Plaintiff,

v.

FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, N.A., a national association; ANA TORRES, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-13-679329-C

Dept. No. XXVI

ORDER GRANTING FIRST HORIZON HOME LOAN'S MOTION FOR SUMMARY JUDGMENT AND DENYING SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT

This matter came before the court on First Horizon Home Loans, a Division of First Tennessee Bank, N.A.'s (**First Horizon**) and SFR Investments Pool 1, LLC's (**SFR**) cross motions for summary judgment, and Intervenors' oral joinder to SFR's motion. Following full briefing, the court heard argument of counsel on April 5, 2016. Steven Shevorski, Esq. appeared on behalf of First Horizon, Diana Cline Ebron, Esq. appeared on behalf of SFR, and Steve Loizzi, Esq. appeared on behalf of Intervenors Squire Village at Silver Springs Community Association (**HOA**) and Alessi & Koenig, LLC (**Alessi**). The Court, having considered the full briefing on the motions, the pleadings and papers on file herein, and argument of counsel, makes the following Findings of Facts and Conclusions of Law:[1]

[1] Any findings of fact that are more appropriately conclusions of law shall be so deemed. Any conclusions of law that are more appropriately findings of fact shall be so deemed.

FINDINGS OF FACT

1. Ana Torres borrowed $136,9213 from First Horizon to acquire the property located at 5069 Midnight Oil Drive, Las Vegas, Nevada 89122, APN 161-26-111-017 in 2008. The loan was secured by a deed of trust recorded in the Official Records of the Clark County Recorder on July 25, 2008 as Instrument Number 20080725-0003028. Torres defaulted on the loan, and First Horizon recorded a notice of default and election to sale on October 30, 2012.

2. On February 1, 2013, the certificate of compliance with Nevada's Foreclosure Mediation Program was recorded. Thereafter, on February 7, 2013, First Horizon recorded a notice of sale setting the date for public auction of the property for February 26, 2013.

3. At the February 26, 2013 trustee's sale, First Horizon credit bid for the property and purchased it for $151,283.09. First Horizon recorded its trustee's deed in the Official Records of the Clark County Recorder on March 7, 2013, as Instrument Number 20130307003168.

4. Alessi, the HOA's collection agent, recorded a notice of delinquent (lien) on February 22, 2012. Thereafter, Alessi recorded a notice of default and election to sell on April 20, 2012. Alessi did not record a notice of sale until February 5, 2013.

5. On March 6, 2013, after First Horizon purchased the property at its foreclosure, Alessi purported to sell the property to SFR for $7,000. SFR recorded its trustee's deed in the Official Records of the Clark County Recorder on March 18, 2013 as Instrument Number 20130318003508.

6. At the time of the HOA foreclosure sale, First Horizon owned the property and was not in default on its obligation to pay the HOA's assessments.

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7. Alessi's NRCP 30(b)(6) witness testified as to Alessi's procedures where a lender forecloses and becomes owner prior to a homeowner's association foreclosure:

> Q. Okay. If Alessi had known that the lender had foreclosed days before the HOA foreclosure sale, would it have moved forward with the sale?
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> Ms. Ebron: Calls for speculation, incomplete hypothetical.
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> Mr. Loizzi: Join. Go Ahead.
>
> A. I would answer the question that in general we would not.
> Q. And why not.
>
> A. Because there would have been a new – well, would have been a trustee's deed recorded by the bank and we would have known of the foreclosure and probably would have sought payment by the bank of the amounts due. We probably would have restarted the collection process if there had been a trustee's deed recorded into the bank's name. That is my recollection of our policy at that time.

(Deposition of David Alessi at 49:9-25 and 50:1).[2]

8. Section 7.7 of the HOA's CC&Rs required the HOA to give First Horizon, as owner, thirty days' written notice of any amount due and owing. Specifically, section 7.7 provides, in part:

> The failure of the Association to send a bill to a Member shall not relieve any Member of his liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed as set forth Section 7.10 below until the Member has been given not less than thirty (30) days written notice prior to such foreclosure that that the Assessment or any installation thereof is or will be due and of the amount owing.

9. The HOA did not provide First Horizon with written notice of the amount of its liability as owner, as required by section 7.7 of the CC&Rs.

10. First Horizon's February 26, 2013 foreclosure extinguished the sub priority piece of the HOA's lien. First Horizon received none of the statutory notices that the former owner, Torres, received.

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[2] The question that prompted Mr. Alessi to describe Alessi's collection policies where a new owner attains title was not objected to during the deposition.

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11. Alessi did not send, and First Horizon as homeowner did not receive, a notice of delinquent assessment. NRS 116.31162(1)(a). Alessi did not send, and First Horizon as homeowner did not receive, a notice of default and election to sell. NRS 116.31162(1)(b). Alessi did not send, and First Horizon as homeowner did not receive, a notice of sale. NRS 116.31165.

CONCLUSIONS OF LAW

1. Summary judgment is proper "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Wood v. Safeway*, (2005) 121 Nev. 724, 729; 121 P.3d 1026, 1029, NRCP 56(c). Materiality is dependent on the underlying substantive law, and includes only those factual disputes that could change the ultimate outcome of a case. *Id.*

2. CC&Rs are restrictive covenants. *Horizons at Seven Hills Homeowners Association v. Ikon Holdings, LLC*, 132 Nev. Adv. Opn. 35, pg. 14 (2016). As such, CC&Rs run with the land and provide a burden and a benefit of rights to the property owner. *Boulder Oaks Cmty. Ass'n v. B & J Andrews*, 169 P.3d 1155, 1160-1161 (Nev. 2007). The burden of this association's CC&Rs is the obligation to pay assessments. The benefit of the CC&Rs is that the HOA must comply with the notice provisions that govern how the HOA enforces its right to collect assessments.

3. In *Shadow Wood Homeowners Assoc., et al. v. New York Comm. Bancorp.*, 132 Nev. Adv. Opn. 5, 11 (2016) the Nevada Supreme Court determined recitals regarding statutory compliance are not irrebuttable conclusions. Specifically, the Court held trial courts retain equitable power to set aside a foreclosure sale equating foreclosures under NRS Chapter 116 to foreclosures under NRS Chapter 107. *Shadow Wood Homeowners Assoc.*, 132 Nev. Adv. Opn. at 14-15. The Court stated, "The conclusive recital provisions in NRS 107.030(8) have never been argued to carry the preemptive effect that [Appellants] attribute to NRS 116.31166." *Id.* at 12-13. Thus, a foreclosure cannot stand where no default occurred despite the recitals in the deed. *Id.* at 11.

4. The HOA violated its own CC&Rs. First Horizon was not in default of any obligation to pay assessments. The HOA's CC&Rs mandate that First Horizon, as homeowner, be given notice of the amount of assessments owed and 30 days' notice in order to pay that amount prior to any foreclosure proceedings.

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5. The HOA did not serve First Horizon with the notice required by Sec. 7.7 of the CC&Rs and instead proceeded immediately to foreclosure.

6. First Horizon's February 26, 2014 foreclosure extinguished its deed of trust causing the super-priority lien to be rendered moot. The HOA's foreclosure could not have extinguished First Horizon's deed of trust because it no longer encumbered the property following First Horizon's foreclosure.

7. 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) 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). FN 1

8. First Horizon, as homeowner, did not receive any of the notices required by NRS Chapter 116. Alessi did not send, and First Horizon did not receive, a notice of delinquent assessment after First Horizon took title to the Property. NRS 116.31162(1)(a). Alessi did not send, and First Horizon did not receive, a notice of default and election to sell after First Horizon took title to the Property. NRS 116.31162(1)(b). Alessi did not send, and First Horizon did not receive, a notice of sale after First Horizon took title to the Property. NRS 116.31165. The HOA's sale is void because it should have re-noticed the foreclosure sale to First Horizon.

9. Because First Horizon, after it took title to the Property, did not receive any foreclosure notices required by NRS Chapter 116, the statute is unconstitutional as-applied.

10. The March 6, 2013, HOA foreclosure sale is void.

11. No genuine issues of material fact remain, and First Horizon is entitled to summary judgment as a matter of law. SFR's motion for summary judgment, and Alessi's and the HOA's joinder thereto, are denied with prejudice, in part. SFR's claim for unjust enrichment, only, is denied without prejudice.

(1) The 9th Cir. Opinion in Bourne Valley v. Wells Fargo Decided 8/12/16 reportedly having ... having been stayed, therefore does not impact this ruling.

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ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 8, 2016 bench trial is vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the March 6, 2013, HOA foreclosure sale is void, and the remedy for the voided sale is stayed pending appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties preserve the status quo with respect to the property, and SFR is not to transfer title to, sell or encumber the Property pending the resolution of any appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First Horizon's Motion for Summary Judgment is **GRANTED**. SFR's motion for summary judgment, along with Alessi's and the HOA's joinder thereto is **DENIED**, with prejudice. SFR's claim for unjust enrichment, only, is **DENIED**, without prejudice.

DATED and Done this ___ day of August, 2016.

THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

Submitted by:
AKERMAN LLP

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CHRISTINE M. PARVAN, ESQ.
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TAB 14

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Attorneys for First Horizon Home Loans

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Plaintiff,

v.

FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, N.A., a national association; ANA TORRES, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive,

Defendants.

Case No.: A-13-679329-C
Dept. No. XXVI

NOTICE OF ENTRY OF ORDER GRANTING FIRST HORIZON HOME LOAN'S MOTION FOR SUMMARY JUDGMENT AND DENYING SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND THEIR ATTORNEY OF RECORD:

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PLEASE TAKE NOTICE that an **ORDER GRANTING FIRST HORIZON HOME LOAN'S MOTION FOR SUMMARY JUDGMENT AND DENYING SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT** has been entered on the 17th day of August, 2016, in the above-captioned matter. A copy of said Order is attached hereto as Exhibit A.

DATED this 19th day of August, 2016.

AKERMAN LLP

/s/ *Christine M. Parvan*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of August, 2016 and pursuant to NRCP 5(b), I served through this Court's electronic service notification system ("Wiznet") a true and correct copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING FIRST HORIZON HOME LOAN'S MOTION FOR SUMMARY JUDGMENT AND DENYING SFR INVESTMENT POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT** addressed to:

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/s/ *Doug J. Layne*
An employee of AKERMAN LLP

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EXHIBIT A

EXHIBIT A

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Attorneys for First Horizon Home Loans

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CLERK OF THE COURT

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company,

Plaintiff,

v.

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Defendants.

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[1] Any findings of fact that are more appropriately conclusions of law shall be so deemed. Any conclusions of law that are more appropriately findings of fact shall be so deemed.

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FINDINGS OF FACT

1. Ana Torres borrowed $136,9213 from First Horizon to acquire the property located at 5069 Midnight Oil Drive, Las Vegas, Nevada 89122, APN 161-26-111-017 in 2008. The loan was secured by a deed of trust recorded in the Official Records of the Clark County Recorder on July 25, 2008 as Instrument Number 20080725-0003028. Torres defaulted on the loan, and First Horizon recorded a notice of default and election to sale on October 30, 2012.

2. On February 1, 2013, the certificate of compliance with Nevada's Foreclosure Mediation Program was recorded. Thereafter, on February 7, 2013, First Horizon recorded a notice of sale setting the date for public auction of the property for February 26, 2013.

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4. Alessi, the HOA's collection agent, recorded a notice of delinquent (lien) on February 22, 2012. Thereafter, Alessi recorded a notice of default and election to sell on April 20, 2012. Alessi did not record a notice of sale until February 5, 2013.

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7. Alessi's NRCP 30(b)(6) witness testified as to Alessi's procedures where a lender forecloses and becomes owner prior to a homeowner's association foreclosure:

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(Deposition of David Alessi at 49:9-25 and 50:1).[2]

8. Section 7.7 of the HOA's CC&Rs required the HOA to give First Horizon, as owner, thirty days' written notice of any amount due and owing. Specifically, section 7.7 provides, in part:

> The failure of the Association to send a bill to a Member shall not relieve any Member of his liability for any Assessment or charge under this Declaration, but the Assessment Lien therefor shall not be foreclosed as set forth Section 7.10 below until the Member has been given not less than thirty (30) days written notice prior to such foreclosure that that the Assessment or any installation thereof is or will be due and of the amount owing.

9. The HOA did not provide First Horizon with written notice of the amount of its liability as owner, as required by section 7.7 of the CC&Rs.

10. First Horizon's February 26, 2013 foreclosure extinguished the sub priority piece of the HOA's lien. First Horizon received none of the statutory notices that the former owner, Torres, received.

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[2] The question that prompted Mr. Alessi to describe Alessi's collection policies where a new owner attains title was not objected to during the deposition.

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CONCLUSIONS OF LAW

1. Summary judgment is proper "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to judgment as a matter of law.'" *Wood v. Safeway*, (2005) 121 Nev. 724, 729; 121 P.3d 1026, 1029, NRCP 56(c). Materiality is dependent on the underlying substantive law, and includes only those factual disputes that could change the ultimate outcome of a case. *Id.*

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5. The HOA did not serve First Horizon with the notice required by Sec. 7.7 of the CC&Rs and instead proceeded immediately to foreclosure.

6. First Horizon's February 26, 2014 foreclosure extinguished its deed of trust causing the super-priority lien to be rendered moot. The HOA's foreclosure could not have extinguished First Horizon's deed of trust because it no longer encumbered the property following First Horizon's foreclosure.

7. 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) 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). FN 1

8. First Horizon, as homeowner, did not receive any of the notices required by NRS Chapter 116. Alessi did not send, and First Horizon did not receive, a notice of delinquent assessment after First Horizon took title to the Property. NRS 116.31162(1)(a). Alessi did not send, and First Horizon did not receive, a notice of default and election to sell after First Horizon took title to the Property. NRS 116.31162(1)(b). Alessi did not send, and First Horizon did not receive, a notice of sale after First Horizon took title to the Property. NRS 116.31165. The HOA's sale is void because it should have re-noticed the foreclosure sale to First Horizon.

9. Because First Horizon, after it took title to the Property, did not receive any foreclosure notices required by NRS Chapter 116, the statute is unconstitutional as-applied.

10. The March 6, 2013, HOA foreclosure sale is void.

11. No genuine issues of material fact remain, and First Horizon is entitled to summary judgment as a matter of law. SFR's motion for summary judgment, and Alessi's and the HOA's joinder thereto, are denied with prejudice, in part. SFR's claim for unjust enrichment, only, is denied without prejudice.

(1) The 9th Cir. Opinion in Bourne Valley v. Wells Fargo Decided 8/12/16 reportedly having been stayed, therefore does not impact this ruling.

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ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the August 8, 2016 bench trial is vacated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the March 6, 2013, HOA foreclosure sale is void, and the remedy for the voided sale is stayed pending appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties preserve the status quo with respect to the property, and SFR is not to transfer title to, sell or encumber the Property pending the resolution of any appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that First Horizon's Motion for Summary Judgment is **GRANTED**. SFR's motion for summary judgment, along with Alessi's and the HOA's joinder thereto is **DENIED**, with prejudice. SFR's claim for unjust enrichment, only, is **DENIED**, without prejudice.

DATED and Done this ___ day of August, 2016.

THE HONORABLE GLORIA STURMAN

DISTRICT COURT JUDGE

Submitted by:
AKERMAN LLP

MELANIE D. MORGAN, ESQ.
Nevada Bar No. 8215
CHRISTINE M. PARVAN, ESQ.
Nevada Bar No. 10711
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Attorneys for First Horizon Home Loans

Approved as to content and form by:
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DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Plaintiff, vs. FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, A NATIONAL ASSOCIATION; ANA TORRES, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No. A-13-679329-C Dept. No. XXVI **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that SFR Investments Pool 1, LLC, by and through its counsel of record, Kim Gilbert Ebron, hereby appeals from the following orders and judgments of the district court:

1. Order Granting First Horizon Home Loan's Motion for Summary Judgment and Denying SFR Investments Pool 1, LLC's Motion for Summary Judgment, entered on August 17, 2016, notice of entry of which was served on August 17, 2016; and

…

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…

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2. Any and all orders made appealable thereby.

DATED this 16th day of September, 2016.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September 2016, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF APPEAL**, to the following parties:

Select All Select None

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/s/Jacqueline A. Gilbert
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Attorneys for SFR Investments Pool 1, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company, Plaintiff, vs. FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK, A NATIONAL ASSOCIATION; ANA TORRES, an individual; DOES I through X; and ROE CORPORATIONS I through X, inclusive, Defendants.	Case No. A-13-679329-C Dept. No. XXVI **CASE APPEAL STATEMENT**

CASE APPEAL STATEMENT

1. **Name of appellant filing this case appeal statement**: Plaintiff SFR Investments Pool 1, LLC (SFR).

2. **Identify the judge issuing the decision, judgment, or order appealed from**:

   The Honorable Gloria Sturman

3. **Identify each appellant and the name and address of counsel for each appellant**:

   Appellant: SFR Investments Pool 1, LLC
   Counsel: Jacqueline A. Gilbert, Esq.
   Diana Cline Ebron, Esq.
   Zachary Clayton, Esq.

KIM GILBERT EBRON
7625 Dean Martin Drive, Suite 110
Las Vegas, Nevada 89139

4. Identify each respondent and the name and address of appellate counsel, if known, for each respondent (if the name of a respondent's appellate counsel is unknown, indicate as much and provide the name and address of that respondent's trial counsel):

Respondent: First Horizon Home Loans, a Division of First Tennessee Bank, a National Association

Trial Counsel: Melanie D. Morgan, Esq.
Akerman LLP
1160 Town Center Drive, Suite 330
Las Vegas, Nevada, 89144

5. Indicate whether any attorney identified above in response to question 3 or 4 is not licensed to practice law in Nevada and, if so, whether the district court granted that attorney permission to appear under SCR 42 (attach a copy of any district court order granting such permission):

N/A

6. Indicate whether appellant was represented by appointed or retained counsel in the district court:

Retained

7. Indicate whether appellant is represented by appointed or retained counsel on appeal:

Retained

8. Indicate whether appellant was granted leave to proceed in forma pauperis, and the date of entry of the district court order granting such leave:

N/A

9. Indicate the date the proceedings commenced in the district court (e.g., date complaint, indictment, information, or petition was filed):

April 2, 2013

10. Provide a brief description of the nature of the action and result in the district court, including the type of judgment or order being appealed and the relief granted by the district court:

This is one of many appeals arising from a homeowners association's ("Association") non-judicial foreclosure sale pursuant to NRS 116. Here, both First Horizon (the "Bank") and

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Association were proceeding with non-judicial foreclosure sales. The Bank foreclosed first, with the Property reverting to the Bank. However, the bank did not record its foreclosure deed, nor did it pay the Association the super-priority portion of the Association's lien that remained after the Bank sale prior to the Association holding its foreclosure sale, at which SFR purchased the Property. SFR filed the instant lawsuit seeking quiet title/declaratory relief, for unjust enrichment, and to obtain permanent injunctive relief against the Bank. The Association and Alessi & Koenig intervened, and joined SFR's motion.

The parties filed cross-motions for summary judgment. Following full briefing and a hearing, the district court granted the Bank's motion and denied SFR's and the joinders thereto, concluding that after title transferred to the Bank, the Association had to begin the foreclosure process anew on the super-priority portion of the lien. The resulting order voided the Association's sale, which the district court stayed pending appeal.

11. Indicate whether the case has previously been the subject of an appeal to or original writ proceeding in the Supreme Court and, if so, the caption and Supreme Court docket number of the prior proceeding:

N/A.

12. Indicate whether this appeal involves child custody or visitation:

N/A.

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13. If this is a civil case, indicate whether this appeal involves the possibility of settlement:

SFR is always willing to attempt to settle but has never been able to settle a case against a party represented by Akerman, LLP.

DATED this 16th day of September, 2016.

KIM GILBERT EBRON

/s/ Jacqueline A. Gilbert
DIANA CLINE EBRON, ESQ.
Nevada Bar No. 10580
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September 2016, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **CASE APPEAL STATEMENT**, to the following parties:

Select All Select None

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/s/Jacqueline A. Gilbert
An employee of Kim Gilbert Ebron

TAB 17

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SFR INVESTMENTS POOL 1, LLC, Plaintiff, vs. FIRST HORIZON HOME LOANS, ANA TORRES, Defendants.	CASE NO. A-13-679329 DEPT. NO. XXVI **Transcript of Proceedings**

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

FIRST HORIZON HOME LOAN'S MOTION FOR SUMMARY JUDGMENT; SFR'S INVESTMENTS POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT

TUESDAY, APRIL 5, 2016

APPEARANCES:

For the Plaintiff:	DIANA CLINE EBRON, ESQ. JACQUELINE GILBERT, ESQ.
For the Defendants:	STEVEN SHEVORSKI, ESQ.
For Alessi & Koenig:	STEVE LOIZZI, ESQ.
RECORDED BY:	KERRY ESPARZA, COURT RECORDER
TRANSCRIBED BY:	KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

TUESDAY, APRIL 5, 2016 AT 10:07 A.M.

MR. LOIZZI: Good morning, Your Honor, Steve Loizzi for Alessi and Koenig.

THE COURT: Good morning.

MR. SHEVORSKI: Good morning, Your Honor, Steve Shevorski of Akerman for First Horizon.

MS. EBRON: Good morning, Diana Cline Ebron on behalf of SFR Investments Pool 1, LLC.

THE COURT: Thank you. And for the record, my Law Clerk doesn't -- no longer works on any Howard Kim cases, her boyfriend now being employed there. So, she's left and that left me to read this whole thing by myself. So, we're ready to go.

MR. LOIZZI: Your Honor, before you get started I spoke to both counsel and they are -- they both have no objection to Alessi and Koenig making an oral joinder to SFR's Motion.

THE COURT: Okay.

MR. LOIZZI: And I think Opposition to the Countermotion for Summary Judgment by the Bank. So, assuming you have no objection, we'd like to join.

THE COURT: Okay. So noted. All right.

MR. LOIZZI: Thank you.

MR. SHEVORSKI: No objection, Your Honor.

THE COURT: All right. So, we have crossmotions. We have SFR's Motion for Summary Judgment and we have a motion of First Horizon Home Loan's motion. So --

MS. EBRON: That's right, Your Honor, and I know that you've read everything. Counsel and I have talked about it and, you know, rather than going through a full argument about everything that's already in our briefs, --

THE COURT: Yes.

MS. EBRON: -- if you have any questions, we'd like to address those.

THE COURT: Yes. Yeah. Because every one of these, for me, as I've always said, I think the statutes says what it says. It's constitutional, on its face, the question is always how it's applied. So, let's talk about how it's applied in this particular case.

And this one's kind of interesting where we've got this problem of -- so, let me make sure I got -- the dates are really important. It's like critical because it's -- the transfer from the party who originally received the notices because of the foreclosure by the lender comes like right in the middle of the noticing process. So, I just want to make sure that I've got that straight and I don't -- so, I don't know, Mr. Shevorski, I don't necessarily want to say I'm adopting it, but the timeline that Ms. Cline's got, this really detailed timeline she's got for us in her

pleading, are there -- I mean, do you take issue with any of the -- her analysis of the dates and how the timeline actually falls? Because that's really kind of the problem here.

MR. LOIZZI: No.

THE COURT: The Bank files its Notice of Default and Election to Sell in October of 2012.

MR. SHEVORSKI: October 30th, Your Honor.

THE COURT: October 30th. Then the Association does its notice February 5th. And they're noticing, I believe, the prior institution. So, then the foreclosure takes place literally like -- March 7th. It takes place on March 7th. And before -- no. March 6th.

MR. SHEVORSKI: March 6th, Your Honor.

THE COURT: March 6th. And then they record it March 7th.

MR. SHEVORSKI: Correct.

THE COURT: Then the foreclosure sale takes place. So, I guess --

MR. SHEVORSKI: It's actually backwards, Your Honor. The Bank's foreclosure sale took place on February 26th and the Deed was recorded on March 7th.

THE COURT: Okay. Okay. Okay. Here it is. So, the Bank's foreclosure is the one on February 26th. Got it.

MR. SHEVORSKI: Right. And then the HOA's

foreclosure sale took place on March 6th. And they recorded their Trustee's Deed sometime after that.

MS. EBRON: March 18th.

THE COURT: Okay. So, the -- I guess that the question was --

MR. SHEVORSKI: I'm sorry. What?

MS. EBRON: March 18th.

MR. SHEVORSKI: March 18th. Thank you.

THE COURT: So, March 7th is the date that the Bank's foreclosure deed gets recorded and that's the day after the HOA forecloses?

MR. SHEVORSKI: Correct.

MS. EBRON: That's correct.

THE COURT: That's interesting.

MS. EBRON: And just to be clear, Your Honor --

THE COURT: I'm sorry. I know this is a big deal. Your clients both really care about this so, I don't want to make light of it.

MS. EBRON: Yes.

THE COURT: But it's just a really interesting factual scenario because the problem that we have here is -- the argument is, you know, who is -- was their proper notice? Was the statue properly applied? And when the Bank's doing everything that it needs to do properly to foreclosure and they technically have foreclosed prior to

the HOA. And the HOA, the question is whether the HOA properly gave all of its notices because there was no way for them to know of the foreclosure.

MR. SHEVORSKI: I --

THE COURT: I mean, unless they went and like stood at the foreclosure sale and said: We better go check and make sure the Bank's foreclosure doesn't go through because we've got one penny. I mean, I'm just trying to figure out how would they have known that there was going to be this hiccup? Because it is really interesting. The Bank had taken title and -- but there was no notice to the Bank. I don't think anybody disputes that.

The Bank had foreclosed prior to the HOA sale and they -- the Bank did not receive any notice that -- I mean, the notice that would have gone to them, to their agents.

MS. EBRON: Well, Your Honor, --

THE COURT: So, I guess that's what I'm trying to figure out. What's the significance of that? Because it is so unique and, so, what's the significance of these dates falling the way they do?

MS. EBRON: I think, to be clear, Your Honor, the Bank did have notice before the sale. They were noticed as the first security interest holder.

THE COURT: Okay.

MS. EBRON: Now, the former homeowner, the

borrower, Ana Torres, was getting all of the notices as the unit owner but the Bank was getting the Notice of Default and the Notice of Sale and they admit that they did receive the notices to, yeah, the Notice of Trustee Sale, the Notice of Default. The Bank was on full notice of the Association foreclosure sale.

The only thing that didn't happen in this case is that once the Association foreclosure -- or, sorry, the Bank foreclosure took place, it didn't tell the Association: By the way, I'm the homeowner now. That's the only notice that didn't take place here.

THE COURT: Right. Okay. So, just to make sure we understand the timing. Bank forecloses February 26th.

MR. SHEVORSKI: Okay.

THE COURT: HOA forecloses March 6th.

MR. SHEVORSKI: Yes.

THE COURT: Bank records March 7th.

MR. SHEVORSKI: March 7th.

THE COURT: Then, SFR records March 18th. So -- and that's part of SFR's position is, you know, if you go back and you do the research, there's no notice to anybody. Because, you know, we aren't -- you know, these notice reporting states that are back east, the -- you know, if you do the research, there's no way to tell.

And I understand your argument, Mr. Shevorski, is:

Of course you could tell because there was a bank foreclosure was noticed. And anybody would have known to check what happened on that date. Why didn't anybody check what happened to the Bank foreclosure? Because there is no actual notice the foreclosure had gone through. That's undisputed. The Deed had not been recorded.

But -- so, what's the due diligence or the standard of care to -- you have properly have researched before either the HOA or the purchaser go forward with the transaction when there is this bank foreclosure out there already looming. It was noticed before all of this. It was already -- the ball was already rolling on it. It's just really interesting. It's kind of a different one because usually the banks are at a different stage. This one, the Bank was already ahead of the game. They were already in the process of foreclosing and they actually -- they were -- actually owned it on the day of the HOA foreclosure sale. So, you know, what's the HOA foreclosing on? Their homeowner no longer owns it. But the problem is that they don't have any notice of that here.

MS. EBRON: Well, and also --

THE COURT: Yeah. interesting.

MS. EBRON: Also, Your Honor, you know, even if SFR had notice of the Bank's foreclosure sale and that the subpriority piece of the Association's lien was paid or was

extinguished, there still would have been an Association foreclosure lien to foreclose on. It runs with the property. It doesn't matter who the unit owner is at the time. They can continue with that.

It's -- you know, the argument the Bank is making is akin to saying that like, say I take out a loan from Mr. Shevorski and secure it with the deed of trust on my house. He goes through the foreclosure process. There's all these notices. I still haven't paid. I quitclaim the property to Mr. Loizzi here the day before the sale and now I claim the Bank foreclosure sale isn't valid because Mr. Loizzi didn't have notice to him of the sale. I mean, it's the same thing. If you could just transfer a property and stop a foreclosure process midstream, then, you know, we wouldn't need to have all the TROs and preliminary injunctions that we've had.

THE COURT: Are they arguing that they're stopping the foreclosure or are they saying they affect what is transferred? It's different. I would agree with you, I don't think that there's any way to stop the foreclosure unless you go in and get a TRO to stop the foreclosure. But how does transferring -- the homeowner has lost her interest. The homeowner who is the person who has the agreement with the HOA, the person who -- and she was the one who was in default. So, once she's no longer is the

HOA's homeowner, now it's the Bank. Does that start something over again to say: You've got to start all over again before you can go forward with the super priority portion of the sale because the debt still attaches to the property. It's still owed. There's no question there.

But does this affect of the super priority, the fact that we are selling because the HOA has the interest with the person who has the contractual interest in the property, the actual agreement between the HOA and whoever the owner is. That's why the HOA has a super priority, because of that relationship and they are providing these services through their HOA fees to the homeowner. That's why it's a super priority. It takes that sort of quasi-governmental role. You know, we're going to maintain the streets and the shrubs and the lighting and whatever. Whatever they're doing.

So, does the fact that the transfer because you have foreclosed, because that person no longer has an interest, how does that affect a super priority? Because they still owe the money. There's no question and I understand your argument that that lien runs with the property. That there's -- it's still attached. But does it affect under the statute, the super priority statute, does it affect whether it strips the junior lien holders of interest? Because it's no longer the junior lien holder.

They actually own it. That's the problem here. It's weird.

Because I agree with you, because we wouldn't need all these TROs that we were having and if just transferring it made any difference. It doesn't. And you still have -- you can still go forward. You can still do you foreclosures but how -- what's the effect of doing it? Do you actually transfer that, in that context? When you make that HOA sale -- foreclosure, the question is: What are they transferring? And, in this case, where the Bank has already foreclosed and the homeowner no longer has that interest. It's now the Bank's property. The Bank is now the one with the obligation to the HOA to pay those fees. Are they wiped out by that sale? It's weird. It's just kind of a crazy factual scenario.

MR. SHEVORSKI: It's a crazy factual scenario with an answer. And the answer is: We're not wiped out. And the reason is, is that we're entitled to notice and opportunity to be heard, just like the former owner. Section 7.7 of the CC&Rs says that.

THE COURT: So, is the duty, then, on the HOA to go in and say: Before we go forward with our sale, we'd better go and check and make sure that there's been no change in the way title is held on this property? That they're -- oh, here's a -- there was a HOA foreclosure

sale. I mean, a mortgage -- the lender was going to be noticed a foreclosure sale. I wonder if that went forward. There's no -- there's no notice. I see no deed.

MR. SHEVORSKI: There's no record notice in the sense that --

THE COURT: Right.

MR. SHEVORSKI: If you're -- but --

THE COURT: Are the obligated to go check on it, I guess is the thing?

MR. SHEVORSKI: Well, it's an undisputed fact that if the Trustee's Deed had been recorded. Now, I'd like to point out that my client acted entirely consistent with Nevada law, under Chapter 107, by recording the Trustee's Deed when it did. We have 30 days to do so and we did that. We recorded within 30 days of the sale, much less than 30 days.

THE COURT: Yeah.

MR. SHEVORSKI: So -- and Mr. Alessi testified that had they known that a Trustee's Deed had been recorded, he would have stopped the foreclosure process and restarted it.

THE COURT: Right.

MR. SHEVORSKI: So, the question is: What's the difference?

THE COURT: Well, the difference is nobody had any

notice.

MR. SHEVORSKI: Nobody had any record notice but if they would have picked up the phone call -- picked up the phone and said: Hey, did you foreclose? They would have known it in a flash. They would have known it in a flash. And, more importantly, Your Honor, the CC&Rs run with the land. My -- they are a burden to my client. Thy are a benefit to my client. The benefit is is they guarantee my client a minimum of 30 days' notice. And it's important to --

THE COURT: So, I guess this is my question then, and that is: The -- I know -- I appreciate that the banks don't like the interpretation of UCOA, that the Supreme Court has come down with.

MR. SHEVORSKI: We like it in every other state, Your Honor.

THE COURT: So, how does it affect your client? That your client had taken title to the property?

MR. SHEVORSKI: Sure. It affects my client. It's true that there is some amount still due in owing, but my client needs to know what that mount is. There has been a foreclosure by my client. Title transferred, regardless of when the Trustee's Deed recorded. My client became the owner. My client gets the burden and the benefit of the CC&Rs. My client gets the burden and the benefit of

Chapter 116's foreclosure procedures. We need to know what to pay. We need to know what to pay because, particular in this instance where this is an FHA-insured loan, we need to know what to pay so we can give FHA clear title. There's no way for my client to know that because the subpriority portion of the lien is gone. We need some amount -- you need to tell us what to pay. You need to tell us what to pay so we can do it.

THE COURT: Okay. So, I guess then the issue is who's got the burden in that case? Is the burden on the Bank to say: We've bought this -- we foreclosed on this property. We better let everybody know because they had 10 days? 10 days before their foreclosure.

MR. SHEVORSKI: Sure. Well, and in this particular instance of the way the lawsuit -- this particular adversary process, we're the ones who got sued for quiet title. The burden of persuasion and the burden of evidence is on the plaintiff. We are defendant. We have demonstrated through undisputed material facts that my client received no notice of what to pay after it took title. That is enough. This is one of those rare instances that this is going back to the *Allison Steel Corporation*. Going to a -- buying at a foreclosure sale is a risky process.

THE COURT: And, so, that's my -- I got to --

because that's the point that -- Ms. Ebron's point. Nobody can -- they have no notice. There was no way for them to have any notice.

MR. SHEVORSKI: Oh, I strongly disagree with that, Your Honor.

THE COURT: Okay.

MR. SHEVORSKI: The foreclosure sale -- the Notice of Sale was recorded. Why didn't SFR show up at the Bank's foreclosure sale in person if it wanted title. There is of record of sale going forward. It could have shown up in purchase of the Bank's foreclosure sale. Why didn't it do so? It didn't -- it went to the HOA foreclosure sale as a calculated risk.

The idea that SFR didn't have notice, it had record notice. A sale date was going to occur. It was a public sale. They could have shown up and bought. They took the chance of going to the HOA sale --

THE COURT: Right.

MR. SHEVORSKI: -- because they thought they were going to get more equity in the property.

THE COURT: Correct. Correct. So, that probably what we should talk about next which is the BFP issue. Under BFP, I understand your disagreement with me and we've got the issue on the value. And that it's not the 20 percent which is sort of vaguely been hinted maybe in a

couple of cases but then in a couple of other cases they said they weren't going to follow the 20 percent rule.

MR. SHEVORSKI: Right.

THE COURT: So, I guess that that's the issue of your appraisals and stuff so, can we talk about that issue?

MR. SHEVORSKI: Sure. First, let's talk about -- and I've read the unpublished opinions. It's actually my law firm's cases, not surprisingly.

THE COURT: Right.

MR. SHEVORSKI: And they do -- the Nevada Supreme Court has hinted that it's got to be price plus something else. And here, we do have price plus something else. It's an undisputed material fact that the foreclosure price here was less than 20 percent of the fair market value of the property, doing a retrospective analysis. That is undisputed.

And I'm not -- let me be very clear. We are not arguing that foreclosure properties -- this is one of the real canards and Judge, I -- Judge Pro is a great judge but this is one of the real canards in his opinion: We are not arguing that foreclosure property should go for the fair market value. The Court, when it is charged with equitable duties, takes the retrospective fair market value, not because that's what it should sell for but someone's into this Court asking for equity. And, so, the Court needs to

make a determination: How much has it fallen from that value? And that's -- and here it's an undisputed material fact that it fell less than 10 percent. It's 10 percent -- less than 10 percent of what the fair market value was.

Now, what does *Shadow Wood* say? *Shadow Wood* says you need price, fraud, oppression, or unfairness. We're not alleging fraud. We're not alleging oppression. We are asserting unfairness and this is the very kind of unfairness that the Court picked up on by citing the *In Re: Tone* [phonetic] case. In --

THE COURT: And I just want to make sure that -- because you did show -- somebody gave me the, I think, maybe Ms. Ebron did, the e-mail that says they bought a number of properties at the same sale.

MR. SHEVORSKI: Right.

THE COURT: And it totaled up to a certain number of dollar figure.

MR. SHEVORSKI: Sure.

THE COURT: You know, there's no insider collusion.

MR. SHEVORSKI: No.

THE COURT: It's just they were a big buyer.

MR. SHEVORSKI: No.

THE COURT: They would come in and they would do multiple transactions at any one time. And then, there's

nothing that indicates there was anything going on there.

MR. SHEVORSKI: No, no, no.

THE COURT: That's just how they were doing business because they were buying multiple parties' properties at one time.

MR. SHEVORSKI: Correct. Correct. We're not alleging --

THE COURT: So, I just want to make sure.

MR. SHEVORSKI: We're not alleging fraud, collusion, or oppression.

THE COURT: Okay.

MR. SHEVORSKI: We are alleging unfairness, asserting unfairness. Not alleging, we're asserting it based on admissible evidence. The unfairness comes in here and is similar to the *In Re: Tone* [phonetic] case cited on, I think, it's page 19 of the opinion of *Shadow Wood* where you had a trustee in a bank context not tell the borrower what they owed. And the Court said that was enough to set aside the sale.

Similarly, here is an undisputed material fact that we were the owner on February 26th. It's an undisputed material fact that no one told the Bank what to pay. It's an undisputed material fact that the public record showed that there was -- that our sale was publicly noticed, that the date was publicly noticed. It went forward in a public

auction. So, the idea that no one else had notice of it, everyone had notice of it. The world had notice of it. There is unfairness here. There is unfairness enough coupled with the price.

And it's important to know that this analysis that is adopted in *Shadow Wood* is a prism. The higher the fair market -- the closer to the fair market value, the more unfairness you need to show. The low -- the bigger the difference between the fair market value and the auction price, the less unfairness you have to show.

And it's important to realize, too, Your Honor, who SFR is. SFR is experienced as a professional bidder is not dispositive but it darn sure is relevant. It's part of the mix of information that Your Honor should consider. Why didn't SFR go to our sale? It took a calculated risk. We submit that a Court in equity shouldn't reward SFR for that risk because it is showing up at a sale, caveat emptor. You may get something but you may not. That's the risk they took. They shouldn't be rewarded for it and a Court sitting in equity should not quiet title in their favor, Your Honor.

THE COURT: Okay. Got it. Thank you. So, Ms. Ebron.

MS. EBRON: Thank you, Your Honor.

First, there was a lot there. I just first want

to address the burden of evidence and persuasion. While SFR is the plaintiff in this case, unlike several others, SFR has a Foreclosure Deed and it has recitals in it that are conclusive. And they are conclusive proof unless there is anything that could set this thing aside. And that is what we've been talking about: Fraud. Which the Bank isn't alleging or asserting. Oppression, again, not asserting that, or unfairness. This is their burden. It is their burden of persuasion. It is their burden of proof to prove this unfairness.

And, so, we do take issue and I think we've included it in our briefs, NRS 47.250 includes all of the presumptions that go along with the foreclosure deed. It's up to the Bank to show that something else happened, that there was, you know, so much unfairness that this Court sitting in equity should set aside the sale and the results of it.

Now, let's consider when we're talking about notice. Notice of the Association foreclosure sale. On April 20th, 2012, Alessi and Koenig mailed multiple notices of default to the Bank and its agents. It's not disputed that those were received. On August 13th, 2012, again, multiple Notices of Default saying that there was a delinquency, that their borrower was not paying assessments. These were all mailed to the Bank and its

agents. There is no dispute that these were received. On February 5th, 2012, multiple copies of the Notice of Sale were mailed to the Bank and its agents. While the Bank was not the homeowner yet, it did have notice every single step of the way that its borrower was not paying assessments. It shows not to pay the assessments. It shows not to require the borrower to pay them. It did start its own foreclosure process, which is something we don't see in all of these cases, but it stopped short.

Just like the Bank is saying: The world was on notice. Because there was a Notice of Sale recorded. Well, the Bank was on notice because there was a Notice of Sale recorded and it received multiple copies. And that's what we're looking at here. We're saying, you know, why didn't SFR go to the Bank foreclosure sale? Well, SFR wasn't purchasing at the Bank foreclosure sales but the real question is: Why didn't the Bank go to the Association foreclosure sale when it knew that it hadn't paid the super priority portion of these association liens before it conducted its own foreclosure sale? And it knew that that borrower hadn't paid. It knew that there was a sale going forward based on the public record and notices that it received.

Talking about SFR needing to pick up the phone and call and see whether or not the Association should have

called the Bank and restarted the noticing, well, that's what the Bank could have done. It was in its complete knowledge and control that it foreclosed on the Deed of Trust and it believed that the Association's lien changed. Well, what did it do? Nothing. It did nothing. And it could have recorded the Trustee's Deed.

And Mr. Shevorski is correct that its normal for a bank to take up to 30 days to record its Foreclosure Deed. SFR doesn't dispute that but, because it had notice of the Association foreclosure sale multiple times, it had a responsibility to either record, or to pick up the phone, call the Association or Alessi and say: Look, your lien amount has changed. You shouldn't go forward with your sale. We already foreclosed on the Deed of Trust. We know the only thing that's left is the super priority portion, let's handle it.

THE COURT: Okay.

MS. EBRON: They didn't do that.

THE COURT: All right. So -- and so that's, I guess, really the kind of the core issue here. What is the Bank's responsibility as the new record holder, the new title holder to the property? Because the Deed of Trust is extinguished. The previous owner no longer has any interest. The -- so, the question of what's the super priority super to? Nothing. There's no more Deed of

Trust.

MS. EBRON: Well --

THE COURT: So, there's no more need to be a super priority because that's gone.

MS. EBRON: Right, Your Honor. It is.

THE COURT: So --

MS. EBRON: But the fact that the superpriority portions survived and that the Bank knows that it would survive is important. And the reason why is as a homeowner if there is an association foreclosure sale going forward on the property, then it's your responsibility to pay before the sale. And just like, you know, a quitclaim deed between Mr. Loizzi and I, it doesn't stop the sale.

THE COURT: Yeah but see, here's my problem: Because if you look at the chain of title, I mean, I understand the fact that we don't have any record notice of the Bank's foreclosure sale but that Deed of Trust is extinguished.

MS. EBRON: Right.

THE COURT: So, the whole point of a superpriority lien is that a portion of the Bank's lien has a superpriority to the Deed of Trust. The Deed of Trust no longer exists.

MS. EBRON: Right.

THE COURT: So, the -- somebody new owns this

property. So, the HOA still has a lien. They can still go forward with their sale and no -- I don't know if I should -- the BFP, I think, for a lack of a better -- I mean, to me --

MS. EBRON: The purchaser.

THE COURT: The purchaser. The purchaser, innocent third party, there's no allegation that your client knew. So, yeah, I probably shouldn't technically call him the BFP because the innocent third party purchaser -- there's no way. There's no record of notice. There's no way for them to know. Should they go out and do this research and say, you know, gosh, did the foreclosure sale from the Bank actually go forward? You know, it's really a question of who's got that obligation. But, to me, it's just -- it's this legal question of: There's nothing for the super priority lien to be super to anymore because the Deed of Trust is gone. Somebody new owns it.

So, when you buy that lien, you buy that subject to whoever now owns the property. Because the -- it's no longer super priority lien. It's no longer -- because there's nothing to be prior to.

MS. EBRON: Right.

THE COURT: It's just not. So --

MS. EBRON: And I understand that typically, Your Honor, SFR didn't purchase the lien, it purchased the

property at the sale.

THE COURT: Correct.

MS. EBRON: And what happens in a foreclosure sale, whether or not there is a Deed of Trust, is that the ownership interest of the unit owner is extinguished by the sale. And that's what happens in every case. That's not disputed. That hasn't been disputed in any of these cases. You know, we're taking about the super priority portion here because that's the part of the lien that survived the Bank's foreclosure sale.

THE COURT: But she no longer has any interest. So, you purchase her interest but her interest has been foreclosed.

MS. EBRON: No. But --

THE COURT: She no longer has any interest.

MS. EBRON: Right. Ana Torrez didn't but at the time of the Association foreclosure sale, First Horizon was the owner, whether or not SFR knew it, and that unit owner's interest is extinguished.

THE COURT: Okay.

MS. EBRON: That's extinguished by the sale. And, so, because First Horizon stepped into the shoes of its borrower, Ana Torres, and became the unit's owner, it had a responsibility to go ahead and take care of the association dues. It shoes not to do it while it was the first

security interest holder. That's a business decision. But when it was the unit owner it has no excuse. It has no excuse and it had notice. First Horizon knew about the sale. It knew when it conducted its own sale that it -- that this -- that the Association foreclosure sale was going forward.

Now, I'm sure Your Honor is aware that a lot of times, many cases, the Bank notices a sale, doesn't go forward with it, there's continuations for one reason or another. So, I don't think it is fair to say that Alessi should have known or the Association should have known that the foreclosure sale took place just because there was a notice that said there may be a foreclosure sale on that date because that hasn't been the pattern in practice of the banks here in Nevada. They've -- it just doesn't always happen.

The one entity here that had knowledge of all of these facts is the Bank. So, you take their knowledge, you compare it to SFR's, you compare it to the Association's, they're the ones who were holding all of the cards.

THE COURT: Okay.

MS. EBRON: They knew everything about it.

THE COURT: Okay. Here's my problem with this whole thing though. Because, interesting facts, but here's the problem. You have to get back to that analysis of the

super priority lien. The super priority lien, under the statute, it has two parts, the subpriority and the super priority. And what's the super priority super to? It's super to the Deed of Trust. There's no more Deed of Trust. It's been extinguished by the sale. There's nothing -- there is no more super priority lien.

MS. EBRON: Right. There's a lien that can extinguish an owner's interest and any subordinate claims.

THE COURT: And it certainly, I believe, did as to Ms. Torres. I think you're correct there. To the extent that she had any claim to anything, it's gone because not only has she been foreclosed on on her Deed of Trust, her -- any interest she might have, arguably that might have survived that, are gone because her interests are extinguished by this.

MS. EBRON: Right, Your Honor.

THE COURT: What happens to the new owner?

MS. EBRON: The new owner --

THE COURT: There's no notice to the new owner that, you know, you're now the owner. Now this is your obligation. Now you've taken this obligation on because you bought it and you didn't pay us off.

MS. EBRON: Right.

THE COURT: Because they could have. They could have bid in an extra amount. They could've done that.

MS. EBRON: But what happened to the new owner is the same thing that would -- that happened to Ms. Torres at the Bank foreclosure sale. The ownership interest was extinguished by the foreclosure of the Association foreclosure sale.

Now, the idea that the Bank, you know, needed extra time or was allowed extra time under the statute --

THE COURT: Right.

MS. EBRON: -- isn't true. That's not accurate with the statute.

THE COURT: So, because they had, undisputed, had notice that there was an HOA foreclosure lien sale going forward, the HOA super priority foreclosure sale was going to be going forward. The Bank was on notice of that and they knew. Now, there is no more Deed of Trust. They know that. Nobody else knows that because there's no record of notice but the Bank knows that.

So, is it your position that, then, since they took that with notice of the then super priority lien, they extinguish the Deed of Trust, so there's nothing now for the lien to be prior to? But they still run this risk that if they don't satisfy that lien -- which, like I said, they could have done. When they bid in their credit amount they could have added in the HOA fees and apparently they didn't.

MS. EBRON: Well, Your Honor --

THE COURT: I mean, couldn't they? At the foreclosure sale thy could have added that in and then could have made sure that the Bank -- that the HOA was paid off at the same time they are buying their own property back. They could've.

MS. EBRON: Right. So, if --

THE COURT: That's one way to deal with it.

MS. EBRON: -- because the Bank was an owner of the property --

THE COURT: Yeah.

MS. EBRON: -- it was on constructive notice of every single thing that had been recorded against the property before it took title.

THE COURT: And I guess the last thing we need to make sure we got in the record is the fact that this was a federally insured loan. They didn't take title in the name of -- was it HUD, or FHA, or whoever?

MS. EBRON: No. They did not, Your Honor.

MR. SHEVORSKI: You're actually not allowed to, Your Honor.

THE COURT: Does that affect us in any way because -- yeah. TY me, that's different. Those cases over in Federal Court where they say it's preempted because, you know, HUD or whoever owns this property. I have no

problem. I agree with it. But this is just an insured lien.

MS. EBRON: HUD isn't here, Your Honor.

THE COURT: It doesn't have -- it doesn't affect it.

MS. EBRON: And First Horizon doesn't have standing for that, to make that argument.

THE COURT: Okay. So, we probably ought to put that on the record. And then we'll let Mr. Loizzi make his point for whatever he needs to do for Alessi.

MR. LOIZZI: Sure.

THE COURT: But I don't think that there is -- that the FHA issue is relevant to this analysis at all. I don't. But if you want to say something then --

MR. SHEVORSKI: Fine. Just for the record, Your Honor, HUD didn't have an ownership interest in the *Washington & Sandhill* case. I'm the lawyer who litigated that case. HUD didn't have an ownership interest. HUD, at one time, did it reconveyed it back.

THE COURT: Right.

MR. SHEVORSKI: Neither did HUD have an interest in just Judge Mahan's case. I understand Your Honor's --

THE COURT: I don't agree --

MR. SHEVORSKI: I'm not here to argue with Your Honor.

THE COURT: I don't agree with you. I think --

MR. SHEVORSKI: I understand.

THE COURT: -- when they have -- I think Judge Dorsey is right. If they have ownership interest at the time, that makes it a world of difference and I think she's -- I agree with her analysis.

MR. SHEVORSKI: That's fine. I'm not here to argue with Your Honor. Ultimately, --

THE COURT: But I don't think it affects this case.

MR. SHEVORSKI: Ultimately the Ninth Circuit has been a -- is going to rule on that --

THE COURT: Right.

MR. SHEVORSKI: -- at some point and maybe that will be persuasive to the courts in this district.

THE COURT: Right. Okay.

MR. SHEVORSKI: And, I'm sorry. Mr. Loizzi was gonna make a point.

THE COURT: Yeah. So, yeah.

MR. LOIZZI: Oh did you -- I thought you were going to say something about being able to record title or not so --

MR. SHEVORSKI: No. My -- I didn't want to interrupt you, I just wanted to address Your Honor's question --

THE COURT: The FHA -- we just wanted to make sure we got the FHA issue on --

MR. SHEVORSKI: Right.

THE COURT: -- because it's in your pleadings. I think we need to talk about the appraisal -- oh, that's -- we need to talk about --

MS. EBRON: Right.

THE COURT: -- that, Ms. Ebron.

MS. EBRON: Right, Your Honor.

THE COURT: Okay.

MS. EBRON: I just wanted to -- you know, I think Your Honor's familiar with the *Senteno* [phonetic] case that we're discussing.

THE COURT: Right.

MS. EBRON: You know, 20 percent, that's not a number that matters. What we do have here is, you know, we're going to have to look at whether or not there was unfairness. From SFR's perspective, it would be unfair to take away its property based on something that the Bank had complete control over. The Bank could have told the Association that it had foreclosed. It could have done it by phone call. It could have been done by recording. It could have paid the super priority portion before the Bank foreclosure sale. It could have paid it after the Bank foreclosure sale and it would have satisfied the lien

before the Association foreclosure sale. It could have showed up at the sale. It could have announced at the foreclosure -- the Association foreclosure sale: Hey, we foreclosed on the Deed of Trust. You might want to bid it up and take their ownership interest away because you're not going to be subject to a Deed of Trust. It could have said: We have some dispute with the Association about it, although there's no evidence of that. It could have bid. It could have done a number of things. And, so, you can't really weigh fairness in favor of the Bank for any of these issues.

We do attach the rebuttal expert disclosure that says the more accurate value is the disposition value rather than the fair market value and that's, you know, the reason why this Court needs to -- or the way the Court should look at the value of the property here.

You know, there is no evidence that the Bank ever even asked for information about what they should pay. They can't say, it's not fair, it's not fair, we didn't know what to pay, when they never opened their mouths and asked. They never provided the information that would allow somebody to calculate the amount that they would owe after there being a foreclosure sale.

THE COURT: Okay. Thank you.

MR. LOIZZI: Your Honor, just a couple of things.

The first one is, you know, with respect to whether or not Alessi and Koenig and/or the HOA should have done something before it foreclosed, like call the Bank, find out if their sale went forward, you know, or something like that, I think that that argument -- I wish I could have recorded that whole argument by Mr. Shevorski because it's directly contradictory to everything -- all of the arguments that they make in the situation where this -- where they didn't foreclose beforehand.

You know, and it -- and, quite honestly, we should be making the same argument that they make, which is, you know, Alessi and Koenig is just a foreclosure trustee. Okay? So, to the extent that the Bank actually did notify anybody with record notice, with actual documentation notice, not just recordings on the Recorder's page, it wouldn't have been Alessi and Koenig. So, there would have been no way for Alessi and Koenig to know about their foreclosure -- their sale being set or going forward unless Alessi and Koenig looked for it. And we would have had to reach out and take our own extra step, which we're not required to do under the statute, and call up the Bank, First Horizon, and say: Hey, we saw you set a sale for February 26th and we are -- we have our own sale coming up on behalf of the HOA. Did your sale actually go forward?

There -- where is -- where are we required to do

that? We're not required to do that anywhere.

Additionally, if they wanted us to have notice, Alessi and Koenig, or the HOA, for that matter, that their sale was going forward and then did go forward, they should have given it to us. It's the same as when they complained in all of these cases that the statute -- NRS 116 doesn't require you to give us notice, it only requires you to give us notice if we ask for it. Well, that seems like NRS 107 doesn't require them to give Alessi and Koenig or the HOA notice of their sales. So the argument is the same. You know, I would then say -- tell the Court: Well how is their foreclosure constitutional with the respect to the HOA's super priority lien when they're not required to give us notice?

They don't send notices to the HOA that they're going to foreclose on their homeowner. They only notify the homeowner. So, you know, they don't send anything to the HOA -- they didn't send anything to the HOA in this case. They didn't send the Notice of Default, the Notice of Trustee Sale, and they didn't send any notice that the sale took place and actually went forward.

So, -- and the HOA is -- has an interest in the property. They have the super priority interest in the property up until the foreclosure takes place by the Bank. So how is 107 constitutional in -- on that note? The

argument is the same both ways. So, for him to say that it's unfair, it's unfair they didn't -- they went forward with the sale and they shouldn't have. They went forward with the sale, but they never gave us an opportunity to pay anything. They went forward -- they didn't tell us how much we should have paid. That's entirely disingenuous, Your Honor. They got every single notice for the HOA foreclosure.

So they knew what to pay. In every single notice that they got, the NOD and the NOTS, multiples of each, by the way, it told them exactly what the deficiency in the payment was. This is a pre-10-1 [phonetic] sale. So there's no requirement to breakdown the amounts specifically as to what they represent. They knew the amount of -- that was owed at the time of the NOD and at the time of the NOTS and if they wanted to do something about it, they could have paid that -- either one of those amounts at any point in time to Alessi and Koenig on behalf of the HOA. That would have taken care of the sale and they wouldn't have had to worry about it. Or they could have reached out to Alessi and Koenig and said: Hey, we're about to foreclose. We want to take care of the super priority amount in case somebody buys the property from us at our sale, we can give clear title to that homeowner because, at this point in time, they can't get fair title

to a new owner.

What would they have done if, at the time they foreclosed on their property, somebody actually came to bid? What would have they have done if SFR showed up -- like they say: SFR should have came to the foreclosure. Great. SFR comes to the foreclosure and they give them what title? Not clear title. They couldn't have passed on clear title because they still owed the nine months' super priority amount at the time they foreclosed and they owe it afterwards because the lien still exists --

THE COURT: Right. So, --

MR. LOIZZI: -- on the property.

THE COURT: Okay. So let's talk about that because say -- I say Mr. Shevorski's correct. He's gonna win. They get title, but Ms. Ebron's client, they bought something. What did they buy? What do you buy when you buy a super priority -- when you buy an HOA -- at an HOA foreclosure sale and you're -- because they say that there's a portion that's super priority and there's a portion that's just a lien that you're buying. So what do you get when you just get that lien? What do you buy?

MR. LOIZZI: Well, you can -- I mean, my answer, -- I disagree with Mr. Shevorski and I -- and my position is that that nine months of priority obligation and that portion, it carried over when they foreclosed because they

have to pay it regardless otherwise they can't pass on clear title to the next owner. So, my position is what Ms. Ebron and her client got was the super priority interest. That's my position. I don't know what -- how Ms. Ebron feels about it. She might feel the same or she might feel differently, but because they're not a new owner in the sense that they're not a new -- you know, they're not a --

THE COURT: So, in other words, it would be different if they sold it to a third party?

MR. LOIZZI: Yes.

THE COURT: If there's like --

MR. LOIZZI: I agree.

MS. EBRON: I don't think it --

MR. LOIZZI: Well I think it's potentially different. I don't know if -- I don't know --

MS. EBRON: Your Honor, it's not.

MR. LOIZZI: But they could have -- well, actually, you're right. I think she's right. It's not different because they couldn't have. They couldn't have sold it to a new person like myself or Ms. Ebron or Your Honor without taking care of the rest of the lien. They couldn't have passed clear title, the -- no title company would have let that happen.

So, in reality, if they wanted to sell it to a new person at the auction and have it go through title and have

it pass clear title, the title company would have required someone to pay that amount before the transaction was complete and if that were -- would have taken place, then maybe we're in a different situation and maybe Ms. Ebron and I were wrong but that didn't happen. Nobody paid that nine months' super priority. It doesn't just go away because, you know, the Bank decided they weren't going to pay it beforehand, like they should have, and they waited until they foreclosed and they still hadn't paid it. They still have never paid it as far as I'm aware. So, it's still there, so they can't pass on clear title to somebody else. So my position is that what they've got -- what they have now is nothing and Ms. Ebron's client has clear title.

MS. EBRON: Right. What the statute says that my client gets out of the Association foreclosure sale is the unit's owner's interest without equity or right of redemption. At the time of the Association foreclosure sale, the unit's owner's interest was an ownership interest without a Deed of Trust because the Bank's foreclosure had already taken place.

In these other cases, the unit's owner's interest where the bank foreclosure hadn't taken place is that the ownership interest, but because the super priority portion in those cases wasn't paid and the Deed of Trust hadn't been foreclosed, the Deed of Trust was extinguished along

with all of the other -- you know, the second mortgages and any other subordinate Deeds of Trust.

So that's what my client purchase, the unit's owner's interest without equity or right of redemption. The Bank hasn't met its burden to show unfairness in this case because it was in control the whole time. It could have done any number of things to save its property and its investment --

THE COURT: Okay.

MS. EBRON: -- and it didn't.

THE COURT: Thank you.

MR. LOIZZI: And I just wanted to add something before Mr. Shevorski gets up. I'm sure he's got something that he wants to throw in. What I --

MR. SHEVORSKI: That's my specialty, Your Honor.

MR. LOIZZI: What I said, and I know that I didn't do any briefing, I know that I joined Ms. Ebron, but I hadn't anticipated the argument going in this direction so I just want to put out there for, Your Honor, which is, you know, the banks, when they make the constitutional arguments, argue that the statute is unconstitutional on its face because it doesn't specifically require notice to the security interest holders. It -- they argue that it's an opt-in statute.

Now I know Your Honor disagreed with that and so

do I, but the argument then is the same on this side. NRS 107 doesn't require them to give notice to the HOA even though the HOA's super priority interest is a security interest in the -- their whole lien is a security interest in the property. But the super priority portion is not only an interest in the property, it's superior interest to their Deed of Trust.

So, if they're going to foreclose on the HOA's interest, how come the HOA doesn't get notice? Why don't they have to get notice? How can we say that the Bank's foreclosure wiped out the HOA and, not only wiped out the HOA's subordinate interest, but that there's no Deed of Trust now to be superior to when they never gave the HOA notice of their foreclosure and they hadn't recorded the Trustee's Deed at the time of the sale -- the HOA sale?

THE COURT: All right. That's kind of it, in a nutshell. Mr. Shevorski, do you want to address that?

MR. SHEVORSKI: Number one, it's an undisputed material fact that Alessi ordered a title report and knew about every notice. That's Mr. Alessi's testimony, that that's their policy and procedure to order a title report to see what's occurring in a property. We're not here to talk about whether or not Chapter 107 is constitutional or not. It just simply has no bearing on this case. We're here to talk about a foreclosure sale that is an undisputed

fact and this is a pure issue of law that does not comply with section 7.7 of the CC&Rs, which says if you're the unit owner, you get 30 days' notice of what you're supposed to pay or the sale shall not go forward. We're the unit owner. It's an undisputed material fact that we didn't get the notice.

Now I take issue that there's a great deal of disparagement about my client in this case, that it did nothing, that it somehow is supposed to glean from the universe about what to pay and what -- well, what does *Shadow Wood* say about that in a very similar situation? On page 17, the question of whether and if so to what extent costs and fees are recoverable in the context of an HOA super priority lien is open.

The Supreme Court doesn't know what it is. How are we supposed to know?

THE COURT: Well I guess my final question is: Well then, what does -- the argument that Mr. Loizzi and Ms. Ebron make, is: What else are they buying? If the buyer, which, you know, in this case, we have no evidence they're anything other than just a commercial buyer. I mean, they go in and they buy a number of properties at any given time. They do their due diligence. They pick what they're going to buy and, yes, you're right. They don't want to go and pay the price they would have to pay at the

Bank foreclosure, they'll buy it at this super priority sale. But where the Bank's already foreclosed, and they don't know that, and they know that there was a sale pending but they don't know if it went forward.

So, what's -- what are they buying?

MR. SHEVORSKI: They're buying nothing.

THE COURT: If the Deed of Trust is extinguished? If the Deed of Trust is extinguished and they buy -- as has been quoted, the unit owner's interest without equity or right of redemption, you buy that, she no longer owns anything. She has been foreclosed upon.

MR. SHEVORSKI: Right.

THE COURT: And her interest is wiped out. She's no longer the owner. What are you buying? Because the HOA still has its lien. The lien does survive. So, --

MR. SHEVORSKI: Some --

THE COURT: -- what is it -- does it just attach to a second --

MR. SHEVORSKI: -- thing is owed.

THE COURT: They -- and she buys a second interest in it?

MR. SHEVORSKI: No. She buys nothing because in this rare instance, my client's rights and notice and opportunity to be heard, whether it's viewed in a constitutional context or under a pure state law context,

SFR buys nothing because the sale should never have gone forward at all.

THE COURT: Okay.

MR. SHEVORSKO: SFR buys nothing. SFR -- the sale -- Alessi, as the agent of the HOA, had no right under Chapter 116 and had no right under section 7.7 to go forward.

THE COURT: All right. Thanks. Final word and --

MS. EBRON: Can I just address --

THE COURT: -- then we're done.

MS. EBRON: I'm sorry, Your Honor, because we haven't mentioned the CC&Rs, 7.7 We addressed that in our Reply brief on pages 16 and 17. They're misreading it in the section and misapplying it. The unit owner or the unit owner's successor in interest could have cured a deficiency within the required time frame. They didn't. They knew about it. They kept it a secret. Of course the Association probably would have not come forward with the foreclosure sale if it had been notified, but it wasn't in this case.

This is -- it's just not feasible that SFR went to a sale, it was a public auction, paid value, $7,000, for nothing.

THE COURT: Right.

MS. EBRON: That just doesn't make any sense.

THE COURT: Okay. Great. Thanks. That was it. That was fine.

MR. SHEVORSKI: That's fine, Your Honor.

THE COURT: Okay. All right. I think under these unique circumstances, what we have here is a case where the Bank is actually going to win. They foreclosed on their Deed of Trust. There is no more Deed of Trust for the HOA lien to be prior to, but that doesn't mean that Ms. Ebron's client bought nothing. She bought the lien. She bought the lien. She's in second place on the property.

MS. EBRON: Your Honor, my client did not buy the lien. My client purchased the property. The statute does not allow for a purchase of the lien.

THE COURT: Right.

MS. EBRON: It allows for the purchase of the property. His client was the owner, the unit's owner at the time of the --

THE COURT: Right. The --

MS. EBRON: -- sale.

THE COURT: Yes, they were. They were. And they didn't have notice of it because they -- because you had to start all over again because there's a new owner. The -- I agree with you it's different. I don't think we can just transfer property to like your brother or -- to try to stop it with a quitclaim, but I think when the Bank wipes out

the Deed of Trust because the super priority lien is prior to something. What is it prior to? It's prior to the Deed of Trust. There's no more Deed of Trust. It's been foreclosed on. They are now the owner, but I just -- I still think that your client buys something when they go in and they bid because they are bidding on a lien and they bought the lien.

MS. EBRON: No, Your Honor. My client bid on a property. My client bid on a --

THE COURT: Okay. Well if that's the position that you want to take, then --

MS. EBRON: -- property.

THE COURT: Okay.

MS. EBRON: It is, Your Honor. It's what 116 says. It's a --

THE COURT: Then I think unfortunately -- then Mr. Shevorski's --

MS. EBRON: -- property.

THE COURT: -- has to be right, that your client buys nothing. If they're buying property, they spent $7,000 for a property that was not properly sold.

MS. EBRON: So are you saying, Your Honor, that --

THE COURT: This sale was improper.

MS. EBRON: Are you saying, Your Honor, that the sale is void.

THE COURT: This sale is void.

MS. EBRON: The sale is void because --

THE COURT: Because the Deed of Trust was extinguished and they didn't start over. They did not start over with a new notice and sale on the super priority lien. The super priority lien does attach. It stays with the property. There's no question. That's still out there. But when they foreclose on the Deed of Trust because it's only a super priority lien because it's prior to something else and that something else, the Deed of Trust, is extinguished, you've got to start over.

MS. EBRON: Well, Your Honor, it is one lien.

THE COURT: Right.

MS. EBRON: There is a super priority portion that the Deed of Trust holder can satisfy --

THE COURT: Right.

MS. EBRON: -- in order to not have its Deed of Trust extinguished. It's still one lien and that lien survived the --

THE COURT: Right. It absolutely did.

MS. EBRON: -- bank foreclosure sale and the Association foreclosed and my client --

THE COURT: But they did not give notice to the new owner, the new record -- because if it -- like I said, I think you're right. You can't get around things by just

transferring property to somebody else. The -- it's where the super priority is prior to the Deed of Trust. When that Deed of Trust is extinguished, you've got to start over because now you're no longer prior to anything else. There's nothing to be prior to.

MS. EBRON: But, Your Honor, it is a lien and even if the -- there is no Deed of Trust holder, no Deed of Trust to be extinguished, the unit's owner can always be extinguished, always. That hasn't been a question in --

THE COURT: And the unit owner who was noticed was Ms. Torres. Her -- when the Deed of Trust is foreclosed, then they have to start over with the new sale, I think. I think this is a case --

MS. EBRON: So, --

THE COURT: -- where the statute was not properly applied.

MS. EBRON: So what portion -- just for the record, Your Honor, what portion of the statute requires Alessi and Koenig and the Association to restart the foreclosure process after a bank forecloses when it --

THE COURT: Because --

MS. EBRON: -- still has --

THE COURT: They have to give notice. Absolutely. They still have the lien but they have to give notice -- under the CC&Rs, they have to give notice -- because that's

what -- all it's based on is CC&Rs. They have to give notice to the record owner. Ms. Torres is no longer the record owner. Technically, --

MS. EBRON: Ms. Torres was the record owner at the time of the foreclosure sale because the Bank had not recorded --

THE COURT: Not actual --

MS. EBRON: -- its ownership interest and that's the problem we have here. There's nothing wrong with this sale. There's nothing wrong with the notice given to First Horizon. There is nothing wrong with SFR purchasing the property at the sale and having the ownership interest that wasn't recorded extinguished, particularly when First Horizon knew about the sale, knew everything that was going on, chose not to record its interest before the date of the Association foreclosure sale or chose not to tell someone: Hey, we're the record owners now. You need to give us 30 more days' notice.

And that is flawed in its reasoning. When somebody purchases a property, they take with notice of everything that has been recorded. So they had at least 30 days' notice because it was there before their sale.

THE COURT: It's interesting. I think it changes everything, that the Bank has actually foreclosed before the sale of the HOA. A super priority lien is prior to

what? A Deed of Trust. The Deed of Trust was extinguished.

MS. EBRON: Right. And the ownership --

THE COURT: There's nothing --

MS. EBRON: -- interest remained and the lien that could extinguish the ownership interest still remained.

THE COURT: But --

MS. EBRON: And it was foreclosed on.

THE COURT: But --

MS. EBRON: And the ownership interest --

THE COURT: As to Ms. Torres, I would agree with you.

MS. EBRON: No, Your Honor. The --

THE COURT: As to Ms. Torres, I would agree with you but it -- as to the new record owner, which I understand they hadn't recorded their Deed of Trust so that puts us in this interesting situation of, you know, what's -- who's got that burden, but, with all due respect, the Deed of Trust, I think, -- I mean, it just doesn't make any sense. There's -- the super priority lien, it's only prior to a Deed of Trust. Where the Deed of Trust was wiped out, that changes it. So you -- what you buy because when you go to these sales and you buy, you don't know what you're buying. You don't know what you're buying and --

MS. EBRON: Your Honor, my client --

THE COURT: -- in this case, --

MS. EBRON: -- knows --

THE COURT: -- you --

MS. EBRON: -- according to the statute that it is buying the property.

THE COURT: Okay.

MS. EBRON: The unit owner's interest. Whoever the unit owner is at that time, their interest is extinguished and my client takes ownership --

THE COURT: Okay.

MS. EBRON: -- interest. That is clearly what the statute says.

THE COURT: All right.

MS. EBRON: And, so, if you're saying that the statute -- or the sale itself is void, --

THE COURT: Yes.

MS. EBRON: -- then that's one thing. And I just want to make sure --

THE COURT: The sale itself is void --

MS. EBRON: -- that it's clear --

THE COURT: -- because a -- because that Deed of Trust was wiped out and that's what would have permitted a purchaser at the sale to take a priority because you would take a priority over that Deed of Trust. There's nothing to take a priority over.

MS. EBRON: But we're not asking to take priority over a Deed of Trust, Your Honor. My client is saying that we have ownership interest of the unit's owner's interest, like if --

THE COURT: Right. If you --

MS. EBRON: Let's take a sale where there isn't a Deed of Trust.

THE COURT: Okay.

MS. EBRON: Right? So, if my client purchases a property at a foreclosure sale where there was never a Deed of Trust, does that mean it doesn't purchase the property?

THE COURT: No.

MS. EBRON: What does it mean?

THE COURT: Because nobody came in and wiped out the Deed of Trust and became the new record owner. If I own a condo -- let's say I inherited my mother's house. There's no mortgage on it. I just inherited it but I don't pay the -- this happens in my probate cases all the time. And they don't pay the maintenance on it and it gets foreclosed on by the HOA, absolutely you take the owner's interest, the owner being the person who owned it all along.

The difference that we have here is we have a person who is the unit owner and we have the Deed of Trust which has -- holds this interest in it as well. They

extinguish the Deed of Trust. They become the new owner. That's the problem where I think that this sale broke down because you needed to start over.

MS. EBRON: So you're saying the nature of the lien changed so --

THE COURT: Right.

MS. EBRON: -- there was new noticing required?

THE COURT: I think there was because that's the only way it becomes a priority because then you take the priority over the person whose notice [indiscernible]. It's really weird.

MS. EBRON: Okay.

THE COURT: Really unique circumstances. I'll look forward to seeing the opinion on this one.

MR. SHEVORSKI: All right. Thank you, Your Honor.

MR. LOIZZI: So then I just want to be clear for Alessi --

THE COURT: So you need to write really clear. I -- to the extent that Ms. Torres had any interest, she's absolutely correct.

MR. SHEVORSKI: Right.

THE COURT: Whatever vague --

MR. SHEVORSKI: I think she's been defaulted.

THE COURT: It -- she's gone. So that probably needs to be in there. I still think that SFR bought

something. I still think they bought a position in line. I know neither of you agree with me on that, so, you know, that's fine. You don't have to put that in there or you can if you want. I -- to me, it seems like they bought something that survives because they paid and they would be in line, you know, if it's sold to some third party -- if the Bank wants to go sell it, --

MS. EBRON: I'm sorry --

THE COURT: -- they've got to pay off SFR, I think.

MS. EBRON: I'm sorry, Your Honor. Are you saying that the -- that SFR purchased a lien interest?

THE COURT: Yeah, I think you purchased a lien.

MS. EBRON: There's nothing in the statute that allows --

THE COURT: I know that.

MS. EBRON: -- SFR to purchase a lien.

THE COURT: I know that nobody agrees with me on that, but I think that SFR did purchase something. I understand you're -- and so that's -- with all due respect, I think you ought to address it in your findings of fact. I know you don't -- nobody agrees with me on it, --

MS. EBRON: Well, --

THE COURT: -- but I think it needs to be in there and that there's something that SFR has to be protected

like if the Bank is going to go sell it to, you know, me tomorrow, do I just pay off the Bank or do I pay off SFR? I think you have to pay off SFR, too, --

MS. EBRON: Well, --

THE COURT: -- because they bought a lien.

MS. EBRON: But, Your Honor, either the sale is void --

THE COURT: Right.

MS. EBRON: -- or it's proper and the ownership interest of the Bank --

THE COURT: Okay.

MS. EBRON: -- was extinguished.

THE COURT: All right.

MS. EBRON: So, if you could --

THE COURT: Okay.

MS. EBRON: -- let us know which one it is, in this case, --

THE COURT: Okay. Well, then I -- it's -- I think it's void. The -- okay. So, I -- you know, to me, it seems unfair to SFR that they spent $7,000 for a property that they have no interest in, but I think they did.

MS. EBRON: Well, if it's void, Your Honor, because the noticing wasn't correct, then the sale would just be unwound and SFR would need to be put back in its previous position.

THE COURT: Okay.

MR. SHEVORSKI: Very good, Your Honor. I'll prepare the order.

THE COURT: Okay. So, --

MR. SHEVORSKI: I've got to run up to Department 22.

THE COURT: -- and that case, then, the lien survives and the fact that $7,000 was paid to the HOA, the HOA has to pay you back, and now it's whatever -- it's ballooned, I'm sure, too.

MS. EBRON: Well, and then the lien on the property would still be there and the Association can still foreclose on the Bank or whoever --

THE COURT: Right. And that's what I'm saying is like: What are -- you -- I'm sure your clients have been paying HOA fees, they've probably invested in the property.

MS. EBRON: Well, and that's the problem with --

THE COURT: Yeah.

MS. EBRON: -- saying that this sale is void based on some alleged --

THE COURT: All right.

MS. EBRON: -- non-notice because the Bank did have notice.

THE COURT: Okay.

MR. SHEVORSKI: Thank you, Your Honor.

THE COURT: Yeah. So --

MR. LOIZZI: Thank you.

THE COURT: -- just -- like I said, it's interesting.

MS. EBRON: Well, Your Honor, we did have an unjust enrichment claim also in this case against the Bank in the even that this -- that the sale was found to be invalid.

THE COURT: That may be where they're entitled to really -- because, I mean, that's why I said, they've got something. They've got some expectation interest that they -- because I'm sure they've been paying on this property all along and that's -- so that's my problem is you buy something --

MR. SHEVORSKI: And collecting rents.

THE COURT: -- and you have some interest in the property for which you, you know, you deserve something.

MR. SHEVORSKI: Well there's -- we moved for summary judgment on that and I didn't see anything in SFR's brief to address unjust enrichment.

THE COURT: Okay.

MR. SHEVORSKI: You may have to review it again, but if we're talking about the adversary proceeding here, we moved for summary judgment on unjust enrichment. That issue was not touched in SFR's briefs that I saw. So I'd

ask Your Honor to review that again and determine whether or not they opposed our Motion for Summary Judgment on --

THE COURT: Okay.

MR. SHEVORSKI: -- that ground.

THE COURT: All right. Because -- I guess, to me, there is something that they've done here. They've bought something and they have some expectation that they had some interest. I don't think they did because I think the sale was improper. So they don't have any title interest, but what do they have? And that's --

MS. EBRON: Well, Your Honor, --

THE COURT: That's the argument, unjust enrichment.

MS. EBRON: -- the sale, like you said, it just needs to be declared void if that is where Your Honor is going that the noticing wasn't proper --

THE COURT: Right.

MS. EBRON: -- because of the Bank foreclosure sale taking place.

THE COURT: Right. Because the sale being void, then the question is: You know, what are they left with? You're -- the point being --

MR. SHEVORSKI: They return to the status quo ante --

THE COURT: -- they couldn't be left with the lien

because the statute wouldn't provide for it. So they aren't left with the lien, but they have some sort of an expectation interest. They --

MR. SHEVORSKI: Well they --

THE COURT: I'm assuming took possession and so this is the beginning of this whole accounting problem. Have they had it rented out? I don't know.

MR. SHEVORSKI: Yes.

THE COURT: And --

MS. EBRON: In this case, I think what would happen would be if -- you know, if after we appeal, if the Supreme Court agrees that the ownership interest at the Bank wasn't extinguished after it had notice after notice after notice, that --

THE COURT: So we would dismiss without prejudice the unjust enrichment to be determined at a later time?

MS. EBRON: Yes, Your Honor. That would be --

MR. SHEVORSKI: That would be fine, Your Honor.

THE COURT: Okay. That's what I'm going to do because I think there's some interest there and I understand now that you've convinced me that it can't be a lien but there's got to be some interest there. They've invested in this property. They've got something.

MR. SHEVORSKI: And they've had the use of it for several years.

THE COURT: That's what I'm saying. This is an accounting nightmare.

MR. SHEVORSKI: Right. It is an accounting nightmare. I would ask maybe if you'd put it in the minutes, Your Honor, review the Motion. We did move for summary judgment on unjust enrichment. If they opposed it, then fine. But I believe Your Honor will find that they didn't.

THE COURT: Okay. I'm going to deny that request and I'm going to instead dismiss without prejudice the unjust enrichment claim because --

MR. SHEVORSKI: Fair enough, Your Honor.

THE COURT: -- I think it has to be resolved at a later time.

MR. SHEVORSKI: Fair enough, Your Honor. Thank you.

THE COURT: Because I think they've got some interest and convinced me it's probably not a lien, but there's something there. They've got -- they bought something and they invested in something. So what are they entitled to? Okay.

MR. SHEVORSKI: Fair enough. Well I think --

THE COURT: So that's how we'll deal with it. So, --

MR. SHEVORSKI: -- seven people up north will tell

us, Your Honor.

THE COURT: Okay. And you'll write, I'm sure, a very detailed order for us?

MR. SHEVORSKI: I will, Your Honor.

THE COURT: Because --

MS. EBRON: Thank you, Your Honor.

MR. SHEVORSKI: And I'll submit it to you, --

THE COURT: All right.

MR. SHEVORSKI: -- Ms. Ebron for form and content and Mr. Loizzi.

THE COURT: Yeah. So everything's vacated. We're good. Then we're done. If you've got the unjust enrichment being dismissed, --

MR. SHEVORSKI: We're done.

THE COURT: -- then we're done. Okay.

MR. SHEVORSKI: Thank you, Your Honor.

MS. EBRON: Thank you, Your Honor.

MS. GILBERT: Your Honor, I apologize.

THE COURT: Oh.

MS. GILBERT: Jacqueline Gilbert with SFR. Would you require us to do a Motion to Stay the resolution, in other words, unwinding the sale? Would we have to do that?

MR. SHEVORSKI: No. I'm not going to [indiscernible].

THE COURT: Okay.

MS. GILBERT: Okay. Thank you.

THE COURT: Okay. So, if you -- if for some reason you can't come to terms and you need it on an order shortening time, let me know.

MS. GILBERT: Thank you.

THE COURT: And we can come to -- we'll rule on it in some way. It sounds like -- that's why I said, it needs to be done after the fact because if they're going to continue to maintain possession, you're going to have to do all of this accounting after the fact.

MR. SHEVORSKI: Yeah. We'll come to --

THE COURT: So, --

MR. SHEVORSKI: We will come to some resolution on the --

THE COURT: Would you want that in the order then?

MR. SHEVORSKI: That's fine.

MS. GILBERT: Yeah. We can come to some wording that -- so that we don't have to un -- void the sale but that it's stayed -- the order is stayed pending the appeal.

MR. SHEVORSKI: Well the order is certainly -- I mean, certainly the sale is void and --

MS. GILBERT: The remedy. In other words, unwinding the sale.

THE COURT: Right.

MR. SHEVORSKI: Right. Yeah, yeah, yeah. I

understand. Returning the parties to the status quo ante would be stayed --

THE COURT: Would be stayed.

MR. SHEVORSKI: -- because, quite frankly, that's what's going to happen when their [indiscernible] motion anyways.

THE COURT: So that just means they can't sell it to anybody else.

MR. SHEVORSKI: Right. Just keep what -- preserve the status quo.

MS. GILBERT: The current status --

THE COURT: Yeah.

MR. SHEVORSKI: The current status quo.

THE COURT: So you'll have some sort of a -- put that in the order and --

MS. GILBERT: Thank you, Your Honor.

THE COURT: -- if you can and if you can't -- if you feel it needs to be separate, --

MR. SHEVORSKI: Yeah.

THE COURT: -- I wouldn't mind --

MR. SHEVORSKI: I think we'll come to some resolution. If we can't, we'll ask for Your Honor's --

THE COURT: Okay.

MR. SHEVORSKI: -- [indiscernible] to try to reach some resolution.

THE COURT: All right. I look forward to hearing what happens on this one.

MR. SHEVORSKI: Thank you.

MS. EBRON: Thank you.

THE COURT: Findings of fact and conclusions of law, yeah.

PROCEEDING CONCLUDED AT 11:13 A.M.

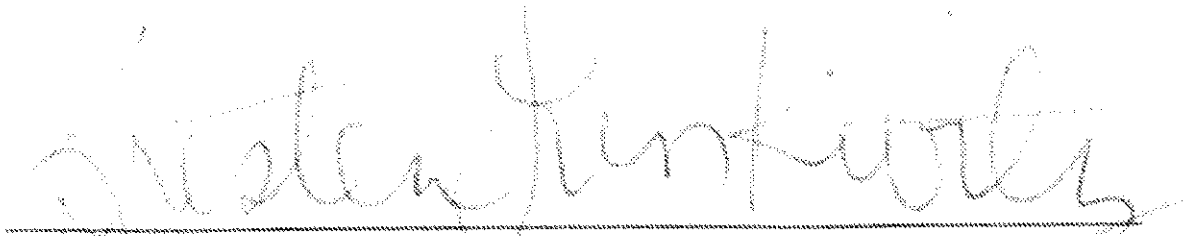
* * * * *

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.



KRISTEN LUNKWITZ
INDEPENDENT TRANSCRIBER

TAB 18

TRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

* * * * *

SFR INVESTMENTS POOL 1, LLC, Plaintiff, vs. FIRST HORIZON HOME LOANS, ANA TORRES, Defendants.	CASE NO. A-13-679329 DEPT. NO. XXVI **Transcript of Proceedings**

BEFORE THE HONORABLE GLORIA STURMAN, DISTRICT COURT JUDGE

STATUS CHECK

TUESDAY, AUGUST 16, 2016

APPEARANCES:

For the Plaintiff: JACQUELINE GILBERT, ESQ.

For the Defendants: REBEKKAH BODOFF, ESQ.

For Alessi & Koenig: HUONG LAM, ESQ.

RECORDED BY: KERRY ESPARZA, COURT RECORDER
TRANSCRIBED BY: KRISTEN LUNKWITZ

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

TUESDAY, AUGUST 16, 2016 AT 9:15 A.M.

MS. GILBERT: Jacqueline Gilbert on behalf of SFR Investments Pool 1, LLC.

MS. LAM: Huong Lam on behalf of Alessi and Koenig.

MS. BODOFF: Rebekkah Bodoff on behalf of First Horizon.

MS. GILBERT: I believe, Your Honor, at this -- set for a status check. I believe the Order was delivered yesterday.

MS. BODOFF: It should have been.

THE COURT: It was submitted. We haven't processed it. Is there any -- do the parties take any position on whether *Borne Valley* changes things? Do we need to reargue anything? Do we need to -- what do we need to do?

MS. GILBERT: I don't believe so, Your Honor.

THE COURT: Okay.

MS. GILBERT: I doubt that the Bank will agree with me, but I believe that it's not binding on this Court.

THE COURT: Okay.

MS. GILBERT: Also, just for your information, there will be a Petition for Rehearing --

THE COURT: Really?

MS. GILBERT: -- and --

THE COURT: How surprising.

MS. GILBERT: -- and for en banc hearing at the Ninth Circuit --

THE COURT: Wow.

MS. GILBERT: -- and, on September 8th, the Nevada Supreme Court has set argument on a case that also has the constitutionality issue.

THE COURT: Facial, unconstitutional. Got it.

MS. GILBERT: So, at this point, I think we --

THE COURT: So, --

MS. GILBERT: -- can go ahead with this.

THE COURT: So, just go ahead and sign the Order?

MS. GILBERT: I believe so, Your Honor.

THE COURT: Okay. All right. And -- okay. That's what we'll do.

MS. GILBERT: Did you want to --

MS. BODOFF: I mean, I would say, Your Honor, that the Bank would say that *Borne Valley* is binding on this Court. The Ninth Circuit certainly believes that *Borne Valley* is binding on this Court.

THE COURT: Yeah. They are not the boss of me, however. So, with all due respect to the Ninth Circuit -- lovely people. But yeah. So, that's -- I guess that's the question is: Do you want a chance to re-brief it, to

reargue it in light of *Borne Valley*? Do you want to stay it? Do you want me to just sign this and you can get up to the Supreme Court and fight it out there? I mean, what's the --

MS. BODOFF: Your Honor, being as we submitted this yesterday, --

THE COURT: Yeah.

MS. BODOFF: -- I'd say we've all signed off on it and it's --

THE COURT: Okay. So, I'm going to go ahead and sign it and you can take it to the next level and best of luck.

MS. GILBERT: Thank you, Your Honor.

THE COURT: And I did not mean that with any disrespect to the Ninth Circuit. Seriously.

PROCEEDING CONCLUDED AT 9:17 A.M.

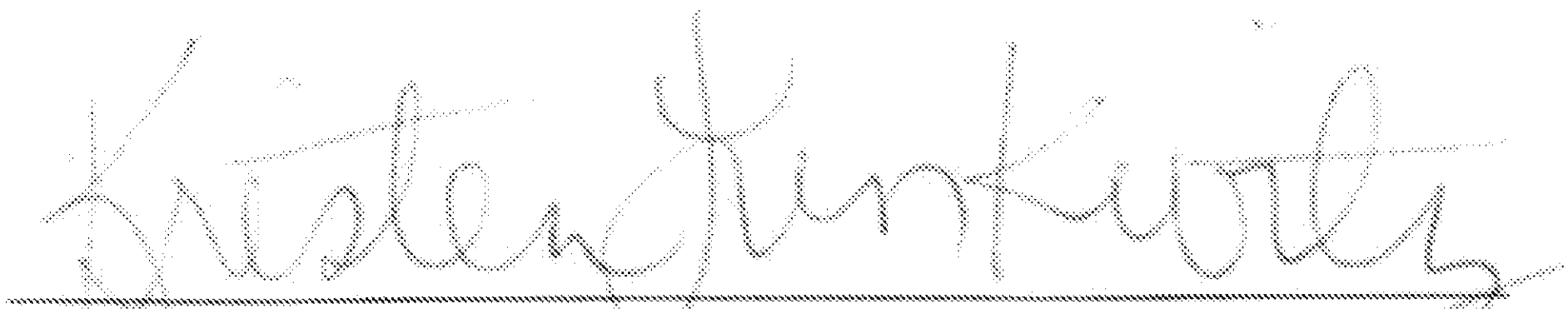
* * * * *

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.



KRISTEN LUNKWITZ
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