

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

BANK OF AMERICA, N.A.;  
MORTGAGE ELECTRONIC  
REGISTRATIONS SYSTEMS, INC.;  
and THE BANK OF NEW YORK  
MELLON;

Appellants,

vs.

THOMAS JESSUP, LLC SERIES  
VII,

Respondent.

Electronically Filed  
Jan 16 2018 12:45 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Case No. 73785

**APPEAL**

from the Eighth Judicial District Court, Department VII  
The Honorable Linda Marie Bell, District Judge  
District Court Case No. A-13-693205-C

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**APPELLANT'S INDEX TO APPENDIX - VOLUME III**

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on the 3<sup>rd</sup> day of January, 2018, I caused to be served a true and correct copy of the foregoing **APPELLANT'S INDEX TO APPENDIX**, in the following manner:

**(ELECTRONIC SERVICE)** The above referenced document was electronically filed on the date hereof with the Clerk of the Court for the Supreme Court of the State of Nevada by using the Court's CM/ECF system and served through the Court's Notice of electronic filing system automatically generated to those parties registered on the Court's Master E-Service List.

RICHARD TOBLER, ESQ.  
Nevada Bar No. 4070  
3654 N. Rancho Drive, Suite 102  
Las Vegas, NV 89130

*Attorney for Respondent  
Michael Jessup, LLC Series VII*

*/s/ Carla Llarena*  
\_\_\_\_\_  
An employee of AKERMAN LLP

1 circumstances relevant to the subject litigation.

2 y. Person Most Knowledgeable  
3 Miles Bauer Bergstrom & Winters, LLP  
4 2200 Paseo Verde Parkway, Suite 250  
5 Henderson, Nevada 89052

6 It is anticipated that this witness will testify as to his or her knowledge of the facts and  
7 circumstances relevant to the subject litigation.

8 z. Julie Skinner  
9 Foxfield Community Association  
c/o Charles L. Geisendorf, Esq.  
2520 St. Rose Parkway, Suite 311  
Henderson, Nevada 89074

10 It is anticipated that this witness will testify as to her knowledge of the facts and  
11 circumstances relevant to the subject litigation.

12 aa. Person Most Knowledgeable  
13 Chicago Title Insurance Company  
14 P.O. Box 400247  
Las Vegas, Nevada 89140

15 It is anticipated that this witness will testify as to his or her knowledge of the facts and  
16 circumstances relevant to the subject litigation.

17 bb. Person Most Knowledgeable  
18 Thomas Jessup, LLC Series VII  
c/o Richard L. Tobler, Esq.  
3654 North Rancho Drive #102  
Las Vegas, Nevada 89130

19 It is anticipated that this witness will testify as to his or her knowledge of the facts and  
20 circumstances relevant to the subject litigation.

21 cc. Person Most Knowledgeable  
22 Thomas Jessup, LLC Series VII  
23 c/o Richard L. Tobler, Esq.  
24 3654 North Rancho Drive #102  
Las Vegas, Nevada 89130

25 It is anticipated that this witness will testify as to his or her knowledge of the facts and  
26 circumstances relevant to the subject litigation.

27 dd. Any and all witnesses identified in the underlying litigation and matters related  
28 thereto.

Discovery is ongoing and Absolute Collection Services, LLC reserves the right to supplement this witness list.

### Calculation of Damages

The calculation of damages pursuant to NRCP 16.1(a)(1)(c) are not applicable to Absolute Collection Services, LLC. However, we reserve the right to amend and supplement this statement of damages as additional information becomes available during the course of discovery, though and including the time of trial.

## Insurance

Pursuant to NRCP 16.1(a)(1)(D), Absolute Collection Services, will supplement this disclosure with a copy of any applicable insurance documents “under which any person carrying on an insurance business may be liable to satisfy part of all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment and any disclaimer or limitations of coverage or reservation of rights under any such insurance agreement.”

Absolute Collection Services, LLC are in the process of reviewing documents and will supplement this 16.1 disclosure statement upon completing that review. Absolute Collection Services, LLC expressly reserves the right to supplement this list of documents as additional documents become known during the course of discovery, through and including the time of trial.

Dated: October 21, 2015

CHARLES L. GEISENDORF, LTD.

/s/ Charles L. Geisendorf  
Charles L. Geisendorf, Esq. (6985)

1 **Certificate of Service**

2 I hereby certify that on October 21, 2015, I served the following document(s):

3 A copy of the preceding **Initial Information Supplied by Absolute Collection Services,**  
4 **LLC Pursuant to N.R.C.P. 16.1.**

- 5 ■ By Electronic Transmission: by transmitting the document to the parties  
6 identified below via this Court's electronic filing system.

7 Michael R. Brooks, Esq.  
8 Christopher A.J. Swift, Esq.  
9 Brooks Hubley, LLP  
10 1645 Village Center Circle, Suite 200  
11 Las Vegas, Nevada 89134

12 Richard L. Tobler, Esq.  
13 3654 North Rancho Drive, Suite 102  
14 Las Vegas, Nevada 89130

15 Darren Brenner, Esq.  
16 William S. Habdas, Esq.  
17 Akerman LLP  
18 1160 Town Center Drive, Suite 330  
19 Las Vegas, Nevada 89144

20 /s/Catharine Bastunas  
21 An employee of Charles L. Geisendorf, Ltd.  
22  
23  
24  
25  
26  
27  
28



**Absolute Collection Services LLC**

TRUST ACCOUNT  
1820 E Sahara Ave #111  
Las Vegas, NV 89104  
702.531.3394

US Bank  
2300 W Sahara Ave #200  
Las Vegas NV 89104

**014071****6/18/2012**

PAY TO THE  
ORDER OF



**FOXFIELD CA****\$ 643.44****Six Hundred Forty Three Dollars and 44/100**

DOLLARS

FOXFIELD CA  
c/o CAMCO  
PO BOX 12117  
Las Vegas, NV 89112

MEMO

For Property Address: 588 Bugle Bluff Dr.

  
  
AUTHORIZED SIGNATURE

 Security features  
included.  
© Details on Back.

Redacted

Redacted

**Absolute Collection Services LLC****014071**

FOXFIELD CA/CAMCO

6/18/2012

\$643.44

Acct # 90137

Property Address: 588 Bugle Bluff Dr., Henderson, NV 89015  
Mailing Address: 588 Bugle Bluff Dr., Henderson, NV 89015  
PAID through 6/18/2012 \$643.44

Notes: FILE CLOSED

Original Owner:  
Lena Cook  
588 Bugle Bluff Dr.  
Henderson, NV 89015

File Closed

Memo: FILE CLOSED

**Absolute Collection Services LLC****014071**

FOXFIELD CA/CAMCO

6/18/2012

\$643.44

Acct # 90137

Property Address: 588 Bugle Bluff Dr., Henderson, NV 89015  
Mailing Address: 588 Bugle Bluff Dr., Henderson, NV 89015  
PAID through 6/18/2012 \$643.44

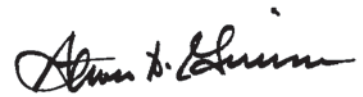
Notes: FILE CLOSED

Original Owner:  
Lena Cook  
588 Bugle Bluff Dr.  
Henderson, NV 89015

File Closed

Memo: FILE CLOSED





CLERK OF THE COURT

**JPTM**

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*Attorneys for Defendants Bank of America, N.A., The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-17, and Mortgage Electronic Systems, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

THOMAS JESSUP, LLC SERIES VII,

Plaintiff,

v.

LENA COOK, an individual; BNY MELLON, N.A.; SFG MORTGAGE, a revoked Arizona corporation; BANK OF AMERICA, N.A.; MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; HEIRS OF THE ESTATE OF LENA COOK; and any and all other persons unknown claiming any right, title, estate, lien or interest in the Property adverse to the Plaintiff's ownership, or any cloud upon Plaintiff's title thereto (DOES 1 through 10, inclusive);

Defendants.

Case No.: A-13-693205-C

Dept. No.: VII

**JOINT PRETRIAL MEMORANDUM**

AKERMAN LLP

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

MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC; BNY MELLON, N.A.

Counterclaimants,

vs.

THOMAS JESSUP, LLC SERIES VII;  
FOXFIELD COMMUNITY ASSOCIATION;  
ABSOLUTE COLLECTION SERVICES, LLC,  
(ROES 1 through 10, inclusive);

Counterdefendants.

Plaintiff Thomas Jessup, LLC Series VII; Defendants Bank of America, N.A. (**Bank of America or BANA**), The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-17 (**BONY** as trustee), and Mortgage Electronic Systems, Inc. (**MERS**); Counterdefendants Thomas Jessup, LLC Series VII (**Plaintiff**), Foxfield Community Association (**HOA**) and Absolute Collections Services (**ACS, Absolute, or HOA trustee**) submit their joint pretrial memorandum.

**(1) Brief Statement of Facts of the Case:**

This is an HOA super-priority case. *The following facts are stipulated in this matter.*

On or about October 31, 2005, Lena Cook entered into the senior deed of trust with SFG Mortgage (the **First Deed of Trust**) for the property located at 588 Bugle Bluff Road, Henderson, Nevada 89015 (the **Property**). The original value of the First Deed of Trust was \$235,000.00, and the First Deed of Trust was recorded on November 7, 2005.

On or about August 16, 2006, Lena Cook entered into a second deed of trust in favor of Bank of America (the **Second Deed of Trust**) for the Property. The Second Deed of Trust was recorded on October 6, 2006, and the Second Deed of Trust provided a \$40,000.00 credit limit to Lena Cook.

The First Deed of Trust was assigned to The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-17, via an Assignment of Deed of Trust, recorded on July 21, 2011.

On April 12, 2011, ACS, as agent for the HOA, recorded a Notice of Delinquent Assessment Lien against the Property. The HOA stated in the Lien that the total amount due was \$793.63. On

1 July 18, 2011, ACS, as agent for the HOA, recorded a Notice of Default and Election to Sell Under  
2 Homeowners Association Lien against the Property. The HOA now represented the amount due had  
3 increased to \$1,642.66.

4 In response to the Notice of Default, on or about August 18, 2011, Bank of America, through  
5 counsel at Miles, Bauer, Bergstrom, & Winters, LLP (**Miles Bauer**), sent correspondence to ACS  
6 and stated that "It is unclear, based upon the information known to date, what amount the ninth  
7 months' of common assessments pre-dating the NOD actually are. That amount, whatever it is, is  
8 the amount BANA should be required to right fully pay to discharge its obligations to the HOA per  
9 NRS 116.3102 and my client hereby offers to pay that sum upon presentation of adequate proof of  
10 the same by the HOA."

11 ACS received Miles Bauer's August 18, 2011 letter. ACS claims to have submitted a  
12 response letter to Miles Bauer dated September 13, 2011. ACS' records show the letter was faxed on  
13 September 14, 2011. It is not clear the response was received by Miles Bauer. The Miles Bauer file  
14 did not contain the response letter. The letter responded directly to Miles Bauer, explaining ACS'  
15 position, at the time, regarding the issues raised in the Miles Bauer letter. ACS stated that Miles  
16 Bauer could order a "Statement of Account" if it submitted payment of \$50. ACS did not provide  
17 Miles Bauer a 9-month super-priority calculation.

18 ACS, as agent for the HOA, then recorded a Notice of Trustee's Sale against the Property on  
19 October 26, 2011. The notice stated the total amount due was now \$3,097.60 and set a sale for  
20 December 6, 2011.

21 On April 25, 2012, ACS recorded a second Notice of Trustee's Sale against the Property,  
22 stating that a sale would be held on June 12, 2012. The notice stated the total amount due was now  
23 \$4,783.29. ACS proceeded to non-judicially foreclose on the Property and recorded a Trustee's  
24 Deed Upon Sale on June 13, 2012, which stated ACS sold the HOA's interest in the Property to CSC  
25 Investment Group, LLC (**CSC**) for \$5,401.00. The person that attended the sale on behalf of  
26 Plaintiff was Shari Wong Culotta, the niece of Plaintiff's Sole Member, Michael Jessup.

27 On August 17, 2012, a Quitclaim Deed was recorded, whereby CSC conveyed its interest in  
28 the Property to Thomas Jessup, LLC. On May 31, 2013, a Quitclaim Deed was recorded, whereby

Thomas Jessup, LLC conveyed its interest in the Property to Plaintiff as a series limited liability company.

The parties agree that the expert report of R. Scott Dugan shall be admissible as expert opinion, in lieu of oral testimony.

The parties stipulate that the fair market value of the property at the time of the sale was \$127,000.00, as defined in the report, without clouded title.

## **(2) List of Claims for Relief**

### **Plaintiff's Claims**

1. Quiet Title
2. Declaratory Relief

### **BONY as Trustee and MERS's Counterclaims and Cross claims for Relief**

1. Declaratory Relief-Sale Limited to Subordinate Lien Rights
2. Declaratory Relief—Insufficient Notices under NRS 116.31162-116.31168
3. Declaratory Relief—Constitutionality of NRS 116.31162-116.31168
4. Quiet Title
5. Unjust Enrichment against HOA
6. Unjust Enrichment against Absolute, the HOA trustee
7. Tortious Interference with Contractual Relations against the HOA and Absolute
8. Breach of the Duty of Good Faith against the HOA and Absolute
9. Wrongful Foreclosure against the HOA and ACS

## **(3) Affirmative Defenses:**

### **1. Plaintiff's affirmative defenses to Defendants' counterclaims**

#### **FIRST AFFIRMATIVE DEFENSE**

MERS' Counterclaims fail to state claims upon which relief may be granted.

#### **SECOND AFFIRMATIVE DEFENSE**

MERS' Counterclaims are barred by the doctrine of laches.

#### **THIRD AFFIRMATIVE DEFENSE**

MERS has waived, by conduct or otherwise any claims against Jessup.



**FOURTH AFFIRMATIVE DEFENSE**

MERS' claims are barred by reason of its unclean hands.

**FIFTH AFFIRMATIVE DEFENSE**

MERS' damages, if any, were caused in whole or in part, or were contributed to, by reason of the acts, omissions, negligence and/or intentional misconduct of MERS and its agents.

**SIXTH AFFIRMATIVE DEFENSE**

At all times, Jessup and other Counter-defendants (Third Party Defendants) acted in accordance with applicable law and in good faith at all times material herein, based upon all relevant facts and circumstances known by it at the time it so acted and, accordingly, MERS is barred from any recovery in this action.

**SEVENTH AFFIRMATIVE DEFENSE**

MERS has failed to timely set aside the foreclosure sale conducted by HOA's trustee.

**EIGHTH AFFIRMATIVE DEFENSE**

MERS failed to mitigate its damages by not (a) inquiring with the foreclosing trustee of the amount required to cure the super-priority lien, and (b) paying said amount.

**NINTH AFFIRMATIVE DEFENSE**

The HOA sold the subject property in accordance with applicable law, and any claim of MERS arising because of discrepancies between the bid price and fair value have no application to the Counterclaims.

**TENTH AFFIRMATIVE DEFENSE**

At all times relevant to the Counterclaim, Counter-defendants acted in a reasonable manner, dealing fairly and in good faith, and acted without intent to inflict harm or damage.

**ELEVENTH AFFIRMATIVE DEFENSE**

MERS's claims are barred as a result of MERS's own actions and inactions, or the actions or inactions of third party agents of MERS.

**TWELFTH AFFIRMATIVE DEFENSE**

Any and all damages sustained by MERS, if any, are the result of MERS's own action and inactions, or the actions or inactions of third party agents of MERS.

**THIRTEENTH AFFIRMATIVE DEFENSE**

The loss, damages, costs and attorney's fees suffered by MERS was the result of its own acts, negligence, omission or wrongdoing in failing to act after receipt of foreclosure notices.

**FOURTEENTH AFFIRMATIVE DEFENSE**

MERS' failure to respond to the legal notices provided to it resulted in the Property being sold under a super-priority lien which extinguished any mortgage interest previously held by MERS.

**FIFTEENTH AFFIRMATIVE DEFENSE**

There are no requirements of the applicable statutes to set forth the detail in foreclosure notices averred to by MERS in its Counterclaims.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Because of equity and good conscience, MERS is estopped from asserting its claims legal rights under the purchase agreement.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

MERS has suffered no legal, cognizable harm or damages as a result of any wrongful conduct of the Counter-defendants.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

All affirmative defenses set forth in NRCP 8(c) are incorporated herein by reference.

**NINETEENTH AFFIRMATIVE DEFENSE**

At all times relevant to the Counterclaim, Counter-defendants acted pursuant to all of its obligations, and was justified or privileged in its actions.

**TWENTIETH AFFIRMATIVE DEFENSE**

Any conduct on the part of the Counter-defendants was not the cause of Plaintiff's alleged losses or damages, the existence of which is denied, relieving Counter-defendants from any liability.

**TWENTY FIRST AFFIRMATIVE DEFENSE**

Recovery against Jessup would unjustly enrich MERS in that the losses, if any at all, and each and every wrong of which MERS complains, occurred by virtue of its or third parties' conduct.

**TWENTY SECOND AFFIRMATIVE DEFENSE**

The conduct of the Counter-defendants conformed to the law.



1 **TWENTY THIRD AFFIRMATIVE DEFENSE**

2 By virtue of the acts, deeds, conduct and/or the failure or omission to act under the  
3 circumstances, MERS waived its rights, if any existed, to assert the claims against the replying  
4 Counter-defendants.

5 **TWENTY FOURTH AFFIRMATIVE DEFENSE**

6 Pursuant to NRCP 11, all possible affirmative defenses may not have been alleged herein,  
7 insofar as sufficient facts were not available after reasonable inquiry upon filing of this Reply to  
8 Counterclaim, therefore, Jessup reserves the right to amend its Reply to add affirmative defenses  
9 should the necessity arise.

10 **2. BNMY's Affirmative Defenses to Plaintiff's Complaint**

11 **First Affirmative Defense**

12 The complaint, including each claim for relief, fails to state facts sufficient to state a valid  
13 claim against Defendants.

14 **Second Affirmative Defense**

15 The Plaintiff is barred from any recovery against Defendants because it has not been  
16 damaged by the conduct alleged in the Complaint.

17 **Third Affirmative Defense**

18 At all times, Defendants acted in accordance with reasonable standards, in good faith, and  
19 with ordinary care, and its conduct did not contribute to the alleged damages.

20 **Fourth Affirmative Defense**

21 The Plaintiff is precluded from recovery against Defendants because it failed to mitigate  
22 properly any damages they may have suffered as a result of the conduct alleged in the Complaint.

23 **Fifth Affirmative Defense**

24 Plaintiff's damages, if any, should be offset, in whole or in part, against any damages caused  
25 by Plaintiff to Defendants as a result of Plaintiff's conduct.

26 **Sixth Affirmative Defense**

27 Any damages Plaintiff may have sustained were proximately caused by the acts of persons  
28 other than Defendants and, therefore, Plaintiff is not entitled to any relief from Defendants.

1                                    **Seventh Affirmative Defense**

2            The Plaintiff's damages, if any, resulted from the acts or omissions of third parties over  
3 whom Defendants had no control. The acts of such third parties constitute intervening or  
4 superseding causes of the harm, if any, suffered by the Plaintiff.

5                                    **Eighth Affirmative Defense**

6            By reason of his own acts, Plaintiff has released and discharged Defendants from the claims  
7 alleged.

8                                    **Ninth Affirmative Defense**

9            The Plaintiff is barred from any recovery against Defendants by the principles of equity  
10 including waiver, laches, and estoppel, so as to preclude in whole or in part, the relief sought in the  
11 complaint.

12                                  **Tenth Affirmative Defense**

13            Plaintiff is barred from claiming its title extinguishes Defendants' interest because the HOA  
14 sale was not intended to be an exercise of super-priority lien rights and the HOA sale only conveyed  
15 a subordinate interest.

16                                  **Eleventh Affirmative Defense**

17            The homeowners' association sale by which Plaintiff claims title is void because it was not  
18 commercially reasonable and the facts and circumstances regarding the sale of the property to  
19 Plaintiff violated the homeowners association's obligation of good faith and duty to act in a  
20 commercially reasonable manner. Thus, Plaintiff's claim of free and clear title to the property is  
21 barred.

22                                  **Twelfth Affirmative Defense**

23            The homeowners' association sale is void because the homeowners' association failed to  
24 comply with the requirements of NRS 116 *et seq.* and other applicable laws. Thus, Plaintiff's claim  
25 of free and clear title to the property is barred.

26                                  **Thirteenth Affirmative Defense**

27            The homeowners' association sale is void because the provisions of NRS 116.31162-  
28 116.31168 fail to provide notice of satisfaction of the conditions precedent required for the existence

1 of super-priority lien rights and, as such, violate the Due Process Clause of the United States  
2 Constitution and the Nevada Constitution.

3 **Fourteenth Affirmative Defense**

4 The homeowners' association sale is void because the "opt-in" notice provisions of NRS  
5 116.3116 *et seq.* do not require that reasonable and affirmative steps be taken to give actual notice to  
6 lenders and other holders of recorded security interests prior to deprivation of their property rights  
7 and, as such, violate the Due Process Clauses of the Fifth and Fourteenth Amendments of the United  
8 States Constitution and the Due Process Clause of the Nevada Constitution.

9 **Fifteenth Affirmative Defense**

10 Defendants have been required to retain the services of an attorney to defend this claim and  
11 have been damaged as a result of this action, in the amount of its attorneys' fees and costs incurred  
12 and to be incurred. Defendants are entitled to recover those fees and costs from the Plaintiff.

13 **Sixteenth Affirmative Defense**

14 Defendant hereby incorporates by reference those affirmative defenses enumerated in Rule 8  
15 of the Nevada Rules of Civil Procedure. In the event subsequent investigation or discovery reveals  
16 the applicability of such defenses, Defendants hereby, reserve their right to seek leave of this Court  
17 to amend its answer to specifically assert the same. Such defenses are herein incorporated by  
18 reference with the specific purpose of not waiving the same.

19 **Seventeenth Affirmative Defense**

20 Pursuant to Rule 11 of the Nevada Rules of Civil Procedure, all possible affirmative defenses  
21 may not have been alleged herein insofar as sufficient facts were not available after reasonable  
22 inquiry upon filing of this answer and, therefore, Defendants reserve their right to amend their  
23 answer to allege additional affirmative defenses if subsequent investigation warrants their assertion.

24 **Eighteenth Affirmative Defense**

25 The Deed of Trust cannot be extinguished by the HOA foreclosure sale because the Nevada  
26 Supreme Court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev.  
27 2014) cannot be applied retroactively.

28 ///

1     **3.     Bank of America's Affirmative Defenses to Plaintiff's Complaint**

2                             **FIRST AFFIRMATIVE DEFENSE**  
3                             **(Failure to State a Claim)**

4             Plaintiff has failed to state facts sufficient to constitute any cause of action against  
5     Defendant.

6                             **SECOND AFFIRMATIVE DEFENSE**  
7                             **(Void for Vagueness)**

8             To the extent that Plaintiff's interpretation of NRS 116.3116 is accurate, the statute, and  
9     Chapter 116, are void for vagueness as applied to this matter.

10                            **THIRD AFFIRMATIVE DEFENSE**  
11                            **(Due Process Violations)**

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

15                            **FOURTH AFFIRMATIVE DEFENSE**  
16                            **(Assumption of Risk)**

17             Plaintiff, at all material times, calculated, knew and understood the risks inherent in the  
18     situations, actions, omissions and transactions upon which it now bases its various claims for relief,  
19     and with such knowledge, Plaintiff undertook and thereby assumed such risks and is consequently  
20     barred from all recovery by such assumption of risk.

21                            **FIFTH AFFIRMATIVE DEFENSE**  
22                            **(Tender, Estoppel, Laches, or Waiver)**

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

25                            **SIXTH AFFIRMATIVE DEFENSE**  
26                            **(Commercial Reasonableness and Violation of Good Faith – NRS 116.1113)**

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

///

///



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

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

**EIGHTH AFFIRMATIVE DEFENSE**  
**(Third Party Fault)**

The damages complained of, if there were any, were proximately contributed to or caused by the carelessness, negligence, fault or defects resulting from acts/omissions of other persons unknown to Defendant at this time, and were not caused in any way by Defendant or by persons for whom Defendant is legally responsible.

**NINTH AFFIRMATIVE DEFENSE**  
**(Reduction of Damages Based on Third Party Fault)**

Defendant is entitled to have any award against it reduced or eliminated to the extent that the negligence, carelessness, or defect resulted from the acts/omissions or comparative fault of other persons that contributed to Plaintiff's damages, if any.

**TENTH AFFIRMATIVE DEFENSE**  
**(No Standing)**

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

**ELEVENTH AFFIRMATIVE DEFENSE**  
**(Unclean Hands)**

Defendant avers the affirmative defense of unclean hands.

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

Defendant was not provided proper notice of the "super-priority" assessment amounts and the homeowner's association foreclosure sale, and any such notice provided to Defendant failed to comply with the statutory and common law requirements of Nevada and with state and federal constitutional law.

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

Defendant denies that the Plaintiff is entitled to any relief for which it prays.

///

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

Defendant avers the affirmative defense of failure to do equity.

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

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

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

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

**SEVENTEENTH AFFIRMATIVE DEFENSE**  
**(Violations of Constitutional and Federal Law)**

The homeowners' association sale is void or otherwise fails to extinguish the applicable deed of trust because it violates provisions of the United States Constitution and federal law.

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

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

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

Chapter 116 of the Nevada Revised Statutes is facially unconstitutional because its "opt-in" notice provisions do not mandate that reasonable and affirmative steps be taken to give actual notice to a record lien holder before depriving that lien holder of its property rights, in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States and Nevada Constitutions.

**TWENTIETH AFFIRMATIVE DEFENSE**  
**(SFR Investments Cannot be Applied Retroactively)**

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



1     **4.     Absolute's and Foxfield HOA's Affirmative Defenses**

- 2             1.     Cross-claimant fails to state a claim upon which relief may be granted.
- 3             2.     The foreclosure sale at issue can eliminate a first deed of mortgage, pursuant to *SFR*
- 4     *Investments Pool 1, LLC v. U.S. Bank*, 334 P.3d 408 (Nev. 2014).
- 5             3.     The foreclosure sale was commercially reasonable.
- 6             4.     ACS acted in good faith at all times.
- 7             5.     Due to Cross-claimant's actions, Cross-claimant is estopped from asserting the claims
- 8     in the cross-claim
- 9             6.     Cross-claimant's claims may be barred by applicable limitations, including a statute
- 10    of limitations.
- 11            7.     Cross-claimant's claims are barred by the doctrine of laches.
- 12            8.     Cross-claimant's claims are barred by the doctrine of waiver
- 13            9.     The damages allegedly occurred by Cross-claimant, if any, were caused in whole or
- 14    in party by Cross-claimant's own acts and omissions.
- 15            10.    The liability, if any, of Cross-claimant must be reduced by the percentage of fault of
- 16    Cross-claimant and others.
- 17            11.    Cross-claimant's claims and causes of action are barred, in whole or in part, due to
- 18    Cross-claimant's failure to mitigate, minimize, or otherwise avoid its alleged damages.
- 19            12.    Cross-claimant's damages, if any, were not caused by ACS, but rather by another
- 20    third party, over which, ACS had no control.
- 21            13.    ACS and HOA owed no duty to Cross-claimant.
- 22            14.    ACS and HOA are not a party of the Deed of Trust between Cross-claimant and its
- 23    mortgagee.
- 24            15.    ACS and HOA had a higher priority lien against the property at 588 Bugle Bluff
- 25    Road, Henderson, Nevada 89015 than Cross-claimant, and extinguished Cross-Claimant's Deed of
- 26    Trust by performing a foreclosure sale.
- 27            16.    ACS and HOA did not owe a duty to Cross-claimant related to the property at issue.
- 28    ///

1           17.     Cross-claimant did not exercise ordinary care, caution, or prudence for the protection  
2 of itself and any damages complained of by Cross-claimant in its Cross-claim were directly or  
3 proximately caused or contributed to by the fault, failure to act, carelessness, and negligence of Bank  
4 of America.

5           18.     Cross-claimant assumed the risk of the transaction upon entering into, and therefore  
6 its claims are unenforceable.

7           19.     Cross-claimant's damages were the result of unrelated, pre-existing, and/or  
8 subsequent conditions unrelated to ACS and HOA's conduct.

9           20.     Any and all damages Cross-claimant may have suffered or will suffer were  
10 proximately caused by its failure to mitigate damages.

11           21.     ACS is informed and believes, and therefore alleges, that Cross-claimant's claims are  
12 barred in that Cross-claimant is "in pari delicto" with ACS and HOA.

13           22.     The claims of cross-claimant should be reduced, modified, and/or barred due to the  
14 failure of consideration.

15           23.     There is no privity of contract between Cross-claimant and ACS and HOA and the  
16 allegations in the Cross-claim are based on an expressed or implied contract with ACS and HOA, are  
17 barred because of a lack of privity of contract.

18           24.     Cross-claimant's claims are barred, in whole or in part, by the doctrines of unilateral  
19 and/or mutual mistake.

20           25.     No special, confidential, or fiduciary relationship existed between the parties.

21           26.     Cross-claimant did not rely upon any statement, representation, advice, or conduct of  
22 ACS, and did not act upon any statement, advise, or conduct to its damage.

23           27.     No actual justiciable controversy exists between ACS and HOA and Cross-claimant  
24 and therefore, the Cross-Claim must be dismissed as to ACS and HOA.

25           28.     There is no basis for recovery of costs or attorney's fees by Cross-claimant from ACS  
26 or HOA.

27           29.     Cross-claimant is barred from recovering special damages herein for failure to  
28 specifically allege the types of special damages claimed, pursuant to NRCP Rule 9(g).

1           30.     Cross-claimant failed to file and pursue a claim with the responsible governmental  
2 agency before filing this lawsuit.

3           31.     ACS and HOA complied with all notice and other requirements for non-judicial  
4 foreclosure as required by Nevada law.

5           32.     ACS performed no acts or omissions that would warrant the imposition of any  
6 damages, including exemplary or punitive damages.

7           33.     Any damages claimed by Cross-claimant are speculative, and are not supported by  
8 proof and are not compensable as a matter of law.

9           34.     ACS and HOA acted properly and in good faith, and in accordance with all duties  
10 imposed by law, without malice, either expressed or implied and without oppression.

11           35.     ACS and HOA denies each and every allegation of the Cross-claim not specifically  
12 admitted or otherwise plead herein.

13           36.     Cross-claimant was on notice that the property at 588 Bugle Bluff Road, Henderson  
14 Nevada 89015 operated under an HOA, specifically that of Foxfield Community Association, and  
15 that the HOA possess a higher priority lien than the First Deed of Trust.

16           37.     Chapter 116 of the Nevada Revises Statutes is not unconstitutional, as homeowners  
17 and mortgage lenders are on notice that HOAs have an interest in the property that is greater than  
18 that of the lenders, and therefore they assume the risk when creating the mortgage.

19           38.     ACS hereby incorporated by reference those affirmative defenses enumerated in Rule  
20 8 of the Nevada Rules of Civil Procedure as if fully set forth herein. In the event further  
21 investigation or discovery reveals the applicability of any such defenses. ACS reserves the right to  
22 seek leave of court to amend this Answer to specifically assert any such defenses. Such defenses are  
23 herein incorporated by reference for the specific purpose of not waiving any such defenses.

24           39.     Pursuant to NRCP 11, ACS states that all necessary affirmative defenses and possible  
25 claims have not been asserted at the present time in this Answer to Cross-claim, and, therefore, ACS  
26 reserves the right to amend its Answer as discovery proceeds in this matter

27       **(3)     A list of Claims or Defenses to be Abandoned**

28           None at this time.

**(4) A list of all exhibits to be presented:**

The Parties offer the following Joint Exhibits, which they anticipate will be used at trial, all of which are stipulated to for admittance as to authenticity:

- 1 Grant, Bargain, Sale Deed, Bates No. BANA000032-000034
- 2 Deed of Trust, Bates No. 000035-000056
- 3 Substitution of Trustee and Full Reconveyance, Bates No. BANA000057-000058
- 4 Deed of Trust, Bates No. BANA000059-000073
- 5 Notice of Delinquent Assessment Lien, Bates No. BANA000074-000075
- 6 Notice of Default and Election to Sell Under Homeowners Association Lien, Bates No. BANA000078-000080
- 7 Assignment of Deed of Trust, Bates No. BANA000081-000082
- 8 Substitution of Trustee Nevada, Bates No. BANA000084-000085
- 9 Notice of Default/Election to Sell Under Deed of Trust, Bates No. BANA000086-000087
- 10 Notice of Trustee's Sale, Bates No. BANA000088-000089
- 11 Certificate State of Nevada Foreclosure Mediation Program, Bates No. BANA000091
- 12 Nevada Notice of Trustee's Sale, Bates No. BANA000092-000093
- 13 Notice of Trustee's Sale, Bates No. BANA000094-000095
- 14 Trustee's Deed Upon Sale, Bates No. BANA000096-000099
- 15 Release of Lien, Bates No. BANA000100
- 16 Quitclaim Deed, Bates No. BANA000101-000105
- 17 Notice of Release of Lien, Bates No. BANA000106
- 18 Quit Claim Deed, Bates No. BANA000107-000108
- 19 Nevada Notice of Trustee's Sale, Bates No. BANA000109-000110
- 20 Documents produced by MERS and BNY Mellon by previous counsel, Bates No. BONY00001-00057
- 21 Miles Bauer affidavits, Bates No. BANA000114-000123
- 22 Documents produced by Foxfield Community Association, Bates No. FOX00001-000085
- 23 Documents produced by Absolute Collections Services, LLC, Bates No. ACS00001-00179



24 Expert report by Scott Dugan, Bates No. DUGAN000001-000032

25 Note for underlying loan

**(5) Any agreements as to the limitation or exclusion of evidence.**

The parties have stipulated to the facts and exhibits described above.

**(6) A list of the witnesses which each party intends to call.**

**Plaintiff's Witnesses:**

Plaintiff plans on calling the following witnesses (\*\* denotes witnesses/representatives of a party that will be produced for trial without the need for issuance of a subpoena):

1. \*\* Michael Jessup for THOMAS JESSUP, LLC SERIES VII  
c/o Richard L. Tobler, Esq.  
Richard L. Tobler, LTD.  
3654 N. Rancho Drive, Suite 102  
Las Vegas, NV 89130
2. Kelly Mitchell for Absolute Collection Services, LLC  
c/o Shane Cox, Esq.  
8440 W Lake Mead Blvd #210  
Las Vegas, NV 89128
3. Yvette Saucedo for Foxfield Community Association  
c/o Shane Cox, Esq.  
8440 W Lake Mead Blvd #210  
Las Vegas, NV 89128
4. Rock K. Jung, Esq.  
Wright Finlay & Zak LLP  
7785 W. Sahara Ave., Suite 200  
Las Vegas, NV 89117  
(702) 475-7964

Plaintiff will possibly call the following witnesses:

5. Daunshari Wong-Culotta  
2330 Paseo Del Prado #C-105  
Las Vegas, Nevada 89102

///

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1 **Defendants' Witnesses:**

2 Defendants plans on calling the following witnesses:

- 3 1. Rock K. Jung, Esq.  
4 Wright Finlay & Zak LLP  
5 7785 W. Sahara Ave., Suite 200  
6 Las Vegas, NV 89117  
7 (702) 475-7964

8 This witness is expected to testify regarding communications with the HOA and/or its agent  
9 regarding the property. Mr. Jung may testify regarding records maintained by Miles Bauer, the facts  
10 and circumstances surrounding payment to the HOA, and its communications with the borrower, if  
11 any.

- 12 2. Kelly Mitchell for Absolute Collection Services, LLC  
13 c/o Shane Cox, Esq.  
14 8440 W Lake Mead Blvd #210  
15 Las Vegas, NV 89128

16 This witness is expected to testify regarding relevant facts and information relating to the  
17 homeowners' association's nonjudicial foreclosure efforts.

- 18 3. Yvette Saucedo for Foxfield Community Association  
19 c/o Shane Cox, Esq.  
20 8440 W Lake Mead Blvd #210  
21 Las Vegas, NV 89128

22 This witness is expected to testify regarding relevant facts and information relating to the  
23 nonjudicial foreclosure sale relevant to this litigation.

24 Defendants may call the following witnesses:

- 25 4. \*\* Shawn Look Bank or other Corporate Representative(s) for Bank of America,  
26 N.A.  
27 c/o Darren Brenner, Esq. and/or William S. Habdas, Esq.  
28 AKERMAN LLP  
1160 Town Center Drive, Suite 330  
Las Vegas, Nevada 89144  
Telephone: (702) 634-5000

This witness will testify regarding relevant facts and information relating to the Bank's lien  
on the subject property.

///



- 1           5.     Representative of Lena Cook  
              Contact information unknown

2           This witness is expected to testify regarding relevant facts and information relating to the  
3     liens on the subject property, as well as the efforts of the homeowners' association to foreclose on  
4     the property, to the extent known to the witness.

- 5           6.     Rule 30(b)(6) Witness for The Bank of New York Mellon fka The Bank of New York  
6                 as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates,  
7                 Series 2005-17  
8                 c/o Darren Brenner, Esq. and/or William S. Habdas, Esq.  
9                 AKERMAN LLP  
              1160 Town Center Drive, Suite 330  
              Las Vegas, Nevada 89144  
              Telephone:     (702) 634-5000

10          This witness will testify regarding relevant facts and information relating to the Bank's lien  
11     on the subject property and efforts to foreclose.

- 12          7.     Rule 30(b)(6) Witness for CSC Investment Group, LLC  
13                 c/o Thomas Armstrong  
14                 2330 Paseo Del Prado, Suite C-113  
              Las Vegas, Nevada 89102

15          This witness is expected to testify regarding relevant facts and information relating to the  
16     homeowners' association's foreclosure sale and the conveyance of the property to Plaintiff, as well  
17     as any relationship it has to Plaintiff.

- 18          8.     Michael Jessup  
19                 c/o Richard L. Tobler, Esq.  
20                 Richard L. Tobler, LTD.  
21                 3654 N. Rancho Drive, Suite 102  
              Las Vegas, NV 89130

22          This witness is expected to testify regarding relevant facts and information relating to the  
23     homeowners' association's nonjudicial foreclosure efforts and Plaintiff's acquisition of the property,  
24     as well any relationship Plaintiff has to any other party in this action.

- 25          9.     Doug Miles or other Corporate Representatives, Persons Most Knowledge, and Rules  
26                 30(b)(6) Witnesses for Miles Bauer  
27                 1231 E. Dyer Road, Suite 100  
              Santa Ana, CA 92705, CA 92705  
28                 Telephone: (714) 481-0239

1 This witness is expected to testify regarding communications with the HOA and/or its agent  
2 regarding the property. This witness and/or these witnesses are expected to testify regarding Miles  
3 Bauer's knowledge of the HOA's foreclosure and all facts related thereto, including, without  
4 limitation, the payment of the super-priority Miles Bauer performed and/or attempted.

- 5 12. Daunshari Wong-Culotta  
6 2330 Paseo Del Prado #C-105  
7 Las Vegas, Nevada 89102

8 This witness is expected to testify concerning relevant facts and information relating to the  
9 subject property.

- 10 13. R. Scott Dugan  
11 R. Scott Dugan Appraisal Company, Inc.  
12 8930 West Tropicana Avenue, Suite 1  
13 Las Vegas, Nevada 89147

14 This witness will testify regarding the fair market value of the subject property at the time of  
15 the HOA's foreclosure sale.

16 **3. HOA's and ACS's witnesses**

- 17 1. \*\* Kelly Mitchell for Absolute Collection Services, LLC  
18 c/o Shane Cox, Esq.  
19 8440 W Lake Mead Blvd #210  
20 Las Vegas, NV 89128
- 21 2. \*\* Yvette Saucedo for Foxfield Community Association  
22 c/o Shane Cox, Esq.  
23 8440 W Lake Mead Blvd #210  
24 Las Vegas, NV 89128
- 25 3. Rock K. Jung, Esq.  
26 Wright Finlay & Zak LLP  
27 7785 W. Sahara Ave., Suite 200  
28 Las Vegas, NV 89117  
(702) 475-7964

(7) **A statement of each principal issue of law which may be contested at the time of trial.**

- A. Whether the HOA foreclosure sale extinguished the Defendants' deeds of trust.
- B. Whether BANA's offer to pay the super-priority amount constitutes a valid tender of  
the super-priority amount, resulting in a sub-priority amount sale and preservation of  
Defendants' interest in the property.

- 1 C. Whether the sale was conducted only on the sub-priority portion of the HOA lien.
- 2 D. Whether ACS's response letter to BANA's counsel acted to block BANA's ability to
- 3 cure the super-priority portion of the HOA's lien.
- 4 E. Whether the HOA's foreclosure sale was commercially reasonable.
- 5 D. Whether Plaintiff is a bona fide purchaser for value.
- 6 E. Whether this Court should sit in equity or in law, and if in equity, whether a
- 7 balancing of equitable considerations favors Plaintiff or favors the Defendants.
- 8 F. Whether *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) can
- 9 be applied retroactively such that the HOA foreclosure sale here extinguished
- 10 Defendants' interest in the property.

11 **(8) An estimate of the time required for trial.**

12 1-2 days.

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(9) Any other matter which counsel desires to bring to the attention of the court prior to trial.

None at this time.

DATED: March 20, 2017.

**RICHARD L. TOBLER, LTD**

**AKERMAN LLP**

/s/ Richard Tobler  
RICHARD TOBLER, ESQ.  
Nevada Bar No. 4070  
3654 N. Rancho Drive, Suite 102  
Las Vegas, NV 89130

*Attorneys for Plaintiff*

/s/ William S. Haldas  
DARREN T. BRENNER, ESQ.  
Nevada Bar No. 8386  
WILLIAM S. HADDAS, ESQ.  
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1160 Town Center Drive, Suite 330  
Las Vegas, Nevada 89144

*Attorneys for Defendants Bank of America, N.A.,  
The Bank of New York Mellon fka The Bank of  
New York as Trustee for the Certificateholders of  
the CWABS, Inc., Asset-Backed Certificates,  
Series 2005-17, and Mortgage Electronic  
Systems, Inc.*

/s/ Shane D. Cox  
SHANE D. COX, ESQ.  
Nevada Bar No. 13852  
8440 W Lake Mead Blvd #210  
Las Vegas, NV 89128

*Attorney for Cross-Defendants Foxfield  
Community Association and Absolute Collection  
Services, LLC*



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 20<sup>th</sup> day of March, 2017, I caused to be served a true and correct copy of the foregoing **JOINT PRETRIAL MEMORANDUM**, in the following manner:

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

<b>Absolute Collection Services, LLC</b>		
<b>Contact</b>		<b>Email</b>
Shane D. Cox, Esq.		<a href="mailto:Shane@absolute-collection.com">Shane@absolute-collection.com</a>
<b>Brooks Hubley LLP</b>		
<b>Contact</b>		<b>Email</b>
Efile desk at Brooks Hubley		<a href="mailto:efile@brookshubley.com">efile@brookshubley.com</a>
<b>Brooks Hubley, LLP</b>		
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Jessica Perlick		<a href="mailto:jperlick@brookshubley.com">jperlick@brookshubley.com</a>
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<b>GERRARD COX &amp; LARSEN</b>		
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Kanani Gonzales		<a href="mailto:KGonzales@Gerrard-cox.com">KGonzales@Gerrard-cox.com</a>
<b>Richard L. Tobler, Ltd.</b>		
<b>Contact</b>		<b>Email</b>
Richard Tobler		<a href="mailto:rltltdck@hotmail.com">rltltdck@hotmail.com</a>

*/s/ Carla Llarena*

An employee of AKERMAN LLP



CLERK OF THE COURT

**ORDR**

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Email: william.habdas@akerman.com

*Attorneys for Defendants Bank of America, N.A., The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-17, and Mortgage Electronic Systems, Inc.*

**EIGHTH JUDICIAL DISTRICT COURT  
CLARK COUNTY, NEVADA**

THOMAS JESSUP, LLC SERIES VII,  
Plaintiff,

v.

LENA COOK, an individual; BNY MELLON,  
N.A.; SFG MORTGAGE, a revoked Arizona  
corporation; BANK OF AMERICA, N.A.;  
MORTGAGE ELECTRONIC REGISTRATION  
SYSTEMS, INC., a Delaware corporation;  
HEIRS OF THE ESTATE OF LENA COOK;  
and any and all other persons unknown claiming  
any right, title, estate, lien or interest in the  
Property adverse to the Plaintiff's ownership, or  
any cloud upon Plaintiff's title thereto (DOES 1  
through 10, inclusive);

Defendants.

MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC; BNY  
MELLON, N.A.

Counterclaimants,

vs.

Case No.: A-13-693205-C

Dept.No.: VII

**ORDER DENYING DEFENDANTS THE  
BANK OF NEW YORK MELLON FKA  
THE BANK OF NEW YORK AS  
TRUSTEE FOR THE  
CERTIFICATEHOLDERS OF THE  
CWABS, INC., ASSET-BACKED  
CERTIFICATES, SERIES 2005-17, BANK  
OF AMERICA N.A., AND MORTGAGE  
ELECTRONIC REGISTRATION  
SYSTEMS, INC.'S AND PLAINTIFF  
THOMAS JESSUP, LLC SERIES VII'S  
MOTIONS FOR SUMMARY JUDGMENT**

AKERMAN LLP

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



MAR 24 2017

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1 FOXFIELD COMMUNITY  
2 ASSOCIATION; ABSOLUTE  
3 COLLECTION SERVICES, LLC, (ROES 1  
4 through 10, inclusive);

5  
6 Counterdefendants.

7 Defendants Bank of America, N.A. (**Bank of America or BANA**), The Bank of New York  
8 Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-  
9 Backed Certificates, Series 2005-17 (**BONY as trustee**), and Mortgage Electronic Systems, Inc.  
10 (**MERS**) filed a motion for summary against Plaintiff Thomas Jessup, LLC Series VII (**Plaintiff**) on  
11 February 6, 2017. Plaintiff filed an opposition to Defendants' motion and a counter-motion for  
12 summary judgment on February 21, 2017.

13 The motions came before the Court for oral argument on March 7, 2017. Having examined  
14 the motions and related briefs, having heard oral arguments, and having reviewed the record and for  
15 good cause showing,

16 **IT IS HEREBY ORDERED** that BANA, BONY as trustee, and MERS's motion for  
17 summary judgment is **DENIED**.

18 **IT IS FURTHER ORDERED** that Plaintiff's counter-motion for summary judgment is  
19 **DENIED**.

20 THE HONORABLE LINDA MARIE BELL

21  
22   
23 DISTRICT COURT JUDGE  
24 3/24/17

Submitted by:

AKERMAN LLP

DARREN T. BRENNER, ESQ.

Nevada Bar No. 8386

WILLIAM S. HABDAS, ESQ.

Nevada Bar No. 13138

1160 Town Center Drive, Suite 330

Las Vegas, Nevada 89144

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*Attorneys for Defendants Bank of America, N.A., The Bank of New York Mellon fka The Bank of New York as Trustee for the Certificateholders of the CWABS, Inc., Asset-Backed Certificates, Series 2005-17, and Mortgage Electronic Systems, Inc.*

RTRAN

DISTRICT COURT

CLARK COUNTY, NEVADA

THOMAS JESSUP LLC SERIES VII,

Plaintiff(s),

vs.

LENA COOK,

Defendant(s).

CASE NO. A-13-693205-C

DEPT. VII

BEFORE THE HONORABLE LINDA MARIE BELL, DISTRICT COURT JUDGE

MONDAY, APRIL 3, 2017

**RECORDER'S TRANSCRIPT  
BENCH TRIAL**

APPEARANCES:

For the Plaintiff: RICHARD L. TOBLER, ESQ.  
SHANE COX, ESQ.  
Tobler & Truman

For the Defendant: DARREN BRENNER, ESQ.  
WILLIAM S. HABDAS, ESQ.  
Akerman, LLP

RECORDED BY: RENEE VINCENT

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Kelly Mitchell . . . . . 43

Defendant's Witnesses:

Yvette Saucedo . . . . . 141

Rock Jung . . . . . 155

EXHIBITSPagePlaintiff's/Defendant's:

Exhibit 1 - 25

7



1 MONDAY, APRIL 3, 2017 AT 8:57 A.M.

2 THE COURT: Jessup v. Cook, case number A-13-693205.  
3 This is the time set for bench trial.

4 If everybody wants to state their appearances,  
5 please.

6 MR. TOBLER: Rich Tobler on behalf of plaintiff, Thomas  
7 Jessup LLC Series VII.

8 MR. COX: Shane Cox on behalf of counter defendants,  
9 Absolute Collection Services and Foxfield Community  
10 Association.

11 MR. BRENNER: Darren Brenner and Will Habdas for Bank of  
12 New York Mellon and Bank of America. And with us as a client  
13 representative is Heather Urie. Ms. Urie works for Bank of  
14 America.

15 THE COURT: All right. Ma'am, you can come up and sit if  
16 you want. You don't have to sit back there.

17 MS. URIE: The chairs are more comfortable back here.

18 THE COURT: Great.

19 MS. URIE: Thank you.

20 THE COURT: Whatever makes you happy.

21 And, sir, what's your name?

22 MR. TOBLER: Also with me is Michael Jessup, the  
23 principal to the plaintiff, Thomas Jessup, LLC.

24 THE COURT: Great. Thank you.

25 Okay. So if you'd like to go ahead and call your --

1 oh. Do we have anything we need to take care of before we get  
2 started?

3 MR. BRENNER: Some minor housekeeping issues on the  
4 exhibits. I think we wanted to go ahead and introduce all of  
5 the exhibits as stipulated exhibits.

6 THE COURT: Great.

7 MR. BRENNER: They're all coming in? Is that --

8 MR. TOBLER: That's correct.

9 MR. COX: Yes.

10 MR. TOBLER: Thank you.

11 MR. COX: Yes.

12 MR. TOBLER: Any objection? No.

13 MR. BRENNER: There is -- when you have a chance, there  
14 is one possible swap out. The last exhibit is the note. It's  
15 Exhibit 25. There's redacted information in this. We want to  
16 swap it out with the unredacted. I understand that there's no  
17 objection.

18 THE COURT: Do you have that with you?

19 MR. BRENNER: I do. I've got multiple copies, if I can  
20 approach?

21 THE COURT: Sure.

22 MR. TOBLER: This is redacted, right?

23 MR. BRENNER: That's just the loan number. I don't -- we  
24 really probably shouldn't have even redacted that, but at  
25 least it has the other information.

1           Judge, I think in order to do my job for my client,  
2 I have to ask Your Honor to seal this exhibit.

3           THE COURT: All right.

4           MR. BRENNER: It's obviously up to the discretion of the  
5 Court. The reason being that Gramm-Leach-Bliley, we believe,  
6 protects certain confidential information that belongs to a  
7 borrower. There is a judicial process exception to that.

8           And I believe the borrower was made a party to this  
9 case, so there is certainly a reason -- an arguable reason not  
10 to seal that. But in order to protect my client from any  
11 possible subsequent regulatory action for putting this  
12 information in open court, I have to ask the Court to seal it.

13           Whether or not it actually gets sealed, though, I  
14 think is up to you, and I've done my job by asking the Court  
15 to seal it.

16           THE COURT: Are your concerns addressed with the redacted  
17 version?

18           MR. BRENNER: They are, but there's things in the  
19 unredacted version that we would -- if we call Ms. Urie, we  
20 would be asking her about things in the unredacted version.

21           THE COURT: Well, what I would suggest then is that we  
22 have the redacted version as a public record and then the  
23 Court uses the unredacted version.

24           MR. BRENNER: I think that makes excellent sense.

25           THE COURT: Because that's the -- under Nevada Supreme

1 Court Rules, part 7 -- because we have to have parts -- that  
2 is the preference. Is everyone all right with that?

3 MR. TOBLER: That's fine.

4 MR. BRENNER: Yes.

5 MR. COX: That's fine.

6 THE COURT: All right. So we'll handle it that way. So  
7 Exhibits 1 through 25 will be admitted.

8 [Exhibits 1 - 25 Received]

9 THE COURT: I will admit the -- let me think about how  
10 I'm going to do this. I'm going to admit the redacted copy  
11 and then I will seal the unredacted copy as a court exhibit.  
12 Does that make sense to everybody?

13 MR. BRENNER: It does.

14 MR. TOBLER: That's fine.

15 THE COURT: That way the Court has it and I can use it,  
16 and then I'll just -- it'll be there and available if you want  
17 to make that part of the record on appeal.

18 MR. BRENNER: It does.

19 THE COURT: Okay.

20 MR. BRENNER: Thank you.

21 THE COURT: Thank you. Anything else we need to take of?

22 MR. TOBLER: I think that's it.

23 MR. BRENNER: I think that's it. I'm sure Your Honor saw  
24 that the -- there's a wealth of stipulated facts in the  
25 pretrial memo.

1 THE COURT: Okay. Go ahead and --

2 MR. TOBLER: Ready?

3 THE COURT: -- call your first witness when you're ready.

4 MR. TOBLER: Okay. I call Michael Jessup to the stand.

5 THE MARSHAL: Right this way, Mr. Jessup.

6 MR. TOBLER: Is your preference up here? Does it matter,

7 Your Honor? Podium?

8 THE COURT: No, whatever you'd like.

9 MR. TOBLER: Okay.

10 THE COURT: Bench trials are very informal in here, so  
11 you don't need to -- feel free to make yourself at home. You  
12 don't need to --

13 MR. TOBLER: Okay.

14 THE COURT: -- ask to approach witnesses unless you feel  
15 like you really need to.

16 THE MARSHAL: Remain standing, raise your right hand, and  
17 face the clerk to be sworn in.

18 MICHAEL JESSUP, PLAINTIFF'S WITNESS, SWORN

19 THE CLERK: Thank you. Please be seated. State and  
20 spell your name for the record.

21 THE WITNESS: State my name?

22 THE COURT: Go ahead and -- good morning, sir. If you  
23 could just go ahead and state your name and then spell it,  
24 first and last, please.

25 THE WITNESS: Michael Jessup, M-I-C-H-A-E-L, J-E-S-S-U-P.



1 THE COURT: Mr. Jessup, hang on, because I forgot one  
2 more thing that I want to talk to the lawyers about real  
3 quick. Okay?

4 THE WITNESS: Okay.

5 THE COURT: I just want to go over scheduling really  
6 quick. So I anticipate breaking today at about quarter to  
7 12:00 and coming back at 1:15 because I have an appointment  
8 during the lunch hour. So just a regular schedule today. How  
9 long do you think this is going to take?

10 MR. TOBLER: I would hope to wrap up in a day, I think.

11 MR. BRENNER: Yeah, we're hopeful that either we finish  
12 -- that if we don't finish everything today, that all we're  
13 coming back for tomorrow is closing argument, is the hope.

14 THE COURT: Okay. Okay. Because I have some -- I have  
15 something going on tomorrow afternoon that requires me to be  
16 in, actually, another courtroom. So if you're not done today,  
17 then we'll figure that out. Okay.

18 MR. BRENNER: Your Honor, so you know, the schedule is  
19 that we planned on, just for witnesses and everything, is  
20 plaintiff and Absolute, and presumptively plaintiff will close  
21 and then we'd move to Rock Jung and the HOA.

22 I think we told Rock to come in the -- that we're  
23 going to -- we're going to give him a heads-up but probably  
24 plan on afternoon. And then Ms. Urie. But if Ms. Urie  
25 testifies, we expect it will be very brief.

1 THE COURT: Okay. And is anybody invoking the -- well,  
2 no, we don't have anybody to exclude, do we? So we're good.

3 MR. TOBLER: Do we have an --

4 THE COURT: Do you want to be --

5 MR. TOBLER: -- exhibit --

6 THE COURT: -- excluded? No? Okay.

7 MR. TOBLER: Do you have the exhibit book for the  
8 witness?

9 MR. BRENNER: We were going to use the -- I guess we  
10 brought two exhibits books, and maybe next time we'll bring  
11 three, but we were going to get --

12 THE COURT: No, no. We'll use the official set for the  
13 witness.

14 MR. BRENNER: Okay.

15 THE COURT: We'll just -- we'll kind of pretend.

16 MR. BRENNER: Did you want me to try to get this up and  
17 --

18 MR. TOBLER: No, that's fine.

19 MR. BRENNER: All right.

20 MR. TOBLER: No.

21 MR. BRENNER: We may need it but --

22 MR. TOBLER: I'm not -- I don't think I'm going to need  
23 to.

24 THE COURT: All right. Go ahead whenever you're ready.

25 MR. TOBLER: Okay.

## DIRECT EXAMINATION

BY MR. TOBLER:

Q Mr. Jessup, what is your affiliation with the plaintiff, Thomas Jessup LLC Series VII?

A The managing member, the only member.

Q And who are the members? You're a managing member, so the manager and the member?

A Yes, sir.

Q Okay. Is that a series limited liability company?

A Yes, sir.

Q What city do you currently reside?

A Henderson, Nevada.

Q How long have you lived in Las Vegas Valley?

A I moved here when I was two years old. I have been out a few times in -- with work.

Q You're a lifelong resident --

A Virtually.

Q -- pretty much?

A Virtually, yes.

Q Okay. What's the extent of your formal education?

A High school and four years of trade school.

Q And what was the trade school that you attended?

A Electrical.

Q Okay. Does that qualify you to have any certifications or licensed in any capacity?

1 A Well, eventually we were required licenses, so yes.

2 Q In what area?

3 A Journeyman electrician and master electrician in  
4 some states.

5 Q Okay. And you've done that for how long?

6 A 45 years.

7 Q 45?

8 A Yes, sir.

9 Q What's your current occupation?

10 A I'm retired.

11 Q Have you held any other occupations other than  
12 electrical journeyman?

13 A I was a realtor for one year in 1977, had a couple  
14 of deals and then I moved to Montana.

15 Q And those -- were those deals affiliated with  
16 commercial properties, residential? What type of deals --

17 A Residential.

18 Q -- were they? Residential?

19 A Yes, sir.

20 Q And you closed on two deals?

21 A That's a long time ago. That would be a couple.  
22 I'm going to say a couple.

23 Q Okay. So only a year in that field; is that  
24 accurate?

25 A Well, actually, less than a year.

1 Q Less than a year. Do you possess any special  
2 certifications or occupational recognitions?

3 A No, sir.

4 Q Okay. This action is in relation to the residential  
5 property known as 588 Bugle Bluff Drive, Henderson, Nevada.  
6 Are you familiar with that property?

7 A Yes, sir.

8 Q And who is the owner of that property?

9 A I am, Thomas Jessup, LLC.

10 Q Series VII?

11 A Series VII, yes, sir.

12 Q And how was that acquired?

13 A Through a foreclosure sale.

14 Q Okay. Are you married?

15 A No, sir.

16 Q Have you been married?

17 A Yes, sir.

18 Q When were you divorced?

19 A 1985.

20 Q Did you ever invest in real estate prior to 2012?

21 A No, sir.

22 Q Did your wife ever invest in real estate prior to  
23 2012?

24 A No, sir.

25 Q Did that somehow change in 2012?



1           A     Well, in 2012, yes, sir, I got involved with  
2 foreclosure sales.

3           Q     Okay. And what types of foreclosure sales did you  
4 become involved with?

5           A     Residential.

6           Q     How did you become introduced to buying at  
7 foreclosure sales?

8           A     Well, my brother-in-law was often always staying at  
9 the -- my home, and he mentioned that his daughter was  
10 purchasing homes at foreclosure sales. That's how I got  
11 involved with it.

12          Q     Were these conventional foreclosure sales or were  
13 they HOA lien foreclosure sales?

14          A     As far as I know, they were all HOA lien foreclosure  
15 sales.

16          Q     Okay. And who is your niece?

17          A     Daunshari Black Wong-Culotta.

18          Q     Okay. I'll just call her Daun, if that's okay. you  
19 know who I'm -- who I am intending, correct?

20          A     [No audible response].

21          Q     And which real estate firm did she affiliate with  
22 during 2012?

23          A     She had Powerhouse Platinum Real Estate --

24          Q     Okay.

25          A     -- Investment Group, I think it was, and CSC,

1 possibly, Investment Group.

2 Q All right. I'll refer to them then as CSC in future  
3 questions. Do you understand who that would be then?

4 A Yes.

5 Q Okay. Did you have her represent you in any  
6 dealings in 2012?

7 A Yes, sir.

8 Q And can you describe those dealings? I'm sorry.  
9 Did you -- did you have her represent you in any dealings  
10 prior to 2012?

11 A Oh. No, sir.

12 Q Okay. Now, you had indicated that you had been  
13 approached to invest in these sales; is that correct?

14 A Yes, sir.

15 Q Who approached you? Did Daun approach you about  
16 this?

17 A Initially, it was her father, John Black.

18 Q Okay. And what was your understanding as to what  
19 she'd be investing in for you?

20 A Purchasing these properties at the foreclosure  
21 sales. I guess that's basically it.

22 Q That's it. Okay. And what was your understanding  
23 of her role in obtaining these properties?

24 A She was the individual to go down and bid on the  
25 properties.

1 Q Okay. Did you have a written agreement between her  
2 in regard to the services she was providing to you for those  
3 sales?

4 A No, sir.

5 Q Do you feel that was necessary?

6 A Today I do, yes, sir. Would have been necessary,  
7 yes.

8 Q Okay.

9 A Should have been.

10 Q So she was your niece you say?

11 A Yes.

12 Q Because of the family relationship, is that why you  
13 believed you didn't need an agreement?

14 A Yes, sir.

15 Q Okay. And what is your relationship with her now,  
16 currently?

17 A Her and my entire family are extremely estranged.  
18 We have no relationship.

19 Q Okay. Is that a result of these foreclosure  
20 transactions?

21 A Yes, sir, and other things that I found out later.

22 Q Okay. Can you describe how you funded your monies  
23 for purchasing these properties for Daun -- or, by Daun?

24 A Yes, after retirement from the electrical union I  
25 had some retirement monies available. After being approached

1 by her father, then I was able to take and withdraw some of  
2 those monies and give them to her so she could purchase these  
3 properties.

4 Q What was your understanding as to how she acquired  
5 these properties for you at the time?

6 A My understanding was she would go to these  
7 foreclosure sales and bid for the properties and the highest  
8 bidder would obtain these properties.

9 Q Do you know whether she ever did any research or  
10 anything on these properties?

11 A Initially, she did. Maybe the first property that I  
12 purchased she did. After that I'm sure she did not.

13 Q Did she ever provide you any information about the  
14 properties that she was going to bid on on your behalf?

15 A No, sir.

16 Q What were your instructions to her in that regard in  
17 bidding?

18 A What was her instructions to --

19 Q What were your instructions --

20 A My instructions --

21 Q -- to her?

22 A -- to her?

23 Q Right.

24 A Purchase the homes at a reasonable price that she  
25 could purchase them at. In other words --

1 Q Was it pretty much, get the best deal or --

2 A Basically, yes.

3 Q Or the highest --

4 A Yes.

5 Q -- value or best deal?

6 A Or the best price.

7 Q Okay. Prior to the sale did you ever have any  
8 discussions with her about the properties themselves?

9 A No, sir.

10 Q Did she ever discuss with you maximum bid prices on  
11 any of these sales?

12 A No, sir. I left that up to her judgement.

13 Q Okay. And how many of these properties have you  
14 acquired through this HOA lien foreclosure process?

15 A I had originally acquired 13.

16 Q And were those all through Daun?

17 A Yes, sir.

18 Q What amount did Daun ultimately bid to acquire this  
19 property, Bugle Bluff?

20 A What did she bid on this property?

21 Q Yes.

22 A It was \$5,401.

23 Q Okay. And when you did ultimately have discussions  
24 with Daun, what did she advise about whether there were  
25 bidders at the sale? Did she advise you that there were other



1 bidders at the sales?

2 A Yes, sir.

3 Q Okay. Do you believe that Daun, at the time of  
4 purchase of this property, paid fair value for the property?

5 MR. BRENNER: Foundation, Your Honor.

6 THE COURT: Sustained.

7 BY MR. TOBLER:

8 Q It's alleged that -- Bank of America alleges that  
9 you paid an unreasonable amount to acquire the property. Do  
10 you understand that?

11 A Yes, sir.

12 Q And in your opinion, do you believe that the value  
13 you paid was fair at the time the sale went down?

14 A I do.

15 Q And why is that?

16 A Well, as multiple bidders had -- each bidder would  
17 bid up the price to the value that it was obtained at.

18 Q So is it your testimony there was an open market and  
19 it was done fairly?

20 MR. BRENNER: Leading.

21 THE COURT: Sustained.

22 BY MR. TOBLER:

23 Q Do you have any information that the sale was  
24 conducted unfairly?

25 A No, sir.

1           Q     At the time you invested did you have any  
2 understanding as to what a super priority lien was?

3           A     No, sir. I heard the term, but that's virtually it.

4           Q     So in light of that, you didn't have an  
5 understanding that the -- that the mortgage lender could lose  
6 their lien interest in the property if they didn't do certain  
7 things?

8           You didn't understand that?

9           A     No, sir.

10          Q     When Daun acquired the subject property, what was  
11 your expectation? What would happen with the property after  
12 you bought it?

13          A     Well, I was to understand that it would be rented or  
14 leased out for a certain length of time until other things  
15 transpired downstream from there.

16          Q     Okay. And did you understand that there was a  
17 mortgage recorded against the property?

18          A     I'm sure I did.

19          Q     Okay. Was that of concern to you, that there was a  
20 mortgage against the property?

21          A     Not at the time, no.

22          Q     Okay. Did you feel at some time you'd have to  
23 address that mortgage?

24          A     Yes.

25          Q     What's your current understanding of the law

1 relating to an HOA super priority lien?

2 A Like --

3 Q Just in simple terms.

4 A Pardon?

5 Q Just in simple terms.

6 A Well, a super priority lien, from what I understand  
7 today, that it can be wiped out because of the -- because of  
8 the foreclosure sale.

9 Q Okay. Do you know whether this property is  
10 marketable as you sit here today, i.e., can it -- can it be  
11 sold to a third party purchaser?

12 A No, sir.

13 Q Why is that?

14 A You know, it can't be sold because of the liens that  
15 are on it, the encumbrances or whatever.

16 Q Have you ever inquired about getting title insurance  
17 for one of these properties that you've acquired in this  
18 fashion?

19 A I have.

20 Q And what was your understanding of obtaining -- the  
21 ability to obtain that? Can you obtain a title -- a title  
22 policy?

23 A Well, I had -- I got an initial preliminary title  
24 search --

25 Q Right.

1           A     -- and it come back that it was -- there was no lien  
2 on it at that time. That was some months after the purchase  
3 of the property.

4           Q     But do you know whether you could get title  
5 insurance to sell it to a third party?

6           A     Title insurance wasn't discussed at that time. I  
7 was just doing a preliminary.

8           Q     Okay. Did you have any communication with any other  
9 party, other than Daun, prior to the time of the sale?

10          A     No, sir.

11          Q     Were you ever advised by Daun or any other third  
12 party that there was a dispute between the HOA and the bank?

13          A     No, sir.

14          Q     And prior to and at the sale were you advised by  
15 Daun or any other person as to whether anyone from the bank  
16 appeared for that foreclosure sale?

17          A     No, sir.

18          Q     When were you advised that Daun had acquired the  
19 subject property for you?

20          A     Probably six weeks after it was purchased.

21          Q     Okay. I want to have you look at Exhibit 14 in that  
22 book in front of you.

23          THE COURT: Did you say 14?

24          MR. TOBLER: 14, yes.

25          BY MR. TOBLER:

1 Q All right. This purports to be a trustee's date  
2 upon sale recorded on, it looks like, June 13th of 2012. Do  
3 you see that?

4 A Yes, sir.

5 Q And that was -- the grantee in that deed appears to  
6 be CSC Investment Group, LLC, correct?

7 A [No audible response].

8 Q In the first paragraph there.

9 A Yeah, the grantee.

10 Q It would be CSC Investments Group?

11 A Yes, sir.

12 Q Okay. And so Daun was an agent of CSC; is that  
13 correct?

14 A Yes.

15 Q And CSC was acquiring the -- were they acquiring the  
16 property for you at the sale?

17 A Yes, sir.

18 Q Okay. Do you know why that was necessary that it  
19 went to CSC and not you?

20 A At the time --

21 Q Or not -- I'm sorry. Jessup, LLC.

22 A At the time, I was not aware how -- no, I was not  
23 aware of that at the time. I've learned that since that time.

24 Q Okay. What did you find out since that time?

25 A Well, my understanding, after the number of

1 investments I've been involved with with Daun, was that very  
2 few of them were actually titled directly in my name, Thomas  
3 Jessup, LLC.

4 And then there was -- a majority of them were actually  
5 titled in something that she owned, CSC or whoever else was  
6 out there. And then she would select who she wanted the  
7 properties to go to.

8 Q Okay. And this property, how would you describe its  
9 condition when you received it?

10 A When I received it, I found out that the property  
11 had been totally trashed.

12 Q Okay. What do you mean by "trashed"?

13 A Well, very, very expensive to rehab the property,  
14 that some vagrants were living in the property.

15 Q Okay. And did you rehab that property?

16 A I did.

17 Q Do you have an approximate cost of what that  
18 involved?

19 A I'm going to say \$20,000.

20 Q Okay. And that's what it took to rehabilitate the  
21 property to make it marketable?

22 A Yes, sir.

23 Q Okay. Let me have you look at Exhibit 16, which is  
24 a quitclaim deed.

25 MR. BRENNER: I don't think so.



1 MR. TOBLER: 16?

2 MR. BRENNER: I've got a release of lien in mine.

3 MR. TOBLER: Oh, oh.

4 MR. BRENNER: Well, mine starts with a release of lien  
5 and then it goes to a quitclaim.

6 MR. COX: 15 is the release of lien, it should be.

7 MR. BRENNER: All right. Maybe my book is just messed  
8 up. I think --

9 THE COURT: The release of lien is 15, and 16 is the  
10 quitclaim deed?

11 MR. BRENNER: In my book it's not, but I can -- it looks  
12 like I just have extra copies of the release of lien --

13 THE COURT: All right.

14 MR. BRENNER: -- in front of the quitclaim deed so --

15 THE COURT: I don't.

16 MR. BRENNER: You don't. You're good? All right. It  
17 was just me.

18 MR. TOBLER: Yours conforms to mine then.

19 MR. BRENNER: All right.

20 MR. TOBLER: Okay.

21 THE COURT: It's just you.

22 MR. BRENNER: Sorry for derailing.

23 BY MR. TOBLER:

24 Q All right. Do you see that -- do you see that cover  
25 page, quitclaim deed, title of document there on --

1 A Yes, I do.

2 Q -- at the bottom -- at the bottom right you'll see a  
3 number. Does it say 101, BANA000101?

4 A Yes, sir. Yes, sir.

5 Q Okay. All right. So this is a quitclaim deed, and  
6 the quitclaim deed reflects that CSC is quitclaiming to Thomas  
7 Jessup, LLC. Do you see that on the second page?

8 A Yes, sir.

9 Q Okay. And so this quitclaim was dated August 17th,  
10 2012. Do you see that?

11 A Yes, sir.

12 Q Okay. So there was approximately two months that  
13 passed before you got title to this property --

14 A Yes, sir.

15 Q -- is that correct?

16 A Yes, sir.

17 Q Okay. I want to show you -- I want you to turn to  
18 Exhibit 18.

19 A Mine's empty.

20 Q Empty?

21 A Oh, I'm sorry. There is -- there is one sheet in  
22 it.

23 THE COURT: One page. You have one sheet? Is there not  
24 two?

25 THE WITNESS: Okay. I'm sorry.

1 THE COURT: Do you have 107 and 108, like the little T  
2 numbers on the bottom?

3 THE WITNESS: Oh. Yes, ma'am.

4 THE COURT: Okay. Good.

5 BY MR. TOBLER:

6 Q Okay. And this purports to be another quitclaim  
7 deed wherein Thomas Jessup, LLC quitclaims to Thomas Jessup  
8 LLC Series VII. Do you see that --

9 A Yes, sir.

10 Q -- up top there?

11 A Yes, sir.

12 Q Why was -- why was that a quitclaim from Thomas  
13 Jessup LLC to Thomas Jessup LLC Series VII?

14 A I changed my properties to series LLCs.

15 Q Okay. And is that the entity that currently holds  
16 title to the property?

17 A Yes, sir.

18 Q And have you kept current all the obligations and  
19 costs associated with maintaining this property?

20 A Yes, sir.

21 Q Does that include HOA dues?

22 A Yes, sir.

23 Q Also, taxes and insurance?

24 A Yes, sir.

25 Q Okay.

1 A Everything.

2 Q All right.

3 MR. TOBLER: I'll pass the witness.

4 CROSS-EXAMINATION

5 BY MR. HABDAS:

6 Q Good morning, Mr. Jessup.

7 A Good morning.

8 Q So I know earlier you had stated that for a brief  
9 period of time you worked in real estate. Is it correct that  
10 in 1977 you had a real estate license?

11 A Yes, sir.

12 Q Okay. And I know we already talked a bit about  
13 Thomas Jessup, LLC. Was it founded in May of 2012?

14 A Yes, sir.

15 Q And I believe you had said this, but was it created  
16 for the specific purpose of holding these HOA properties?

17 A Yes, sir. Acquire the properties at the HOA sales,  
18 yes, sir.

19 Q Okay. And then you begin -- you began buying these  
20 HOA properties in or around May of 2012; is that correct?

21 A Yes, sir.

22 Q Now, this particular property that we're discussing  
23 today, the Bugle Bluff property, was that the first HOA  
24 property you acquired?

25 A No, sir.

1 Q Okay. Now, before the purchase, did you do any  
2 review of any documents that were recorded against this  
3 property?

4 A No, sir.

5 Q Now, before the purchase, did you review the HOA  
6 CC&Rs for this property?

7 A No, sir.

8 Q Did you contact the HOA and ask it whether or not  
9 the bank had attempted to make payment for any part of the  
10 lien?

11 A No, sir.

12 Q Did you contact the HOA's trustee to see if the bank  
13 had made payment on any part of the lien?

14 A No, sir.

15 Q Did you contact the HOA's trustee to see if the bank  
16 had made payment on any part of the lien?

17 A No, sir.

18 Q Did you contact the bank to see if the bank had made  
19 payment on any part of the lien?

20 A No, sir.

21 Q And before the purchase, did you get an estimated  
22 market value for the property?

23 A No, sir.

24 Q And before the purchase, did you get a title report  
25 for this property?

1           A     No, sir.

2           Q     And had you ever stepped foot in the property before  
3 the purchase?

4           A     No, sir.

5           Q     Had you even driven by the property to look at it  
6 before the purchase?

7           A     No, sir.

8           Q     All right. So it's true that you didn't -- you did  
9 no research whatsoever on this property before the purchase,  
10 correct?

11          A     That is correct, sir.

12          Q     Now, you said that -- your testimony was that Shari  
13 had paid \$5,401 for this property; is that correct?

14          A     Yes, sir.

15          Q     Is that how much you paid her for the property?

16          A     Oh, no, sir.

17          Q     Okay. Do you know how much she took?

18          A     How much I paid her?

19          Q     Did you pay her more than that?

20          A     Yes, sir.

21          Q     Okay. How much did you pay for the property?

22          A     \$1,500.

23          Q     1,500?

24          A     Yes, sir.

25          Q     Okay. Now, you didn't attend this actual HOA sale,



1 did you?

2 A No, sir.

3 Q Okay.

4 THE COURT: I want to make sure I understand that  
5 correctly. So she paid \$5,401 and you paid her less money for  
6 the property?

7 THE WITNESS: No, ma'am. Over and above. \$1,500 -- she  
8 took a commission of -- I'm going to call it a commission of  
9 \$1,500.

10 THE COURT: So you paid her \$6,901?

11 THE WITNESS: I'm going to say yes. I gave her a block  
12 of money, and then she -- the first thing she would do at the  
13 sale is take out her commission.

14 THE COURT: Okay. So do you pay her the price of the  
15 property plus \$1,500?

16 THE WITNESS: Yes, ma'am.

17 MR. HABDAS: Great. That was a good -- thanks for the  
18 clarification.

19 BY MR. HABDAS:

20 Q Now, if I could have you turn to Exhibit 16, please.  
21 Now, we had already looked at this document previously, and  
22 you had said this was a quitclaim of the property to Thomas  
23 Jessup from CSC. You recognize this document, correct?

24 A Yes, sir.

25 Q Okay. Now, if we look at the first paragraph here,

1 the first full paragraph, it says that CSC is conveying  
2 forever quitclaim to Thomas Jessup LLC all of its interest, if  
3 any, to the property. Did I read -- do you understand that  
4 section?

5 A I'm not sure. Is that on the second page?

6 Q It's on the second page. Sorry.

7 A Okay. Okay.

8 Q First full paragraph. And I'll read it again.

9 A Sure.

10 Q It says CSC Investment Group LLC does hereby  
11 release, remise, and forever quitclaim to Thomas Jessup LLC --  
12 Thomas Jessup LLC, again, is repeated in there -- all of its  
13 interest, if any, in that certain real property commonly  
14 known, and it has the address. Did I read that correctly?

15 A I'm going to say yes, sir.

16 Q Okay. Now, if we turn over to the -- it's the last  
17 page of this exhibit, which is Bates stamped BANA105 on the  
18 bottom right.

19 A Bates stamped?

20 Q 105.

21 A Yes, sir. Go ahead.

22 Q Okay. Now, under section 4 here and section 3, this  
23 is for the tax amount paid. It notes under section 3 that  
24 there was no taxes paid. And under section 4 it states that  
25 there was a tax exemption due to a valid agency agreement.

1 Did you have an agency agreement with CSC?

2 A It's extremely difficult for me to answer that  
3 question because I don't know exactly what we're looking at  
4 here.

5 Q Well, it was your testimony earlier, I believe, that  
6 CSC was acting as your agent at the sale; is that correct?

7 A Yes, sir.

8 Q Okay. And I believe you had also said that there  
9 was no written contracts between you and CSC; is that correct?

10 A I'm going to say that is correct.

11 Q Now, during your testimony you had said that you  
12 thought that was fine at the time, but now I believe you said,  
13 in retrospect, you would want a written agreement. Why is  
14 that?

15 A Well, I understand from -- that some of the  
16 properties, again, were put in my LLC. Others were put in her  
17 LLC. And so she was basically selecting the properties to  
18 give to who. She was involved, her father was involved, and  
19 there was other investors involved.

20 Q Okay. So going from that, you had said earlier in  
21 your testimony that this particular property was -- CSC was  
22 there to buy this for Thomas Jessup LLC; is that correct?

23 A Let me explain that. Not necessarily for me,  
24 because it was titled in her -- in her LLC.

25 Q Understood. And so what -- she was there with CSC

1 to buy the property at that time, period, correct?

2 A Yes, sir.

3 Q And it was bought for CSC at that time, correct?

4 A Yes, sir.

5 Q Okay. And so her decision later to give you this  
6 particular property came afterwards; is that correct?

7 A Yes, sir.

8 Q Now, before going into the sale, did you give any --  
9 Shari any specific directions as to what the maximum price  
10 that you -- she could bid on a property for you was?

11 A No, sir. I would have expected her to use her  
12 discretion on them.

13 Q Okay. And were there any specific things you told  
14 her? If you see this, don't buy the property, for example?

15 A The only thing that I remember saying to her was --  
16 the first one she purchased was, for the lack of a better term  
17 at the time, in the ghetto. I says, keep me out of the  
18 ghetto.

19 Q Okay. So maybe a certain neighborhood or a set of  
20 neighborhoods that you didn't want houses in?

21 A And values, what I thought, but I'm not -- I did not  
22 convey that to her.

23 Q Okay. So you didn't convey anything as to value?

24 A No, sir.

25 Q Okay. All right. So would it be correct to say

1 that Shari selected this property completely on her own?

2 A To title in her name?

3 Q No, I'm sorry. I'll restate it. When she went to  
4 the sale and chose to bid on this particular property, you had  
5 no input on that, correct?

6 A No, sir.

7 Q Okay. And are you aware of any or what research  
8 Shari did before purchasing this property?

9 A No, sir, I'm not.

10 Q Okay. So she didn't convey that to you afterwards?

11 A No, sir.

12 Q Okay. All right. If I could have you look at  
13 Exhibit 13, please. And we're going to be looking at the  
14 second page, which is labeled BANA95.

15 A Okay.

16 Q Now, this document is the notice of this foreclosure  
17 sale. Do you know if you've seen this document before today?

18 A I can't say that I've seen it before today, sir.

19 Q Okay. But do you know what a notice of foreclosure  
20 sale is?

21 A Just a public notice.

22 Q Okay. So it's a public notice about this sale. On  
23 the second page here, we have a first full paragraph, and if  
24 you take a look here, the second sentence, I'm going to read  
25 this. It starts with the word said, and it says, said sale --

1           A     Okay.  What -- okay.  I'm with you.

2           Q     You're with me.  It says, said sale will be made but  
3 without covenant or warranty, express or implied.  Did I read  
4 that correctly?

5           A     Yes, sir.

6           Q     Okay.  Now I'm going to turn you to Exhibit 14.

7           A     Okay.

8           Q     All right.  And this is the trustee's deed upon sale  
9 that we looked at previously.  Now, the first full paragraph  
10 on this particular one has a section that starts with, does  
11 hereby grant on the second line.  Are you with me there?

12          A     Yes, sir.

13          Q     It says, does hereby grant and convey but without  
14 warranty, express or implied.  Did I read that correctly?

15          A     Yes, sir.

16          Q     Okay.  Now, Mr. Jessup, you had described earlier  
17 how you had found out about this type of foreclosure sale.  
18 And I believe you had said that you had learned about these  
19 through -- is it your brother-in-law?  Is that correct?

20          A     Yes, sir.

21          Q     Okay.  And what you had learned from your  
22 brother-in-law was that there was some money, perhaps, to be  
23 made in these types of sales; is that correct?

24          A     Through leasing.

25          Q     Okay.  And so then after speaking with him you



1 decided that you wanted to invest some money in these  
2 properties; is that correct?

3 A That is correct.

4 Q Okay. And you believed that that money -- at the  
5 time you believed that that money could be made by buying  
6 these properties through the HOA sale and then renting them  
7 out for a period of time until the bank foreclosed; is that  
8 correct?

9 A Yes, sir.

10 Q Okay. And you were fully aware that the bank might  
11 foreclose on the property, correct?

12 A Sir, I can't say that I knew that. I'm going to say  
13 yes, that I knew that.

14 Q Okay.

15 A I don't know when I learned that. Because in my  
16 involvement things progressed, what I learned.

17 Q Okay. So it was your intent -- Thomas Jessup LLC's  
18 intent to buy these properties -- buy this property and take  
19 title to it at the sale and try to make some money renting it  
20 out until the time the bank foreclosed again; is that correct?

21 A Yes.

22 Q Okay. Now, after the sale did Thomas Jessup  
23 actually rent this property out?

24 A Yes, sir.

25 Q Okay. And has it been rented out since the time of

1 the sale, since you acquired it?

2 A Yes, sir.

3 Q Do you know how much it was rented out for,  
4 approximately, per month?

5 A Currently, it's rented out at \$945 a month.

6 Q Okay. And did it ever vary?

7 A Sir, I can't answer that question.

8 Q Okay. So Thomas Jessup is -- has had this property  
9 and rented it out since the time of this sale, correct?

10 A Yes, sir.

11 Q All right. Now, after the sale did you do any  
12 research as to the fair market value of this property?

13 A No, sir.

14 Q Look at the website Zillow or any of those other  
15 websites?

16 A No, sir.

17 Q Do you know approximately how much rental income  
18 you've obtained?

19 A Oh, no, sir.

20 Q Okay. Do you have any reason to doubt that if we  
21 multiplied the 945 a month times the number of months that  
22 you've had the property that that would be approximately the  
23 amount of income you've received?

24 A I would say that it would be a little bit less than  
25 that because I do believe that -- I don't believe that it was

1 -- started out at 945 a month.

2 Q Okay. So there might be a little deviation if it --

3 A Sure. Yes, sir.

4 MR. HABDAS: That's all that I have.

5 CROSS-EXAMINATION

6 BY MR. COX:

7 Q Good morning, Mr. Jessup. My name is Shane Cox. I  
8 represent the HOA in this case, Foxfield Community Association  
9 and, also, Absolute Collection Services. Now, you stated that  
10 you had purchased approximately 15 properties; is that  
11 correct?

12 A 13.

13 Q 13. Do you know if you only purchased properties  
14 through foreclosure sales held by Absolute, or did you also  
15 purchase properties held by other --

16 A I'm going to assume there are others involved.

17 Q Okay. But you don't know --

18 A Correct.

19 Q -- for certain?

20 A No.

21 Q Do you know any employees from Absolute Collection  
22 Services?

23 A No, sir.

24 Q Do you have any business relationships with anyone  
25 from Absolute Collection Services or the company Absolute

1 Collection Services?

2 A No, sir.

3 Q Do you know any of the board of directors on this  
4 HOA, Foxfield Community Association?

5 A No, sir.

6 Q Do you know any of the owners of Complete  
7 Association Management Company, aka CAMCO?

8 A No, sir.

9 Q Do you have any business relationships with anyone  
10 that works or is a principal of CAMCO?

11 A No, sir.

12 MR. COX: That's all I have.

13 THE COURT: All right.

14 MR. TOBLER: Just a couple follow-up, Your Honor.

15 THE COURT: Go ahead.

16 REDIRECT EXAMINATION

17 BY MR. TOBLER:

18 Q Mr. Jessup, do you ever recall being advised of any  
19 dispute between the HOA and the bank, verbal or written?

20 A No, sir.

21 Q And was it your understanding that you had a verbal  
22 agreement with Daun concerning her agency and purchasing for  
23 you?

24 A Sir, that is my statement. There was one time in  
25 the handling of the monies I was giving her, there was a --

1 some kind of an agreement there.

2 Q Okay. But she -- you, in fact, paid her -- did you  
3 pay her to attend these sales for you?

4 A Again, I would give her a block of money she would  
5 put in her account, and then she would have those monies to  
6 purchase the properties. She had to have the money for the  
7 sale itself. Sometimes it was in cash and other means.

8 Q I think you testified that for each transaction you  
9 paid her \$1,500 for her services, correct?

10 A Yes, sir.

11 Q Okay.

12 A Yes, sir.

13 Q Now, I think you've testified, also, that you  
14 invested approximately \$20,000 to rehab this property?

15 A Yes, sir.

16 Q And that you paid about \$6,900 to acquire the  
17 property and pay agency fees?

18 A Yes, sir.

19 Q Okay. So you have about 27,000 into this out of  
20 pocket?

21 A Yes, sir.

22 Q And do you believe that you've yet recaptured that  
23 investment at this point in time as of yet?

24 A Because of all my attorneys' fees, no, sir.

25 Q Okay.

1 MR. TOBLER: All right. No further questions.

2 THE COURT: Thank you. Anything else?

3 MR. HABDAS: Nothing further here.

4 THE COURT: Anything else?

5 MR. COX: Nothing, no.

6 THE COURT: All right. Sir, you can go back to your  
7 seat. Thank you so much.

8 THE WITNESS: Thank you.

9 THE COURT: Mr. Tobler, do you have any other witnesses?

10 MR. TOBLER: Yes. The next witness is Kelly Mitchell.

11 THE MARSHAL: Kelly Mitchell?

12 MR. TOBLER: Yes.

13 MR. BRENNER: Do we just shake that and it comes on or is  
14 there a button? I don't know if it comes on automatically.

15 THE COURT: Did you say shake it?

16 MR. BRENNER: Okay. Well, I'm going to use it.

17 THE COURT: Okay.

18 MR. BRENNER: Well, I don't know.

19 THE COURT: You clap and then it comes on.

20 MR. BRENNER: Well, apparently. Apparently, that's all  
21 it takes.

22 THE MARSHAL: Remain standing, raise your right hand, and  
23 face the clerk to be sworn in, please.

24 KELLY MITCHELL, PLAINTIFF'S WITNESS, SWORN

25 THE CLERK: Thank you. Please be seated. State and



1 spell your name for the record.

2 THE WITNESS: Kelly Mitchell --

3 THE COURT: Oh, ma'am, go ahead and have a seat first.

4 THE WITNESS: Okay. Kelly Mitchell, K-E-L-L-Y,  
5 M-I-T-C-H-E-L-L.

6 THE COURT: All right. Thank you.

7 DIRECT EXAMINATION

8 BY MR. TOBLER:

9 Q Ms. Mitchell, this isn't your first time in court,  
10 is it, to testify on behalf of ACS?

11 A In this kind of atmosphere it is.

12 Q It is?

13 A Uh-huh.

14 Q Okay. Are you --

15 THE COURT: If you feel stressed, you're going to be  
16 fine. Don't worry about it.

17 BY MR. TOBLER:

18 Q I got some real easy questions for you, so it's just  
19 -- yeah. Are you currently employed?

20 A I am.

21 Q Okay. And who are you employed with?

22 A Absolute Collection Services.

23 Q Okay. And what is your occupation?

24 A I'm the collection manager and the owner.

25 Q And what was your occupation in 2011?

1 A The same.

2 Q And who was your employer in 2011?

3 A Absolute Collection Services.

4 Q Okay. What businesses does -- I'm going to call it  
5 ACS, if that's okay --

6 A That's fine.

7 Q -- to be short. What does ACS engage in?

8 A We collect delinquent assessments for HOAs.

9 Q So is your clientele entirely comprised of HOAs?

10 A They are.

11 Q Does it engage in the provision of nonjudicial  
12 trustee services?

13 A We do.

14 Q And, again, is that only with respect to HOAs?

15 A It is.

16 Q How long have you been employed by Absolute  
17 Collection Services?

18 A Since its inception in September of 2009.

19 Q And are you a principal to that company?

20 A I'm the owner.

21 Q You're the owner. The sole owner?

22 A Yes.

23 Q And what types of work did you do prior to 2009?

24 A I was an accounting director for an HOA management  
25 company.

1 Q Did that have any involvement with HOA lien  
2 foreclosure sales?

3 A It did.

4 Q In what respect?

5 A As the head of accounting I would work with the  
6 outside agencies regarding the nonjudicial foreclosures.

7 Q Okay. So you would hire trustees and you would  
8 communicate with them concerning sales?

9 A The HOAs would hire the trustees and I would work  
10 with them to communicate between the board, the management  
11 company, and the -- and the collection company.

12 Q Okay. And what are your tasks and duties associated  
13 with ACS?

14 A I'm in a little bit of everything. It's customer  
15 service, answering phones, filings, recordings, reviewing  
16 files.

17 Q Okay.

18 A Everything.

19 Q And how long have you engaged in trustee work?

20 A September of 2009.

21 Q Okay. Can you estimate the total number of  
22 nonjudicial foreclosure sales in what you have acted as  
23 trustee? Just an estimate. I'm not asking for a specific  
24 number.

25 A Altogether or during a certain year?

1 Q Altogether.

2 A Maybe 250, 300.

3 Q How about during 2012, if you can estimate that?

4 A Maybe 125, 130.

5 Q And what is the trend for the years of HOA  
6 foreclosure lien -- or, foreclosures maybe from 2009 to  
7 current? What's the trend?

8 A In 2009 we didn't have too many because we started  
9 in September. So our first foreclosures really happened in  
10 2010. And I would have to say during the time period of 2011  
11 to 2012 they soared right along with the marketplace. In 2014  
12 it started to wind down. And now, hardly any.

13 Q Hardly any now?

14 A Yes.

15 Q Why do you think it soared in 2011 and '12?

16 A Just my opinion, everything was kind of crashing at  
17 that time.

18 Q Okay. I want to have you look at that book in front  
19 of you. I want to flip to Exhibit 23. Just take a look at  
20 those documents in Exhibit 23, if you would for a second.

21 A Okay.

22 Q Do you recognize those documents?

23 A I do.

24 Q Okay. What are they?

25 A They appear to be our documents throughout the

1 foreclosure process.

2 Q Is that exhibit the full content of ACS's file  
3 regarding this nonjudicial foreclosure?

4 A I believe it is.

5 Q And that would be 588 Bugle Bluff Drive?

6 A Yes.

7 Q And did you have an opportunity to review any of  
8 these documents before you came in to testify today?

9 A I just reviewed the status report, really, which is  
10 the time period --

11 Q Okay.

12 A -- of events.

13 Q And that would be from inception of a lien to the  
14 foreclosure?

15 A It would.

16 Q Okay. Are you the person most knowledgeable with  
17 ACS concerning the content of this particular file?

18 A I am.

19 Q And did you completely work this file from start to  
20 finish?

21 A Not just me alone, but yes, I --

22 Q You supervised it?

23 A Yes.

24 Q Okay. And were you, in fact, the person with ACS  
25 that conducted the HOA lien foreclosure services for this

1 property? I guess I asked that already so --

2 Did you -- did you appear for the sale on this property?

3 A No.

4 Q Who did that?

5 A That would be Sin City Realty.

6 Q And what is she to ACS?

7 A That's our outside company that we hire to post and  
8 to publish the sales.

9 Q And what was her name?

10 A Sin City Realty.

11 Q Sin City. So in the course of giving -- did you  
12 give the notice -- did ACS give the notices for the sale on  
13 this property?

14 A We recorded the notices and then we provided it to  
15 Nevada Legal News and to Sin City in order to post and  
16 publish.

17 Q Did you get -- did you give the mailings for the  
18 notices?

19 A We did the mailings. It was through a third party  
20 mailer.

21 Q Okay. And are the mailings within this file in  
22 Exhibit 3 before you?

23 A They are.

24 Q Okay. What's the first notice that gets mailed out  
25 on the -- in this foreclosure process?

1           A     That would be -- from our offices that would be the  
2 pre-lien, and it goes first class and certified to the owner.

3           Q     And what does -- what does that entail?

4           A     It's a demand for payment saying how much is owed,  
5 what some of the options are, and then it includes our price  
6 list.

7           Q     And is that only sent to the owner?

8           A     It is.

9           Q     Okay. And how long do you wait before you take  
10 further action after no action?

11          A     30 days.

12          Q     Okay. And then what happens?

13          A     If there's no response, then we get a ledger from  
14 the management company, we record the lien, and then we send  
15 the lien first class and certified to the owner.

16          Q     The owner only?

17          A     Only.

18          Q     Okay. And if that's not paid, then what happens?

19          A     Then we get another ledger, we send out a pre-notice  
20 of default letter, and that goes out first class and certified  
21 to the owner.

22          Q     The owner only?

23          A     Yes.

24          Q     Okay. And if there's no action on that, what  
25 happens next?



1           A     Then we get a trustee sale guarantee report, we  
2 record a notice of default, and we send that first class and  
3 certified to all parties that are on the notice -- or, on the  
4 trustee sale guarantee report.

5           Q     Okay. So the recipients of the notice of default  
6 are on the trustee sale guarantee?

7           A     They are.

8           Q     Okay. Based upon Exhibit 23, do you know who the  
9 mortgagees on the property were, the banks? Who were the  
10 banks on the property?

11          A     They would be listed on Exhibit 3 from the mailings,  
12 so yes.

13          Q     Okay. I'm going to have you look at page 35.  
14 There's a real small -- ACS00035 at the bottom. Is that the  
15 page you're referring to?

16          A     Well, this is our proof of mailing from our third  
17 party mailer, so these are the parties that got mailed.

18          Q     Okay. So Bank of America was --

19          THE COURT: Mr. Tobler, did you say page five?

20          MR. TOBLER: Page -- Bates stamp 35.

21          THE COURT: 35. Okay.

22          MR. TOBLER: Yeah.

23 BY MR. TOBLER:

24          Q     So SFG Mortgage was one that it was sent to?

25          A     Correct.

1 Q And that was unclaimed?

2 A Correct.

3 Q And Bank of America was sent a notice?

4 A Correct.

5 Q And it's confirmed delivered?

6 A Correct.

7 Q Okay.

8 MR. TOBLER: Wow.

9 MR. BRENNER: I know. You need a magnifying glass.

10 BY MR. TOBLER:

11 Q I want to have you turn to page 28, Bates stamp 28,  
12 and you have to get a microscope.

13 MR. BRENNER: Somebody thought it would be a funny joke  
14 at trial.

15 MR. TOBLER: Yeah, it is.

16 THE WITNESS: Okay.

17 BY MR. TOBLER:

18 Q Okay. Pages 29, 30, and 31 are either not marked or  
19 marked very small, but they are the following three pages  
20 after 28. Do you see those three pages?

21 A I do.

22 Q And does that reflect notices going out to SFG  
23 Mortgage?

24 A It does.

25 Q Now, I want to have you look at -- oh, my gosh --

1 page 25. Is that the mailing for Bank of America?

2 A It is.

3 Q Okay. So I want to have you go back to page 35 and  
4 I want you to describe what this sheet means. This one you  
5 can actually read.

6 A This is the printout from our third party mailer  
7 indicating which people were mailed and the processing of it.

8 Q Okay. And this is with respect to the NOD, correct?

9 A Correct.

10 Q And take a look at page 38. This appears to be an  
11 NOD, notice of default, recorded on September 6th of 2011,  
12 correct?

13 A Correct.

14 Q Okay. And if you look on page 22, there's another  
15 NOD, and it reflects the date of July 18th, 2011. Do you see  
16 that?

17 A I do.

18 Q Do you know why there were two?

19 A The one on page 22 --

20 Q Yes.

21 A -- is ours.

22 Q Okay.

23 A And on page 38, I believe this is someone else's.

24 Q The backup? Or it's not applicable to this case --  
25 or, this property?

1 A Well, it's applicable to the property, I believe.

2 It's just not ours.

3 Q Okay.

4 A We would have received this from another party.

5 Q All right. And would the one on page 38 be -- you  
6 say it's somebody other than you?

7 A [No audible response].

8 Q Do you know who that is?

9 A I imagine the bank.

10 Q Okay. So is it your understanding that you filed  
11 the first NOD and the bank filed the next NOD subsequent?

12 A It is.

13 Q Okay. I'm going to have you look at page 40 of this  
14 Exhibit 23. I'm going to call this the Miles letter for  
15 future testimony. Okay?

16 A Okay.

17 Q All right. And this is a letter to you, correct?

18 A Correct.

19 Q And what is this letter about? Why do you get --  
20 why did you get this letter?

21 A I got this letter because they received the notice  
22 of default that was sent, and they were stating their position  
23 regarding super priority amounts and asking for a statement, I  
24 believe.

25 Q Okay. And is this something you had received

1 previously, this type of letter?

2 A Yes.

3 Q And is it generally with Bank of America that you  
4 receive these letters?

5 A Yes.

6 Q So approximately how many of these letters had you  
7 received before this letter was received of this type?

8 A Well, this one was in 2011 --

9 Q Right.

10 A -- and the letters started in 2010, so several.

11 Q So the letters started in 2010? Is that what you  
12 said?

13 A Yes.

14 Q Okay. And before that, would you get any feedback  
15 from the banks?

16 A Like I said, we started in 2009, so I didn't really  
17 see the letters until 2010.

18 Q Okay. All right. Fair enough.

19 Okay. So on the second to the last paragraph on page 41  
20 it says, please let me know what the status of any HOA lien  
21 foreclosure sale is, if any. Do you see that?

22 A I do.

23 Q Did you give a status of the lien foreclosure sale  
24 after that letter?

25 A I responded with our letter.

1 Q Okay. Is that evidenced by page 43?

2 A It is.

3 Q Is this a letter you personally wrote?

4 A No.

5 Q Who wrote this letter?

6 A I have counsel assist me in everything that I do.

7 Q Okay.

8 A And so I asked him to review and assist me in  
9 responding to the Miles Bauer letter. So he wrote the  
10 language that was in this letter.

11 Q And what does -- what does the transaction report at  
12 the top of the letter represent?

13 A That's a fax.

14 Q Okay. And does it show a fax being received, this  
15 fax -- or, this page being received?

16 A It does.

17 Q To the number that's on that fax -- on that report?

18 A It does.

19 Q Okay. I want to read to you the first paragraphs of  
20 your response letter. It says, I'm in receipt of your most  
21 recent correspondence regarding a statement of account for the  
22 above mentioned property.

23 Please note that in conversations past you had stated  
24 your client's position of paying the nine months of  
25 assessments and no late fees, collection costs, et cetera, all

1 occurring before the foreclosure by your client. I am making  
2 you aware that this is our view that without an action of  
3 foreclosure, a nine-month statement of account is not valid.

4 At this time, I respectfully request that you submit to  
5 the trustee's deed upon sale showing your client's possession  
6 of the property and the date it occurred. At that time we  
7 will provide a nine-month super priority lien statement of  
8 account.

9 Now, was it -- was it apparent that Miles was trying to  
10 break some type of protocol that you had with them previously?

11 MR. BRENNER: Vague and leading.

12 THE WITNESS: I don't --

13 THE COURT: Hold on just a second, ma'am. Sustained.

14 BY MR. TOBLER:

15 Q What was your understanding as to why you had stated  
16 these two paragraphs in the front end of this letter?

17 A Counsel had assisted me in preparing the letter.

18 Q Okay.

19 A So at this time, this was our response. I  
20 communicated what counsel indicated because I believe that was  
21 the best way to be protected on that.

22 Q Okay. And so do you not have an understanding as to  
23 what the prior protocol was?

24 A I didn't have a protocol with Miles Bauer.

25 Q Okay. Because you had gone through counsel in that



1 -- in that respect?

2 A I'm just really not understanding the question, to  
3 be honest.

4 Q Okay. So it seems that there were prior  
5 conversations with Miles in your first paragraph here?

6 A Correct.

7 Q Okay. Were those conversations with you or someone  
8 else?

9 A They were with Rock Jung at Miles Bauer with me.

10 Q Okay. And what was their position of paying nine  
11 months of assessments all occurring before the foreclosure by  
12 their client?

13 MR. BRENNER: Objection to the extent it's calling for  
14 hearsay about prior conversations.

15 MR. TOBLER: I understand. What was her understanding?

16 THE COURT: Do you have a response to the hearsay  
17 objection?

18 MR. TOBLER: Yeah, I'm asking, what was her  
19 understanding, not what was said or the truth of the matter  
20 said.

21 THE COURT: Overruled.

22 THE WITNESS: Okay.

23 THE COURT: You can answer, ma'am.

24 THE WITNESS: Rock and I had conversations regarding what  
25 his position was on those super priority amounts, and he -- on

1 the -- on the letters and on the checks they had indicated  
2 that they were payment in full.

3           However, Absolute went by the commission for common  
4 interest communities and hotels advisory opinion that came out  
5 in December of 2010 indicating that collection costs were  
6 included in the super priority amounts. We agreed to disagree  
7 on those matters, and so we would provide statements when  
8 requested through the right channels in our office.

9 BY MR. TOBLER:

10       Q     And then would Miles make their own interpretation  
11 of what amount was owed at that point?

12       MR. BRENNER: Calls for speculation.

13       MR. TOBLER: She has firsthand knowledge of what happened  
14 in these prior conversations and dealings.

15       MR. BRENNER: She can't know what Miles Bauer did with  
16 those documents.

17       THE COURT: Sustained.

18 BY MR. TOBLER:

19       Q     Do you have an understanding as to what Miles did  
20 with those documents you gave them?

21       A     Sometimes they would remit payments. Sometimes they  
22 wouldn't.

23       Q     Okay. Is there anything in this letter that says to  
24 Miles that you would refuse any amount short of the full  
25 amount due?

1 A No.

2 Q Third paragraph in the second sentence. It says, we  
3 intend to proceed on the above mentioned account up to and  
4 including foreclosure. Do you see that?

5 A I do.

6 Q And it says -- at the bottom sentence it says,  
7 should you provide us with a recorded notice of default of  
8 notice of sale, we will hold our action to -- we will hold our  
9 action so your client may proceed. Do you see that?

10 A I do.

11 Q Did you ever receive a response from Mr. Rock after  
12 this correspondence?

13 A I don't believe so. I'm looking for the status  
14 report to --

15 Q Okay.

16 A -- be sure.

17 MR. COX: It's on page 132, if you wanted to know.

18 BY MR. TOBLER:

19 Q 132 I'm told is -- might be the page.

20 A Okay. Thank you. No, we did not.

21 Q If requested, would you have provided a statement of  
22 account to Miles Bauer?

23 A Yes.

24 Q Would you charge them?

25 A Yes.

1 Q Are you entitled by statute to charge, do you know?

2 MR. BRENNER: Calls for a legal conclusion.

3 BY MR. TOBLER:

4 Q In your experience as a trustee, do you know of a  
5 statute where you're entitled to receive a fee for providing  
6 an account statement?

7 MR. BRENNER: Same objection.

8 THE COURT: Sustained.

9 BY MR. TOBLER:

10 Q What is the basis for your charging of a fee?

11 A Whenever we do work on the file, we would charge the  
12 fee for it. It takes us -- after receiving the ledger it  
13 takes us about a half an hour or 45 minutes to audit and  
14 create the statement with the time periods, dates, breakdowns.

15 Q Okay. And based upon the lack of response, did ACS  
16 proceed with the foreclosure on this matter?

17 A We did.

18 Q Did you record a notice of sale after this letter  
19 was received -- or, was sent by you?

20 A Yes.

21 Q And you had no response to the notice of sale?

22 A No.

23 Q When did the sale occur? Let me turn you to page  
24 106. If you could advise by that document when the sale  
25 occurred.

1 A June 12th, 2012.

2 Q So between your letter nine months previously and  
3 the time of sale, you never heard from -- back from Mr. Jung?

4 A Correct.

5 Q Do you know whether any representatives of Bank of  
6 America appeared at the foreclosure sale?

7 A I don't.

8 Q Did you hear from anyone else at the Miles firm  
9 concerning the foreclosure on this property after your letter  
10 to Miles -- Mr. Jung?

11 A I didn't.

12 Q What was the next action after your letter in  
13 dealing with Bank of America?

14 A Well, the next notice would have been the notice of  
15 trustee sale.

16 Q Okay. But after the sale, what was your -- what was  
17 your next involvement with Bank of America concerning the  
18 sale?

19 A I don't believe we had any.

20 Q Okay. Would it be the subpoena that you issued  
21 these documents with?

22 A Yes.

23 Q Okay. Do you know how many people appeared for this  
24 foreclosure sale?

25 A I don't.

1 Q Have you ever appeared for these types of sales?

2 A Not really.

3 Q Okay. I'm going to have you look at page 107, and  
4 this is the second page of the trustee's deed upon sale. And  
5 I want you to look at the first full paragraph, third line,  
6 and I'm going to read it for you here.

7 It says Absolute Collection Services LLC has complied  
8 with all requirements of law, including, but not limited to,  
9 the elapsing of 90 days, mailing of copies of notice, of  
10 delinquent assessment, and notice of default and the posting,  
11 publication -- and publication of the notice of sale.

12 Do you see that there?

13 A I do.

14 Q As you sit here today, is that statement still true?

15 MR. BRENNER: Calls for a legal conclusion.

16 THE COURT: Sustained.

17 BY MR. TOBLER:

18 Q Do you have any information or have you had any  
19 conversations with anyone advising that the notices were  
20 improper?

21 A No.

22 Q Do you have any information or communications with  
23 others that Bank of America did not receive any of these  
24 notices that were mailed to Bank of America?

25 A No.

1 Q Do you know whether -- did the successful bidder at  
2 this property, did they pay \$5,401?

3 A They did.

4 Q And at that time in 2012 was that bid price unusual,  
5 given the amount of lien being foreclosed on?

6 A No.

7 Q What was the amount of the lien when Bank of America  
8 was first provided notice of the foreclosure?

9 A That would be on the notice of default. I forget  
10 what page it is. 22 in the micro-writing.

11 Q Okay.

12 A It appears to be 1,642.66.

13 Q And if Bank of America had paid that amount at that  
14 time the notice was issued, would you have rescinded the sale  
15 or caused the sale to be rescinded?

16 A It wouldn't have been sold at that time.

17 Q I understand. But if they came in and paid that  
18 amount, would there be a need to proceed with a foreclosure?

19 A No.

20 Q And so it would be -- would it be canceled?

21 A It would.

22 Q And how much had the lien accrued to at the time the  
23 sale took place?

24 A I'm sorry. I'm looking for the bid sheet, but I'm  
25 believing it would have been right around the 5,400. There we



1 go. Yeah, 5,400 was the opening bid.

2 Q Even?

3 A Even.

4 MR. BRENNER: Could we get the witness to say what page  
5 she was looking at?

6 THE WITNESS: I'm sorry. 114.

7 MR. BRENNER: Thank you.

8 THE COURT: Was that your question, Mr. Tobler?

9 MR. TOBLER: I'm sorry?

10 THE COURT: Was that your question? I think --

11 MR. TOBLER: What did it accrue to at the time of the  
12 sale, the lien amount.

13 THE COURT: How much was the actual HOA lien at the time  
14 of the sale?

15 THE WITNESS: At the time of the sale the opening bid was  
16 5,400.

17 THE COURT: So was that what was owed?

18 THE WITNESS: That's what was owed.

19 THE COURT: Okay.

20 BY MR. TOBLER:

21 Q And based on the record, was --

22 THE COURT: Was that even -- 5,400 even?

23 THE WITNESS: I round to the nearest 50.

24 ///

25 BY MR. TOBLER:

1 Q And based on the records that you have before you,  
2 was CSC Investment Group LLC the successful bidder?

3 A They were.

4 MR. TOBLER: That's all I have.

5 THE COURT: Mr. Brenner.

6 MR. BRENNER: I'm going to jump in and say I need five?

7 THE COURT: Perfect. We're going to take a -- just a  
8 quick break.

9 THE WITNESS: Okay.

10 MR. BRENNER: Your Honor, I would just ask -- I'd just  
11 remind the witness, since, I think, you know, it's her first  
12 time, not to talk with anybody.

13 THE COURT: Yeah, don't talk to anybody about your  
14 testimony. All right?

15 THE WITNESS: Okay.

16 THE COURT: Okay.

17 MR. BRENNER: Thank you.

18 [Recess at 10:22 a.m.]

19 MR. BRENNER: All set?

20 THE CLERK: Yes.

21 CROSS-EXAMINATION

22 BY MR. BRENNER:

23 Q Good morning, Ms. Mitchell. My name is Darren  
24 Brenner. I'm the attorney for Bank of America and Bank of New  
25 York Mellon.

1           You said your position since 2011 with Absolute is  
2 collection manager and owner?

3           A       Since 2009.

4           Q       Since 2009. Have you been the sole owner since  
5 2009?

6           A       I had a partner from 2009 to two thousand, I want to  
7 say, twelve. I can't really remember.

8           Q       And who was that partner?

9           A       Ken Williams.

10          Q       And I know you said you worked with a management  
11 company prior to 2009. What was that management company?

12          A       CAMCO.

13          Q       Do you have an understanding of who the property  
14 manager is for the Foxfield HOA?

15          A       I believe the association manager was Suzanne  
16 Darnell.

17          Q       I'm sorry. Who's the property management company?

18          A       CAMCO.

19          Q       And that was true back in 2011?

20          A       It was.

21          Q       Who was the owner of CAMCO in 2011?

22          A       Ken Williams.

23          THE COURT: I'm sorry. Who was?

24          THE WITNESS: Ken Williams.

25          BY MR. BRENNER:

1 Q So Ken Williams was co-owner of Absolute with you  
2 and he was the owner of CAMCO in 2011; is that correct?

3 A Correct.

4 Q Did CAMCO and Absolute maintain different offices?

5 A We did.

6 Q Okay. In your position as collection manager and  
7 owner, are you familiar with Absolute's collection policies  
8 and procedures since 2009?

9 A I am.

10 Q And are you also familiar with Absolute's policies  
11 and procedures for taking properties to HOA foreclosure sales?

12 A I am.

13 Q Are you familiar with Absolute's policies and  
14 procedures in 2011 and 2012 for handling of notices of  
15 delinquent assessment lien?

16 A I am.

17 Q And notice of default?

18 A I am.

19 Q And notices of sale?

20 A I am.

21 Q Okay. Are you familiar with Absolute's policies and  
22 procedures for accepting payments on delinquent accounts  
23 during this period of time, 2011, 2012?

24 A I am.

25 Q Are you familiar with Absolute's policies and

1 procedures for accepting payments from lenders during this  
2 period of time?

3 A I am.

4 Q And are you familiar with Absolute's policies and  
5 procedures for the handling of payments towards the super  
6 priority portion of a lien by the holder of a first deed of  
7 trust in 2011 and 2012?

8 A I am.

9 Q And you're familiar with the law firm of Miles  
10 Bauer?

11 A I am.

12 Q And based on your testimony earlier, that's in the  
13 course of your dealings with its attempts to pay off the super  
14 priority portion of the lien?

15 A Correct.

16 Q You're familiar with the policies and procedures for  
17 Absolute in maintaining collection files?

18 A Yes.

19 Q And it is your testimony that Absolute conducted the  
20 collection efforts with the property at 588, B-U-G-L-E, Bugle  
21 Bluff Drive?

22 MR. TOBLER: Bugle.

23 MR. BRENNER: I may have written it down wrong. Bugle?  
24 Is it Bugle? Yeah. I can't read my own handwriting.

25 THE WITNESS: It is.

1 BY MR. BRENNER:

2 Q And that was on behalf of the Foxfield Community  
3 Association, correct?

4 A Correct.

5 Q All right. I'm going to ask you to take a look at  
6 Exhibit 5, which is -- I'll put it up. Are you familiar with  
7 this document?

8 A I am.

9 Q And what is it?

10 A This is our recorded lien.

11 Q Who prepared this document?

12 A Richard did.

13 Q And who is Richard?

14 A He's our general manager.

15 Q And that's Richard Kaye?

16 A It is.

17 Q K-A-Y-E, correct?

18 A Correct.

19 Q All right. And your signature appears on this  
20 document as well?

21 A Correct.

22 Q And what was the purpose of your signature on this  
23 document?

24 A I reviewed it and notarized it.

25 Q And what's your understanding as to why this was

1 prepared?

2 A There was a delinquent assessment, and per NRS 116,  
3 you record the lien and you send it to the owner.

4 Q And you said that earlier. You just sent this  
5 document to the owner, correct?

6 A Correct.

7 Q You did not send it to Bank of America, correct?

8 A Correct.

9 Q You did not send it to Bank of New York Mellon,  
10 correct?

11 A Correct.

12 Q Okay. But you did record the document, correct?

13 A Correct.

14 Q All right. Did the homeowner association -- if I  
15 just say the HOA, I'm referring to Foxfield. Is that okay?

16 A Yes.

17 Q Did the HOA authorize Absolute to prepare this  
18 document?

19 A They did.

20 Q Is there a document that memorializes that  
21 authorization?

22 A The contract.

23 Q And can you point us to that contract in the file,  
24 if there is one.

25 [Pause]

1 Q Let me ask you this: Would it be your standard  
2 procedure to put that contract in the collection file?

3 A It is, and I saw it on the intake form. At that  
4 time, it was a paragraph on the intake form. Which, for the  
5 life of me, I can't see right now.

6 Q My colleague is suggesting it might be found in the  
7 HOA production on page 71, which is Exhibit tab 22. I think  
8 your file is Exhibit tab 23.

9 A Yes, that would be it.

10 Q And how far through the process would this  
11 authorization take Absolute, based on its policies and  
12 procedures?

13 A It would take us through the notice of sale.  
14 However, we also had the board sign an authorization to  
15 publish before we'd actually file the NOS.

16 Q Okay. All right. And looking at -- I'm not going  
17 to put it up on the Elmo because we have the notice of lien up  
18 there, but looking at Exhibit tab 22, the document marked  
19 FOX71, it's your understanding that that document was executed  
20 by the homeowner association?

21 A It was executed by the management company on behalf  
22 of the HOA, who would have signed off on that in a meeting.

23 Q And it's your understanding that the management  
24 company was working on behalf of the HOA?

25 A Correct.



1 Q And that management company is CAMCO, correct?

2 A Correct.

3 Q All right. I know you said that this notice of  
4 delinquent assessment lien wasn't provided to Bank of America  
5 or Bank of New York Mellon. Was it your policy to provide  
6 this type of document to the beneficiary of a first deed of  
7 trust?

8 A No.

9 Q And I believe that you testified this is the first  
10 of three notices or different types of notices that were  
11 recorded in relation to the sale, the second being the notice  
12 of default, the third being the notice of sale?

13 A Correct, notice of recorded of documents.

14 Q Correct. Correct. Recorded documents.

15 Did you charge for all of those documents? Did you  
16 charge the HOA?

17 A We charged the account, yes.

18 Q What's the difference between charging the HOA and  
19 charging the account?

20 A Because we're hopefully getting the homeowner to  
21 remit the payment and not the HOA.

22 Q Okay. At what point would the HOA have to pay those  
23 amounts?

24 A After sale.

25 Q After sale. So only -- so Absolute only gets paid

1 if the property goes to sale?

2 A No. If it doesn't go to sale, if they want to  
3 cancel the file, they can do that as well, but they would need  
4 to remit the invoice.

5 Q Okay. So the scenarios are, the HOA can cancel the  
6 sale and then the HOA has to pay your fees or the HOA goes  
7 forward with the sale and then Absolute is paid after the  
8 sale?

9 A Correct.

10 Q What if the property doesn't sell at auction?

11 A If it gets reverted back to the HOA, then they have  
12 the option of leasing out the property.

13 Q The HOA could then lease out the property?

14 A Yes, and we would hold our fees in abeyance for  
15 that.

16 Q And then would you take money from the lease  
17 agreement?

18 A The rents, yes.

19 Q So one way or another, once this process is started,  
20 if the HOA doesn't go forward with the sale, the HOA is paying  
21 for whatever costs you've incurred?

22 A Correct.

23 Q Now, I know you mentioned that there were two  
24 nonrecorded notices that were consistent both with this file  
25 and your policies and procedures, correct?

1 A Correct.

2 Q And did ACS charge for those notices?

3 A We did.

4 Q And you said neither of those unrecorded notices  
5 were provided to Bank of America or Bank of New York, correct?

6 A Correct.

7 Q Would you agree with me that, typically speaking,  
8 the lien is going to be smallest at the time of the notice of  
9 delinquent assessment lien as compared to the notice of  
10 default or the notice of sale?

11 A I would.

12 Q And that's because once a homeowner has stopped  
13 paying, they generally have ceased paying permanently,  
14 correct?

15 A In some cases, yes.

16 Q And if you're -- and if they have paid, you're  
17 probably not going to be issuing a notice of default or a  
18 notice of sale, correct?

19 A Correct.

20 Q All right. Let's take a look at the notice, if we  
21 can. At the top of this I've highlighted the statement I'm  
22 going to read. This notice of delinquent assessment is being  
23 given pursuant to NRS 117.70 et seq. or NRS 116.3115 et seq.  
24 and the declarations of covenant conditions and restrictions  
25 (CC&Rs) of the homeowners' association. Did I read that

1 correctly?

2 A You did.

3 Q Okay. There is not a copy of the CC&Rs in your  
4 collection file; is that correct?

5 A Correct.

6 Q Did you review the CC&Rs prior to proceeding with  
7 this sale?

8 A No.

9 Q Why not?

10 A If there -- the association, as well as our steps  
11 that we follow in NRS 116, if there was any additional steps  
12 that they needed us to take, then there would have been an  
13 addendum done and we would have taken it that way.

14 Q So how do you know that the sale -- that this lien  
15 was recorded consistent with the CC&Rs?

16 A I'm relying on the HOA and the absence of an  
17 addendum.

18 Q So you didn't obtain a copy of the CC&Rs, correct?

19 A Correct.

20 Q You didn't review a copy of the CC&Rs, correct?

21 A Correct.

22 Q And, in fact, your policy was not to obtain or  
23 review the CC&Rs; is that correct?

24 A Correct.

25 Q And the sole basis for the statement that the notice

1 of lien was pursuant to the CC&Rs was the absence of an  
2 addendum, correct?

3 A Correct.

4 Q Now, this says the total amount due is \$793.63; is  
5 that correct?

6 A Correct.

7 Q Would you agree with me that nowhere in this  
8 document is the amount of the monthly assessment set forth?

9 A Correct.

10 Q Doesn't tell you the number of months in arrears?

11 A Correct.

12 Q It doesn't include a specific figure that Absolute  
13 would have considered to be the super priority amount at this  
14 time?

15 A Correct.

16 Q The words super priority aren't stated in this  
17 document; is that correct?

18 A Correct.

19 Q Would you agree with me that there is no way to  
20 extrapolate from this document what nine months of delinquent  
21 assessments would have been for this particular delinquency?

22 A Correct.

23 Q Could I get you to take a look at Exhibit 23, the  
24 first page. Do you recognize this document?

25 A I do.

1 Q I'll just put it up on the Elmo. What is it?

2 A This is the management company's ledger for the HOA,  
3 I believe, at the time that we took in the file.

4 Q All right. I don't know if it's doing any -- doing  
5 some good to put this on the Elmo. It's small. But do you  
6 see where I've highlighted a bunch of things that say QA?

7 A I do.

8 Q What does that stand for?

9 A Quarterly assessment.

10 Q What does that mean for there to be a quarterly  
11 assessment?

12 A That means that's the amount that the homeowners pay  
13 each quarter.

14 Q Sometimes you've seen -- you've seen a monthly  
15 assessment, right?

16 A Correct.

17 Q So to find nine months' worth of assessments where  
18 we're using a quarterly assessment we would take the quarterly  
19 assessment and multiply it by three; is that correct?

20 A Correct.

21 Q At what point during the process did Absolute obtain  
22 this ledger?

23 A On February 24th. I think that may have been our  
24 initial intake. And then we obtain another ledger each step.

25 Q Could you review this document, and I'll direct your

1 attention to the next page if that aids. Can you tell me what  
2 the quarterly assessment was at the time the notice of  
3 delinquent assessment lien was recorded?

4 A It was recorded in April. I can tell you, prior to  
5 April 2011, it was \$55 a quarter.

6 Q So if we wanted nine months, we would -- to find out  
7 what nine months of the assessments were at the time the  
8 notice of delinquent assessment lien was recorded, we would  
9 take 55 and multiply it by three?

10 A Correct.

11 THE COURT: Or nine.

12 MR. BRENNER: Pardon?

13 THE COURT: Or nine.

14 MR. BRENNER: No, not nine because it's 55 quarterly.

15 THE COURT: Oh. I see. Got it. Quarterly.

16 MR. BRENNER: Yep.

17 BY MR. BRENNER:

18 Q So it would be 165, I think; is that correct?

19 A I'll take your word for it.

20 Q And you had the -- you knew what the monthly  
21 assessment was when you did the notice of delinquent  
22 assessment lien, correct?

23 A The quarterly assessment.

24 Q I'm sorry. Thank you. The quarterly assessment,  
25 correct?

1 A Yes, because we got a ledger.

2 Q Would you agree with me it wouldn't have been  
3 difficult to plug in the quarterly assessment in the notice of  
4 delinquent assessment lien?

5 A It wouldn't have been right either.

6 Q Why would it not have been right?

7 A Because the lien is for what is owed the HOA.

8 Q Yeah, but if you just wanted to write in -- the  
9 quarterly assessment for this property is \$55. That's not  
10 something that would have been difficult, right?

11 A Not difficult, but not required.

12 Q Why do you say "not required"?

13 A Because NRS did not require it.

14 Q Your policies and procedures didn't require it; is  
15 that correct?

16 A Correct. And our policies and procedures, really,  
17 are in NRS 116.

18 Q Let's look at the notice of default. It is Exhibit  
19 6. Let me know when you're there.

20 A I'm there.

21 Q Okay. And do you recognize this document?

22 A I do.

23 Q And you agree with me that this is the notice of  
24 default Absolute recorded on July 18th, 2011?

25 A I do.



1 Q And this document says that the amount of the lien  
2 as of July 15th, 2011, is \$1,642.66; is that correct?

3 A It is.

4 Q Do you see anything in this document that states how  
5 that lien was calculated?

6 A No.

7 Q Anything in this document that sets forth the amount  
8 of the monthly assessment -- or, the quarterly assessment?

9 A No.

10 Q Anything in this document that states what  
11 Absolute's position is on the super priority lien?

12 A No.

13 Q Anything in this document that states the number of  
14 months in arrears?

15 A No.

16 Q Anything in this document that states the number of  
17 -- or, the amount of the sixteen forty-two sixty-six that is  
18 attributable to delinquent assessments only?

19 A No.

20 Q Anything in this document that sets forth the amount  
21 that is attributable to cost or fees?

22 A No.

23 Q And is this document consistent with your policies  
24 and procedures as of July 18th, 2011?

25 A It is.

1 Q Turning to the next page, do you see, again, the  
2 statement at the top stating that this notice is given  
3 pursuant to NRS 117.070? And I won't read the rest, but do  
4 you see that notice?

5 A I do.

6 Q Basically repeating what you've said in the notice  
7 of delinquent assessment lien?

8 A Correct.

9 Q And, again, this document was signed by Richard Kaye  
10 and you notarized it?

11 A Correct.

12 Q Now, there is a statement here in this document, and  
13 I didn't highlight it, but it's important, so I'll try to show  
14 it to you with my pen. Do you see where it says, upon your  
15 written request, Foxfield Community Association will give you  
16 a written itemization of the entire amount you must pay? Do  
17 you see that?

18 A I do.

19 Q Do you see any statement in here about there being a  
20 charge to get that itemization?

21 A Not for the owner, no.

22 Q So you would charge -- you would not charge the  
23 owner but you charge lenders?

24 A Correct.

25 Q And that was your policy and procedure?

1 A It was.

2 Q And the itemization that you provided, would it set  
3 forth the amount of the quarterly assessment?

4 A It would.

5 Q Would it set forth the number of months in arrears?

6 A It would.

7 Q And was this statement in here about providing upon  
8 written request or written itemization, was that just for this  
9 association or was that your general practice?

10 A General practice.

11 Q And it was an expectation that in order to obtain  
12 that itemization the homeowner would contact Absolute as  
13 opposed to the HOA?

14 A Correct.

15 Q And that's consistent with what we see at the bottom  
16 here where it says to find out the amount you must pay or to  
17 arrange for payment to stop the foreclosure contact the  
18 following trustee?

19 A Correct.

20 Q And is it going to be your testimony once again that  
21 to find out the amount you must pay only applies to the  
22 homeowner, not to the bank?

23 A No, we don't charge the homeowner.

24 Q Let's take a look at Exhibit 10, if we can, please.  
25 Are you familiar with this document?

1 A I am.

2 Q What is it?

3 A Our recorded notice of trustee sale.

4 Q Now, at the top, would you agree with me that it  
5 directs any questions about the foreclosure to Absolute?

6 A It does.

7 Q Now, the lump sum in this one is 3,097; is that  
8 correct?

9 A Correct.

10 Q A little less than double of what it was at the time  
11 of the notice of default?

12 A Correct.

13 Q Do you see anything in here that sets forth all the  
14 things we've already discussed, the number of months in  
15 arrears, the quarterly assessment, or Absolute's position on  
16 the amount of the super priority portion of the lien, if any?

17 A No.

18 Q Now, you said the lien at the time of the sale was  
19 \$3,097.60; is that correct?

20 A No, the time -- this is just --

21 Q I'm sorry. Let me withdraw that because I misstated  
22 it. You said that the HOA's lien at the time of the sale was  
23 approximately \$5,400, correct?

24 A Yes.

25 Q Okay. What if the day before the sale someone had

1 paid you \$3,097.60? Would that have been enough to stop the  
2 sale?

3 A Yes.

4 Q So you chose the bid price solely based on the  
5 amount necessary to get the HOA paid?

6 A Correct.

7 Q What was the -- what was the amount of monthly  
8 assessments at the time of the sale? What was the total?

9 A Without the ledger, I don't know.

10 Q Well, let me see if I can point you to a document  
11 that might help. Take a look at ACS177, 178, 179 and tell me  
12 what these are.

13 MR. TOBLER: Exhibit 23?

14 MR. BRENNER: Yeah, Exhibit 23. Thank you.

15 THE WITNESS: These are checks to Absolute, to CAMCO, and  
16 to Foxfield.

17 BY MR. BRENNER:

18 Q And why would you have issued these checks?

19 A For -- these occurred after sale, so this would be  
20 the disbursement of funds and our being reimbursed for payment  
21 of the transfer tax to record the deed and our collections  
22 costs, CAMCO for their transfer fee, audit fee and doc fee,  
23 and then Foxfield for their assessments.

24 Q All right. And Absolute took -- of the \$5,401,  
25 Absolute took \$4,287.56; is that correct?

1           A     Sort of. I had to pay the transfer tax to record  
2 the deed, so that was -- part of that is reimbursement for the  
3 transfer tax.

4           Q     And you paid CAMCO \$470?

5           A     Correct.

6           Q     And you paid Foxfield 643.44?

7           A     Correct.

8           Q     All right. How were those numbers determined?

9           A     It would have been on the ledger of what was owed  
10 the HOA, along with the audit, transfer, and doc fee from the  
11 management company, along with the transfer tax, the deed, and  
12 then all of our costs through the notice of sale.

13          Q     So the 643 that the HOA got, that was more than just  
14 assessments?

15          A     Yes.

16          Q     Because it would also include whatever management  
17 fees CAMCO directly charged the HOA? Is that what you're  
18 saying?

19          A     No. It would have included the assessments, late  
20 fees, interests. And then if there was -- if there were any  
21 fees for letters that CAMCO charged, it would be on there as  
22 well.

23          Q     You would agree with me that of the proceeds from  
24 the HOA foreclosure sale, Absolute obtained the majority of  
25 those?

1 A Correct.

2 Q And CAMCO, you said, was also owned by Ken Williams?

3 A Correct.

4 Q And CAMCO got \$470?

5 A They did.

6 Q And Ken Williams' signature is on the check to his  
7 company CAMCO?

8 A Correct.

9 Q And if I could get you to turn to Exhibit 13. Do  
10 you recognize this document?

11 A I do.

12 Q What is it?

13 A Our recorded notice of trustee sale.

14 Q A second one?

15 A Yes.

16 Q Why was there a second one?

17 A We canceled our first one to allow the bank to move  
18 forward with foreclosure.

19 Q Did you charge for this second one?

20 A We did.

21 Q And do you know what that charge was?

22 A I believe it's for -- it's our price list. The  
23 trustee sale is 275.

24 Q So you charged another \$275 against the account to  
25 do the second notice?

1 A Correct.

2 Q All right. Now, this one has another lump sum of  
3 4,783.29. Do you agree with that?

4 A I do.

5 Q Now, earlier you testified that payment of \$3,097.60  
6 would have stopped the sale; is that correct?

7 A During the first sale, yes.

8 Q Okay. The first sale that never happened?

9 A Correct.

10 Q All right. And so now it would have taken \$4,783.29  
11 to stop the sale?

12 A Correct.

13 Q And we talked about how you've gone forward -- or,  
14 you decided to go with the sale price of 5,400. Did Absolute  
15 make the decision on what the starting bid price would be?

16 A We did.

17 Q You could have started it anywhere?

18 A No, we have to make sure that the association is  
19 paid in full.

20 Q So you couldn't start below fifty-four, but you  
21 could start it above?

22 A I don't believe that's what it says. What we're  
23 trying to do is -- and as directed by the HOA, is to set the  
24 sale to take the sale so the HOA can recover their nonpaid  
25 assessments. We're not trying to -- I mean, that's the



1 intention is to get them paid. We're not interfering in  
2 anything else.

3 Q Well, your assessments -- or, the HOA's assessments  
4 and your several thousand dollars in costs and fees, correct?

5 A Correct.

6 Q And you're not concerned about payments for junior  
7 lienholders, right?

8 A No, I'm not.

9 Q Okay. You didn't look at what the deeds of trust  
10 were and set a bid price on an amount that might get the  
11 junior lienholders excess proceeds, correct?

12 A Correct.

13 Q And you knew that if you did get an amount that was  
14 more than costs, fees, and assessments, that money would go to  
15 junior lienholders?

16 A It would actually go to counsel for disbursement.

17 Q And do you know where counsel disbursed the money?

18 A I do not.

19 Q You're saying in all of your dealings at Absolute,  
20 you do not know how your counsel disbursed the excess proceeds  
21 from HOA sales?

22 A Well, I know that some went through an interpleader,  
23 but there's so much litigation, to tell you the truth, no, I  
24 don't know where --

25 Q Absolute files these interpleaders, correct?

1 A No, our counsel files the interpleaders.

2 Q And they file them in Absolute's name?

3 A I haven't even seen one.

4 Q You haven't seen an interpleader and you don't know  
5 what happens to excess proceeds. Is that your testimony?

6 A That is my testimony.

7 Q And in order to find out what happens to excess  
8 proceeds, what -- I'm talking about Absolute's policies and  
9 procedures for dealing with excess proceeds. In order to find  
10 out what happens, we'd have to ask your counsel?

11 A Correct.

12 Q Do you maintain an account that has excess proceeds  
13 in it?

14 A No.

15 Q Because you give all of that money to counsel?

16 A Correct.

17 Q And going back to what I was asking you about, do  
18 you know whether or not there were any instances in which  
19 excess proceeds have been disbursed to the beneficiary of a  
20 first deed of trust?

21 A I know that there were checks issued to  
22 beneficiaries of trust, but very seldom were they cashed and  
23 very seldom would they reach out for the amounts.

24 Q And why were checks issued to the beneficiaries of  
25 first deeds of trust?

1           A     I believe the attorney felt that's where they needed  
2 to go.

3           Q     So if I understand correctly, when it comes to doing  
4 the notices of delinquent assessment lien, the notice of  
5 default, and the notice of sale, and the language we talked  
6 about at the top about it being pursuant to the statutes,  
7 Absolute is comfortable doing that on its own; is that  
8 correct?

9           A     Correct.

10          Q     But when it comes to following the statutes for  
11 disbursement of excess proceeds, you rely on counsel?

12          A     We do. We've relied on counsel to draw up all of  
13 our documents, so that's not a far stretch.

14          Q     Let's talk about the Miles Bauer letters -- or,  
15 letter. I think it was Exhibit 23, pages 40 and 41. It's  
16 probably too small to read up there so --

17          A     That's fine. I can see it.

18          Q     Yep. You testified that you had seen letters like  
19 this before when you received this letter; is that correct?

20          A     Correct.

21          Q     And at the time this letter was received -- and for  
22 the record, it's a stipulated fact that it's -- or, that at  
23 least it was sent on August 18th, 2011. At the time this  
24 letter was received, what were your procedures for handling a  
25 letter like this?

1           A     At this time we had sent the letter of -- or,  
2 counsel had already typed up the response, and then we would  
3 respond with that letter.

4           Q     So you sent a -- you're saying you sent a form  
5 letter back in response?

6           A     Correct.

7           Q     And that's the form letter that we -- that you  
8 provided testimony about earlier?

9           A     It is.

10          Q     Did you read that form letter before you sent it  
11 out?

12          A     Yes --

13          Q     Did you read --

14          A     -- at the time.

15          Q     Did you read the Miles Bauer letter before you sent  
16 out the form letter?

17          A     Yes.

18          Q     And how long was that procedure in place?

19          A     2011, 2012, and mostly throughout 2013.

20          Q     So the procedure changed in 2013?

21          A     No, the letters just didn't come as often.

22          Q     The letters from Miles Bauer?

23          A     Correct.

24          Q     Okay. Because I was asking specifically about  
25 Absolute's procedure. How long did you have the procedure

1 about responding to Miles Bauer's letter like the one dated  
2 August 18th, 2011, with the form letter?

3 A As long as we were receiving them.

4 Q So throughout? Through the entirety of your  
5 dealings with Miles Bauer, whenever you received the August  
6 18th, 2011, letter, you provided the same form response?

7 A We did. If there was any changes and if -- because  
8 sometimes they were slightly different. If there was any  
9 changes in the Miles Bauer letter, we forwarded them to  
10 counsel, and counsel would let us know if there was any  
11 additional language or change in response that would be  
12 needed.

13 Q Counsel charged for that, right?

14 A Yes.

15 Q More than \$50, right?

16 A Yes.

17 Q And you knew you could have just provided a  
18 statement to Miles Bauer without charging it, correct?

19 A That was our process, was to charge for the  
20 statement.

21 Q But you knew you could have provided the statement  
22 without charging for it. You had that discretion, right?

23 A I'm sure I could have.

24 Q All right. Well, I'm going to put it up here,  
25 although, I know it might be hard to read along. The first

1 paragraph of this letter says, this letter is in response to  
2 your notice of default with regard to the HOA assessments  
3 purportedly owed on the above described real property.

4 This firm represents the interest of MERS as nominee for  
5 Bank of America, NA, successor by merger to BAC Home Loan  
6 Servicing, LP, herein after BANA with regard to these issues.  
7 BANA is the beneficiary/servicer of the deed of trust loan  
8 secured on the property. Did I read that correctly?

9 A You did.

10 Q Any reason to doubt the truth of that at the time  
11 you received this letter?

12 A No.

13 Q You believed that Bank of America was the  
14 beneficiary or servicer of the first deed of trust on this  
15 property?

16 A Correct.

17 Q And, in fact, you had pulled the trustee sale of  
18 guarantee by this point that would provide you that  
19 information?

20 A Correct.

21 Q All right. Do you -- now, I'm not going to try to  
22 read through everything, unless we have to, but I'm going to  
23 ask you a question starting with the citations on that first  
24 page going through the first full paragraph on the next page.  
25 Did you, as you reviewed these letters, have an understanding

1 about what Mr. Jung was saying?

2 A I understood what he was saying.

3 Q And what was your understanding?

4 A That he -- the way he interpreted this statute was  
5 that it was -- arguably, there was a super priority amount  
6 and, arguably, that super priority amount consisted of nine  
7 months of assessments only.

8 Q And did you also understand that he was asking you  
9 to tell him what nine months' worth of assessments was?

10 A I didn't quite see that, because I didn't know what  
11 time period he wanted to pay for. And the assessments  
12 changed, which is what led us to our conversations on the  
13 phone. So I would require that a statement was ordered that  
14 would have that time period and the assessments on it.

15 Q Well, let's talk about that. Let's look at this.  
16 It says, based on section 2(b), a portion of your HOA lien is  
17 arguably senior to BANA's first deed of trust, specifically  
18 the nine months of assessments for common expenses incurred  
19 before the date your -- date of your notice of delinquent  
20 assessments dated July 15th, 2011. Did I read that correctly?

21 A You did.

22 Q When you read that, you knew that he was saying  
23 we're looking for the nine months prior to the recording of  
24 your notice of delinquent assessment lien, correct?

25 A Correct.

1 Q So you did know what nine months he was looking for?

2 A Not in its entirety, because we agree with the point  
3 of where the default starts. That's another conversation that  
4 we had over the phone that's, again, not communicated in the  
5 letters.

6 Q I'm not asking you about out of court statements  
7 that aren't in the letter. I'm asking you about the letters.  
8 And I'm also not asking you about disagreements.

9 You understood that the number he was requesting, per  
10 this letter, was nine months of delinquent assessments  
11 measured from the date of the July 15th, 2011, notice of  
12 delinquent assessment lien, correct?

13 A I'll agree that's what he was looking for, sure.

14 Q And that's information you could have provided?

15 A And I would have.

16 Q And you had that information, correct?

17 A Once we requested the ledger, we did.

18 Q And that's not information you ever provided?

19 A No, unfortunately, the -- he didn't request it.

20 Q Well, I'm confused. You just got done saying you  
21 understood what he was requesting in here. Are you saying  
22 this letter --

23 A No, I'm saying --

24 Q -- was not a request -- hold on. Are you saying  
25 this letter is not a request for that information?



1           A     What I'm saying is, what he was requesting is in  
2 direct conflict with what was held by the common interest  
3 communities, and we differed on where the nine months started  
4 for the delinquent assessment.

5           So that's why, in our response back to him, we let him  
6 know how he could order a statement so we could provide the  
7 dates, so we could provide the quarterly amounts. That way he  
8 could pay from what he wanted from that.

9           Q     Well, you could have written back in the letter, we  
10 don't agree with your interpretation of law, but nine months  
11 measured from July 15th, 2011, is X. You could have done  
12 that, right?

13          A     Sure.

14          Q     That wouldn't have been hard, would it?

15          A     Not at all.

16          Q     Wouldn't have had to have retained counsel and pay  
17 counsel, right?

18          A     I don't try to interpret statute. That's why I rely  
19 on counsel for it.

20          Q     It goes on to say, this letter, it is unclear, based  
21 on the information known to date, what the amount, the nine  
22 months of common assessments predating the NOD actually are.  
23 Do you have an understanding as to why he was saying it was  
24 unclear?

25          A     Not entirely.

1           Q     But it's fair to say that prior to this point there  
2 were no recorded notices, correspondence, or any information  
3 provided to Bank of America that identified what the monthly  
4 assessment was for this property?

5           A     Quarterly, correct.

6           Q     Quarterly. Thank you.

7           The letter goes on, that amount, whatever it is, is the  
8 amount BANA should be required to rightfully pay to fully  
9 discharge its obligations to the HOA per NRS 116.3102. And my  
10 client hereby offers to pay that sum upon presentation of  
11 adequate proof of the same by the HOA. Did I read that  
12 correctly?

13          A     You did.

14          Q     You knew that Mr. Jung, on behalf of Bank of  
15 America, was offering to pay nine months of delinquency  
16 measured from the July 15th, 2011, date; is that correct?

17          A     Correct.

18          Q     If I could get you to turn to ACS44. And you  
19 testified that this was your response, correct?

20          A     Correct.

21          Q     Before preparing this response, did you tell the HOA  
22 about Mr. Jung's request?

23          A     It was on the status report that they had access to,  
24 but I did not verbally tell them.

25          Q     And the status report, did the HOA board members

1 have access to it or did CAMCO have access to it?

2 A They all did.

3 Q Both CAMCO and the HOA board members?

4 A Correct.

5 Q Okay. And the HOA board members' access was through  
6 CAMCO, or they had independent access?

7 A Independent access.

8 Q How do you know that?

9 A Because they -- I provided them their usernames and  
10 their passwords.

11 Q Did you have any discussions with the board about  
12 the Miles Bauer letter before sending your response?

13 A No.

14 Q Okay. So let's read the letter. I'll zoom in. You  
15 state -- I'm not going to read the first paragraph because you  
16 already -- it was already read in. I know we read the second  
17 paragraph, but I've got a different question, so I'm going to  
18 start there.

19 You state: I am making you aware that it is our view  
20 that without the action of a foreclosure, a nine-month  
21 statement of account is not valid. Can you explain what you  
22 were saying?

23 A Well, again, we had counsel draw this up, but when  
24 counsel and I discussed it, his firm belief --

25 Q Hold on a second. Okay. Go ahead. Sorry.

1           A     His belief was that the super priority didn't exist  
2 without foreclosure, and, therefore, any statement that we  
3 provided, since Miles Bauer put payment in full in their  
4 letters and payment in full on their checks, that it wouldn't  
5 be a valid statement.

6           Q     You go on to state: At this time I respectfully  
7 request you submit the trustee's deed upon sale showing your  
8 client's possession of the property and the date --

9           THE COURT: Mr. Brenner, hold on just a second, because I  
10 didn't -- I want to make sure that I'm following that.

11                  Can you please explain that to me a little bit more?

12           THE WITNESS: About what counsel said?

13           THE COURT: Yeah.

14           THE WITNESS: He indicated that the super priority just  
15 -- it simply didn't exist before the foreclosure sale, that --  
16 the way he told it is that they -- after a foreclosure sale,  
17 we would then provide a nine-month statement, and then they  
18 could pay that and that would be paid in full.

19                  But any attempt to pay anything along the way we  
20 couldn't accept the paid in full. And in Miles Bauer letter,  
21 in case if we signed the checks, then we were in agreement  
22 with their position. So that's why it wouldn't be in a paid  
23 in full status.

24           THE COURT: Got it.

25 BY MR. BRENNER:

1 Q There's nothing in Mr. Jung's correspondence that  
2 says anything about paid in full, correct?

3 A I can't say correct on that.

4 Q Go back and look, please.

5 A In this variation of the letter in the -- on the  
6 second page it says that that -- on one, two, three, four,  
7 five lines down it says, that amount, whatever it is, is the  
8 amount BANA should be required to rightfully pay to fully  
9 discharge its obligations to the HOA.

10 Q Per NRS 116.3102. And my client hereby offers to  
11 pay that sum upon presentation of adequate proof of the same  
12 by the HOA. That's the full statement, correct?

13 A Correct, which means that they would want me to  
14 release the lien and that the account would be paid in full.

15 Q Well, you didn't say that in your letter.

16 A Well, I didn't draw up the letter, again.

17 Q But you signed the letter, right?

18 A No.

19 Q That's not your name at the bottom?

20 A No, that's my name at the bottom. I just didn't  
21 sign it. It's a form letter.

22 Q Ma'am, does this letter represent Absolute  
23 Collection Services' --

24 A It does.

25 Q -- response to Mr. Jung's August 18th, 2011, letter?

1 A It does.

2 Q It's the full response, correct?

3 A It is.

4 Q There's no other letter or correspondence to Miles  
5 Bauer, correct?

6 A Correct.

7 Q Now, I want to go back to the statement we were  
8 talking about where we were reading from. We already went  
9 over the I am making you aware that it is our view that  
10 without action of foreclosure a nine-month statement of  
11 account is not valid.

12 It goes on, at this time I respectfully request that you  
13 submit the trustee's deed upon sale showing your client's  
14 possession of the property and the date that it occurred.  
15 What are you asking for there?

16 A That they foreclosed on the property in order to get  
17 the nine-month statement.

18 Q So the foreclosure you're referring to in the first  
19 sentence is the foreclosure by a first deed of trust?

20 A Correct.

21 Q You're not referring to an HOA foreclosure in the  
22 first sentence?

23 A No.

24 Q So it was your position that there wasn't a  
25 nine-month super priority to be paid until the bank

1 foreclosed?

2 A Correct.

3 Q And you go on to say in the last sentence there, at  
4 that time we will provide a nine-month super priority lien  
5 statement of account. The time you're referring to again is  
6 when the bank forecloses?

7 A Yes, and provides us with the TDUS.

8 Q Okay. Now, you go on to the next paragraph, and it  
9 says, as discussed, any statement of account from us will show  
10 the entire amount owed. You knew that Mr. Jung wasn't asking  
11 for the entire amount owed?

12 A Correct.

13 Q You knew he wanted nine months measured from that  
14 July 2012 date, correct?

15 A 2011.

16 Q 2011 --

17 A Yes.

18 Q -- thank you. Okay.

19 You go on -- and you can see where I've highlighted -- it  
20 says, we recognize your client's position as the first  
21 mortgage company as the senior lienholder. Did I read that  
22 correctly?

23 A You did.

24 Q You recognized that the bank's lien was senior to  
25 the HOA's lien?

1 A Correct.

2 Q Now, you go on to state, per our previous  
3 conversation, a statement of account costs \$50 and is not good  
4 for a sale transfer of the property. Can you explain what you  
5 mean, is not good for the sale of transfer of a property?

6 A Because it wouldn't include any of the sales costs  
7 and the transfer fees and doc package fees.

8 Q You mean, the things that a new homeowner would have  
9 to pay?

10 A Correct.

11 Q All right. But when you -- when you wrote this,  
12 again, you knew that that was not something that Miles Bauer  
13 was looking for?

14 A Correct. And, again, I didn't write it.

15 Q So \$50, that's \$5 less than the quarterly  
16 assessment, right?

17 A Correct.

18 Q It would be -- it would be about -- paying the \$50  
19 would be about 30 percent of the super priority lien in and of  
20 itself?

21 A Depends on your definition of the super priority  
22 lien.

23 Q Well, how about -- how about nine months of unpaid  
24 assessments?

25 A Yes.



1           Q     You go on to talk about an actual payoff. If you  
2 would like an actual payoff demand, it is good for the sale or  
3 transfer of property. Please visit our website; you state the  
4 website, and then you say, the upfront fee for the demand is  
5 \$150. What do you mean upfront fee?

6           A     That you pay \$150 in order to receive the demand.

7           Q     Was there -- would there be additional costs after  
8 that?

9           A     No.

10          Q     Okay. And the demand, would it be the nine-month as  
11 Mr. Jung requested, or it would be just a full statement of  
12 everything owed plus the additional costs the homeowner has to  
13 pay once they take possession of the property?

14          A     Any statement from us would have had the dates and  
15 the breakdowns of everything that was owed.

16          Q     Now, do you recall reading in Mr. Jung's letter that  
17 he asked you for information about the status of the sale?

18          A     Yes.

19          Q     Okay. And you knew he was asking you for  
20 information on what the status of the sale was, correct?

21          A     Correct.

22          Q     Do you see anywhere in this letter where you set  
23 forth what the status of the sale was?

24          A     I do.

25          Q     Pardon?

1           A     I do.

2           Q     Where is it?

3           A     In the third paragraph. He had already received the  
4 notice of default, so we were indicating in our letter that we  
5 intend to proceed.

6           Q     What is the last sentence of that paragraph?

7           A     Should you provide us with the recorded notice of  
8 default or notice of sale, we will hold our action so your  
9 client may proceed.

10          Q     As you testified earlier, you were provided with a  
11 notice of default from the beneficiary, the first deed of  
12 trust, correct?

13          A     And we did, and we held the sale. In fact, we  
14 canceled it.

15          Q     Just answer my question, please. You were provided  
16 that notice, correct?

17          A     Yes.

18          Q     It also showed up in your status notes that you had  
19 a copy of that notice of default, correct?

20          A     Correct.

21          Q     And you ultimately went forward with the sale; is  
22 that correct?

23          A     Correct.

24          Q     Now, just looking at the entirety of this letter,  
25 you would agree with me, nowhere did you say what the super

1 priority was, what your position on the super priority was,  
2 what the number of months in arrears were, or what the  
3 quarterly assessment was?

4 A Correct.

5 Q And you would agree with me, based on your testimony  
6 earlier, that that wasn't difficult information to provide, at  
7 least as far as the amount of the quarterly assessment?

8 A Correct.

9 Q And all you had to do was look at the ledger that  
10 you already had in your file and write in the letter the  
11 quarterly assessment is \$55 a month?

12 A I'd have to request a new ledger because they  
13 change, but there would be communication involved, yes.

14 Q A new ledger is not difficult to get, right?

15 A No.

16 Q You do it in the course of your regular operations  
17 on a daily basis, right?

18 A Correct.

19 Q I'd like for you to turn to Exhibit 22. And I'm  
20 going to have you look at the CC&Rs. It starts on FOX16. Are  
21 you there?

22 A I am.

23 Q Have you seen these CC&Rs prior to today?

24 A No. Well, yes, in depositions and whatnot.

25 Q Okay. But you hadn't seen them prior to litigation?

1 A No.

2 Q And your review of them was specifically a result of  
3 requests that were made upon you in litigation?

4 A Correct.

5 Q Can I get you to turn to FOX55. So you have a  
6 highlighted portion. I'm not going to read all of that. But  
7 I'm looking at section 9.1 of FOX55. It's titled in bold and  
8 underline, first mortgagees right of inspection of records.

9 Any first mortgagee will be entitled upon written request  
10 to inspect the books and records of the association during  
11 normal business hours; sub (2), receive within 90 days  
12 following the end of any fiscal year of the association a  
13 financial statement of the association for the immediately  
14 preceding fiscal year of the association free of charge to the  
15 requesting party; and (3), receive notice of all meetings of  
16 the members of the association and be permitted to designate a  
17 representative to attend all such meetings. Did I read that  
18 correctly?

19 A You did.

20 Q Would you agree with me that this document entitled  
21 the first mortgagee to inspect the books and records of the  
22 association?

23 MR. COX: Object. Calls for a legal conclusion.

24 THE COURT: Sustained.

25 BY MR. BRENNER:

1 Q Would you agree with me that this says any first  
2 mortgagee will be entitled upon written request to inspect the  
3 books and records of the association? It says that, correct?

4 MR. COX: Object. Document speaks for itself.

5 THE COURT: Sustained.

6 BY MR. BRENNER:

7 Q Do you see anything in this document that refers to  
8 authorizing a charge for a statement of account?

9 A No.

10 Q Can I get you to turn back to Exhibit tab 23, ACS76.  
11 Do you recognize this?

12 A I do.

13 Q What is it?

14 A This is the notice of trustee sale from ReconTrust.

15 Q And this is in ACS's file, correct?

16 A It is.

17 Q And if it's in the file, we know that ACS received a  
18 copy of it, correct?

19 A Correct.

20 Q And what's the date on this?

21 A February 29th, 2012.

22 Q And what was the date of the HOA sale?

23 A June 2012.

24 Q So about three months and maybe a couple weeks later  
25 the HOA proceeded with its sale?

1 A Correct.

2 Q Despite knowing that there was a notice of trustee  
3 sale by the bank against the property?

4 A It was actually canceled when we called ReconTrust.

5 Q And where do you see -- where do you see that  
6 information?

7 A On March 9th is when we received the notice, and on  
8 April 24th I called ReconTrust.

9 Q Well, now, wait a second. This doesn't say that  
10 they canceled.

11 This says that there's no date set, correct?

12 A It says on March 9th that they're canceling their --  
13 or, I'm sorry, that we were canceling our sale.

14 Q And you didn't cancel your sale, did you?

15 A We actually did. We did another notice of trustee  
16 sale. Hold on. This is small.

17 Okay. That was after their NOD. This is after their  
18 NOS. No, we did not cancel this second sale.

19 Q But you had told Rock if the bank was going to move  
20 forward, you would cancel your sale?

21 A Correct.

22 Q And you would agree with me that this doesn't say  
23 that the bank had canceled its sale? It just said that there  
24 wasn't a date set?

25 A Correct.

1 MR. BRENNER: Just one moment, Your Honor, if I can.

2 THE COURT: Yep.

3 MR. BRENNER: No further questions.

4 THE COURT: All right. Mr. Cox.

5 MR. COX: Do you want to proceed, Your Honor, or --

6 THE COURT: Yes.

7 MR. COX: Until 11:45?

8 THE COURT: It's 11:30.

9 MR. COX: What?

10 THE COURT: Yeah, it's 11:30.

11 MR. COX: Oh, until 11:45?

12 THE COURT: Until 11:45.

13 MR. COX: Okay.

14 THE COURT: We'll just keep going --

15 MR. COX: Okay.

16 THE COURT: -- with all the time we have.

17 MR. COX: Just making sure, Your Honor.

18 CROSS-EXAMINATION

19 BY MR. COX:

20 Q Good morning, Ms. Mitchell.

21 A Good morning.

22 Q Now, all properties that you've sold on behalf of  
23 Absolute Collection Services have occurred in North Las Vegas,  
24 Las Vegas, and Henderson, or have there been other cities as  
25 well?

1 A All of them have been in those cities.

2 Q Okay. So since 2010 you started receiving letters  
3 from Miles Bauer?

4 A Correct.

5 Q And what did you do when you first received a Miles  
6 Bauer letter?

7 A When we first received a letter we would refer it  
8 over to counsel, and I asked him to review and to help us  
9 respond, so he would -- he would do that.

10 Sometimes we would receive different variations of  
11 letters. If I received one that wasn't exactly like the other  
12 one, I would have counsel review and help me respond. And he  
13 wrote the language in the responses.

14 Q So you relied on your counsel to correctly respond  
15 to that letter, and he gave you that version that you reviewed  
16 prior to sending it out?

17 A Correct.

18 Q I believe you stated that your counsel gave you the  
19 opinion that the super priority amount did not exist until  
20 after a sale?

21 A He did.

22 Q And did you have a personal belief about that?

23 MR. BRENNER: Objection. Relevance.

24 THE COURT: Sustained.

25 BY MR. COX:



1 Q Were you aware of varying opinions at the time  
2 regarding whether a super -- an HOA sale could extinguish a  
3 first deed of trust?

4 A I was aware. I know that some believed that the  
5 first deed could be extinguished. But, more often than not,  
6 what I heard is that people would rent them until the bank  
7 foreclosed.

8 Q And that occurred even prior to July 2012?

9 A It did.

10 Q In the year of 2012 have you -- did you ever sell a  
11 property that did not have a first deed of trust recorded  
12 against it?

13 A We did. There was one in July, October, and  
14 November of 2012.

15 Q Do you know what properties those were?

16 A I do. In July of 2012 it was 712 Irish Mitten.

17 Q And what happened to that property? How much did it  
18 sell for at that sale in July of 2012?

19 MR. BRENNER: Relevance.

20 THE COURT: Sustained.

21 BY MR. COX:

22 Q Now, when you decided to sell the property, what was  
23 your intention in selling the property?

24 A We were hired by the HOA to do that, and they  
25 directed us for the sale that the intention was to recover the

1 unpaid assessments and what was owed the HOA.

2 Q Was your intention to somehow interfere with the  
3 deed of trust?

4 A No.

5 Q I'd like you to review Exhibit 23, page 132. It  
6 appears that the sale was initially set for December 6th,  
7 2011; is that correct?

8 A It is.

9 Q And after that, you postponed the sale at least  
10 three times; is that correct?

11 A We did.

12 Q And the sale was finally set on March 13th, 2012? I  
13 think that was the fourth setting you had?

14 A It was.

15 Q And then you received a notice of sale, and said it  
16 was set for March 19th, 2012; is that correct?

17 A Correct.

18 Q Why did you decide to cancel your sale in response  
19 to receiving this notice of sale?

20 A Because it appeared the first was foreclosing. We  
21 received their notice of trustee sale.

22 Q So you would -- in your normal course of business,  
23 you normally attempted to halt your sale if a -- if you knew  
24 that a first deed of trust was about to foreclose?

25 A Yes.

1 Q And why was that?

2 A We would allow them to go through their  
3 foreclosures, as we saw them as the senior lienholder per NRS  
4 116.

5 Q And then you called ReconTrust around April 24th,  
6 2012; is that correct?

7 A Correct.

8 Q And they told you that there was no trustee sale set  
9 at that time?

10 A Correct.

11 Q So at that time you decided to set sale on the  
12 property on behalf of the HOA?

13 A Correct.

14 Q How many collection accounts have you handled on  
15 behalf of HOAs, generally, per year since 2010?

16 A Accounts per year, maybe -- at this time, maybe  
17 about 1,500, 1,600.

18 Q And approximately what percent actually ended up  
19 going to sale?

20 A Three percent.

21 Q This sale occurred in June 2012; is that correct?

22 A Correct.

23 Q Did you have a normal procedure for conducting your  
24 sales; for example, where they happen a few times a month or  
25 were they less frequent?

1 A They occurred once a month.

2 Q Is there a date of the month that it occurred on?

3 A Usually the second Tuesday, pending holidays.

4 Q So you wouldn't conduct sales on holidays?

5 A No.

6 Q Is there a specific time where you would hold those  
7 sales?

8 A Four o'clock.

9 Q They would always be at four o'clock?

10 A They would.

11 Q And why is that?

12 A We realized that that's when other people were  
13 holding their sales as well. It just seemed to be the  
14 standard time.

15 Q Did you hold your sales on the same dates that other  
16 HOA trustees held their sales?

17 A I don't know, honestly.

18 Q After you received the letter from Miles Bauer, did  
19 you do anything else to notify them of the upcoming sale?

20 A Through the notice of sale, sending that out.

21 Q Would you send the notice of sale to the bank  
22 continually, or you would also send it to the firm Miles  
23 Bauer?

24 A I would also send it to Miles Bauer.

25 Q And that goes for both of the notice of sales that

1 you recorded and sent out?

2 A It does.

3 Q Okay. So you mailed both of those notice of sales  
4 to Miles Bauer based on their request?

5 A Based on the communication in the letter that I  
6 received, yes.

7 Q I'm going to refer you back to the notice of  
8 delinquent assessment lien that you recorded. I believe it's  
9 -- you can find it in Exhibit 5. I believe you testified that  
10 this was a form notice; is that correct?

11 A Correct.

12 Q And who prepared the form?

13 A Counsel.

14 Q So it was approved by counsel?

15 A It was approved by counsel and the financial  
16 institutions division.

17 Q You had to submit this to the financial institutions  
18 division?

19 A We did.

20 Q And they approved the form of it?

21 A They did.

22 Q All right. Can we go to Exhibit 6 as well. Is the  
23 same true for the notice of default? Did counsel prepare this  
24 form for you?

25 A They did.

1 Q And you had to submit this to the financial  
2 institutions division and they approved it as well?

3 MR. BRENNER: Hearsay. Compound. Second part is  
4 hearsay.

5 THE COURT: Sustained.

6 BY MR. COX:

7 Q Did you submit this document to the financial  
8 institutions division?

9 A Yes.

10 Q And did they approve this form letter?

11 MR. BRENNER: Hearsay.

12 THE COURT: Mr. Cox.

13 BY MR. COX:

14 Q Is it your understanding that they approved this  
15 form letter?

16 MR. BRENNER: Same objection. Lacks foundation, too.  
17 Only foundation would be hearsay.

18 MR. COX: It's -- I mean, in her course of business she  
19 has to submit this, so I'm just curious if she has approval or  
20 not. She knows whether she has approval, whether she got it  
21 back as approved.

22 THE COURT: What's the exceptions to the hearsay?

23 MR. COX: Well, it's fine, Your Honor.

24 THE COURT: Okay. Can you do me a favor? Tap on the --  
25 go to the right --

1 THE WITNESS: Of this?

2 THE COURT: -- part of that screen, the actual screen.

3 Maybe it's the [indiscernible]. Not this corner. Just tap on  
4 it, the actual screen. There you go. Thank you.

5 BY MR. COX:

6 Q So you were aware of an advisory opinion given by  
7 the commission for common interest communities and condominium  
8 hotels?

9 A I am.

10 Q And when did -- when was that opinion given?

11 A In December of 2010.

12 Q And what was your understanding of what that opinion  
13 stated?

14 MR. BRENNER: Hearsay. Speaks for itself.

15 THE COURT: Sustained.

16 BY MR. COX:

17 Q So you had formed the belief that collection costs  
18 were included in the super priority amount?

19 A I did, through that opinion.

20 Q You're also aware of an opinion given by the Nevada  
21 Real Estate division?

22 A I am.

23 Q And do you know when that decision came out?

24 A It was December of 2012.

25 Q So that was after the sale occurred; is that

1 correct?

2 A Correct.

3 Q And what date was it that you received this account  
4 from the HOA?

5 A I want to say February 2011.

6 Q I'm going to refer you back to page 132, if that  
7 assists you.

8 A Yes. February 25th, 2011.

9 Q Okay. And then the sale actually occurred in June  
10 2012; is that correct?

11 A It did.

12 Q So in that time period you never received a payment  
13 for this property; is that correct?

14 A Correct.

15 Q And as far as you're aware, the HOA did not forward  
16 you any payment?

17 A No, they did not.

18 Q Where were your sales held?

19 A They were held in the lobby of our office.

20 Q And generally speaking, where was your office?

21 A We moved, so I'm trying to remember. I believe at  
22 this time we were on Lake Mead and Rampart.

23 Q Is this office hidden? Is it a public location?

24 A It's public.

25 Q So you would allow anyone to come into the sale that



1 wanted to?

2 A Correct.

3 Q Did they have to qualify to bid?

4 A They did.

5 Q And what was that process?

6 A The auctioneer would take them back and they would  
7 have to show that they had the appropriate funds available,  
8 readily available to bid.

9 Q Do you believe that the highest bidder was the one  
10 who ultimately purchased the property who you recorded the  
11 deed to?

12 A Yes.

13 Q Do you have any reason to dispute that CSC  
14 Acquisition Group was the highest bidder?

15 A No.

16 Q So in what time period was Ken Williams a part owner  
17 with you?

18 A He was silent partner from its inception, September  
19 of 2009 and, I want to say, through April of 2013.

20 Q And you said he was a silent partner, so he didn't  
21 have an active role in the company?

22 A No, he did not.

23 Q Why did you decide to join with him as a -- as a  
24 partner?

25 A I worked for him for over a decade, he was preparing

1 to retire, I didn't want to work for anybody else, and he  
2 agreed to help fund Absolute to get me started somewhere else.

3 MR. COX: Do you want to pause there, Your Honor?

4 THE COURT: Sure. That's a good place to stop.

5 MR. COX: Thank you.

6 THE COURT: All right. We'll go ahead and break until  
7 1:15.

8 MR. BRENNER: 1:15?

9 THE COURT: Yep.

10 MR. BRENNER: I'd just like to say this in front of Your  
11 Honor in case you have a different instruction, I'm going to  
12 tell Rock like 2:15? 2:00? 2:15?

13 MR. HABDAS: Are you going to call him first, though?

14 THE COURT: Well, do you have any other witnesses  
15 besides --

16 MR. BRENNER: This is your last witness?

17 THE COURT: Ms. Mitchell?

18 MR. COX: Yeah.

19 MR. TOBLER: Yeah, my last. So I think that's a little  
20 late.

21 THE COURT: How long do we anticipate --

22 MR. BRENNER: You think it's late?

23 THE COURT: -- with her?

24 MR. TOBLER: Yeah. I mean, how much --

25 MR. COX: I'll be 15 minutes, maybe.

1 MR. BRENNER: I'll have -- let's, just to be safe, say I  
2 would have 15. Do you have any?

3 MR. TOBLER: Maybe five.

4 MR. BRENNER: So 2:00? I'll tell him about 2:00.

5 MR. TOBLER: 2:00.

6 MR. COX: Are you going to call him first?

7 MR. BRENNER: I could tell him earlier. I mean --

8 MR. HABDAS: Do him before the HOA?

9 MR. BRENNER: Yeah, we'll do him before the HOA.

10 THE COURT: Why don't you tell him 1:45, just in case.

11 MR. BRENNER: Okay. 1:45. Okay.

12 THE COURT: He won't mind waiting.

13 MR. BRENNER: All right. Thank you.

14 THE MARSHAL: Court will be in recess until 1:15.

15 [Recess at 11:46 a.m.]

16 MR. COX: Are you ready?

17 THE COURT: Yes. Thank you. Sorry. Somebody sat in my  
18 chair on Friday.

19 BY MR. COX:

20 Q All right. Good afternoon, Ms. Mitchell. If you  
21 could, could you open up to Exhibit 23, Bates stamp ACS45.

22 A Okay.

23 Q What is this document?

24 A That's the signed authorization to publish.

25 Q And what does this document tell you, or why do you

1 keep it in your file?

2 A This is the board's signature on the bottom  
3 indicating to move forward with the publishing, posting, and  
4 foreclosure sale.

5 Q And do you know what date this was signed?

6 A September 27th, 2011.

7 Q And do you know who signed it?

8 A Julie Skinner.

9 Q Was she an HOA board member at this time?

10 A She is.

11 Q I'm going to go over your process just a little bit,  
12 and I apologize if we've gone through this before. So you  
13 recorded a notice of delinquent assessment lien against the --  
14 this property, 588 Bugle Bluff; is that correct?

15 A Correct.

16 Q And it was sent first class and certified to the  
17 homeowner?

18 A It is.

19 Q Is it only sent to the homeowner?

20 A Yes.

21 Q Is it sent to any other addresses?

22 A To all available addresses that we have.

23 Q And how do you come about available addresses for  
24 the homeowner?

25 A They're either provided by the management company or

1 we come across them when we verify ownership at the assessor's  
2 office.

3 Q How do you verify ownership through the assessor's  
4 office?

5 A We look at the address on the county records on the  
6 website.

7 Q Do you do that at every step you take?

8 A We do.

9 Q Do you also conduct any searches regarding  
10 bankruptcies?

11 A We do at every step in the process.

12 Q Following recording the notice of delinquent  
13 assessment lien, you recorded a notice of default; is that  
14 correct?

15 A We did.

16 Q And you sent that as well, first class and  
17 certified, to certain parties?

18 A We do.

19 Q What parties did you send that to?

20 A To the parties listed on the TSG report.

21 Q And then after that you recorded two copies of the  
22 -- two separate copies of the notice of sale; is that correct?

23 A Correct.

24 Q And you sent those first class and certified to all  
25 parties that appeared on the previous TSG report or --

1           A     No, we get an updated TSG report, so there would  
2 have been two updates, one for the first NOS, one for the  
3 second NOS, and we would have sent all those first class and  
4 certified.

5           Q     And is there any other way you publish or -- the  
6 notice of sale?

7           A     It's published in Nevada Legal News for three weeks,  
8 and it's also posted on the property and in three public  
9 places.

10          Q     And who pays to have these published and posted?

11          A     Absolute does.

12          Q     And who pays to have the lien, notice of default,  
13 notice of sale recorded?

14          A     Absolute does.

15          Q     Do you also pay for the TSG reports you described?

16          A     We do.

17          Q     Do you have any other person review your documents  
18 to make sure everything is in compliance with statute?

19          A     We do.

20          Q     And who is that?

21          A     Before we go to sale our file goes through attorney  
22 review, and he double-checks to make sure all statutes are  
23 followed.

24          Q     And you wouldn't proceed to sale unless an attorney  
25 approved your sale?

1 A Correct.

2 Q Do you know how many properties you sold on that  
3 June 2012 date? I'll refer you to page 114. Well, strike  
4 that question.

5 Can you tell me what page 114 is when you get there?

6 A This is our bid sheet.

7 Q Now, this document is entitled sales results at the  
8 top; is that correct?

9 A Correct.

10 Q And this is pages 114 and 115; is that correct?

11 A Correct.

12 Q So what does this document show? Why do you have it  
13 in your records?

14 A This is a bid sheet that I create. It's handed out  
15 to all the parties that come to the sale. And it's also given  
16 to our crier so he knows what bid amounts to start at. And  
17 then after the sale it is -- I open it back up and I update it  
18 to the results of what happened.

19 Q Okay. Here, in front of us, on pages 114 and 115,  
20 this looks like it just has sales results, because it has the  
21 information regarding the results of the sale and purchase  
22 price; is that correct?

23 A Correct.

24 Q So do you have the bid sheet still in your  
25 possession?

1 A I would, yes.

2 Q And it's substantively similar to this document?

3 A Yes.

4 Q What are the differences?

5 A Just the results.

6 Q So can you tell me how many properties went for sale  
7 that day, June 12th, 2012?

8 A Unless I miscounted, about 18.

9 Q Okay. And how many were sold to third parties?

10 A About ten.

11 Q Do you know whether these were separate third  
12 parties that purchased at this sale?

13 A There was -- I reviewed the status report before  
14 coming in, the deeds; there was about three to six different  
15 parties that purchased this -- these.

16 Q Was that normal in 2012 to have approximately three  
17 to six people who actually purchased properties at your sales?

18 A Yes.

19 Q Just to clarify, you said you search for bankruptcy  
20 at every step you take; is that true?

21 A We do.

22 Q Is that up to and including sale?

23 A It is.

24 Q Do you pull a TSG right before the sale to confirm  
25 that there are no changes?



1 A We do. It's called a date-down.

2 Q And that includes bankruptcy information for the  
3 homeowner?

4 A It does.

5 Q Okay.

6 MR. COX: No more questions.

7 REDIRECT EXAMINATION

8 BY MR. TOBLER:

9 Q Ms. Mitchell, I want to call your attention to page  
10 43 of Exhibit 23. This is your letter in response to Mr.  
11 Jung.

12 A Okay.

13 Q And the fourth paragraph says -- that sentence there  
14 in the beginning -- per our previous conversation, a statement  
15 of account costs \$50 and is not good for a sale transfer of  
16 the property. Do you see that?

17 A I do.

18 Q Now, you said you had previous conversation with Mr.  
19 Jung; is that accurate?

20 A It is.

21 Q And did that conversation involve your giving notice  
22 to him that a statement of account would be \$50?

23 MR. BRENNER: Leading and hearsay.

24 THE COURT: Sustained.

25 BY MR. TOBLER:

1 Q What was your understanding of that conversation  
2 that took place that you're referring to?

3 MR. BRENNER: Hearsay.

4 MR. TOBLER: What was your understanding?

5 THE COURT: Overruled.

6 BY MR. TOBLER:

7 Q Go ahead.

8 A My understanding was that we discussed our views and  
9 that I did tell him statements would be \$50, and he was aware  
10 of that and everything we discussed in the letter.

11 Q Do you recall whether he ever responded about the  
12 \$50 charge?

13 MR. BRENNER: Hearsay.

14 MR. TOBLER: I'm not asking for the truth of the matter.

15 MR. BRENNER: You're asking for an out of court statement  
16 about what a nonparty said in the case. What other --

17 MR. TOBLER: It goes to the truth of the matter.

18 MR. BRENNER: -- what other purpose is there? But what  
19 other purpose would there be?

20 THE COURT: Why are you asking her the question?

21 MR. TOBLER: I want to -- I want to assess whether there  
22 was any comment about -- or any understanding made with  
23 respect to her notice to him that there would be a \$50 charge.

24 MR. BRENNER: We're going to have the witness here under  
25 oath. What he said is -- what he -- what this witness

1 believes he said is classic --

2 THE COURT: Objection sustained.

3 BY MR. TOBLER:

4 Q You were talking about the amount of the nine months  
5 of assessments previously. Is it possible that the nine-month  
6 assessment amount could be different if it was measured off of  
7 the NOD versus the NOS?

8 A Yes.

9 Q Would a statement of account resolve that issue as  
10 to discrepancies?

11 A Yes.

12 Q Let me have you turn to page 132 of Exhibit 23.

13 A Okay.

14 Q I'm having trouble reading this, but I'll get real  
15 close. It said on -- on March 9th is said received first NOS.  
16 Is that the bank's NOS?

17 A It is.

18 Q Okay. And their -- you're indicating their sale is  
19 set for March 19th?

20 A It was.

21 Q And in reliance of that, did you cancel the sale for  
22 the HOA lien foreclosure?

23 A We did.

24 Q Okay. About a month and a half later, on 4/24/2012,  
25 it says you called ReconTrust?

1 A Correct.

2 Q Do you recall what the substance of that  
3 conversation was?

4 A They indicated that there was no sale set.

5 Q I'm sorry?

6 A They indicated that there was no sale date set.

7 Q Okay. Do you know what happened with the 3/19/12  
8 sale date?

9 A They did not tell me. They would just say whether  
10 or not it went to sale or not. They wouldn't disclose that  
11 kind of information.

12 Q Do you recall whether you told them you were going  
13 forward with your sale because they hadn't gone forward with  
14 theirs?

15 MR. BRENNER: Hearsay.

16 MR. TOBLER: What she told them is not hearsay.

17 THE WITNESS: I don't recall.

18 MR. TOBLER: Okay.

19 MR. BRENNER: I don't think we had a ruling on the  
20 objection but --

21 THE WITNESS: Oh, I'm sorry.

22 THE COURT: Did you want to respond to that, Mr. Brenner?

23 MR. BRENNER: Her out of court statements are hearsay.

24 Whether they're hers or somebody else's, it's an out of court  
25 statement.

1 MR. TOBLER: But it's her own statement. She's here  
2 testifying about what she said, not what somebody else said.

3 THE COURT: It's still hearsay.

4 MR. TOBLER: Okay.

5 THE COURT: Sustained.

6 BY MR. TOBLER:

7 Q How long did you suspend the HOA lien sale to  
8 accommodate Bank of America to foreclose on their mortgage  
9 foreclosure?

10 A Our net sale date was set for June 12th.

11 Q No, I'm saying, when you first postponed a sale  
12 because you wanted Bank of America to go forward, when was  
13 that?

14 A We first received notice that they were moving in  
15 September of 2011 with their notice of default. We postponed  
16 our sale out three times and we received their notice of sale.

17 Q When was our first sale to occur?

18 A When was the first HOA sale to occur?

19 Q Correct. Yes.

20 A December 6th, 2011.

21 Q Okay. And when did you ultimately foreclose?

22 A June 12th, 2012.

23 Q So you waited approximately seven months to  
24 foreclose while Bank of America was doing their foreclosure  
25 sale?

1 A Correct.

2 Q Do you feel that was an adequate amount of time to  
3 allow them to proceed?

4 A I do.

5 Q And does that conform with your statement in your  
6 letter that you would hold our -- quote, hold our action so  
7 your client may proceed?

8 A It does.

9 Q After April 24th of 2012, when you had a  
10 conversation with ReconTrust, did you receive any  
11 correspondence or any communication between ReconTrust, Bank  
12 of America, or any representative of them?

13 A No, I did not.

14 Q Did you record a notice of sale after April 24th, or  
15 was it a continuation?

16 A There was a new notice of sale done.

17 Q What date?

18 A I'd have to look at it, but I believe April 2012.

19 Q Sometime in April?

20 A Yes.

21 Q And that notice would have been mailed to all  
22 relevant parties that we've been talking about today?

23 A Yes.

24 Q Would you ever postpone or cancel a foreclosure sale  
25 if somebody represented to you that I'll pay you but I

1 disagree with your amount?

2 Would you ever do that?

3 A It really depends. If a homeowner is in  
4 disagreement with the amount, I'm bound to have to go back and  
5 audit and make sure --

6 Q Okay.

7 A -- that all the numbers are correct. So yes, it  
8 would definitely be postponed at that point.

9 Q But that would take the homeowner coming to you and  
10 complaining about it, correct?

11 A Correct.

12 Q Okay. Did Mr. Jung ever expressly request a  
13 statement of account?

14 A He didn't request a statement of account.

15 MR. TOBLER: That's all I have.

16 RECROSS-EXAMINATION

17 BY MR. BRENNER:

18 Q Looking back on 132, on that entry on -- I'm sorry,  
19 it is small writing -- on 4/24/2012, where it says there's no  
20 trustee sale set, you understand that there's a difference  
21 between a date not being set and a sale being canceled,  
22 correct?

23 A I do.

24 Q Okay. And if ReconTrust had told you we canceled  
25 our sale, you would have put that in your note, correct?

1 A Not necessarily.

2 Q So you would have put in -- even if they told you  
3 the sale was canceled, you would have wrote there's no trustee  
4 sale set, despite knowing the difference between those two  
5 things?

6 A Because they don't disclose to me whether it was  
7 canceled or not. It was very hard getting information out of  
8 them.

9 Q So you would have written no trustee's sale set if  
10 you would have gotten no information about whether it was  
11 canceled or not?

12 A Correct, they --

13 Q Clearly, they told you there was no date set,  
14 correct?

15 A That's what they told me. That's why that's what I  
16 -- that's what I put in.

17 Q But you knew there was a pending notice of sale?

18 A I knew that there was one, yes, that's why I called  
19 them.

20 Q And you didn't see -- you weren't served and didn't  
21 see anything in the recorded documents that suggested that the  
22 notice of default by the bank had been rescinded?

23 A No, I didn't.

24 Q And you're used to seeing that type of document when  
25 a notice of default or a notice of sale is rescinded, correct?



1 A Not all the time, no.

2 Q But you know what I'm talking about? You've seen  
3 them before?

4 A I know what you're talking about, yes.

5 Q And you didn't see one here?

6 A No, I didn't.

7 Q So one of the other things that you testified about  
8 -- moving away from the sale date. You testified that you  
9 were aware of varying opinions about the super priority, and  
10 you formed the belief that collection costs were included in  
11 the super priority. Is that accurately summarizing your  
12 testimony?

13 A It is.

14 Q Did you state anywhere in your letter to Rock that  
15 you had believed collection costs were super priority?

16 A No, that was in our phone conversation.

17 Q But that's not in the letter, correct?

18 A Correct.

19 MR. BRENNER: I just want to, for the record, move to  
20 strike the portion about the conversation, because I didn't  
21 ask a question that called for hearsay, and I wouldn't want  
22 hearsay to be on the record when I asked about correspondence.

23 THE COURT: All right. It's stricken.

24 BY MR. BRENNER:

25 Q And those collection costs that we're talking about

1 being included in the super priority, those were almost  
2 exclusively, if not exclusively, Absolute's, correct?

3 A Correct.

4 Q All right. And as far as the interpretations of the  
5 super priority you were aware of, you adopted the position  
6 that was going to result in the most likely recovery for  
7 Absolute of those collection costs, correct?

8 A It was the only opinion out there, yes.

9 Q And that's -- but you said you were aware of varying  
10 opinions.

11 A No, of the written opinion by the common interest  
12 communities --

13 Q And you adopt -- you knew that there was dispute  
14 amongst the community, correct?

15 A Correct.

16 Q All right. And you adopted the position that was  
17 most self-serving to Absolute, didn't you?

18 A The only opinion out there, yes.

19 Q Well, I'm not talking about opinions. I'm talking  
20 about positions. You knew that you could have accepted nine  
21 months as the super priority, correct?

22 A And we would, had it been paid.

23 Q And you've seen nothing that indicates to you that  
24 the assessment amount measured at nine months' worth of  
25 assessments was ever provided to Miles Bauer or Bank of

1 America; is that correct?

2 A Correct.

3 Q So explain to me how it is that they would pay to  
4 you a number that hadn't been disclosed.

5 MR. COX: Argumentative.

6 MR. BRENNER: I'll withdraw.

7 THE COURT: Sustained.

8 BY MR. BRENNER:

9 Q You testified earlier that you wouldn't get your  
10 collection costs back unless the HOA went forward with the  
11 sale, correct?

12 MR. COX: Misstates testimony.

13 BY MR. BRENNER:

14 Q Unless the HOA went forward or canceled the sale; is  
15 that correct?

16 MR. BRENNER: I'll rephrase, Your Honor.

17 BY MR. BRENNER:

18 Q You testified that you wouldn't get your collection  
19 costs back unless the HOA made the decision to cancel the sale  
20 or you went forward, correct?

21 A Correct.

22 Q And you've seen nothing to suggest that the HOA  
23 wanted the sale canceled, correct?

24 A Correct.

25 Q So the only way to get your collection costs was to

1 move forward with the sale?

2 A Per the board direction, yes.

3 MR. BRENNER: No further questions.

4 THE COURT: Cross, Mr. Cox?

5 MR. COX: No.

6 MR. TOBLER: Nothing.

7 THE COURT: Great. Thank you, ma'am. You're free to go.

8 THE WITNESS: Thank you.

9 THE COURT: Have a good afternoon.

10 THE WITNESS: You, too.

11 THE COURT: All right. Mr. Tobler, anyone else, or was  
12 that your last witness?

13 MR. TOBLER: [No audible response].

14 THE COURT: Mr. Tobler?

15 MR. TOBLER: Pardon?

16 THE COURT: Did you have anyone else?

17 MR. TOBLER: No, that's it.

18 THE COURT: Great. Okay.

19 MR. BRENNER: We told Mr. Jung 1:45. There's a couple  
20 housekeeping things I could probably --

21 THE COURT: Okay. Great.

22 MR. BRENNER: First of all, we're not going to move for a  
23 Rule 50 relief, but we are going to plan -- we are planning on  
24 arguing that plaintiff hasn't met their burden at the time,  
25 but we're going to reserve that for closing arguments after

1 all testimony is heard.

2 We want to publish the deposition transcript of the  
3 plaintiff under the Rule -- I think it's 32. Is it 32? Maybe  
4 it's -- whichever rule says that they're usable for plaintiffs  
5 -- that party's testimony is usable for all purposes. I don't  
6 plan on reading from it now, but I want it to be published so  
7 that it's there on the record if there is a secondary level of  
8 proceedings.

9 THE COURT: Is there any objection to that?

10 MR. COX: No.

11 MR. TOBLER: No.

12 THE COURT: All right. Plaintiff's deposition will be  
13 published.

14 [Counsel confer]

15 THE COURT: Why don't we just take five minutes.

16 MR. BRENNER: Okay.

17 [Recess at 1:42 p.m.]

18 THE MARSHAL: Remain seated. District Court Department  
19 VII is now back in session.

20 MR. BRENNER: We're ready to proceed.

21 THE COURT: Somebody has a witness?

22 MR. HABDAS: We do.

23 MR. BRENNER: Yeah, Mr. Jung is -- he's on his way up.  
24 He's apologizing because he got stuck in an accident with the  
25 rain, but we're going to go ahead and call the Foxfield HOA.

1 THE COURT: All right. Ma'am, come on up.

2 THE MARSHAL: If you would remain standing, raise your  
3 right hand, and face the clerk to be sworn in.

4 YVETTE SAUCEDA, DEFENDANT'S WITNESS, SWORN

5 THE CLERK: Thank you. Please be seated. State and  
6 spell your name for the record.

7 THE WITNESS: Yvette Saucedo, Y-V-E-T-T-E. Last name is  
8 S-A-U-C-E-D-A.

9 THE COURT: Good afternoon, ma'am.

10 THE WITNESS: Good afternoon.

11 THE COURT: Whenever you're ready.

12 DIRECT EXAMINATION

13 BY MR. HABDAS:

14 Q Good afternoon, Ms. Saucedo. Where do you work?

15 A I work for Complete Association Management Company,  
16 also known as CAMCO.

17 Q And how long have you been with CAMCO?

18 A I'm on my seventh year.

19 Q And where did you work before CAMCO?

20 A Directly prior to working at CAMCO I was home with  
21 my kids for a couple years, and before that I was in the title  
22 and escrow field.

23 Q Okay. And what is your title at CAMCO?

24 A Accounting director.

25 Q Has that been your title throughout your tenure

1 there?

2 A My first year at CAMCO I was assistant to the  
3 accounting director.

4 Q Okay. And just briefly, what are some of the duties  
5 that you undertake as an accounting director?

6 A I oversee the accounting department, which includes  
7 our accounts payable and accounts receivable departments. I  
8 process the mailing out of statements to the homeowners within  
9 the communities that we manage. I audit the delinquent  
10 accounts and send out delinquency notices.

11 I prepare the monthly financial statements for our  
12 communities and I correspond with board members, homeowners,  
13 and community managers regarding any accounting related issues  
14 that might come up.

15 Q Thank you. And what is the relationship between  
16 CAMCO and Foxfield Community Association?

17 A CAMCO is the community management company for  
18 Foxfield Community Association, and we've managed them since,  
19 I believe, 2009.

20 Q And is CAMCO still managing for that HOA today?

21 A Yes.

22 Q Okay. And so in your role as accounting director  
23 for CAMCO, are you familiar with the HOA's policies and  
24 procedures regarding the collection of HOA assessments?

25 A Yes.

1 Q And similarly, are you familiar with the HOA  
2 policies and procedures for the creation and maintenance of  
3 its files?

4 A Yes.

5 Q And are you also familiar with the HOA's policies  
6 and procedures regarding the creation and maintenance of its  
7 budgets?

8 A Yes.

9 Q And are you also familiar with the HOA policies and  
10 procedures regarding HOA collections, generally?

11 A Yes.

12 Q And are you also familiar with the HOA policies and  
13 procedures regarding collection -- collections?

14 A Yes.

15 Q Okay. Are you also familiar with the HOA policies  
16 and procedures regarding nonjudicial foreclosures?

17 A Yes.

18 Q Okay. And then finally, are you also familiar with  
19 the HOA's governing documents, meaning the CC&Rs?

20 A Yes.

21 Q Now, briefly, what duties does CAMCO provide  
22 specifically for this HOA?

23 A We provide all of the accounting -- day-to-day  
24 accounting for the association, so receiving and posting of  
25 payments, mailing out statements.



1 We also provide property related services, so we do  
2 drives over the community and look for homeowners that are in  
3 violation of the CC&Rs, and we would send out those notices to  
4 those homeowners. We also plan their meetings, schedule their  
5 meetings, and attend the meetings and deal with any vendors  
6 for anything related to the property.

7 Q Okay. Great. Thank you. And that's a good  
8 overview. And you've gone through a few things. I'm going to  
9 touch on a couple of them.

10 You mentioned violations, that you manage the violations.  
11 Does somebody from CAMCO actually monitor the neighborhood and  
12 look for violations that homeowners have made?

13 A Yes.

14 Q Okay. And when you say violations, would those be  
15 violations of the CC&Rs?

16 A Correct.

17 Q Okay. And so who at the HOA keeps copies of the  
18 CC&Rs?

19 A All board members would have a copy of the CC&Rs.  
20 And within the management company the CC&Rs are located in the  
21 association file.

22 Q Okay. So in order to -- essentially, I'm going to  
23 call it police, but to look for violations of CC&Rs, CAMCO  
24 would need to be aware of the contents of the CC&Rs; is that  
25 correct?

1 A Correct.

2 Q Okay. And in that role CAMCO does -- does CAMCO  
3 rely on the CC&Rs?

4 A Yes.

5 Q And does the HOA expect its members, the homeowners  
6 to abide by those CC&Rs?

7 A Yes.

8 Q And does the HOA expect itself to abide by the CC&Rs  
9 as well?

10 A Yes.

11 Q Now, you also mentioned sending of notices. So  
12 CAMCO sends correspondence to the homeowners on behalf of the  
13 HOA?

14 A That's correct.

15 Q And would that include a bill for assessments?

16 A Yes.

17 Q And then I believe you said, also, notices for  
18 violations. Did you mention those?

19 A Yes.

20 Q Okay. And what about notices for hearings?

21 A Yes.

22 Q Now, are you familiar with the quarterly assessment  
23 for this particular HOA in 2011 and 2012?

24 A Yes.

25 Q What was the assessment in 2011?

1           A     I believe in 2011 it was \$50 per quarter, and then  
2 it went up to \$55 per quarter. I believe that happened in  
3 2012.

4           Q     Okay. Now, if we wanted to double-check that in the  
5 records we have in front of us, which record would contain  
6 that information?

7           A     The account ledger.

8           Q     Okay. Now, if I can turn your attention to what we  
9 have here as Exhibit 22, Bates stamped on the bottom FOX84.

10          A     Okay.

11          Q     Is that the ledger you were referring to?

12          A     Yes, it is.

13          Q     Okay. And after reviewing this ledger briefly, can  
14 you tell us if what you had said earlier is correct?

15          A     It's not. It actually was -- it increased to \$55  
16 per quarter in 2011.

17          Q     Okay. So then --

18          A     Well --

19          Q     Go ahead.

20          A     Sorry. Yes, that is correct.

21          Q     Okay. So in 2011 it was \$55 and in 2012 it was \$55;  
22 is that right?

23          A     That's correct.

24          Q     Okay. Now, you've heard of the company Absolute  
25 Collection Services before?

1 A Yes.

2 Q What is the relationship between Absolute Collection  
3 Services -- and I'll call them ACS going forward -- and this  
4 HOA?

5 A ACS is the collection company that the association  
6 uses for its collection services.

7 Q Okay. And was that true in 2011 through 2013?

8 A Yes.

9 Q Is that true today as well?

10 A Yes.

11 Q Now, who at ACS was the contact for the HOA and  
12 CAMCO?

13 A There's only a couple employees there. We usually  
14 communicate with Richard Kaye or Kelly Mitchell.

15 Q Okay. And does CAMCO and the HOA consider ACS a  
16 vendor?

17 A Yes.

18 Q Okay. Now, I know earlier you had said that the HOA  
19 attempts to comply with the CC&Rs; is that correct?

20 A Yes.

21 Q Does the HOA also expect ACS to abide by the CC&Rs?

22 A Yes.

23 Q And does the HOA expect ACS to be familiar with the  
24 CC&Rs so it can abide by them?

25 A Yes.

1 Q Okay. Now, how does the HOA pay ACS for its  
2 services?

3 A The collection agency gets paid when an account is  
4 paid off, whether that be the homeowner that pays off the  
5 account or another party or through the foreclosure sale  
6 itself. If the property were to revert to the HOA, then the  
7 HOA would be responsible for paying those collection costs.

8 Q Okay. So then if the sale goes forward, the HOA --  
9 the ACS is paid from the proceeds at the sale; is that  
10 correct?

11 A That's correct.

12 Q Okay. But if the sale doesn't go forward, then the  
13 HOA has to pay those amounts; is that correct?

14 A Yes.

15 Q Okay. Now, I'm going to direct your attention to,  
16 first, what is -- same Exhibit 22, but Bates stamped FOX71 on  
17 the bottom.

18 A Okay.

19 Q Are you familiar with this type of document?

20 A Yes.

21 Q What is this type of document?

22 A This is a new account intake form that would be sent  
23 over with an account ledger when the account was turned over.

24 Q So this is sent from the HOAs to Absolute; is that  
25 correct?

1           A     That's correct.

2           Q     Okay. And this starts the process for collections;  
3 is that also correct?

4           A     Correct.

5           Q     Okay. Now, the next thing I want you to look at is  
6 the first page we have here, which is FOX1 in that same  
7 exhibit.

8           A     Okay.

9           Q     Are you familiar with this type of document?

10          A     Yes, I am.

11          Q     What is this document?

12          A     This is the authorization to publish. This document  
13 gets signed by a board member and is the authorization to  
14 proceed with the sale.

15          Q     Okay. Now, we've just looked at two documents, the  
16 first was an initial referral and the second was the  
17 authorization to publish. Other than these two documents, are  
18 there any other documents that are required by the HOA to give  
19 explicit permission with ACS to finish foreclosing on a  
20 property?

21          A     No, just those documents.

22          Q     Okay. And who sets the minimum bid price?

23          A     The collection agency.

24          Q     Okay. So the HOA didn't tell ACS what the minimum  
25 bid price should be; is that correct?

1 A That's correct.

2 Q Okay. And did the HOA have any communication with  
3 ACS to instruct ACS whether or not it should accept or reject  
4 payments from banks?

5 A No.

6 Q And did the HOA tell ACS that it should conduct a  
7 super priority foreclosure sale?

8 A No.

9 Q And did the -- in your -- have you reviewed this  
10 file, the documents that we have in front of us?

11 A I did a review at the office of what documents I had  
12 access to. I'm not real sure exactly what's in here, but it's  
13 probably --

14 Q Okay.

15 A -- the same set of documents.

16 Q Based on the documents you reviewed at your office,  
17 did you see anything in the HOA's file to indicate that in  
18 this particular case the bank had attempted to pay ACS some  
19 amount for the super priority?

20 A I didn't see anything in the HOA's file, no.

21 Q And would it be typical that ACS would inform the  
22 HOA if there was a letter from a bank?

23 A No.

24 Q And did ACS have the full authority from the HOA to  
25 either choose to accept or reject these types of payments from

1 banks?

2 A Yes.

3 Q Okay. So just to make sure I've got your testimony  
4 correct on that, is it your testimony that the HOA granted the  
5 authority to ACS to conduct the sale as it saw fit?

6 A Correct.

7 MR. HABDAS: I have no more questions. I'll pass.

8 THE COURT: All right. Thank you.

9 MR. TOBLER: None.

10 THE COURT: Mr. Cox, go ahead when you're ready.

11 CROSS-EXAMINATION

12 BY MR. COX:

13 Q Good afternoon, Ms. Saucedo?

14 A Yes.

15 Q Can you review the documents found on Exhibit 22,  
16 pages 84 and 85.

17 MR. BRENNER: I'm sorry. What page?

18 MR. COX: 84 and 85.

19 MR. BRENNER: Thank you.

20 THE WITNESS: Okay.

21 BY MR. COX:

22 Q Between the months -- or, the date of April 2nd,  
23 2010, and prior to the sale that occurred June 12th, 2012, did  
24 you receive any payments from the homeowner?

25 A No, we did not.



1 Q Did you receive any payments from a bank or any  
2 other party on behalf of the homeowner?

3 A No, we did not.

4 Q Can you refer to Bates stamp pages 5 through 6 of  
5 Exhibit 22.

6 A Okay.

7 Q Are these documents maintained in the HOA's file  
8 that CAMCO held?

9 A Yes.

10 Q And according to this, the HOA had selected Absolute  
11 Collection Services to act as its agent according to its  
12 delinquent account collection protocol?

13 A That's correct.

14 Q Thank you. Now, it was Ms. Julie Skinner who signed  
15 the signed authorization to publish, which we can find on  
16 Exhibit 23, page 45?

17 A I think it's page 1.

18 Q Of your exhibit it's page 1? Exhibit 22, page 1?

19 A Yes.

20 Q Okay. Sorry. I was referring to Absolute's. Was  
21 Ms. Skinner a board member in September 2011?

22 A Yes, she was.

23 Q And to your knowledge, she was the one who signed  
24 this document?

25 A Correct.

1 Q Now we're going to go through -- could you review in  
2 Exhibit 22, pages 72 through 81 -- oh, sorry, 83. And what  
3 are these documents?

4 A These are the association's budgets, it looks like,  
5 from 2006 through 2012.

6 Q And what are the requirements that the HOA has to do  
7 in keeping the budget?

8 A In finalizing the budget or --

9 Q Do you have to file them, for example? How do you  
10 have to keep them?

11 A Well, they are sent out to the entire community, and  
12 then we keep a copy on our server.

13 Q So these are mailed out to all the homeowners in the  
14 community?

15 A Yes, they are.

16 Q Okay. What was the HOA's intention in selling the  
17 property?

18 A The HOA's intention was to make itself whole again  
19 and get the money that was due to the community.

20 Q Did it have any intention in interfering with the  
21 first deed of trust?

22 A No.

23 MR. COX: Okay. That's all the questions that I have.

24 MR. HABDAS: Nothing further here.

25 THE COURT: Okay.

1 MR. TOBLER: Nothing.

2 THE COURT: Okay.

3 MR. BRENNER: Okay. Fair enough.

4 THE COURT: Didn't have any there so.

5 MR. TOBLER: Okay.

6 THE COURT: All right, Ms. Saucedo --

7 THE WITNESS: Okay?

8 THE COURT: -- thank you so much.

9 THE WITNESS: Thank you.

10 THE COURT: Is he done yet?

11 MR. BRENNER: [Indiscernible] did said he was here, so I  
12 think we're ready.

13 THE COURT: Good.

14 [Pause]

15 THE MARSHAL: Remain standing, raise your right hand, and  
16 face the clerk to be sworn in, please.

17 ROCK JUNG, DEFENDANT'S WITNESS, SWORN

18 THE CLERK: Thank you. Please be seated. State and  
19 spell your name for the record.

20 THE WITNESS: Rock, R-O-C-K, Jung, J-U-N-G.

21 THE COURT: Good afternoon.

22 THE WITNESS: Good afternoon, Judge.

23 THE COURT: Whenever you're ready, Mr. Brenner.

24 MR. BRENNER: Okay.

25 DIRECT EXAMINATION

1 BY MR. BRENNER:

2 Q Mr. Jung, can you please state your present  
3 occupation?

4 A Yes, I'm an attorney.

5 Q And are you a Nevada licensed attorney?

6 A I am.

7 Q How long have you been a Nevada licensed attorney?

8 A Since 2008.

9 Q Where are you currently employed?

10 A At the law firm Wright, Finlay & Zak.

11 Q Where were you employed in August of 2011?

12 A At the law firm Miles, Bauer, Bergstrom & Winters.

13 Q And what were your dates of employment at Miles  
14 Bauer?

15 A Approximately October 2009 through March 2014.

16 Q Was Bank of America one of your clients during that  
17 time?

18 A Yes, they were.

19 Q And during that time period what type of work did  
20 you do for Bank of America?

21 A Primarily, we would seek to protect their first deed  
22 of trust lien interest by fulfilling any super priority lien  
23 obligations that may have existed.

24 Q And so that was in relation to HOA nonjudicial  
25 foreclosure sales?

1 A Correct.

2 Q All right. Can you explain to me, in general, how  
3 you would go about fulfilling those responsibilities?

4 A After receiving a copy of their recorded notice of  
5 default pertaining to an HOA account, I would seek to reach  
6 out to the HOA or HOA trustee for information pertaining to  
7 the super priority amount, which I could forward to my client,  
8 which we could then seek to satisfy.

9 Q During your dates of employ at Miles Bauer,  
10 approximately how many times were you retained by Bank of  
11 America for that purpose, as you've described it?

12 A Over the years I was at Miles Bauer I'd estimate  
13 several thousand times.

14 Q Did you charge Bank of America for the services you  
15 provided?

16 A Yes, we did.

17 Q Are you familiar with a company known as Absolute  
18 Collection Services, or ACS?

19 A I am.

20 Q And how did you become familiar with Absolute  
21 Collection Services?

22 A They were one of the HOA sales trustees that would  
23 record HOA notices on behalf of HOAs in Nevada.

24 Q And approximately how many times during your employ  
25 with Miles Bauer, if you recall, did you tender or attempt to

1 tender super priority payments to Absolute?

2 A During my course of employment with Miles Bauer, for  
3 ACS specifically, several hundred times.

4 Q And through those efforts did you become familiar  
5 with Absolute's practices for handling your requests and  
6 correspondence?

7 A Yes.

8 Q Can you -- are you able to describe those practices?

9 A As I recall, their practices did evolve during my  
10 employment with Miles Bauer. Initially, in 2009, what I  
11 recall is that ACS would refuse to provide any payoff or super  
12 priority information stating that any such amount was  
13 premature absent a foreclosure on the first deed of trust.

14 If I recall correctly, that eventually evolved where they  
15 were providing nine months' worth of assessments, but that was  
16 several years later in, maybe, 2013, I believe.

17 Q Well -- well, strike that.

18 Let's -- if I -- there's an exhibit binder in front of  
19 you. If I could ask you to turn to Exhibit tab 23. And  
20 there's a document called ACS40, and I'll put it up here on  
21 the screen to help you find it. I have a feeling you're going  
22 to recognize it. Let me know when you're there.

23 A Okay. I'm ready.

24 Q Okay. Do you recognize this document?

25 A Yes, I do.

1 Q What is it? I'm sorry. I'm moving it on you. How  
2 would you describe what this letter is?

3 A I describe this is as initial correspondence between  
4 myself and ACS regarding a notice of default that ACS would  
5 have recorded on behalf of the HOA.

6 Q And do you see where it shows a property address of  
7 588 Bugle Bluff Road, Henderson, Nevada 89105?

8 A Yes, I do.

9 Q And if you turn to the second page, do you see a  
10 signature on that page?

11 A Yes.

12 Q Do you recognize that signature?

13 A Yes, I do.

14 Q Whose signature is it?

15 A That would be my signature.

16 Q This is a copy of a letter you wrote on August 18th,  
17 2011, to Foxfield through Absolute Collections; is that  
18 correct?

19 A Correct.

20 Q Why did you write this letter?

21 A We wrote this letter in an attempt to fulfill any  
22 super priority lien obligations that may have existed.

23 Q Well, why not just pay the super priority when you  
24 receive the notice of default?

25 A We didn't know what the super priority amount was at

1 the time we received the copy of the notice of default.

2 Q All right. Let's look at some of the statements in  
3 this. If we look at paragraph one on page one, it says, this  
4 letter is in response to your notice of default with regard to  
5 the HOA assessments purportedly owed on the above described  
6 real property.

7 This firm represents the interest of MERS as nominee for  
8 Bank of America, NA, as successor by merger to BAC Home Loans  
9 -- Home Loan Servicing, LP, herein after BANA with regard to  
10 these issues. BANA is the beneficiary/servicer of the first  
11 deed of trust loan secured by the property. Did I read that  
12 correctly?

13 A Yes, you did.

14 Q Is everything in there truthful?

15 A Yes.

16 Q So it's true that Bank of America retained you to  
17 address the HOA's notice of default and election to sell?

18 A Yes.

19 Q And that was one of the purposes in writing this  
20 letter to Foxfield via Absolute was to convey that?

21 A Correct.

22 Q All right. If we go to page 2, paragraph 3, it  
23 starts, based on section 2(b). Let me know when you're there.

24 A Okay. I'm there.

25 Q Based on section 2(b), a portion of your HOA lien is



1 arguably senior to BANA's first deed of trust, specifically  
2 the nine months of assessments for common expenses incurred  
3 before the date of your notice of delinquent assessment dated  
4 July 15th, 2011. Did I read that correctly?

5 A Yes, you did.

6 Q Why nine months?

7 A Nine months, at the time, was what we interpreted  
8 the statute to compose -- or, comprise the super priority  
9 amount.

10 Q All right. It goes on, for the purposes of  
11 calculating the nine-month period, the trigger date is the  
12 date the HOA sought to enforce its lien. Did I read that  
13 correctly?

14 A Yes, you did.

15 Q All right. And based on your practices, what did  
16 you consider to be the date the HOA sought to enforce its  
17 lien?

18 A The recording date of the notice of default.

19 Q The recording date of the notice of default or --  
20 take a look at the -- at the sentence that precedes that and  
21 see if that -- the starting sentence, if you could, and see if  
22 that changes your testimony.

23 A I'm sorry. Can you rephrase the question?

24 Q I'm sorry. Maybe I misunderstood your testimony.

25 Let me go back and ask the question. Let me go ask it -- or,

1 let me go back and ask the initial question.

2 What was your understanding, based on your policies and  
3 procedures, what the trigger date was for the nine months of  
4 common assessments that comprised the super priority?

5 A It was the time where the HOA recorded their notice  
6 of default.

7 Q Okay. All right. And then it goes on to say, that  
8 amount, whatever it is, is the amount Bank of -- or, BANA  
9 should be required to rightfully pay to fully discharge its  
10 obligations to the HOA per NRS 116.3102. And my client hereby  
11 offers to pay that sum upon presentation of adequate proof of  
12 the same by the HOA. Did I read that correctly?

13 A Yes, you did.

14 Q What were you looking for as proof?

15 A A payoff ledger on ACS letterhead, for example.  
16 Something to show that these were the assessments that were  
17 due and owing from the HOA.

18 Q And if that -- if such a ledger had been provided,  
19 what was your policy and procedure at that point?

20 A It would have then been to turn around and obtain a  
21 check -- a cashier's check for the amount equivalent to nine  
22 months' worth of assessments and to deliver that check to ACS  
23 prior to any HOA nonjudicial foreclosure sale.

24 Q So if ACS had provided the information requested,  
25 you would have paid nine months' worth of delinquent

1 assessments; is that correct?

2 A That is correct.

3 Q The next paragraph goes on to say, please let me  
4 know what the status of any HOA lien foreclosure sale is, if  
5 any. My client does not want these issues to become further  
6 exacerbated by a wrongful HOA sale, and it's my client's goal  
7 and intent to have these issues resolved as soon as possible.  
8 Can you tell me why you included that statement in your  
9 letter?

10 A We didn't want the HOA to proceed any further with  
11 their foreclosure process up to and including the conducting  
12 of a sale without my client having the opportunity to fulfill  
13 any super priority lien obligations that may have existed.

14 Q Okay. All right. If I could get you to turn to  
15 ACS44.

16 A Okay.

17 Q Do you have a recollection of receiving this letter  
18 in response to your August 18th, 2011, letter?

19 A This does look familiar, this type of letter  
20 correspondence I would get from ACS.

21 Q And what would you -- what was your understanding of  
22 what this letter was conveying?

23 A My understanding was that they considered my request  
24 for a super priority amount to be premature absent my client  
25 foreclosing on their first deed of trust. And, also, I

1 remember, specifically, they would acknowledge my client's  
2 senior deed of trust lien.

3 Q And do you see this -- my copy has highlights, if  
4 that helps locate what I'm pointing to. Do you see the third  
5 paragraph where it says, we recognize your client's position  
6 as the first mortgage company as the senior lienholder? Do  
7 you see that?

8 A I'm sorry. Did you say second or third?

9 Q Third paragraph. I can slow down. It's the one,  
10 two, three, four, five -- I think the fifth sentence in the  
11 third paragraph.

12 A It starts with, we recognize your client's position?

13 Q Yes. We recognize your client's position as the  
14 first mortgage company as the senior lienholder. Is that what  
15 you were referring to a moment ago?

16 A Correct. Yes.

17 Q And do you see below where it says in the last  
18 paragraph, per our conversation, a statement of account costs  
19 \$50 and is not good for a sale/transfer of the property?

20 A Yes, I see that.

21 Q All right. And it was your understanding that the  
22 statement of account wouldn't be provided unless you paid \$50  
23 consistent with what this statement says?

24 A That's correct.

25 Q Okay. And you weren't asking for a statement of the

1 full account, correct?

2 A Correct.

3 Q You were just asking for a nine-month payoff?

4 A That's correct.

5 Q To your knowledge, in relation to this file, was a  
6 nine-month payoff ever provided?

7 A No, it was not.

8 Q Okay. During this period of time -- and I know it's  
9 a long time ago, and you had a lot of files. During this  
10 period of time, in September of 2011, was it your  
11 recollection, just as a broad, general matter, whether or not  
12 Absolute was providing you with a nine-month super priority  
13 payoff?

14 A They were not providing us nine months' super  
15 priority payoffs.

16 Q Okay. If we go to the second paragraph here in this  
17 letter, it says, I'm making you aware that it is our view that  
18 without the action of a foreclosure, a nine-month statement of  
19 account is not valid.

20 At this time I respectfully request that you submit the  
21 trustee's deed upon sale showing your client's possession of  
22 the property and the date that it occurred. At that time we  
23 will provide a nine-month super priority lien statement of  
24 account. What did you understand Absolute was conveying to  
25 you?

1           A     My understanding was that there was no super  
2 priority lien amount that was due and owing, according to ACS,  
3 and that they were waiving any right to demand such an amount  
4 at that time.

5           MR. BRENNER: No further questions.

6           THE COURT: Mr. Cox.

7                               CROSS-EXAMINATION

8 BY MR. COX:

9           Q     Mr. Jung, could you refer to Exhibit 21, please.

10          A     Okay.

11          Q     Now, this is an affidavit from your prior law firm,  
12 Miles Bauer; is that correct?

13          A     That's correct.

14          Q     Now, in this set of documents do you find a response  
15 letter from Absolute Collection Services?

16          A     I do not, no.

17          Q     Do you know independently whether or not you  
18 received a response letter from Absolute Collection Services?

19          A     For this particular property?

20          Q     This property.

21          A     Based on their custom and practice they would have  
22 always -- they would have given me a response. I don't  
23 independently recall for this specific property.

24          Q     What actions did you take after receiving the  
25 response from Absolute Collection Services?

1           A     My understanding and recollection is that I would  
2 monitor the property to see if it did go to HOA nonjudicial  
3 foreclosure sale.

4           Q     Do you do anything in response to it going to sale?

5           A     I would advise my client if and when it did go to  
6 sale and what actions we should take thereafter.

7           Q     Okay. Can I refer you to that same Exhibit 21,  
8 specifically page 123. Now, there's a paragraph that begins  
9 with, based on section 2(b).

10          A     Okay.

11          Q     Are you with me? Okay.

12          A     Yes.

13          Q     Now, you state in the first sentence -- I'll read it  
14 to you -- based on section 2(b), a portion of your HOA lien is  
15 arguably senior to BANA's first deed of trust, specifically  
16 the nine months of assessments for common expenses incurred  
17 before the date of your notice of delinquent assessment dated  
18 July 15th, 2011.

19                I believe your testimony was that you believed that the  
20 super priority portion of the lien was the nine months  
21 preceding the recording of the notice of default; is that  
22 correct?

23          A     Correct.

24          Q     So this is a misstatement here, that you say that a  
25 portion of the HOA lien is senior -- arguably senior to BANA's

1 first deed of trust, specifically the nine months of  
2 assessments for common expenses incurred before the date of  
3 your notice of delinquent assessment dated July 15th, 2011?

4 A No. I mean, I meant the notice of default. I mean,  
5 this one might have -- I might have said notice of delinquent  
6 assessment. I think I sometimes use them interchangeably in  
7 the letters that I wrote, depending on what I received a copy  
8 of from my client at that time.

9 Q Okay. So it probably refers to the notice of  
10 default then?

11 A Yes.

12 Q At any time did you communicate to Ms. Mitchell that  
13 you believed that the HOA could only collect nine months of  
14 assessments and nothing more?

15 A Besides what's written in this correspondence, I  
16 don't believe so.

17 Q You never advised them that they would have to  
18 release their lien after you offered nine months of  
19 assessments?

20 A For this particular property?

21 Q For any property.

22 MR. BRENNER: Relevance. Foundation.

23 MR. COX: There's prior conversations of, you know, what  
24 they talked about, what she wanted -- what he wanted her to do  
25 that would be, you know, relevant to this conversation as



1 well.

2 MR. BRENNER: Then if it's about conversations, then I'll  
3 also object on hearsay.

4 MR. COX: You've got a party opponent right here.

5 MR. BRENNER: He's not a party.

6 MR. COX: Then he's not an agent that can offer money on  
7 behalf of Bank of America.

8 MR. BRENNER: He's obviously the attorney hired by Bank  
9 of America, but that doesn't mean that the hearsay rule  
10 doesn't apply to him.

11 MR. COX: This is the communication with Bank of America  
12 she had.

13 THE COURT: Well, there has to be -- and so what's the  
14 relevance as to that?

15 MR. COX: I think the relevance is her mindset when  
16 receiving the letter, what they're asking for with this  
17 letter.

18 MR. BRENNER: If I may respond, he can't testify about  
19 what Absolute's mindset was. She's already provided testimony  
20 about everything that she could testify about.

21 MR. COX: It can't be hearsay on both sides. I mean,  
22 I've got to have an opportunity to ask a question.

23 THE COURT: Well, it absolutely can be hearsay on both  
24 sides. There has to be an exception for it to come in.

25 MR. COX: And I'm saying party opponent.

1 THE COURT: Mr. Jung is an attorney.

2 MR. COX: Is he a representative of Bank of America or  
3 was that the conversation with Bank of America at the time  
4 when these letters occurred?

5 THE COURT: What is your exception? So you're saying  
6 it's an admission?

7 MR. COX: Yes.

8 THE COURT: Okay. So the objection is sustained.

9 MR. COX: Okay. No further questions.

10 THE COURT: All right.

11 CROSS-EXAMINATION

12 BY MR. TOBLER:

13 Q Mr. Jung, my name is Rich Tobler. I represent the  
14 plaintiff in this matter, Thomas Jessup LLC Series VII, the  
15 party who bid on the property at the foreclosure sale that  
16 ultimately went down.

17 I was -- I was curious to hear that you had represented  
18 Bank of America in thousands of these transactions. Is that  
19 what you said?

20 A That's correct. Yes.

21 Q And how did you track all the activity with these  
22 thousands of foreclosures?

23 A We used our case management system, ProLaw.

24 Q Okay. Would it surprise you if I represented to you  
25 that your correspondence is the only correspondence that was

1 disclosed by Bank of America's counsel?

2 MR. BRENNER: Relevance. What counsel discloses in  
3 litigation has no relevance in a case, especially with a  
4 witness who's not a party.

5 MR. TOBLER: I'm asking if there's -- what I'm leading  
6 to is, what else -- was there anything else? I mean, is this  
7 it?

8 THE COURT: Overruled.

9 THE WITNESS: I'm sorry, counsel. One more time, please.

10 BY MR. TOBLER:

11 Q Would it surprise you if this was the only  
12 correspondence that you had in the file concerning this  
13 matter?

14 MR. BRENNER: Foundation. It's a different question.

15 THE WITNESS: The only --

16 THE COURT: Overruled. Go ahead. I'm sorry.

17 THE WITNESS: I'm sorry, Judge. The only correspondence  
18 to ACS is -- you're saying is this letter?

19 BY MR. TOBLER:

20 Q From your firm concerning this matter.

21 A It would not surprise me if we didn't receive any  
22 further payoff information for me to act upon, so no.

23 Q Okay. So you would just let it lie and let the  
24 foreclosure go down?

25 A No, we would still monitor it, but there is nothing

1 we could do as far as a super priority amount absent  
2 additional information from ACS.

3 Q Did you -- did you happen to go back, and do you  
4 remember having any phone calls or any other communications  
5 going back to ACS and say, hey, I really need a statement from  
6 you? Did anything like that?

7 A I did have phone calls with Ms. Mitchell of ACS  
8 going forward. I don't recall if it was specifically  
9 pertaining to this specific property. As I testified earlier,  
10 I know ACS eventually changed their policy for providing  
11 payoff information or nine months of payoff amounts.

12 But at this time, I don't recall if I specifically  
13 brought up this property to Ms. Mitchell in our ensuing phone  
14 conversations or correspondence.

15 Q I think your testimony earlier was, you wanted proof  
16 of payment payoff ledger. Do you remember that?

17 A Can you repeat that? I wanted proof --

18 Q You testified that you wanted proof of payment --  
19 proof of payment ledger. You said that earlier just in your  
20 testimony. Is that accurate?

21 MR. BRENNER: Misstates testimony.

22 MR. TOBLER: I wrote it down.

23 THE COURT: Overruled.

24 THE WITNESS: I don't recall. I used the term proof of  
25 payment?

1 BY MR. TOBLER:

2 Q Proof of payment ledger.

3 A I wanted some kind of information from ACS informing  
4 me what the nine months' super priority amount was.

5 Q Okay. So would that -- would that information be  
6 included in an account statement from the HOA?

7 MR. BRENNER: Calls for speculation.

8 MR. TOBLER: He sees them every day.

9 MR. BRENNER: Well, that's a different question.

10 THE COURT: Overruled.

11 THE WITNESS: It could, but without something from ACS, I  
12 wouldn't -- I wouldn't be able to tell you definitively.

13 BY MR. TOBLER:

14 Q Did you order a statement of account on this  
15 particular matter?

16 A We did not, not the one where we were going to be  
17 charged \$50 for just a total amount, no.

18 Q And there's no correspondence here that says we  
19 don't have to pay you, right?

20 A No, that's the good thing, is that ACS told us --  
21 already said that it didn't come into play, the super priority  
22 amount, until my client foreclosed on their first deed of  
23 trust, and that they recognized my client's lien as the senior  
24 lien.

25 Q Do you disagree with that statement?

1 A Do I disagree with that statement?

2 Q Yes.

3 MR. BRENNER: Objection. Form. Calls for a legal  
4 conclusion.

5 MR. TOBLER: He's an attorney.

6 MR. BRENNER: He has not been disclosed as an expert  
7 witness I called as an expert witness. He's been called as a  
8 lay witness for his transactions with Absolute. And we  
9 already have the legal expert.

10 MR. TOBLER: Your Honor, this is -- this is the guy that  
11 was dealing with super priority liens and loans and  
12 foreclosures and so forth. I think he's pretty qualified to  
13 testify about super priority lien litigation.

14 MR. BRENNER: If plaintiff wanted to call him that way,  
15 he needed to be designated as an expert. But it doesn't  
16 matter, because we have a legal expert, she's wearing a black  
17 robe and she can make those decisions. We don't need lay  
18 witness testimony to make legal conclusions.

19 THE COURT: All right. The objection is sustained.

20 BY MR. TOBLER:

21 Q In the course of your dealings as an attorney, is  
22 the super priority amount only applicable when the bank  
23 forecloses on their property?

24 MR. BRENNER: Same objection.

25 MR. TOBLER: That's what he's got -- his whole letter is

1 about this. I got ask him about his letter and his  
2 understanding.

3 THE COURT: I read the letter and I read the -- that's my  
4 work. If we can just focus on what he did. I'll read the  
5 letter if I forgot.

6 MR. TOBLER: Okay.

7 BY MR. TOBLER:

8 Q All right. So it was your protocol, you said, for  
9 -- at Miles Bauer that you would not pay for an account  
10 statement, correct?

11 A Not where it just lists the full amount that's due  
12 and owing by the borrower.

13 Q Well, how would you know otherwise what the account  
14 was broken down as if you didn't have an account statement?

15 A Oh, they said that -- ACS said in their  
16 correspondence that they would not provide the nine months'  
17 worth of assessments because they thought it was premature.  
18 But if we wanted to pay them \$50, they would provide us an  
19 amount that included everything that was due.

20 Q But wouldn't you have found out what the assessment  
21 was in that account statement if it was provided to you?

22 A It's possible, but like I testified earlier, ACS  
23 also clearly, explicitly stated that they recognize our  
24 client's position as the senior lien.

25 So in conjunction with the fact that they also stated the

1 super priority amount didn't come into play until their client  
2 -- excuse me, until my client foreclosed on their first deed  
3 of trust, it wasn't necessary to spend \$50 on an amount that  
4 wasn't applicable to what my client may have owed.

5 Q It wasn't necessary?

6 A Correct.

7 Q But you know, based upon your letter, that there is  
8 a priority lien for nine months of dues over and above the  
9 Bank of America deed of trust, correct?

10 MR. BRENNER: Calls for a legal conclusion, and the  
11 document speaks for itself.

12 THE COURT: Overruled.

13 THE WITNESS: Correct.

14 BY MR. TOBLER:

15 Q So you understood that if it didn't -- if that was  
16 not paid, then that amount could extinguish -- or, the  
17 nonpayment of that amount could extinguish the bank's  
18 mortgage, correct?

19 MR. BRENNER: Same objection.

20 THE COURT: Sustained.

21 BY MR. TOBLER:

22 Q What would happen if you didn't pay the nine months?

23 MR. BRENNER: Same objection.

24 THE COURT: Sustained.

25 BY MR. TOBLER:



1 Q You had indicated that you tracked these cases as  
2 they proceeded through the foreclosure process, correct?

3 A Correct.

4 Q Okay. And if you hadn't resolved the super priority  
5 lien amount, would you do nothing?

6 A If we weren't given a chance to tender a super  
7 priority amount, we would monitor it to see if it eventually  
8 went to sale or not.

9 Q So you wouldn't make a phone call and say, hey,  
10 what's the -- what's the assessment per month?

11 A I did have correspondence with Ms. Mitchell, but I  
12 don't recall if it was just for this specific property or if  
13 it was ACS's policy in general.

14 Q But there was nothing in the file to confirm that  
15 you had further discussions with her, was there?

16 A Nothing that I see in front of me.

17 Q So the chances of you remembering this specific  
18 matter is pretty unlikely, correct, when you have thousands of  
19 cases to deal with?

20 A For this specific case, correct.

21 Q Okay. So you wouldn't make a return phone call or  
22 you wouldn't make a -- give a return letter, correct, and you  
23 wouldn't pay the \$50 to find out what your amount is due on  
24 the super priority portion, correct?

25 A No, I would make a phone call, in general, to

1 address ACS's policy of providing super priority payoffs or  
2 nine months' worth of assessments.

3 Q There's no evidence of that, correct?

4 A For this specific file, I do not see any.

5 Q Do you -- who do you get your notices from when they  
6 -- when they trickle down?

7 A The copy of the recorded notices?

8 Q Correct.

9 A Generally, from our -- from our clients.

10 Q Okay. And would you get a notice of sale?

11 A Occasionally, depending on the referral.

12 Q Depending on a referral?

13 A Correct, depending on which property. Most  
14 properties, I recall, was a copy of the notice of default.

15 Q But you would not receive notices of sale?

16 A No, occasionally, from time to time.

17 Q You don't know whether that occurred in this case?

18 A For this case, looking at the correspondence, it  
19 looks like it was a copy of the notice of default that we  
20 received.

21 Q If I represented to you that it was mailed -- the  
22 notice of sales mailed to your client, would you typically  
23 receive that, too?

24 A We might. Yeah. Sure.

25 Q So if you got a notice of sale and you knew that

1 within 21 or so days that it was going to foreclose, what  
2 would -- what would you do in response to that notice of sale  
3 if the super priority amount was not resolved?

4 A Well, I don't know if we received a copy of the  
5 notice of sale for this specific property. But if we had, it  
6 would have been the same as our previous interactions and that  
7 ACS wouldn't provide us any information to allow us to pay any  
8 super priority amount.

9 And ACS specifically said they were not going to do that  
10 unless my client could show them a copy of the trustee's deed  
11 upon sale showing the property had been foreclosed on by my  
12 client. So there was nothing to do at that point.

13 Q Okay. So once it hit a notice of sale -- and I'm  
14 not saying with this specific situation, but what would happen  
15 at the time on the notice of sale when it was unresolved?  
16 What would you do?

17 A We would just --

18 MR. BRENNER: Relevance.

19 MR. TOBLER: What are their actions prior to the  
20 foreclosure, Your Honor? I mean, that's relevant.

21 MR. BRENNER: We're talking about a specific set of facts  
22 that occurred in this case.

23 MR. TOBLER: What is his policy?

24 MR. BRENNER: Because what would the policy be in this  
25 case with these facts, I will withdraw my objection.

1 THE COURT: Objection sustained.

2 BY MR. TOBLER:

3 Q What would the policy be if you received a notice of  
4 sale where the super priority amount was not resolved?

5 A The policy --

6 MR. BRENNER: Same objection.

7 THE COURT: Overruled. Go ahead.

8 THE WITNESS: The policy would be to monitor to see if  
9 the sale actually went through or to see if it was postponed  
10 or canceled outright or if the homeowner fulfilled their  
11 obligations, if any, and brought it current.

12 BY MR. TOBLER:

13 Q So you did -- so you did nothing then, correct?

14 A No, that's not what I said. I said we would monitor  
15 to see if the sale actually went through, is scheduled, or if  
16 it was postponed or canceled or brought current by the  
17 homeowner.

18 Q Whose burden is it to pay the super priority lien  
19 amount?

20 MR. BRENNER: Calls for a legal conclusion.

21 THE COURT: Sustained.

22 BY MR. TOBLER:

23 Q If you knew the matter was going to sale, would you  
24 -- would your client -- would you or your client send anyone  
25 to monitor the sale?

1           A     No, not for this specific property, as far as I can  
2 tell.

3           Q     Would your client authorize you to record a notice  
4 that the super priority lien amount was in dispute or was  
5 unresolved?

6           A     For this specific property, no.

7           Q     Would your client ever proceed to court to obtain an  
8 injunction to stop the sale from proceeding?

9           A     For this specific property, no.

10          Q     Why do you say this specific property?

11          A     Because it does vary out of the thousands of cases  
12 that we handled.

13          Q     Okay. You had indicated that you received the  
14 notice of default, correct?

15          A     Correct.

16          Q     And you have seen what the amount due was at that  
17 point; is that accurate, as far as the entire lien?

18          A     Correct.

19          Q     And would you, on occasion, as part of your policy,  
20 simply pay that amount to an HOA to resolve the foreclosure  
21 issue?

22          A     I did have files where I did do that, or I would  
23 reach out to the HOA or HOA trustee and let them know that my  
24 client was interested in paying the full amount that was  
25 currently due and owing, which may or may not be that amount

1 listed on the recorded notice that I received a copy of.

2 Q Well, what was the distinction or the deciding  
3 factor as to whether you paid the full amount or held firm on  
4 the nine months?

5 MR. BRENNER: Relevance.

6 MR. TOBLER: He doesn't remember what -- how it applied  
7 to this, so I'm asking for his policy opinion as to what would  
8 occur.

9 THE COURT: And what's the relevance?

10 MR. TOBLER: Well, he -- well, he says, first of all,  
11 Your Honor, that sometimes he paid it and sometimes he didn't,  
12 the full amount.

13 THE COURT: Okay.

14 MR. TOBLER: And I wanted to -- I wanted to know why and  
15 what circumstance would the full amount be paid.

16 MR. BRENNER: I just don't think it's relevant to this  
17 case but --

18 THE COURT: Sustained.

19 BY MR. TOBLER:

20 Q The letter from ACS that you've reviewed, it doesn't  
21 say anything in there that they refused to give you  
22 information, correct?

23 A Where they used the exact word refused?

24 Q Or they ever rejected providing any further  
25 information?

1           A     I'm sorry.  You're asking me if they're saying,  
2 specifically, we're not going to give you any information?

3           Q     Correct.

4           A     I don't know if they used the exact word we refuse  
5 or we reject your request.  What I recall is that they said --  
6 ACS said absent a showing -- or, absent a showing of a copy of  
7 the trustee's deed upon sale showing that your client  
8 foreclosed on its first deed, that we're not going to provide  
9 you a nine-month payoff statement at this time.

10          And we recognize your client's position as the senior  
11 lienholder; however, if you want to pay us \$50, we can give  
12 you a statement that shows everything that's due and owing.

13          Q     You understood that?

14          A     Yes.

15          Q     So is it safe to say that for \$50 you could have  
16 determined what was going on in this case with respect to the  
17 assessments?

18          MR. BRENNER:  Calls for speculation.

19          THE COURT:  Sustained.

20          BY MR. TOBLER:

21          Q     If you were to request an account statement in the  
22 ordinary course of dealing with this issue, would that reflect  
23 what the assessment would be?

24          MR. BRENNER:  Speculation.  Asked and answered.

25          MR. TOBLER:  In his experience.

1 MR. BRENNER: Asked and answered.

2 THE COURT: It is sustained on asked and answered.

3 MR. TOBLER: That's all I have, Your Honor.

4 THE COURT: All right. Thank you.

5 MR. BRENNER: No further questions, Your Honor.

6 THE COURT: All right. Mr. Cox.

7 MR. COX: No questions.

8 THE COURT: All right. Thank you, sir. You're free to  
9 go.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Mr. Brenner.

12 MR. BRENNER: Thank you, Mr. Jung. Your Honor, I think  
13 we're going to close our case. We do have the note under  
14 seal.

15 THE COURT: Okay.

16 MR. BRENNER: Okay. There's nothing I would ask of the  
17 witness that isn't in a document so --

18 THE COURT: All right.

19 MR. BRENNER: So on that, we will rest.

20 THE COURT: Okay. Mr. Cox, do you have any witnesses?

21 MR. COX: No further witnesses, Your Honor.

22 THE COURT: Do you have any rebuttal witnesses, Mr.  
23 Tobler?

24 MR. TOBLER: None further.

25 THE COURT: Okay. So do you all just want to take 15



1 minutes or something?

2 MR. TOBLER: Sure.

3 MR. BRENNER: That's fine.

4 THE COURT: And then some -- collect your thoughts and  
5 then we'll do closings.

6 MR. BRENNER: Sounds good to me.

7 MR. TOBLER: Yeah.

8 THE COURT: Great. So we'll just say -- you know what,  
9 do you want to say 3:30? Is that good?

10 MR. COX: I would say 15 minutes --

11 THE COURT: Is that too much time?

12 MR. COX: -- just to make sure we finish.

13 THE COURT: If he comes.

14 MR. BRENNER: I don't know, but I was going to go over  
15 some of the documents, since I was --

16 THE COURT: It was just today. I was here the whole  
17 time.

18 MR. BRENNER: You've heard me -- you've met me before.

19 THE COURT: I was here the whole time, Mr. Brenner.

20 MR. TOBLER: He gets paid by the word, okay?

21 MR. BRENNER: All right. All right.

22 THE COURT: I just want to give you all enough time to  
23 gather your thoughts.

24 MR. BRENNER: All right.

25 THE COURT: You can tell me what you want because I'm

1 here; I get paid the same either way.

2 MR. BRENNER: I say sooner rather than later. But if  
3 these gentlemen would like until 3:30, they're welcome to have  
4 it, but I'm ready to go.

5 THE COURT: Mr. Cox, Mr. Tobler, what do you want? Give  
6 me a time.

7 MR. TOBLER: I'm fine. 3:15.

8 THE COURT: 3:20?

9 MR. TOBLER: 3:20 is fine.

10 MR. COX: 3:20 is fine.

11 THE COURT: All right. Great.

12 THE MARSHAL: Court will be in recess until 3:20.

13 [Recess at 3:05 p.m.]

14 THE COURT: Whenever you're ready, Mr. Tobler.

15 MR. TOBLER: Ready?

16 THE CLERK: Hold on just one second.

17 THE COURT: Okay.

18 MR. TOBLER: Sure.

19 THE CLERK: Thanks.

20 MR. TOBLER: No problem.

21 THE COURT: All right.

22 THE CLERK: It's really hard for me. I have to ask them  
23 to work on it.

24 [Pause]

25 THE CLERK: Thank you.

1 THE COURT: All good.

2 MR. TOBLER: Okay. Thank you. Your Honor, basically,  
3 the preeminent issue before the Court, I believe, is whether  
4 Bank of America tendered their obligations to the HOA or the  
5 trustee. Or was there an excuse not to proceed and tender  
6 some amount to the HOA trustee to salvage their lien interest  
7 in this particular property.

8 As we've heard testimony about, there was never any  
9 request of BANA -- I'm going to call Bank of America BANA --  
10 to demand an account statement that was offered in the  
11 subsequent letter by ACS.

12 Yes, it was \$50. Yes, the trustee -- under 107.310,  
13 the beneficiary may charge a fee of not more than \$60 for each  
14 statement furnished pursuant to NRS 107.200. And I realize  
15 that's not 116, but they are trustees, and they're still  
16 acting in the capacity of trustee, and this statute authorizes  
17 that to be charged to any party requesting information about  
18 the payoff.

19 Based upon the records that were disclosed and  
20 submitted by Bank of America, there was no response that we  
21 can see to ACS's letter. The only thing -- the only  
22 correspondence we have or proof of correspondence that we have  
23 was the first shot or salvo fired by Bank of America's  
24 counsel, Mr. Jung.

25 Mr. Jung was very adept in the foreclosure laws. He

1 understood that if his client did not pay a relatively small  
2 sum prior to the foreclosure going down, that their lien  
3 interest in the mortgage wouldn't be lost. Notwithstanding  
4 that knowledge and stating that in his letter, there was  
5 nothing done after the fact.

6           There was no refusal of a tender of any amount.  
7 Bank of America could have gone back in the records and said,  
8 okay, what do we know the minimum amount to be due? And they  
9 could have gone back to the notice of lien, which is of  
10 record, and seen that there was approximately, I believe,  
11 seven hundred and some odd dollars at the time the notice of  
12 lien was recorded.

13           At a minimum, they knew at the time the notice of  
14 default was recorded that there was sixteen hundred and some  
15 odd dollars that was due and payable, which if paid, as we  
16 heard from Ms. Mitchell, would have rescinded the sale.

17           So they bring before us the argument that, well, I  
18 didn't have to pay that \$50. But what has that \$50 erupted  
19 into? A \$50 that they were entitled to, the trustee was  
20 entitled to pursuant to statute and which was a real point of  
21 contention, apparently, that they didn't need to obtain the  
22 statement.

23           Well, we heard Mr. Jung say they wanted a statement.  
24 That's what he testified to. I wanted proof of a statement --  
25 or, a ledger. I had written down his testimony and reiterated

1 before the Court that he wanted a ledger. And that ledger is  
2 the account statement that we had offered -- or, not we had  
3 offered, but the trustee had offered in her -- in her letter  
4 and in response to Mr. Jung's letter.

5 Are we saying \$50 became the difference between  
6 thousands and thousands of dollars of litigation fees that  
7 have been incurred in this matter by both sides -- or, three  
8 sides? I would hate to say so, but apparently, according to  
9 Bank of America, yes.

10 There was no refusal to tender of any amount. Had  
11 they come into them and say, I'm giving you \$500 because I  
12 think that's what might resolve it or give \$1,000, I think  
13 that's fine -- what might resolve it, and it would have. But  
14 there was never any effort other than a form letter that they  
15 had pushed print and changed the names and addresses and sent  
16 it out to ACS.

17 There was no other proof of any other dialogue after  
18 that from Bank of America, even after notice of sale twice,  
19 the postponement of the HOA's lien sale for seven months while  
20 B of A was getting their foreclosure together. And because it  
21 didn't materialize after seven months, they said, we're going  
22 forward. I'm going to re-notice the sale.

23 Re-notice the sale, send it to B of A. What do we get  
24 back? Nothing. Do we get an injunction? No, we get nothing.  
25 Do we get somebody at the sale saying I object to this sale

1 because I believe my lien amount has been rejected or my cure  
2 amount has been rejected? Nothing occurred.

3 And you cannot do equity to someone who has sat back  
4 on the rights and done nothing to save \$50 when it was  
5 entirely -- when it was entirely authorized pursuant to  
6 statute.

7 We didn't have any responses to ACS's letter. We  
8 didn't have any responses to notices of sale. We had no  
9 dialogue with ACS, even knowing that the foreclosure was  
10 re-noticed to occur. ACS fulfilled their agreement to stay  
11 the HOA foreclosure. But when they delayed and dragged their  
12 feet for seven months, it was enough. They elected to  
13 proceed, and Bank of America knew that by virtue of the  
14 re-noticed sale.

15 There was no appearance at the sale to otherwise  
16 bid, pay the amount, or contest the sale by B of A. No  
17 recordings or contesting of the lien status. There was no  
18 intention or known effort to enjoin the sale.

19 And we -- I was rather surprised to hear he was so  
20 lackadaisical about the matter going -- proceeding forward  
21 with foreclosure and not doing anything about it. And this  
22 all occurred over a period of more than a year.

23 A secondary issue that Bank of America has brought  
24 up is the idea that the \$5,400 paid was commercially  
25 unreasonable. And commercially unreasonable or commercial

1 unreasonable is a concern of the UCC, primarily. And  
2 Nevada has a longstanding track record for decisions on  
3 foreclosure concerning whether foreclosures were conducted  
4 fairly.

5 That was under the Long v. Town case. It was under  
6 Tomiyasu. And Stone Hollow, quite frankly, I don't know where  
7 that case lies, because there's been orders rescinded on it,  
8 and certainly, it does not offer any change in standard as to  
9 what these prior cases had argued.

10 Namely, Bank of America hasn't demonstrated a  
11 necessary showing of fraud, unfairness or oppression to call  
12 the for sale -- foreclosure sale into question. There must  
13 be, in addition, some proof of element of fraud or unfairness  
14 or oppression to bring the sale into question. And there's  
15 been no evidence of that produced at this point in time.

16 My client wasn't even involved much with the sale.  
17 He had an agent conduct that on his behalf. So Bank of  
18 America provides no support for bootstrapping a low price into  
19 an element of fraud. It's just not there.

20 And as you can see from the ledger of ACS, there  
21 were 18 foreclosures that day, and some of them had bidders  
22 and some of them didn't, but that's what the market bore.  
23 There's no indication that they suppressed the price or had a  
24 collusion with anybody else to suppress the price. That's  
25 just how it was back then.

1           The sale was a customary sale in accordance with NRS  
2 116.107. We've heard testimony from Ms. Mitchell that she  
3 satisfied each and every element of proper notice and listened  
4 to her testimony with respect to how matters were handled with  
5 the Miles Bauer firm.

6           There isn't any indication that Bank of America  
7 didn't receive the notices and, in fact, acknowledged that  
8 they did receive the notices when the Miles Bauer letter was  
9 initially obtained and received.

10           So there's no defect in notice here. It was  
11 conducted properly. There's no evidence to the contrary.  
12 It's clear that my client is the title record holder of the  
13 property through a series of transfers from the agent that  
14 acquired it to his original LLC and now to his Series LLC.  
15 That interest has remained constant, and it is the same  
16 interest that was acquired at the time of the foreclosure  
17 sale.

18           Bank of America makes a lot of noise about a  
19 requirement to break out the super priority amount versus the  
20 nonpriority amount, even though the statute at the time made  
21 no reference to it.

22           The trustee was merely following the statute  
23 precisely and in accordance with its own terms in providing  
24 these notices that you see before the Court. And there's  
25 nothing wrong with those notices. They were, in fact, what



1 was the law and what was required at the time.

2           So there's no defect in notice, the content of the  
3 notice, and they had adequate time, indeed, 14, 15 months to  
4 investigate and resolve this issue, which they elected not to  
5 do. And they've just buried their heads in the sand resulting  
6 in litigation, which probably, collectively may cost all three  
7 parties the value of the property in question.

8           They have an appraisal for \$127,000, which is the  
9 value they presume or they alleged at the time the sale went  
10 down. But it's not really fair to say that it's worth  
11 \$127,000, because we know now there were title problems with  
12 that particular property and still are title problems that  
13 can't be resolved without a court order.

14           So you take this house, and it's subject to whatever  
15 claims and whatever defenses that the bank may throw at you  
16 over the course of five years or four years of litigation, and  
17 is it really worth 127,000? No, it's not.

18           What's it worth? \$5,401. That's what they paid for  
19 it and that's what our -- the general public knew that its  
20 value would be in light of the problems with the bank, the  
21 first mortgage, and the upheaval in the super priority loan --  
22 or, lien status.

23           So it's our position, Your Honor, that we have  
24 adequately proved the case, the notices were properly given.  
25 Constitutional issues are currently pending, perhaps, before

1 the Ninth [sic] State Supreme Court, but we know that under  
2 Saticoy Bay, the Supreme Court ruled that these provisions  
3 were, indeed, constitutional and there was no stayed action.  
4 So I don't think that's an issue in this -- in this particular  
5 --

6 THE COURT: Nevada Supreme Court.

7 MR. TOBLER: -- litigation. Pardon me?

8 THE COURT: The Nevada Supreme Court.

9 MR. TOBLER: Nevada Supreme Court.

10 THE COURT: Yeah.

11 MR. TOBLER: It's being -- because of Bourne Valley and  
12 because of Saticoy, it's going to Supreme Court.

13 So it's our position, Your Honor, as the plaintiff,  
14 that we have proven our burden that the sale was conducted  
15 fairly and properly, that there was no real attempt to tender  
16 the super priority lien amount.

17 And the fact that Bank of America simply did nothing  
18 after sending a form letter to ACS does not constitute proving  
19 their burden or proving their burden that they must pay a  
20 token amount to salvage this property from being -- from  
21 extinguishing their first mortgage. They just didn't do it.

22 And on those grounds, Your Honor, we ask that you  
23 order that title be granted, and in favor of the plaintiff,  
24 and that we proceed in that fashion, that plaintiff be  
25 entitled to title to the house and the residence at this

1 point. Thank you.

2 THE COURT: Thank you. Who's next?

3 MR. BRENNER: I'm up.

4 THE COURT: Okay.

5 MR. BRENNER: Doesn't matter.

6 THE COURT: To her it does.

7 MR. COX: I mean, you have times against me speaking  
8 about --

9 MR. BRENNER: Your Honor, I did want to talk about the  
10 statutes, which addresses our issues, as well as the claim  
11 that statutes were complied with. I'm going to read from  
12 them. I brought packets for the Court and for everyone else,  
13 but I'm going to go through, if I could, if you're interested.

14 THE COURT: Sure.

15 MR. BRENNER: If I may approach.

16 THE COURT: You're not reading the whole thing, are you?

17 MR. BRENNER: No.

18 THE COURT: Okay.

19 MR. BRENNER: Portions, and I think I highlighted the  
20 portions that I'm going to read. One of the reasons I wanted  
21 to do this, Your Honor, I mean, we really have got three,  
22 maybe three, four defenses in this case, and we have the  
23 tender, which is our offer to pay. And this is the second  
24 issue, and this is what's somewhat unique, at least to  
25 Absolute and this set of facts.

1           We have got -- and especially when we see the  
2 statutes, we'll see this. We've got one of two situations.  
3 Even if the tender itself, the offer to pay was ineffective,  
4 we either have a waived super priority or we have a  
5 statutorily defective sale based upon the notice that was  
6 provided via the letter from Ms. Mitchell that you've heard  
7 testimony about today. And that's why I really wanted to  
8 focus on those statutes.

9           You know, that's separate and apart from Shadow Wood  
10 Commercial reasonableness, but I also want to talk about --  
11 I'll also sum it up with the restatement today. And  
12 specifically, their statement expressly says -- and I'm giving  
13 you a preview, it says, defective notices, misrepresentations  
14 by the trustee. These are precisely what we're talking about  
15 when we need an additional factor in addition to price alone.  
16 So although we want to present them as three separate  
17 defenses, they all kind of bleed together.

18           On tender, you know, I will tell you that it's our  
19 position that the offer to pay, the very offer to pay is  
20 sufficient to satisfy the super priority portion of the lien,  
21 and that comes from the Cladianos case, that comes from the  
22 Ebert case. You know, the quote from Cladianos is, tender is  
23 complete when, quote, the money is offered to a creditor who  
24 is entitled to receive it.

25           And from our perspective, this case can be resolved

1 in that very simple basis. Money was offered, the creditor  
2 rejected, repudiated, or whatever we want to say; they said  
3 no, you do not need to pay this. Mitchell said that, that it  
4 was her position there was no super priority. Mr. Jung said  
5 that was his understanding. The HOA didn't have a different  
6 belief. The HOA said we seeded all control, full control to  
7 Absolute.

8 Now, getting into the statutes, even if we're going  
9 to find that that is not a tender under those facts, doesn't  
10 count, just -- you just don't meet the tender doctrine, then  
11 we've got a problem with the sale itself or we have a waived  
12 lien. And I will try to go through these quickly. But  
13 honestly, Your Honor, this is an analysis --

14 THE COURT: Go ahead and take your time.

15 MR. BRENNER: This type of analysis isn't in any  
16 published decision from the Supreme Court or any unpublished  
17 decision that I'm aware of. It just hasn't been addressed.

18 What is the required -- the key questions are under  
19 the statutes, as they existed then. What are the required  
20 contents of the notice and what happens when somebody says, I  
21 need more information? And if we look at NRS 116.3112, and we  
22 look at --

23 THE COURT: 3112 or 31162?

24 MR. BRENNER: I'm sorry, 31162, subsection (1)(a), it  
25 says -- and I highlighted the language -- a notice of

1 delinquent assessment which states the amounts of the  
2 assessment and other sums which are due in accordance with  
3 subsection (1) of NRS 116.3116. It's unrefuted that the  
4 amount of the periodic assessment is not set forth. There is  
5 only a lump sum that's set forth in this notice of delinquent  
6 assessment lien.

7           We then go to subsection (b), and this -- subsection  
8 (b) deals with the notice of default. And this says that the  
9 notice of default and election to sell must -- and this is  
10 subsection (1) -- quote, describe the deficiency in payment.  
11 It must describe what that deficiency is.

12           If somebody says to you, describe for me the car  
13 that you saw that was involved in the accident that sped away  
14 from the scene, would you say, well, I saw that it was a motor  
15 vehicle, or would you say it was blue Toyota, 1988, it had a  
16 dent in the fender? You would provide a description that was  
17 necessary to achieve the goals of the statute.

18           Now, we see, and this is an argument that's  
19 frequently -- and I'm going to move on to 116.31168. And I  
20 think this is consistent with what this Court has previously  
21 found. Subsection (1), the provisions of NRS 107.090 apply to  
22 foreclosure of an association's lien as if the deed of trust  
23 were being foreclosed.

24           I want to put a placeholder here on subsection (2),  
25 because I'm going to come back to this, because it's also

1 relevant here. An association may, after recording a notice  
2 of default and election to sell, waive the default and  
3 withdraw the notice or any proceeding to foreclose.

4 But for now -- I'll come back to (2). For now, I  
5 want to focus on (1), which tells us to go to 107.090, and  
6 counsel referenced that the provisions of 107 are applicable  
7 here.

8 We go to one -- this one will be a fast one. We go  
9 107.090, and it refers us to another statute and says that the  
10 sale must be noticed and mailed in accordance with 107.080.  
11 And these are the same arguments that we -- that we've seen  
12 for some time.

13 Then we go to 107.080, and it deals with the power  
14 of sale. And, again, in order to incorporate 107, we've got  
15 to take out the word foreclosure on a deed of trust and insert  
16 the word foreclosure on an HOA sale.

17 And 107.080 says, the power of sale must not be  
18 exercised, however, until, and then going down, (a) says,  
19 basically, in the case of any trust agreement coming into  
20 force, and, again, we're substituting HOA because otherwise  
21 this wouldn't make any sense whatsoever.

22 And we go to subsection (2), which applies here  
23 because we've got a 2006 deed of trust. On or after July 1,  
24 1957, reading on to the highlighted, a beneficiary under the  
25 subordinate deed of trust or any other person who has a

1 subordinate lien or encumbrance of record on the property has,  
2 for a period of 35 days, computed as prescribed in section 3,  
3 failed to make good on the deficiency and performance or  
4 payment.

5           When we synthesize this together, what the statutes  
6 say are, you may not go forward with a sale until you've given  
7 a junior lienholder an opportunity to satisfy, and you  
8 specifically have to give the junior lienholder at least 35  
9 days of an opportunity to satisfy.

10           It remains our position this is a statutorily  
11 defective sale because the lien was not described. It remains  
12 our position that to read these statutes in harmony, to  
13 effectuate a legislative intent that a deed of trust can be  
14 extinguished over the failure to pay a nine-month assessment.  
15 Describe means exactly what it says. Give enough information  
16 so that the subordinate lienholder can satisfy the lien.

17           But in this case we don't necessarily have to do  
18 that calculus because we've got the Bank of America -- Bank  
19 of America -- or, we've got Bank of America retaining Miles  
20 Bauer, essentially saying, you did not give us information in  
21 the notice of default that we need to pay the super priority  
22 portion of the lien. Please give it to us.

23           And you've got the HOA through Absolute coming back  
24 and saying we're not going to give it to you, and the reason  
25 why we're not going to give it to you is because we're not



1 asserting that there is a lien that has seniority over the  
2 bank's interest. We're saying that there is no super  
3 priority; there won't be a super priority until you foreclose  
4 in this case.

5 And that brings us back to that other provision that  
6 I referenced, both as a matter of equity, as a matter of law  
7 that you can waive a legal right and as a matter of statutory  
8 construction. In 116.3116(a), the association can waive, and  
9 that's exactly what it did here.

10 Ms. Mitchell testified she knew that there was  
11 dispute in the industry surrounding what the super priority  
12 was, what it included, how it was enforced, and she made a  
13 knowing decision what she was going to do about the super  
14 priority in this case and decided it would not be asserted in  
15 this case, and all other actions that followed flowed from  
16 that statement.

17 So, Your Honor, I believe that satisfies -- or, that  
18 explains, I should say, our position on how either you've got  
19 a waived super priority or a statutorily defective sale. And  
20 that brings us into commercial reasonableness, the Shadow Wood  
21 analysis, our third defense in this case, if you will.

22 And I won't belabor the point. We think price alone  
23 is sufficient. I understand that there's dispute on that  
24 point. Some day that will be another issue that will have to  
25 be resolved by the Supreme Court. We'll refer to the

1 restatement, refer to prior briefing on our belief that price  
2 alone is sufficient.

3 But here's what we do have in this case: We've got  
4 a stipulated fair market value of \$127,000. Now, what we  
5 stipulated to, if we look at the pretrial memo, is the  
6 standard of fair market value -- let me get the exact  
7 language. The parties stipulate that fair market value of the  
8 property at the time of the sale was \$127,000.

9 Now, I want to say this because I want to be clear.  
10 When we use the phrase fair market value, we're talking about  
11 the legal terminology, the term of art as utilized in the  
12 restatement. And I think that that's clear.

13 We're not talking about what the market would bear  
14 for an HOA foreclosure sale. We understand that it's not  
15 going to bear the full fair market value. We're talking about  
16 a fair market value had it not been an HOA foreclosure sale  
17 with the definition defined in the restatement that I know  
18 Your Honor has seen a million times.

19 And our point is, even if fair market value is not  
20 enough to validate a sale, there is a point where it drops so  
21 low that judicial scrutiny has to heighten about the  
22 circumstances that were surrounding this sale. We have to dig  
23 deeper. We have to look deeper.

24 And a sale price of 5,401 represents 4.25 percent of  
25 fair market value. The restatement tells us there's a point

1 where fair market value drops so low that it's an abuse of  
2 discretion not to unwind the sale.

3 But it also tells us -- and, again, direct quotes  
4 from the restatement -- even where more than value is  
5 required, even the slightest, you know, end quote, slightest  
6 fraud, oppression, or unfairness is enough of an additional  
7 factor to invalidate the sale.

8 And I won't repeat everything I just said at the  
9 beginning because I think it all applies with the unfairness  
10 factors that we have in this particular case. What I will add  
11 is the jaw-dropping admission from ACS that even though they  
12 represent to the entire world that this sale is being  
13 conducted pursuant to the CC&Rs, even though they say to the  
14 entire world, if you want a statement of account, just ask us,  
15 and even though the CC&Rs say the first mortgagee is entitled  
16 to information, and there's no mention about there being any  
17 charge; in fact, it says they're entitled to annual reports,  
18 which would have the assessment information free of charge;  
19 despite all of that, ACS said we don't read the CC&Rs that we  
20 represent, or, I should say, misrepresent to the world at  
21 large this -- that apply to this sale.

22 And we heard the HOA, and even though, at least at  
23 one point in time, the same individual, Mr. Williams, was  
24 owner and/or part owner of the collection agency, they have  
25 divergent practices. CAMCO expected -- CAMCO, the agent of

1 the HOA, expected Absolute to read and apply the CC&Rs.  
2 Absolute said that they didn't even read them. Never looked  
3 at the content of them.

4           So, Your Honor, we are in a situation where the only  
5 factor that remains on commercial reasonableness is -- that  
6 doesn't mitigate in my client's favor is -- well, that we  
7 haven't analyzed yet. It does mitigate in my client's favor.  
8 But the only factor that remains to be analyzed is BFP.

9           And I'm not sure we heard counsel comment on that in  
10 his closing argument. I don't think counsel can present a  
11 case that they are -- that he was a BFP because he wasn't the  
12 purchaser at the sale. And no evidence was presented from the  
13 actual purchaser of the sale.

14           Now, let's say we assume what I think effectively  
15 plaintiff would say was, well, it was our agent who purchased  
16 the property at the sale. And let's say we're going to adopt  
17 that argument that BFP status can extend through a third  
18 party.

19           The plaintiff had no idea what was being purchased.  
20 The plaintiff testified that it was his understanding that Ms.  
21 Wong-Culotta had no idea what was being purchased. I think  
22 the testimony was that she did nothing to research.

23           There was no discussion of the properties prior to  
24 bidding. There was no understanding of what the super  
25 priority was. There was no attempt to research recorded

1 documents. There was no attempt to inquire with any third  
2 parties. There was no attempt to do an inspection of the  
3 property. There was no attempt to do a drive-by of the  
4 property.

5           The plaintiff didn't even know what was purchased  
6 until six weeks after there was a purchase in this case. Your  
7 Honor, that is the antithesis of a BFP. The law on BFP, and  
8 this is the Huntington v. Mila case, 119 Nev. 355, is, you  
9 can't be a BFP when the circumstances are such that a  
10 purchaser is in possession of facts which would lead a  
11 reasonable man in his position to make an investigation that  
12 would advise him of the existence of prior unrecorded rights.

13           There was no attempt to even check. I mean, not  
14 even about unrecorded rights. There was no attempt to check  
15 about anything. You know, had there been an attempt to check,  
16 the language would have been seen in the deed of trust, this  
17 is Exhibit 3, provision 9, which -- BANA42, which says, if a  
18 borrower fails to perform the covenants and agreements  
19 contained in the security instrument; it goes on, lender's  
20 actions can include, but are not limited to, paying of any sum  
21 secured by a lien which has priority over this security  
22 interest.

23           Setting aside the fact that the HOA disavowed that  
24 its lien had priority over the security interest, anyone who  
25 had read this would have seen that language. They would have

1 also seen the planned unit development rider, which  
2 specifically says, in addition to the covenants and agreements  
3 made in the security instrument, borrower and lender further  
4 covenant and agree as follows: If borrower does not pay PUD  
5 dues and assessments when due, the lender may pay them.

6 Now, some of this discussion may ultimately be moot  
7 because perhaps the most substantial admission from the  
8 plaintiff was he thought was purchasing a property subject to.  
9 He thought the scheme was, Wong-Culotta will purchase these,  
10 they will go to him, he will rent them out for a period of  
11 time, having bought them for pennies on the dollar, perhaps a  
12 commercially reasonable price for a property that is subject  
13 to, make a few bucks renting out the property, and he knew the  
14 bank would foreclose.

15 I mean, he was -- even if he didn't maintain his  
16 license, he was a licensed real estate agent, after all, and  
17 knew this is not how real estate transactions went down. The  
18 traditional BFP has gotten the trustee sale guarantee, has run  
19 title reports, done inspections. None of that occurred in  
20 this particular case.

21 That's not to say that plaintiff didn't purchase  
22 something of value. He did. And he's a BFP of what he  
23 purchased, which was a property subject to. Or if he is a  
24 BFP, it's a property subject to a deed of trust. He is not a  
25 bona fide purchaser for value of a property that didn't have a

1   lien interest on it.

2               Let's say for the sake of argument that Your Honor  
3 determines he was, in fact, a BFP without knowledge of the  
4 prior recorded interest by the bank, that's just one factor  
5 that weighs in the equities of the situation.

6               In this particular instance, as counsel aptly points  
7 out, everybody spent legal fees. And that, after all, is the  
8 American rule versus the English rule. Litigation fees  
9 generally don't get involved in the case.

10              So setting those aside, we have a situation where  
11 plaintiff can't remember the exact rents, but it was \$945,  
12 almost four years. It was a little less than that. You know,  
13 if we extrapolate the amounts out, we're looking at somewhere  
14 between -- something with a -- with a three zero -- with a  
15 30,000 to 45,000, depending on how we look at that.

16              It's unfortunate that Ms. Wong-Culotta, as we've  
17 heard from the testimony, bought these properties and gave a  
18 relative the dogs and left him sitting with those and left him  
19 sitting with a \$20,000 bill. That is unfortunate, but that is  
20 not our issue. That is a product of lack of due diligence and  
21 lack of a written agreement with somebody that we're not  
22 responsible for.

23              But even if we take all of that money, the 20,000  
24 and the 5,000, plaintiff has still had enjoyment of use and  
25 rental proceeds almost certainly in excess of the amounts that

1 were put in the property.

2           So when we are balancing the equities, all of the  
3 things Bank of America did, all of the things that we've  
4 mentioned, all of the things plaintiff did not do in this case  
5 and what plaintiff ultimately ended up with, the equities do  
6 not favor finding that the deed of trust was extinguished,  
7 just as plaintiff conceded in his testimony he thought the  
8 results should be. This court should also enter an order  
9 saying the bank has and may foreclose on this property, just  
10 as plaintiff said he expected that they would.

11           I want to make sure -- before I move on to the  
12 alternative claims, I want to make sure that -- and this is in  
13 the restatement I gave the Court. This is in the comments on  
14 page 4. It says, even where the foreclosure price for less  
15 than fair market value cannot be characterized as grossly  
16 inadequate.

17           If the foreclosure proceeding is defective under  
18 local law in some other respect, a court is warranted in  
19 validating the sale and may even be required to do so. Such  
20 defects may include, for example, chilled bidding, an improper  
21 time or place of sale, fraudulent conduct by the mortgagee, a  
22 defective notice of sale, or selling too much or too little of  
23 the mortgaged real estate.

24           I want to focus on the fraudulent conduct of the  
25 mortgagee, which, in this case, is the HOA, because they're



1 selling the property and the defective notice of sale.

2 Obviously, I went over why the sale was defective.

3           Fraud isn't just the act I want to pull the wool  
4 over your eyes. It can be a misrepresentation, too. And if,  
5 in fact, this was a sale that was on the super priority lien,  
6 despite the misrepresentation, we have an additional factor.  
7 It's not like this is an exclusive list, but we have  
8 additional factors that are expressly articulated in this  
9 particular case.

10           Criticism is made of, oh, the bank didn't attend the  
11 foreclosure sale. Why would we? They said that they weren't  
12 foreclosing. They say we could have bid. Why would we? We  
13 only owe nine months at most and then have the right to  
14 conduct our own foreclosure sale.

15           If we find that the bank was required to go to the  
16 sale and bid, then we've completely nullified the super  
17 priority. We have to pay whatever the HOA wants or whatever  
18 other bidders want and that -- we're now way outside of the  
19 nine months.

20           I'm going to turn to our claims against the HOA.  
21 These are pled as alternative claims. We are asking --  
22 Absolute and the HOA, I should say. We are asking for the  
23 opportunity to enforce these as either or. We have sued for  
24 unjust enrichment.

25           ACS and the HOA took and retained \$5,401 under the

1 circumstances. If it's found that our deed of trust was  
2 extinguished when they represented they wouldn't, we are  
3 entitled to -- they shouldn't benefit from that and we should  
4 have that -- those amounts.

5 Tortious interference with contractual relations.  
6 Marching down those elements there existed valid contract  
7 between plaintiff and third party. And, really, this case  
8 implicates two. The major one is the deed of trust.

9 I went over the provisions, the ones that say we are  
10 allowed to pay. The deed of trust is a contract between us  
11 and the borrower. The HOA knew we were going to pay. The HOA  
12 said that they wouldn't foreclose on the property if we were  
13 attempting to foreclose.

14 They knew that there was a pending sale. They knew  
15 that there had been no rescission of the notice of sale,  
16 acknowledged that they were going to stop, and then got  
17 impatient and decided that they were going to move forward.

18 And to the extent they extinguished our deed of  
19 trust, they committed an act that was designed to disrupt that  
20 contractual relationship. I don't think there's any dispute  
21 that they knew of the contract or if the deed of trust was  
22 extinguished that there was actual disruption of the contract.

23 I'll move to damages in a minute after I go over our  
24 other two claims. Briefly, Your Honor, the CC&Rs are also a  
25 contract. And the CC&Rs also said we have the right to

1 information about the property. And there was a contract with  
2 the HOA that Absolute disrupted.

3           We have two other damages claims, breach of the duty  
4 of good faith and wrongful foreclosure. For breach of the  
5 duty of good faith, this is statutory, and the Nevada  
6 legislature has carved out certain areas where a relationship  
7 gives rise to a duty of good faith and they are limited.  
8 Employer, employee, where there's an employment contract,  
9 insurer and uninsured, very limited situations.

10           But foreclosures of such significance that the  
11 legislature by statute created a duty of good faith and fair  
12 dealing, and it says under 116.1113, every contract or duty  
13 governed by this chapter imposes an obligation of good faith  
14 in its performance or enforcement.

15           And now is when we get to the litany of what  
16 Absolute did. They didn't just represent that we were -- that  
17 they weren't foreclosing. They refused to provide basic  
18 information needed to satisfy the super priority portion of  
19 the lien.

20           They wouldn't provide any information unless  
21 additional monies were paid. And even if those additional  
22 monies were paid, they said that it's not going to be what you  
23 asked. It's going to be what we want to put. It's not even  
24 going to be our position on what the super priority is. It's  
25 just going to be a broad statement of account.

1           Ms. Mitchell testified it would have been easy at  
2 any given time to just tell Miles Bauer what nine months times  
3 -- I'm sorry, what three times the quarterly assessment was or  
4 what nine months was, and she chose not to.

5           The duty of good faith, it doesn't require that you  
6 put other people's interests above your own, but it does  
7 require that you consider the interest of other parties. It's  
8 not like a normal transaction where you can purely consider  
9 your own interest.

10           And there was no consideration -- again, if we get  
11 past that threshold of this was a super priority sale or the  
12 HOA can't waive, there was no consideration of the bank's  
13 interest in this case.

14           Briefly, Your Honor, wrongful foreclosure.  
15 Defendant exercised the power of sale or foreclosed on  
16 plaintiff's property. At such time there was no breach of  
17 condition or failure of performance.

18           I think this is all of the arguments that we've  
19 already -- that I've already gone over and discussed. There  
20 was no breach by the bank. We offered to pay. We attempted  
21 to pay. The only breach was in not providing the information  
22 requested and attempting to profit from it.

23           To the extent we look at these causes of action and  
24 meet some type of recklessness element or intent, even those  
25 causes of action that don't have it, we heard Ms. Mitchell

1 testify that she knew that the overwhelming majority of this  
2 money was going to go to Absolute or CAMCO and that the HOA  
3 was going to see so little of it.

4           So the only party that really benefited by rejecting  
5 this and going to sale was Absolute. And the important tie  
6 here is, we heard Absolute say they don't get paid unless the  
7 HOA cancels, which we didn't have, or they actually take the  
8 property to sale.

9           So forcing this property to sale, not giving a super  
10 priority, ensuring that somebody shows up and bids because  
11 they haven't relinquished the super priority is designed to  
12 get themselves paid, or at least that's the reasonable  
13 inference that should be raised.

14           I think Ms. Mitchell even conceded when I asked why  
15 didn't you set a higher bid price, why didn't you try to get  
16 some excess, she said because we were only looking out for  
17 Absolute and the HOA. She believed that that was their only  
18 duty.

19           Briefly, Your Honor, on damages. There was a deed  
20 of trust, there was a note. The face value of the deed of  
21 trust is 235,000. We saw that at the time of the sale, and I  
22 think this is the key, that the notice of breach that was  
23 pending by the first deed of trust was in the amount of  
24 \$263,492.55.

25           If we look at the note, we'll see that the interest

1 on the note -- so that's the amount we're seeking as our  
2 damages on the damages claims. We'll see that the interest on  
3 the note was 6.85 percent. There's a default rate of an  
4 additional 4 percent. So since the time of the HOA sale we're  
5 looking for a total interest of 10.85 percent.

6           You can see because the breach notices we had  
7 already accelerated. You'll see in the note that there was a  
8 right to accelerate and demand the entire balance due because  
9 of the breach. You'll also see that the failure to pay HOA  
10 dues is itself a breach.

11           So, Your Honor, as damages go -- so we're on quiet  
12 title. On the quiet title claim we are seeking a declaration  
13 that the deed of trust was not extinguished and that the bank  
14 has every right to foreclose on it.

15           On the alternative damages claims, we are seeking  
16 adjudication of those claims in our favor in the amount of two  
17 hundred and sixty-three dollars, four hundred -- I'm sorry,  
18 \$263,492.55 plus the interest rate I mentioned we would be  
19 allowed to foreclose. Any amounts we're able to obtain today  
20 would be offset against the damages that we are entitled to  
21 proceed.

22           The note also authorizes the recovery of attorneys'  
23 fees, but I think that is something we would deal with after  
24 the fact, depending on the judgment that is issued.

25           THE COURT: Thank you, Mr. Brenner.

1 MR. BRENNER: Thank you.

2 THE COURT: Mr. Cox.

3 MR. COX: Yes. Firstly, Your Honor, I want to go through  
4 the claims that Mr. Brenner just went through of their  
5 alternative claims, so to say. The first one for unjust  
6 enrichment I won't spend too much time on. And it's the  
7 unjust retention of money or property of another against the  
8 fundamental principles of justice or equity in good  
9 conscience.

10 The HOA didn't foreclose for the bank. They didn't  
11 attempt to foreclose for the bank. They were foreclosing  
12 because they have no other option. They weren't getting paid.  
13 And their position they say, you know, the HOA is only  
14 entitled to nine months of assessment and can't proceed to  
15 foreclosure afterwards. And what is the HOA supposed to do?  
16 Just sit there unpaid for years while the bank sits, waits to  
17 foreclose. That's unreasonable.

18 The next claim we have is for tortious interference  
19 with contractual relations. There is a very important element  
20 that was missed by Mr. Brenner, and that is intentional acts  
21 intended or designed to disrupt the contractual relationship.

22 Both Ms. Mitchell and Ms. Saucedo stated that their  
23 intention wasn't to interfere with the deed of trust. Their  
24 intention was to collect money for the HOA. That's -- the HOA  
25 wants to get paid.

1           Also, the element of actual disruption of the  
2 contract. Your Honor, we saw that the bank had recorded a  
3 notice of default and a notice of sale. The homeowner wasn't  
4 paying. The homeowner had repudiated the contract by not  
5 paying under the note.

6           Next, the claim for breach of the duty of good  
7 faith. The statute states that every contract or duty  
8 governed by this chapter imposes an obligation of good faith  
9 in its performance or enforcement.

10           What is the duty that Absolute and the HOA owe to  
11 the first deed of trust? And we see -- I mean, the statute  
12 says, oh, they must mail the notice of default and notice of  
13 sale arguably to the first deed of trust. It doesn't state  
14 that they have to provide free -- a free statement of account.  
15 It doesn't say that they have to state what the assessments  
16 are.

17           If we look at the CC&Rs and they said yes, a first  
18 deed of trust can get financial information. It doesn't say  
19 you can have the financial information for a specific property  
20 at any specific time. What it says is you can get financial  
21 information from the HOA. And I believe that that's similar  
22 to the budgets that are sent out, that are sent out to  
23 homeowners. That's the information that people can have.

24           Next, we have the claim for wrongful foreclosure.  
25 In Collins v. Union Federal Savings and Loans Association it



1 says an action for the tort of wrongful foreclosure will lie  
2 if the trustor or mortgagor can establish that at the time of  
3 the power of a sale was exercised or the foreclosure occurred  
4 no breach of condition or failure of performance existed on  
5 the mortgagor's or trustor's part, which would have authorized  
6 the foreclosure or exercise of the power of sale.

7           This doesn't talk about another lienholder. this  
8 action -- I mean, there's no Nevada law that says, oh, a  
9 lienholder can sue another lienholder for wrongful  
10 foreclosure. If we look at some of the decisions made in the  
11 United States District Court of Nevada, they even say that a  
12 wrongful foreclosure claim must fail where the party does not  
13 allege that they were not in default when foreclosure  
14 proceedings were initiated.

15           THE COURT: Can you say that again? There were a lot of  
16 nos there.

17           MR. COX: Yes. So this is Judge Hunt of the United  
18 States District Court of Nevada has interpreted Nevada law to  
19 say a wrongful foreclosure claim must fail where the party  
20 does not allege that they were not in default when foreclosure  
21 proceedings were initiated.

22           So this cause of action goes to, was there a power  
23 to conduct the sale? And yes, there was a power to conduct  
24 the sale by the HOA and Absolute. In fact, they hadn't been  
25 paid for over a year. That's what gave them the power to

1 proceed with the sale. It doesn't go into any defect in the  
2 sale. That's -- Mr. Brenner argued, you know, that's a  
3 grounds to set aside the sale. So the homeowner was in  
4 default at the time.

5           If we look at the SFR decision it states that NRS  
6 116.311 subsection (6) and NRS 116.31162, provide for the  
7 nonjudicial foreclosure of the whole of an HOA's lien and not  
8 just the subpriority piece of it. So the HOA can foreclosure  
9 on the subpriority piece of the lien or the whole of the lien.  
10 They can do either one.

11           The problem we face, Your Honor, is, it's clear  
12 that, you know, the HOA, Absolute, maybe a lot of the parties  
13 that attended the sale didn't believe that the first deed of  
14 trust would be extinguished. I think that explains exactly  
15 why the price was so low.

16           That is the same decision that was held that -- by  
17 three of the Nevada Supreme Court Justices in the SFR  
18 decision. They believe that you would have to do a judicial  
19 foreclosure to extinguish the deed of trust.

20           Next, I'll talk about damages. Your Honor, the bank  
21 wasn't damaged by how much was owed on the note. The note was  
22 still an existing contract that the home owner could have  
23 paid. If the bank had proceeded to foreclosure, they would  
24 have got probably less than what was the fair market value at  
25 that time.

1           And they could have gone after the homeowner for any  
2 remaining balance. So I don't see that the damages equal the  
3 value of the note because there's -- they have a remedy at  
4 hand where they can go after the homeowner for that remaining  
5 balance.

6           I'll let go what plaintiff's counsel said. There's  
7 been a lot of talk about a demand for a statement of account  
8 being offered. Absolute provided its opinion in its letter.  
9 I think we know what that says. It might have been -- it  
10 might have been wrong at the time, and, you know, that's how  
11 it -- that's how it is, but they did offer Bank of America an  
12 opportunity to order a statement.

13           They didn't know the amount that Bank of America  
14 wanted to pay. They said -- the letter said, oh, we believe  
15 that it's nine months preceding the lien. And then in another  
16 place it said, oh, we believe it's preceding the notice of  
17 default. The amount of assessments change.

18           So what they wanted to do was put a statement out  
19 that said, okay, here are all the charges, here are all the  
20 months. It was \$50 during this year. It's \$55 during this  
21 year. We don't know what you want to pay, but here's a  
22 statement.

23           So Absolute shouldn't be required to work for free  
24 and provide statements all the time whenever someone requests.  
25 There is -- there no requirement in the law that that

1 information be provided for free.

2 I mean, we look at the SFR decision and it says that  
3 a trustee can put the full amount of the lien on its notices.  
4 That is something reasonable to do because the homeowner gets  
5 it, reads it, and you don't want to confuse a homeowner  
6 because they don't understand as well as a bank should.

7 So we read in NRS 107.310, as plaintiff's counsel  
8 said, a beneficiary may charge a fee of not more than \$60 for  
9 each statement furnished pursuant to NRS 107.200 or 107.210.  
10 Further in NRS 116.4109 subsection (7) it provides an  
11 association may charge a fee of not more than \$150 to prepare  
12 and furnish a statement of demand. So that's the statement of  
13 demand that Ms. Mitchell referred to.

14 The statute provides the HOA a way to charge for  
15 giving this information out. And a deed of trust beneficiary  
16 can charge too for giving their information for a calculating.  
17 A homeowner is not entitled to know what the amount of the  
18 deed of trust is. They would have to order a statement of  
19 account.

20 Let's talk about the tender issue right now. A  
21 tender should be unqualified delivery of a check or the  
22 showing of the ability to do so.

23 Mr. Jung -- Mr. Jung stated today that when he got a  
24 statement of account he would have to take that information  
25 back to the bank and ask if they were willing to pay it. He

1 did not even have the authority that day to say yes, I will  
2 pay that amount, I can right now, I have the ability to do so  
3 today when he wrote that letter.

4 MR. BRENNER: For the record, I object that that  
5 misstates the evidence.

6 THE COURT: I have all the evidence. Thank you.

7 MR. BRENNER: Thank you.

8 MR. COX: So, Your Honor, it was qualified, the letter,  
9 he had a ton of qualifications, you have to give me this  
10 amount. And then also he didn't have the ability to do that  
11 at that time.

12 Your Honor, I wish I could go into the -- all the  
13 other claims and I wish I could snap my fingers and say, you  
14 know, okay, this was a subpriority sale. Unfortunately, I  
15 read NRS 116 today and the SFR decision said, oh, the HOA can  
16 foreclose either on the whole lien or the subpriority piece of  
17 it. But it doesn't tell us how it distinguishes between those  
18 two.

19 There's nowhere in our Supreme Court decisions that  
20 says, oh, if the HOA, you know, were to do this, then it would  
21 be a subpriority sale. It's clear that Ms. Mitchell believed  
22 it was a subpriority sale, that the bank was a first deed of  
23 trust. That's the opinion that the justices of the Supreme  
24 Court believed at the time. It was the opinion of the  
25 plaintiff at the time. That's what they believe the