

IN THE SUPREME COURT OF THE STATE OF NEVADA

BANK OF AMERICA, N.A., THE BANK OF
NEW YORK MELLON, F/K/A THE BANK
OF NEW YORK MELLON AS TRUSTEE
FOR THE CERTIFICATEHOLDERS OF THE
CWABS, INC., ASSET-BACKED
CERTIFICATES, SERIES 2005-17; AND
MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.,

Appellant,

vs.

THOMAS JESSUP, LLC SERIES VII;
FOXFIELD COMMUNITY ASSOCIATION;
AND ABSOLUTE COLLECTION
SERVICES, LLC,

Respondent.

Electronically Filed
May 16 2019 08:50 p.m.
Elizabeth A. Brown
Clerk of Supreme Court
Case No. 73785

APPEAL

From the Eighth Judicial District Court, Clark County
The Honorable Linda M. Bell, District Judge
District Court Case No. A-13-693205-C

**BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT
AND SUPPORTING PETITION FOR EN BANC RECONSIDERATION**

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus curiae, Las Vegas Development Group, LLC, is a privately owned Nevada limited liability company with no publicly held corporation owning 10% or more of its stock.

Amicus curiae, LVDG, LLC, is a privately owned Nevada series limited liability company with no publicly held corporation owning 10% or more of its stock.

Amicus curiae, Airmotive Investments, LLC, is a privately owned Nevada limited liability company with no publicly held corporation owning 10% or more of its stock.

Amicus curiae, Thunder Properties, Inc., is a privately owned Nevada corporation with no publicly held corporation owning 10% or more of its stock.

Amicus curiae are represented by Roger P. Croteau and Timothy E. Rhoda, of Roger P. Croteau & Associates, Ltd. Amicus curiae respectfully request leave to appear and present argument at the hearing of this matter if it pleases the Court.

STATEMENT OF AMICI CURIAE

Amici are collectively the owners of hundreds of parcels of real property that were the subject of homeowners association lien foreclosure sales conducted over the course of the past several years. Many of these homeowners association lien foreclosure sales were conducted by Absolute Collection Services, LLC (“*Absolute*”), a Respondent in this appeal and the party that carried out the homeowners association lien foreclosure sale at issue herein.

Amici are presently involved in hundreds of lawsuits related to the force and effect of homeowners association lien foreclosure sales upon security interests that were recorded against their various properties, including many in which Absolute was the foreclosing trustee. During the course of this litigation, Absolute has repeatedly testified that its policy and practice was to accept checks that were tendered by Miles Bauer Bergstrom & Winters, LLP (“*Miles Bauer*”) on behalf of Bank of America, N.A. (“*BANA*”). As such, the Panel’s substitution of its own factual determination regarding the meaning of Absolute’s correspondence to Miles Bauer herein was not only procedurally improper, but was also factually incorrect.

As discussed below, Amici can point this Court to numerous instances when Absolute’s principal, Kelly Mitchell, testified under oath that Absolute, subject to very limited exception, accepted any check that Miles Bauer or BANA might have remitted in connection with real property that was the subject of

homeowners association lien foreclosure sales that it was responsible for carrying out.

Amici have a significant interest in the issues addressed in the instant appeal. Since the entry of the *Jessup* decision, BANA and its counsel have sought to apply *Jessup*'s holding to virtually every lawsuit involving a homeowners association lien foreclosure sale carried out by Absolute. Moreover, many courts have treated the *Jessup* decision as a binding decision on matters of fact, finding that it binds them to make a determination that it would have been futile for Miles Bauer to remit a check. This is extraordinarily problematic given the fact that Absolute's testimony almost invariably contradicts such a finding.

For the reasons discussed herein, the Panel's opinion is erroneous and should be reconsidered. At the very least, the question of whether BANA should be excused from remitting a check is a fact question to be determined on a case by case basis – not based upon a Panel opinion that was based upon the record before the Court.

ARGUMENT

A. THE PANEL IMPROPERLY SUBSTITUTED ITS OWN FINDINGS OF FACT FOR THOSE OF THE TRIAL COURT

As discussed at length in the Respondent's Petition for En Banc Reconsideration, the Panel herein improperly substituted its own factual determinations for those of the trial court. This argument has been fully set forth

in the subject Petition. The purpose of this brief is not to expound upon the Panel's failure to give deference to the trial court's factual findings but rather to point out that the Panel's factual determination was in and of itself fatally flawed based upon the testimony that has been given on behalf of Absolute on numerous occasions in other litigation.

B. PRIOR TO THE JESSUP DECISION, IT WAS WELL ESTABLISHED THAT THE MILES BAUER LETTER WITHOUT AN ACCOMPANYING PAYMENT WAS INEFFECTIVE TO SATISFY THE SUPERPRIORITY PORTION OF A HOA LIEN

Prior to the *Jessup* decision, this Court had addressed substantially identical circumstances and specifically found that the first Miles Bauer letter, in the absence of a subsequent payment, was insufficient to satisfy and discharge the superpriority portion of a homeowners association lien. See e.g., *Bank of New York Mellon for Certificateholder of CWALT, Inc., Alternative Loan Trust 2005-1CB Mortgage Pass-Through Certificate, Series 2005-1CB v. SFR Investments Pool 1, LLC*, 420 P.3d 558 (Table), 2018 WL 3025963 (June 15, 2018) (unpublished) and *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 420 P.3d 559 (Table), 2018 WL 3025973 (June 15, 2018) (unpublished). Indeed, this Court affirmed its prior decisions in this very matter, stating as follows:

We agree with the Purchaser, as it is the generally accepted rule that a promise to make a payment at a later date or once a certain condition has been satisfied cannot constitute a valid tender.

...

Accordingly, we conclude that Miles Bauer's offer to pay the yet-to-be-determined superpriority amount was not sufficient to constitute a valid tender.

Bank of Am., N.A. v. Thomas Jessup, LLC Series VII, 2019 Nev. LEXIS 6, *7-8, 435 P.3d 1217, 135 Nev. Adv. Rep. 7, 2019 WL 1087513.

Although *Jessup* affirmed this Court's numerous previous opinions holding that the first Miles Bauer letter, in the absence of any subsequent payment, was insufficient to constitute a "tender" that satisfied the superpriority portion of the HOA liens at issue, in *Jessup*, this Court went on to hold that BANA's "obligation to tender the superpriority amount was excused because [Absolute] stated in its fax that it would reject any such tender if attempted." *Jessup*, 2019 Nev. LEXIS 6, *8, 435 P.3d 1217, 135 Nev. Adv. Rep. 7, 2019 WL 1087513. This finding of fact was completely contrary to the trial court's judgment. Moreover, this finding of fact was contrary to Absolute's practices and procedures as documented in various other litigation.

C. ABSOLUTE HAS FREQUENTLY TESTIFIED THAT IT NOT ONLY WOULD PROVIDE INFORMATION TO MILES BAUER BUT THAT IT WOULD ACCEPT PAYMENTS REGARDLESS OF AMOUNT

As discussed in Respondent's Petition for En Banc Reconsideration, nowhere in its correspondence to Miles Bauer did Absolute ever state that it would not accept any payment from the Bank had a payment been transmitted. In *Jessup*, this Court acknowledged this fact, stating as follows:

Although ACS's fax did not explicitly state that it would reject a superpriority tender, we believe this is the only reasonable construction of the fax, which stated that "a 9 month Statement of Account is not valid" and refuted Miles Bauer's "position of paying for 9 months of assessments . . . all occurring before foreclosure by

[the Bank]."

Jessup, 2019 Nev. LEXIS 6, *9-10, 135 Nev. Adv. Rep. 7, 2019 WL 1087513.

Aside from the fact that the Panel improperly substituted its own finding of fact for that of the trial court, this finding of fact was quite simply incorrect. Kelly Mitchell has frequently testified that Absolute would not have rejected a payment except under very limited circumstances.

Aside from her testimony in this matter, Ms. Mitchell, has testified on numerous occasions regarding Absolute's practices and procedures regarding payments and attempted payments by Miles Bauer. For example, in the matter of *Bank of America, N.A. v. Woodcrest Homeowner's Assn*, No. 2:15-cv-01193-MMD-GWF, Ms. Mitchell testified as follows:

Q. And did you believe that that came into existence after the beneficiary of the first Deed of Trust, after the bank foreclosed on their Deed of Trust?

MR. MARKMAN: Same objection.

THE WITNESS: No, only for payment in full.

BY MS. COMBS:

Q. What do you mean by "only for payment in full"?

A. Because we were getting checks saying payment in full from banks and it wasn't payment in full.

Q. Okay. So you didn't take the position that they had to first foreclose on their Deed of Trust before you would give them a nine-month account statement?

A. No, we didn't. **We'd provide a statement of account. It would show everything that was due so they could figure out what they wanted to pay and they could submit a check however they wanted to. We would accept all checks.** The only checks we wouldn't submit are the checks that said payment in full.

Q. And you would agree that you wouldn't accept checks that were accompanied by Miles, Bauer's letters?

A. No, I would not agree with that.

See Exhibit 1, p. 19. (Emphasis added). Thus, Ms. Mitchell confirmed that it was the policy of Absolute to not only provide a statement of account to Miles Bauer but to also **accept all checks**. *Id.*

Similarly, in the matter of *Bank of America, N.A. v. Ann Losee*

Homeowners' Association, Case No. 2:16-cv-00407-JCM-CWH, Ms. Mitchell confirmed that it was Absolute's policy to "accept all payments" that were tendered by banks towards satisfaction of the superpriority portion of HOA liens. See Exhibit 2, p. 10. Moreover, Ms. Mitchell stated as follows:

A. Because it wasn't – likely, a reason why it wasn't caught because both of us disagreed on what the super priority amounts were. So they were paying amounts that we didn't necessarily agree with, **but we accepted them any way.** . . .

Id., p. 22. (Emphasis added).

Additionally, in the matter of *Teal Petals St. Trust vs. Bank of America, N.A.*, Case No. A-14-703167-C, Ms. Mitchell again confirmed that, had BANA or Miles Bauer tendered a payment, it was Absolute's policy and practice to accept such a payment, despite the fact that "[Absolute's and Miles Bauer's] nine months didn't agree with each other." See Exhibit 3, p. 25.

Finally, in the matter of *Las Vegas Development Group, LLC v. James R. Blaha, et al.*, Case No. A-15-715532-C, Ms. Mitchell could not have been more clear that Absolute would have accepted any payment that BANA and/or Miles Bauer might have provided, testifying as follows:

Q. During this 2010 to 2011 time frame, if a request was made by a secured lender for a superpriority payoff demand, what were the practices of Absolute Collections with respect to how to respond to that question?

A. We'd advise them how to order a statement, and once they did that, we would provide the statement. And then as the superpriority amounts were in dispute, **we would accept the payment.**

See Exhibit 4, p. 24. Not liking this response, counsel sought clarification:

Q. Say that again.

A. As the superpriority amounts were in dispute, the banks believed one thing and we believed the other. **We would accept the payment, no matter what they paid.**

Id. Thus, Ms. Mitchell testified that no matter what amount of money Miles

Bauer might have attempted to pay, Absolute would have accepted such payment. Ms. Mitchell went on to clarify that under certain circumstances a payment might be returned. Specifically, Ms. Mitchell stated that Absolute would accept any payment that did not say “paid in full” on it. *Id.*, p. 26. In such a situation, Absolute would return the check to Miles Bauer and indicate that it needed to be sent without that wording. *Id.* Ms. Mitchell testified that Absolute and Miles Bauer came to an agreement on this issue in early 2010 and that Miles Bauer thereafter discontinued writing “paid in full” on the checks. *Id.*, p. 68. Subsequent to that time, Absolute accepted all checks that Miles Bauer remitted to it. *Id.*, p. 26.

With respect to the “paid in full” language, the critical point (and what may have been lost in *Jessup*), is that Absolute did not object to language which might indicate that the superpriority portion of the HOA Lien was paid in full, but rather language that stated that the HOA Lien in its entirety had been paid in full. Ms. Mitchell made this fact perfectly clear, stating as follows:

A. Yes. It’s still not paid in full. As far as is the priority paid in full? Yes, I can accept that kind of writing on a check. But account paid in full I can’t.

Id., p. 86. This was completely sensible given the fact that if Miles Bauer had transmitted any payment, its payment would have been far less than the full amount of the HOA Lien. Thus, it was completely reasonable for Absolute to insist that the check not be labeled as “payment in full” because this could be deemed to indicate that the entire account balance had been satisfied.

Ms. Mitchell went on to state:

Sometimes Miles Bauer requested a statement and other times they wouldn’t. This one they didn’t.

Id., p. 43. She further confirmed yet again that had Miles Bauer sent any

payment, it would have been accepted even though a disagreement existed regarding the amount of the superpriority amount:

Q. But since there was a disagreement between Absolute Collections and at least the law firm representing Bank of America as to what was allowed to be included in the superpriority portion of the lien, what would happen if the bank tendered the payment of nine months of assessments but did not tender a payment related to collection costs and attorneys' fees and late charges.

A. **Like I said earlier, we would accept the payment.**

Id., p. 45.

Ms. Mitchell has repeatedly and consistently testified that Absolute's policy and practice was to accept payments remitted to it by Miles Bauer on behalf of BANA. The Panel's finding to the contrary was not supported by the record in *Jessup*. Nor is it supported by Absolute's testimony in various other matters. The failure to reconsider this matter will likely result in the application of erroneous facts in hundreds of pending legal matters involving real property with a potential market value of tens or hundreds of millions of dollars.

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CONCLUSION

For the reasons set forth herein, Amici respectfully support Thomas Jessup, LLC Series VII's Petition for En Banc Reconsideration and suggest that it should be granted.

DATED this 16th day of May, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda

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**LAS VEGAS DEVELOPMENT GROUP,
LLC; LVDG, LLC; AIRMOTIVE
INVESTMENTS, LLC; THUNDER
PROPERTIES, INC.**

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect with 14 point, double spaced Times New Roman font.
2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 29(e) because it is proportionately spaced, has a typeface of 14 points or more and contains 2190 words. The undersigned has relied upon the word count of the word processing system used to prepare the attached brief.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 16th day of May, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda
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INVESTMENTS, LLC; THUNDER
PROPERTIES, INC.**

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Nevada Supreme Court on May 16, 2019. Electronic service shall be made in accordance with the Master Service List.

/s/ Timothy E. Rhoda
An employee of ROGER P. CROTEAU &
ASSOCIATES, LTD.

EXHIBIT 1

EXHIBIT 1

Kelly Mitchell ~ November 14, 2017
30(b)(6) Representative of Absolute Collection Services, LLC

Page 1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3 * * * * *
4 BANK OF AMERICA, N.A.,)
5 Plaintiff,) Case No.:
6 vs.) 2:15-cv-01193-MMD-GWF
7 WOODCREST HOMEOWNERS)
8 ASSOCIATION; LAS VEGAS)
9 DEVELOPMENT GROUP, LLC;)
10 DOE INDIVIDUALS I-X,)
11 inclusive, and ROE)
12 CORPORATIONS I-X, inclusive,)
13 Defendants.)
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**CERTIFIED
COPY**

DEPOSITION OF KELLY MITCHELL
30(b)(6) REPRESENTATIVE OF ABSOLUTE COLLECTION SERVICES, LLC
Taken on Tuesday, November 14, 2017
At 3:07 p.m.
Taken at 1160 North Town Center Drive
Suite 300
Las Vegas, Nevada

Reported By: Terri M. Hughes, CCR No. 619

Kelly Mitchell ~ November 14, 2017
30(b)(6) Representative of Absolute Collection Services, LLC

Page 2

1 DEPOSITION OF KELLY MITCHELL, 30(b)(6) REPRESENTATIVE OF
2 ABSOLUTE COLLECTION SERVICES, LLC, taken at All-American
3 Court Reporters, 1160 North Town Center Drive, Suite 300,
4 Las Vegas, Nevada, on Tuesday, November 14, 2017, at 3:07
5 p.m., before Terri M. Hughes, Certified Court Reporter, in
6 and for the State of Nevada.

7 APPEARANCES:

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22 For the Defendant, Las Vegas Development Group, LLC:

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Kelly Mitchell ~ November 14, 2017
30(b)(6) Representative of Absolute Collection Services, LLC

Page 3

1 I N D E X

2 Witness: KELLY MITCHELL

3		Examination	Further Examination
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4	By Mr. Croteau	38	--

5

6

7 E X H I B I T S

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1 (Exhibits A and B were marked for
2 identification.)

3 (In an off-the-record discussion held prior to the
4 commencement of the deposition proceedings, counsel
5 agreed to waive the court reporter requirements under
6 Rule 30(b)(5) of the Federal Rules of Civil Procedure.)
7 Whereupon --

8 KELLY MITCHELL,
9 being first duly sworn to tell the truth, the whole truth,
10 and nothing but the truth, was examined and testified as
11 follows:

12 EXAMINATION

13 BY MS. COMBS:

14 Q. Good afternoon. My name is Jamie Combs, and I
15 represent Bank of America in this action.

16 Can you please state and spell your name for the
17 record?

18 A. Kelly Mitchell. K-E-L-L-Y M-I-T-C-H-E-L-L.

19 MS. COMBS: And can the others in the room
20 please state their appearances?

21 MR. MARKMAN: David Markman on behalf of
22 Woodcrest HOA.

23 MR. COX: And Shane Cox representing the
24 deponent.

25 MS. COMBS: Okay.

1 of assessments, late fees and collection costs.

2 BY MS. COMBS:

3 Q. And did you believe that that came into existence
4 after the beneficiary of the first Deed of Trust, after
5 the bank foreclosed on their Deed of Trust?

6 MR. MARKMAN: Same objection.

7 THE WITNESS: No, only for payment in full.

8 BY MS. COMBS:

9 Q. What do you mean by "only for payment in full"?

10 A. Because we were getting checks saying payment in
11 full from banks and it wasn't payment in full.

12 Q. Okay. So you didn't take the position that they
13 had to first foreclose on their Deed of Trust before you
14 would give them a nine-month account statement?

15 A. No, we didn't. We'd provide a statement of
16 account. It would show everything that was due so they
17 could figure out what they wanted to pay and they could
18 submit a check however they wanted to. We would accept
19 all checks. The only checks we wouldn't submit are the
20 checks that said payment in full.

21 Q. And you would agree that you wouldn't accept
22 checks that were accompanied by Miles, Bauer's letters?

23 A. No, I would not agree with that.

24 Q. You had -- did Absolute accept checks from Miles,
25 Bauer that were accompanied by the Miles, Bauer letter?

1 CERTIFICATE OF REPORTER

2

3 STATE OF NEVADA)
4) ss:
5 COUNTY OF CLARK)

6

7 I, Terri M. Hughes, CCR No. 619, do hereby
8 certify: That I reported the deposition of KELLY
9 MITCHELL, 30(b)(6) Representative of Absolute Collection
10 Services, LLC, commencing on Tuesday, November 14, 2017,
11 at 3:07 p.m.

12 That prior to being deposed, the witness was
13 duly sworn by me to testify to the truth, the whole truth
14 and nothing but the truth. That I thereafter transcribed
15 my said shorthand notes into typewritten form, and that
16 the typewritten transcript of said deposition is a
17 complete, true and accurate transcription of my said
18 shorthand notes. That prior to the conclusion of the
19 proceedings, pursuant to FRCP 30(e) the reading and
20 signing of the transcript was not requested by the witness
21 or a party.

22 I further certify that I am not a relative or
23 employee of counsel of any of the parties, nor a relative
24 or employee of the parties involved in said action, nor a
25 person financially interested in said action.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this 4th
day of December, 2017.



Terri M. Hughes, CCR No. 619

EXHIBIT 2

EXHIBIT 2

Kelly Mitchell November 16, 2016
30(b)(6) Representative of Absolute Collection Services, LLC

Page 1

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA
3

4 BANK OF AMERICA OF N.A.)
5 SUCCESSOR BY MERGER TO BAC HOME)
6 LOANS SERVICING, LP FKA) CASE NO.
7 COUNTRYWIDE HOME LOANS SERVICING,) 2:16-CV-00407-JCM-CWH
8 LP,)

9 Plaintiff,)

10 vs.)

11 ANN LOSEE HOMEOWNERS')
12 ASSOCIATION; NEVADA NEW BUILDS,)
13 LLC; JANET MARLENY GARCIA;)
14 ARKHAM, LLC; ARKHAM XIII, LLC;)
15 ABSOLUTE COLLECTION SERVICES,)
16 LLC,)

17 Defendants.)
18 _____)

**CONDENSED
TRANSCRIPT**

19 DEPOSITION OF KELLY MITCHELL
20 30(b)(6) REPRESENTATIVE OF ABSOLUTE COLLECTION SERVICES, LLC

21 Taken on Wednesday, November 16, 2016

22 At 1:00 p.m.

23 At All-American Court Reporters

24 1160 N. Town Center Drive

25 Suite 300

Las Vegas, Nevada

REPORTED BY: SHIFRA MOSCOVITZ, CCR NO. 938

Kelly Mitchell November 16, 2016
30(b)(6) Representative of Absolute Collection Services, LLC

4 (Pages 10 to 13)

Page 10	Page 12
<p>1 A. We do.</p> <p>2 Q. And what is the purpose for that?</p> <p>3 A. We actually get three. We get one at the</p> <p>4 notice of default, we get one at the notice of sale</p> <p>5 and we get one on the day of the sale. The purpose</p> <p>6 that the notice of default is to inform all</p> <p>7 interested parties to mail off the NOD to them, same</p> <p>8 for NOS, date down and make sure there is no further</p> <p>9 changes.</p> <p>10 Q. And how about market value, did you do any</p> <p>11 research to ascertain the market value of the</p> <p>12 property?</p> <p>13 A. No.</p> <p>14 Q. Now, at this point, in 2013, 2014, did</p> <p>15 Absolute have a policy regarding accepting super</p> <p>16 priority payments from banks?</p> <p>17 A. We would accept all payments.</p> <p>18 Q. So you would accept all payments, and</p> <p>19 would you break out a specific super priority amount</p> <p>20 for a bank, if they requested it?</p> <p>21 A. We would express our view on what the</p> <p>22 super priority is and break that out.</p> <p>23 Q. And if you did accept a payment, would you</p> <p>24 announce it at the sale?</p> <p>25 A. We would.</p>	<p>1 Q. It just would have said bid sheet?</p> <p>2 A. Correct.</p> <p>3 Q. Did the auctioneer also call out whether</p> <p>4 or not the super priority was paid?</p> <p>5 A. They did.</p> <p>6 Q. And they would receive the information</p> <p>7 from this sheet, as well?</p> <p>8 A. Yes.</p> <p>9 Q. So they would have the paper as well as an</p> <p>10 announcement?</p> <p>11 A. They would.</p> <p>12 Q. If you can turn to ACS9, are you familiar</p> <p>13 with this document?</p> <p>14 A. I am.</p> <p>15 Q. I see a name on the second page, Renisha,</p> <p>16 who is that?</p> <p>17 A. She was our recording officer.</p> <p>18 Q. And would it be Absolute's policy and</p> <p>19 procedure that Renisha would have drafted this</p> <p>20 document, as well as signed it?</p> <p>21 A. Drafted, she would have made the changes.</p> <p>22 It's a form document, so yes.</p> <p>23 Q. So the specific things that were different</p> <p>24 here that were not on the form document, she would</p> <p>25 have entered those, is that correct?</p>
Page 11	Page 13
<p>1 Q. Now, I have got a sheet here that's on</p> <p>2 ACS1 and 2, it's ACS2, in particular, that has the</p> <p>3 information I want to look over, but what is ACS1</p> <p>4 and 2?</p> <p>5 A. This is our bid sheet that's handed out to</p> <p>6 all the investors before sale.</p> <p>7 Q. And can you explain to me briefly why it</p> <p>8 says sales results instead of bid sheet at the top?</p> <p>9 A. Back then we were not keeping two separate</p> <p>10 sheets. The bid sheet would have all the</p> <p>11 information except the results and after the sale I</p> <p>12 would go in, put the results, change the name to</p> <p>13 sales result and provide a copy to Nevada Legal</p> <p>14 News.</p> <p>15 Q. The property we are here on today is 2317</p> <p>16 Clarrington, which I see on ACS2, and it lists super</p> <p>17 priority paid as yes, do you see that?</p> <p>18 A. I do.</p> <p>19 Q. Is it correct to say that the bidders at</p> <p>20 this particular auction would be informed that the</p> <p>21 bank paid the super priority?</p> <p>22 MR. MARKMAN: Objection, to the extent it</p> <p>23 calls for legal conclusion.</p> <p>24 Q. Okay. They would have got this paper?</p> <p>25 A. Yes.</p>	<p>1 A. Yes.</p> <p>2 Q. And would she have received those, like</p> <p>3 for example, the amount due and owing, would she</p> <p>4 have got that from your computer system?</p> <p>5 A. She would have received an updated ledger</p> <p>6 and then added in the audit fee from the management</p> <p>7 company and our collection fee.</p> <p>8 Q. And in terms of just looking at this</p> <p>9 notice, is there any way for us to know, based on</p> <p>10 this notice, what the monthly assessment was for</p> <p>11 this HOA?</p> <p>12 A. No.</p> <p>13 Q. And is there any way, looking at the face</p> <p>14 of this notice, to know how long this owner was</p> <p>15 delinquent?</p> <p>16 A. No.</p> <p>17 Q. Are the words super priority found</p> <p>18 anywhere on this notice?</p> <p>19 A. No.</p> <p>20 Q. And sitting here today, is there any way</p> <p>21 for us to calculate exactly how much of this was</p> <p>22 assessments versus costs and fees?</p> <p>23 A. Not without looking at the ledger and</p> <p>24 doing it that way.</p> <p>25 Q. When you say the ledger, that's not a</p>

Kelly Mitchell November 16, 2016
30(b)(6) Representative of Absolute Collection Services, LLC

6 (Pages 18 to 21)

<p style="text-align: right;">Page 18</p> <p>1 Q. Now, it says that I believe it was sold on 2 June 17th, 2014 for \$9,000. Do you have any reason 3 to believe that's not true? 4 A. No, I don't. 5 Q. And in the second page on ACS, the first 6 paragraph at the very end, it says all notices were 7 mailed, posted, published in accordance with Nevada 8 law. Before signing it, how would Richard have 9 known it was true? 10 A. The information would be in our file. 11 Q. So he would have reviewed the file and 12 reviewed each notice? 13 A. Correct. 14 Q. And now in the first page, underneath the 15 undersigned, there is a first full paragraph, it 16 starts with Ann Losee HOA. It says "Does hereby 17 grant and convey, but without covenant and warrantee 18 express or implied". That language, "without 19 warrantee express or implied", do you know what that 20 means? 21 A. That would be without security of the 22 condition of the title. They were taking it and 23 buyer be aware as it is. 24 Q. As far as you know, did this particular 25 buyer, Nevada New Builds ever contact you to</p>	<p style="text-align: right;">Page 20</p> <p>1 bit. I think the response to this letter is on 144. 2 Would this have been the response? 3 A. It is. 4 Q. And in this response, you give your view 5 on the super priority, is that correct? 6 A. Correct. 7 Q. And then you provide a series of amounts 8 in like a table, which would include on the first 9 level the monthly assessment, but then also the late 10 fees and collection fees and every other fee on the 11 account, including, at the bottom, it looks like the 12 amount to pay the lien off in full, is that correct? 13 A. Correct. 14 Q. Now, how much is listed on here for the 15 monthly assessments for the HOA? 16 A. Twenty dollars in several different 17 stages. \$19 in 2012 and \$20 in 2013. 18 Q. Now, as we saw earlier from the ledger, it 19 appears earlier from the ledger that the amount was 20 \$54 and not those amounts. Do you have any idea of 21 why this took place? 22 A. As this was a form letter I believe that 23 box was not changed, because the amount in the super 24 priority column identify what the \$54 a month is. 25 Q. So it was just an error?</p>
<p style="text-align: right;">Page 19</p> <p>1 complain about that language? 2 A. No. 3 Q. Now, as far as your review of the file, 4 did the bank attempt to pay the super priority lien 5 on this one? 6 A. They did. 7 defendant's attorney: Objection. Calls 8 for legal conclusion. 9 Q. Can we turn over to what is ACS 78? 10 A. Okay. 11 Q. Have you seen this specific letter before? 12 A. I have. 13 Q. And what is this letter? 14 A. This is a Miles Bauer indicating they 15 received our notice of default, giving their view on 16 what they believe the super priority amount is and 17 requesting a statement. 18 Q. And as far as you know, did you respond to 19 this letter? 20 A. I did. 21 Q. Now, would it be you directly that 22 responded or someone at ACS? 23 A. On the status report it would say who 24 responded. 25 Q. Sounds good. We can look at that in a</p>	<p style="text-align: right;">Page 21</p> <p>1 A. Yes. 2 Q. Now if you turn to Pages 12 and 13, have 3 you seen this letter before? 4 A. I have. 5 Q. And what is this letter? 6 A. This the Miles Bauer letter indicating 7 that they received our statements and what about the 8 statements they don't like and I believe this was 9 inclusive with their check of \$180. 10 Q. So if we look at the status report on 146, 11 which is I believe the last page, does it indicate 12 that payment was received from Miles Bauer? 13 A. It does, yes, it does. 14 Q. Okay. And is that the March 4th entry? 15 A. It is. 16 Q. Okay. And at that point, after ACS cashed 17 the checks, would there be any further communication 18 with Miles Bauer on this file? 19 A. They would have received a notice of sale 20 if they requested anything. 21 Q. Sorry. In terms of the fact that miles 22 Bauer had sent a check for \$1,840, it appears to be 23 ACS's position on the ledger that although there was 24 an accident, which seems to have caused the monthly 25 assessment to be listed incorrectly, that the super</p>

7 (Pages 22 to 25)

Page 24

Page 25

EXHIBIT 3

EXHIBIT 3

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3
4 TEAL PETALS ST. TRUST,)
5 Plaintiff,)
6 vs.) CASE NO. A-14-703167-C
7 BANK OF AMERICA, N.A., a) DEPT NO. XXIII
8 national association; and MTC)
9 FINANCIAL INC., dba TRUSTEE)
10 CORPS,)
11 Defendants.)
12
13 BANK OF AMERICA, N.A.,)
14 Cross-Claimant,)
15 vs.)
16 PALO VERDE RANCH HOMEOWNERS)
17 ASSOCIATION; and ABSOLUTE)
18 COLLECTION SERVICES, INC.,)
19 Cross-Defendants.)
20
21
22
23
24
25

**CERTIFIED
COPY**

18 DEPOSITION OF KELLY MITCHELL
19 30(b)(6) REPRESENTATIVE OF ABSOLUTE COLLECTION SERVICES, LLC
20 Taken by Bank of America, N.A.
21 Taken on Friday, July 15, 2016
22 At 2:06 p.m.
23 At All-American Court Reporters
24 1160 North Town Center Drive, Suite 300
25 Las Vegas, Nevada
26
27 REPORTED BY: CINDY MAGNUSSEN, RDR, CCR NO. 650

1 APPEARANCES:

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16 For Absolute Collection Services, LLC:

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18 Absolute Collection Services, LLC
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Kelly Mitchell July 15, 2016
30(b)(6) Representative for Absolute Collection Services, LLC

Page 3

1 EXAMINATION

2 WITNESS: PAGE
3 Kelly Mitchell

4 Examination by Ms. Scaturro 4

5 Examination by Mikrut 41

6 Examination by Ms. Gutierrez 55

7 Examination by Mr. Cox 57

8

9

10

11

12

13

14

15 EXHIBITS

16 NUMBER DESCRIPTION PAGE

17 A Notice of Deposition. 4

18 B File. 4

19 C List of Fees. 12

20 D Check Stubs. 39

21 E Check Stubs. 40

22

23

24

25

1 A. This was one of their form letters that they
2 send out when they receive a notice of default. And so
3 we would respond usually with a letter because they say
4 their view regarding the superpriority, we would respond
5 with a letter regarding our view of superpriority, and
6 then how they can go about requesting a statement.

7 Q. Okay. Was this -- well, a copy of this letter
8 provided to the HOA or the management company?

9 A. Sometimes they sent it to both. So I'm not
10 exactly sure.

11 Q. Okay. So your --

12 A. But did the HOA know about it, sure, because
13 it's on the status report.

14 Q. Okay. But is it your testimony that in -- at
15 this time in 2011, you would have sent it either to the
16 HOA, the management company, or both?

17 A. No. I'm saying Miles, Bauer most likely sent it
18 to the HOA and to us.

19 Q. Okay. No, my question was what -- if Absolute
20 provided this to the HOA?

21 A. No.

22 Q. Okay. But it was reflected on the status
23 report. Correct?

24 A. Correct.

25 Q. Okay. If you can turn to 62. Sorry. Going

1 backwards. I was trying to go in order.

2 What is this document?

3 A. This is our response.

4 Q. Okay. And in this response, you state that the
5 nine-month statement isn't valid until the bank
6 forecloses; is that correct?

7 A. That's what I'm saying, that we would have
8 accepted. Yes. But our nine months didn't agree with
9 each other.

10 Q. What do you mean by that?

11 A. Meaning Miles, Bauer went by the NRED advisory
12 opinion, that it was just nine months, period. Where
13 Absolute Collection Services went by the CICCH opinion
14 saying that it was nine months, late fees, and collection
15 costs.

16 Q. But that's not really what the letter says,
17 right? While you may have disagreed at this point --

18 A. My intent for what it should say is different
19 than what is conveyed because I'm not counsel.

20 Q. Right.

21 A. But either way, I would have provided them a
22 statement, and then they could have paid whatever they
23 wanted to, as indicated in the fourth paragraph.

24 Q. In the second paragraph, you state that it's
25 your view that without foreclosure, a nine-month

1 statement is not valid?

2 A. For payoff. Absolutely. And I guess I should
3 have inserted "for payoff."

4 Q. Okay. And so why did you make that statement?
5 What did you mean by that?

6 A. What we meant was that the first was
7 foreclosing, then well -- although we didn't have any
8 documentation to that effect.

9 But if the first was foreclosing, and they
10 foreclosed and they were actually on title, then we
11 would go ahead and accept the nine months, although our
12 views were different again. So we had provided our
13 total with what it would take as a payoff.

14 But what they are asking for in their letter
15 is not a payoff. What they are asking for is to pay
16 whatever interest they believe they have in that
17 property.

18 Q. Did you have any communications with Miles,
19 Bauer, other than this letter, regarding its --
20 October 25th, 2011 letter that was sent to Absolute?

21 A. The reason why I'm saying that that's probably
22 about the time we received it is because we don't have a
23 date stamp. So I'm not exactly sure who put the Post-it
24 on there.

25 But between this day and this day, there's

1 nothing on the status report saying that we had any
2 other communication with them.

3 Q. Because the status report says December 8th,
4 2011. I'm looking at 160, received Miles, Bauer letter.
5 Responded.

6 A. It could be because we were moving and we were
7 sharing a P.O. box with the HOA and management company,
8 it could be that they stamped it. But I don't know for
9 sure. But we note everything when it happens. That's
10 all I'm saying.

11 Q. Okay. And you personally drafted this response
12 on 62; is that right?

13 A. Yeah. This was one of our -- well, the form
14 letter for pretty much every Miles, Bauer letter that
15 came.

16 Q. Okay. Had you discussed with the HOA or its
17 management company what your response to one of these
18 Miles, Bauer letters would be?

19 A. Let me look at something real quick. Yes.

20 Q. And what was that discussion?

21 A. On page 132 and 133, the board acknowledgment
22 indicates our view and as it's held with the Commission
23 for Common Interest Communities.

24 MS. MIKRUT: I'm sorry? Did you say 132
25 and 133?

1 THE WITNESS: Yes.

2 MS. MIKRUT: The price list?

3 THE WITNESS: Well, it's not a price
4 list. If you read the first two paragraphs of 133, I
5 guess.

6 BY MS. SCATURRO:

7 Q. This doesn't really discuss at all superpriority
8 lien or attempted payment by a lender, does it?

9 A. No. I'm sorry.

10 Q. Okay.

11 A. I was looking at Commission for Common Interest
12 Communities. Them adopting the price list. Oh, no.
13 This one they adopted the price list. Never mind. I
14 have to look at the contract.

15 Q. Okay. Contract aside, do you recall having any
16 discussions with the HOA about -- or the management
17 company about how to respond to the Miles, Bauer letter?

18 A. No. Other than in some of our contracts, it
19 started appearing. So that's why I said I wanted to look
20 at the contract.

21 Q. And that's interesting because I haven't seen
22 one of those. What's in the contract if it's the
23 circumstance that's in the contract?

24 A. It would have been our view at the time, which
25 when I taught, and I still teach accredited classes, and

1 CERTIFICATE OF REPORTER

2
3 I, Cindy Magnussen, Certified Court Reporter,
4 State of Nevada, do hereby certify:

5 That I reported the deposition of Kelly Mitchell,
6 30(b)(6) Representative of Absolute Collection Services, LLC,
7 commencing on Friday, July 15, 2016, at 2:06 p.m.

8 That prior to being deposed, the witness was duly
9 sworn by me to testify to the truth. That I thereafter
10 transcribed my said shorthand notes into typewriting and
11 that the typewritten transcript is a complete, true and
12 accurate transcription of my said shorthand notes. That
13 prior to the conclusion of the proceedings, the reading and
14 signing was requested by the witness or a party.

15 I further certify that I am not a relative or
16 employee of counsel of any of the parties, nor a relative or
17 employee of the parties involved in said action, nor a
18 person financially interested in the action.

19 In witness whereof, I hereunto subscribe my name
20 at Las Vegas, Nevada, this 26th day of July, 2016.


21 
22 CINDY MAGNUSSEN, RDR, CCR No. 650

EXHIBIT 4

EXHIBIT 4

1	DISTRICT COURT	
2	CLARK COUNTY, NEVADA	
3		
4	LAS VEGAS DEVELOPMENT GROUP,)	
	LLC, a Nevada limited)	
5	liability company,)	
)	
6	Plaintiff,)	
)	
7	v.)	CASE NO. A-15-715532-C
)	DEPT. NO. XXX
8	JAMES R. BLAHA, an)	
	individual; BANK OF AMERICA,)	
9	NA, a National Banking)	
	Association, as successor by)	
10	merger to BAC HOME LOANS)	DEPOSITION OF
	SERVICING, LP; RECONTRUST)	
11	COMPANY NA, a Texas)	KELLY MITCHELL
	corporation; JOSE PEREZ, JR.,)	
12	an individual; EZ PROPERTIES,)	30(B)(6) DESIGNEE OF
	LLC, a Nevada limited)	
13	liability company; K&L BAXTER)	ABSOLUTE COLLECTION
	FAMILY LIMITED PARTNERSHIP, a)	
14	Nevada limited partnership;)	SERVICES, LLC
	FCH FUNDING INC., an unknown)	
15	corporate entity; DOE)	LAS VEGAS, NEVADA
	individuals I through XX and)	
16	ROE CORPORATIONS I through)	SEPTEMBER 25, 2018
	XX,)	
17)	
	Defendants.)	
18	_____)	
19		
20		
21	Reported By Kele R. Smith, NV CCR No. 672, CA CSR No. 13405	
22	LST Job No. 1-492899	
23		
24		
25		

<p>Page 2</p> <p>1 DEPOSITION OF KELLY MITCHELL, 2 taken at 400 South Rampart Boulevard, Suite 400, Las 3 Vegas, Nevada, on Tuesday, September 25, 2018, at 10:43 4 a.m., before Kele R. Smith, Certified Court Reporter, in 5 and for the State of Nevada. 6 7 APPEARANCES: 8 For the Witness: 9 ABSOLUTE COLLECTION SERVICES 10 BY: SHANE COX, ESQ. 11 8440 West Lake Mead Boulevard 12 Suite 210 13 Las Vegas, Nevada 89128 14 (702) 531-3394 15 16 For the Plaintiff: 17 ROGER P. CROTEAU & ASSOCIATES 18 BY: ROGER P. CROTEAU, ESQ. 19 9120 West Post Road 20 Suite 100 21 Las Vegas, Nevada 89148 22 (702) 254-7775 23 For the Defendants James R. Blaha and Noble Home Loans, 24 Inc., formerly known as FCH Funding, Inc.: 25 KOLEGAR & LEATHAM BY: AARON R. MAURICE, ESQ. 400 South Rampart Boulevard Suite 400 Las Vegas, Nevada 89145 (702) 362-7800 amaurice@klinevada.com</p>	<p>Page 3</p> <p>1 For the Defendant Bank of America: 2 AKERMAN 3 BY: WILLIAM HADBAS, ESQ. 4 1635 Village Center Circle 5 Suite 200 6 Las Vegas, Nevada 89134 7 (702) 634-5024 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>
<p>Page 4</p> <p>1 I N D E X 2 3 WITNESS: KELLY MITCHELL 4 5 EXAMINATION PAGE 6 By Mr. Maurice 5, 91 7 By Mr. Hadbass 59, 94 8 By Mr. Croteau 73, 93 9 10 11 EXHIBITS 12 MARKED PAGE 13 Exhibit 1 Notice of Taking Deposition 7 14 Exhibit 2 ACS File 30 15 16 17 18 19 20 21 22 23 24 25</p>	<p>Page 5</p> <p>1 LAS VEGAS, NEVADA; TUESDAY, SEPTEMBER 25, 2018 2 10:43 A.M. 3 -oOo- 4 (The Reporter was relieved of her duties 5 under NRC 30(b)(4).) 6 Whereupon, 7 KELLY MITCHELL, 8 having first been called as a witness, was duly sworn 9 and testified as follows: 10 11 EXAMINATION 12 BY MR. MAURICE: 13 Q. Would you please state and spell your name for 14 the record? 15 A. Kelly Mitchell. K-E-L-L-Y, M-I-T-C-H-E-L-L. 16 Q. Ms. Mitchell, would it be safe for me to presume 17 you've been deposed a number of times? 18 A. Yes. 19 Q. Would it be a waste of time to for me to explain 20 how a deposition works? 21 A. It would. 22 Q. Just a few things. I want to make sure you 23 understand you have a right to ask for clarification. 24 If I ask you an inartful question you do not understand, 25 I want you to say, "Aaron, I don't understand that</p>

<p style="text-align: right;">Page 22</p> <p>1 If there was no response to that, we'd send out a 2 pre-NOD letter first class and certified to the owner 3 verifying ownership on PACER and getting a ledger. If 4 there was no answer to that, we would record the Notice 5 of Default, order a TSG record after obtaining the 6 ledger and verifying ownership on PACER. We send the 7 NOD to all interested parties that were listed on the 8 TSG report and send an authorization to publish to the 9 board for the next meeting.</p> <p>10 If we had the authorization back and if the 11 90 days was past, we would record the Notice of Sale, 12 get up undated TSG report, send that first class and 13 certified to everybody on the updated TSG report. If 14 there was no response, we would post, publish, and hold 15 auction.</p> <p>16 Q. And then let's talk about the auction. Did you 17 guys actually handle the auction or did you refer that 18 to the third party?</p> <p>19 A. Referred out.</p> <p>20 Q. Back in this 2010 to 2011 time frame, to whom was 21 Absolute Collections referring the foreclosures to?</p> <p>22 A. Compass Realty.</p> <p>23 Q. Why was it that Absolute Collections didn't 24 handle the foreclosures themselves?</p> <p>25 A. It wasn't common practice with any collection</p>	<p style="text-align: right;">Page 23</p> <p>1 company.</p> <p>2 Q. Now let's go a little bit further in the process 3 and talk about the situation the HOA obtains title to 4 the property by way of a credit bid. Under those 5 circumstances, that's what would then lead to Absolute 6 Collection's post-foreclosure program. Correct?</p> <p>7 A. Correct.</p> <p>8 Q. Walk me through that process back in this 2010 to 9 2011 time frame.</p> <p>10 A. Really depended on the board.</p> <p>11 Q. What do you mean?</p> <p>12 A. Meaning some didn't take post-foreclosure 13 programs, some did. Some didn't want the 14 refurbishments. Some did. I mean, it depended on their 15 direction.</p> <p>16 Q. Were there some HOAs when they obtained title to 17 a property at an NRS Chapter 16 foreclosure sale, did 18 not want to retain ownership of the unit and looked to 19 sell it to a third party?</p> <p>20 A. If they did, I'm not aware of it. They would 21 take title to it. Generally weren't included if there 22 was a sale. They were included if they were leasing it.</p> <p>23 Q. Back in the 2010/2011 time frame, when was it in 24 the process that Absolute Collections would close its 25 file and essentially turn the matter back over to the</p>
<p style="text-align: right;">Page 24</p> <p>1 management company?</p> <p>2 A. Payment would always be one.</p> <p>3 Q. You're talking about if prior to a foreclosure, 4 payment was received to pay off the loan. Correct?</p> <p>5 A. Yes. Payment would be first. If the board asked 6 us to would be second after a foreclosure and they 7 didn't want the post-foreclosure program. That would be 8 third. During post-foreclosure it would be closed when 9 the amounts were satisfied with Absolute and the HOA -- 10 and there was some type of end or settlement or transfer 11 back or something would occur to the title.</p> <p>12 Q. During this 2010 to 2011 time frame, if a request 13 was made by a secured lender for a superpriority payoff 14 demand, what were the practices of Absolute Collections 15 with respect to how to respond to that question?</p> <p>16 A. We'd advise them how to order a statement, and 17 once they did that, we would provide the statement. And 18 then as the superpriority amounts were in dispute, we 19 would accept the payment.</p> <p>20 Q. Say that again.</p> <p>21 A. As the superpriority amounts were in dispute, the 22 banks believed one thing and we believed the other. We 23 would accept the payment, no matter what they paid.</p> <p>24 Q. Let's go back to the first thing. You talked 25 about advising them how to get a statement?</p>	<p style="text-align: right;">Page 25</p> <p>1 A. Correct.</p> <p>2 Q. I was asking specifically about a superpriority 3 payoff demand. Is there a difference between a 4 superpriority payoff demand and the statement?</p> <p>5 A. They show the same thing. There's a column for 6 superpriority and a column for the full amount.</p> <p>7 Q. That's on the statement?</p> <p>8 A. Correct.</p> <p>9 Q. Would Absolute Collections provide a 10 superpriority payoff demand?</p> <p>11 A. Yes. It would be considered a statement.</p> <p>12 Q. What were the steps back in 2010 to 2011 that a 13 person had to go through to obtain a statement?</p> <p>14 A. Well, it depends. If it was the bank who sent 15 the letter asking for a statement, we would ask them if 16 what they wanted was the full payoff or if they wanted 17 the partial, and we'd tell them how to order it. Advise 18 them that if it was a true escrow demand requesting 19 ownership, it was \$150 paid up front. If it was just a 20 statement to see what was owed to pay a portion, then we 21 would add \$50 to the account.</p> <p>22 Q. So do you mean in that second scenario the bank 23 would receive a statement for free, but there would be a 24 \$50 charge added to the delinquent assessment?</p> <p>25 A. Correct. It would be on the account for whatever</p>

<p style="text-align: right;">Page 26</p> <p>1 time that it settled.</p> <p>2 Q. During this 2010 to 2011 time frame, would</p> <p>3 Absolute Collections provide a statement to a lender</p> <p>4 that had not completed a foreclosure on the property?</p> <p>5 A. Yes.</p> <p>6 Q. If I understood your testimony correctly, if a</p> <p>7 lender -- we're using a hypothetical. If a lender</p> <p>8 obtained a statement and did the math and calculated</p> <p>9 nine months of the assessments and sent Absolute</p> <p>10 Collections a letter and said "Enclosed herewith you'll</p> <p>11 find in check in the amount of the superpriority</p> <p>12 payment," which is nine months of collections, even if</p> <p>13 Absolute Collections may not have agreed with the bank's</p> <p>14 theory with regard to its ability to pay the</p> <p>15 superpriority amount, Absolute Collections, nonetheless,</p> <p>16 would accept the payment. Correct?</p> <p>17 A. As long as it did not say "paid in full," we</p> <p>18 would accept it.</p> <p>19 Q. What would Absolute Collections do if it said</p> <p>20 "paid in full"?</p> <p>21 A. We would return it and indicate it needed to be</p> <p>22 resent without that wording.</p> <p>23 Q. You mentioned when you walked through the general</p> <p>24 steps that Absolute Collections went through back in the</p> <p>25 2010 to 2011 time frame, almost on every step a PACER</p>	<p style="text-align: right;">Page 27</p> <p>1 search was run. Do you recall testifying to that?</p> <p>2 A. I do.</p> <p>3 Q. What was the purpose of the PACER search?</p> <p>4 A. To see if the owner was in bankruptcy.</p> <p>5 Q. If the owner was in bankruptcy, what would</p> <p>6 Absolute Collections do?</p> <p>7 A. Monitor the file.</p> <p>8 Q. Does that mean Absolute Collection Services would</p> <p>9 suspend activities and wait until the bankruptcy was</p> <p>10 resolved?</p> <p>11 A. Correct.</p> <p>12 Q. This case involves a party named Las Vegas</p> <p>13 Development Group. Are you aware of that?</p> <p>14 A. I am.</p> <p>15 Q. If I use "LVDG," will you know what I'm talking</p> <p>16 about?</p> <p>17 A. I will.</p> <p>18 Q. When is the first time you heard the name LVDG,</p> <p>19 or Las Vegas Development Group?</p> <p>20 A. I imagine after they started buying at sales.</p> <p>21 Q. But Absolute Collections didn't actually conduct</p> <p>22 the sales. Correct?</p> <p>23 A. Correct.</p> <p>24 Q. If the property sold at a sale, would Absolute</p> <p>25 Collections play any role in the recording of the</p>
<p style="text-align: right;">Page 28</p> <p>1 trustee's deed?</p> <p>2 A. We recorded every deed. That's how I would know</p> <p>3 the name.</p> <p>4 Q. Okay. Do you recall approximately when Las Vegas</p> <p>5 Development Group began purchasing properties at HOA</p> <p>6 foreclosure sales?</p> <p>7 A. I don't.</p> <p>8 Q. Do you know the principals behind LVDG?</p> <p>9 A. No.</p> <p>10 Q. Have you had any interaction with LVDG in</p> <p>11 connection with Absolute Collection's post-foreclosure</p> <p>12 program?</p> <p>13 A. No.</p> <p>14 Q. Do you know John?</p> <p>15 A. I've seen the name.</p> <p>16 Q. But if he were in the room, you wouldn't know who</p> <p>17 he was?</p> <p>18 A. Correct.</p> <p>19 Q. Which about Charles Schmidt?</p> <p>20 A. I do.</p> <p>21 Q. How do you know Charles Schmidt?</p> <p>22 A. I would see him at the sales.</p> <p>23 Q. So you actually attended the sales even though</p> <p>24 they were being conducted by Compass Realty?</p> <p>25 A. Not really. They were in our lobby, so I had to</p>	<p style="text-align: right;">Page 29</p> <p>1 pass through it.</p> <p>2 Q. If Mr. Schmidt was in the room, you would be able</p> <p>3 to recognize Mr. Schmidt?</p> <p>4 A. I would.</p> <p>5 Q. Have you had any dealings with Mr. Schmidt?</p> <p>6 (Mr. Croteau entered the deposition.)</p> <p>7 BY MR. MAURICE:</p> <p>8 Q. Have you had any dealings with Mr. Schmidt</p> <p>9 outside the context of an NRS Chapter 116 foreclosure?</p> <p>10 A. No.</p> <p>11 Q. There are a number of instances where properties</p> <p>12 that were foreclosed upon at Chapter 116 foreclosure</p> <p>13 sales and title was taken back by the association,</p> <p>14 shortly thereafter the association transferred that</p> <p>15 title to LVDG. Are you aware of that?</p> <p>16 A. Some of them, yeah.</p> <p>17 Q. Did Absolute Collections play any role in the</p> <p>18 subsequent transfers?</p> <p>19 A. There would be offers made on the property, not</p> <p>20 just by LVDG, but other offers. We would submit them</p> <p>21 all to the board and the board would say whether or not</p> <p>22 they would accept those. If they did, we would record</p> <p>23 the deed for them.</p> <p>24 Q. So that might be one of those situations where</p> <p>25 these offers were made post foreclosure. Correct?</p>

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1 conclusion.

2 BY MR. MAURICE:

3 Q. The next sentence, "It is unclear, based upon the

4 information known to date, what amount the nine months

5 of common assessments predating the NOD actually are.

6 That amount, whatever it is, is the amount BAC should be

7 required to rightfully pay to fully discharge its

8 obligations to the HOA per NRS 116.3102 and my client

9 hereby offers to pay that sum upon presentation of

10 adequate proof of the same by the HOA."

11 See where I read that?

12 A. Yes.

13 Q. Okay. Seems to me that is Bank of America's

14 counsel saying "We're willing to pay this nine months of

15 assessments once we figure out what the amount is."

16 What was Absolute Collection's standard response to

17 this what you described as a form letter that included

18 that language?

19 A. It would be in the last paragraph of our letter

20 two pages back which states they need to order the

21 statement and make sure there's not an escrow demand.

22 We'll charge \$50 to the account. Please Email me back

23 if you would like it.

24 Q. The next paragraph says, "Please let me know what

25 the status of any HOA lien foreclosure sale is, if any.

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1 with respect to that property?

2 MR. CROTEAU: Objection. Relevant.

3 Improper hypothetical.

4 A. If they made payment, we could still foreclose.

5 We would hold it for a time to see if they would make

6 payment, yes.

7 BY MR. MAURICE:

8 Q. If Miles Bauer Bergstrom & Winters responded by

9 requesting a statement, in that scenario Absolute

10 Collections would at least stand down for a while to see

11 if Bank of America and the HOA could get things worked

12 out?

13 A. That's not what I said.

14 MR. CROTEAU: Objection. Misstates.

15 BY MR. MAURICE:

16 Q. Tell me where I'm wrong.

17 A. I said if we received payment. This is not

18 payment.

19 Q. Here the law firm is saying "Our goal is to

20 prevent this foreclosure from proceeding. Please

21 refrain from taking further action to enforce the HOA

22 lien until my clients and the HOA have had an attempt to

23 speak."

24 A. Even if they wanted to pay what they wanted to,

25 the nine months would still foreclose, so this alone,

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1 My client does not want these issues to become further

2 exacerbated by a wrongful HOA sale and it is my client's

3 goal and intent to have these issues resolved as soon as

4 possible. Please refrain from taking further action to

5 enforce this HOA lien until my client and the HOA have

6 had an opportunity to speak to attempt to fully resolve

7 all issues."

8 Do you see that?

9 A. I do.

10 Q. That's a request by Bank of America's counsel to

11 stop the foreclosure process with respect to this lien

12 so that Bank of America can work out its issues with the

13 HOA. Correct?

14 A. I see that.

15 Q. How was it that Absolute Collections responded to

16 that request by Bank of America? And I understand it's

17 a form letter, so this happened not just with respect to

18 this property but with respect to hundreds of

19 properties. Correct?

20 A. Correct. Sometimes Miles Bauer requested a

21 statement and other times they wouldn't. This one, they

22 didn't.

23 Q. If they didn't request -- let's handle it the

24 other way. If the law firm did request a statement,

25 would Absolute Collections stop the foreclosure process

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1 this letter, would get them a statement if they Emailed

2 me back so they could go ahead and pay the nine months.

3 But to stop collection altogether, no.

4 Q. Okay. The only way the bank was going to be able

5 to stop the collection altogether or at least address

6 the issue with the superpriority was to request a

7 statement, calculate the superpriority portion of that,

8 and to tender that payment. Correct?

9 A. Correct.

10 Q. But since there was a disagreement between

11 Absolute Collections and at least the law firm

12 representing Bank of America as to what was allowed to

13 be included in the superpriority portion of the lien,

14 what would happen if the bank tendered the payment of

15 nine months of assessments but did not tender a payment

16 related to collection costs and attorneys' fees and late

17 charges?

18 A. Like I said earlier, we would accept the payment.

19 Q. But would proceed with the foreclosure?

20 A. Either way, most likely if the board wanted us

21 too, yeah. The full amount is not paid with the

22 superpriority amount.


23 Q. Correct. Under that scenario where the lender

24 tenders the nine months of assessments but does not

25 tender late fees, collection charges -- the things that

<p style="text-align: right;">Page 66</p> <p>1 A. Please.</p> <p>2 Q. Since you had the position about the fees and</p> <p>3 costs, if you included the nine, that's based on the</p> <p>4 Jackie Glass Korbel decision. Is that correct?</p> <p>5 A. No.</p> <p>6 Q. How did you calculate that nine months of</p> <p>7 interest?</p> <p>8 A. This is a little bit before the decision from the</p> <p>9 commission who actually oversees HOAs, but we knew where</p> <p>10 they were going with it as there was plenty of</p> <p>11 discussions in meetings. That's where our view came</p> <p>12 from.</p> <p>13 Q. Understood. Now, in your response, and I know --</p> <p>14 I was trying to take the letter out and break it into</p> <p>15 different pieces or whatever, but your testimony is that</p> <p>16 that statement of account at this time for \$25, although</p> <p>17 not used, as it says, for transfer, would that have</p> <p>18 included a column with that nine, nine, nine calculation</p> <p>19 that you had?</p> <p>20 A. It would have been broken down. It would have</p> <p>21 said these are the assessments each month times nine.</p> <p>22 Q. When the instances the check was sent -- did you</p> <p>23 receive checks in that amount?</p> <p>24 A. Yes.</p> <p>25 MR. CROTEAU: Objection. Relevance, beyond</p>	<p style="text-align: right;">Page 67</p> <p>1 the scope of this case, no facts in evidence.</p> <p>2 BY MR. HABDAS:</p> <p>3 Q. So you do remember actually receiving some where</p> <p>4 they actually gave you the amount you asked for?</p> <p>5 A. Not the amount I asked for, no. Miles Bauer</p> <p>6 would give the nine months.</p> <p>7 Q. I'm asking if you recalled any instances where</p> <p>8 the amount that you listed that you thought was owed in</p> <p>9 the nine months of collection, nine months late and all</p> <p>10 that, do you have any recollection of anyone paying that</p> <p>11 amount?</p> <p>12 A. Yes.</p> <p>13 Q. When that amount was paid, would that stop the</p> <p>14 foreclosure sale?</p> <p>15 A. No.</p> <p>16 Q. All right. And that's because you didn't</p> <p>17 believe -- is that accurate, that it's because you had a</p> <p>18 belief upon that nine-month period, as you said, not</p> <p>19 being valid until the bank forecloses. Right?</p> <p>20 A. It wouldn't be paid in full until the bank</p> <p>21 foreclosed. Correct.</p> <p>22 Q. True?</p> <p>23 A. True. To get me to release the lien after a bank</p> <p>24 foreclosed and everything would be the nine months being</p> <p>25 paid. Then it's payment in full.</p>
<p style="text-align: right;">Page 68</p> <p>1 Q. But even paying the amount that you would have</p> <p>2 asked for on your payoff, which is even more than Miles</p> <p>3 Bauer typically would have, as you said, followed up if</p> <p>4 they paid the nine months?</p> <p>5 A. There's a lot of woulda, coulda, shoulda there.</p> <p>6 You're getting me lost.</p> <p>7 Q. I'll ask it a different way. I think in earlier</p> <p>8 testimony you said that in the instances where Miles</p> <p>9 Bauer followed up with you and actually provided a check</p> <p>10 which was their nine months times the assessments, that</p> <p>11 you would not at this time accept those checks --</p> <p>12 correct -- because of the language "paid in full"?</p> <p>13 MR. CROTEAU: Objection. Misstates the</p> <p>14 testimony.</p> <p>15 A. That is not what I said. This was after Rock and</p> <p>16 I had conversations about it. They stopped putting the</p> <p>17 "paid in full" on the checks.</p> <p>18 BY MR. HABDAS:</p> <p>19 Q. Do you know what date they stopped?</p> <p>20 A. It was early 2010.</p> <p>21 Q. Was it on the check or check stub?</p> <p>22 A. Check. It was in the memo.</p> <p>23 Q. As you sit here today, your recollection is if</p> <p>24 Miles Bauer had taken -- requested a statement of</p> <p>25 account and submitted a nine-month check, you believe at</p>	<p style="text-align: right;">Page 69</p> <p>1 this time it wouldn't have included such language?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. And you believe that you would have</p> <p>4 included that even though you didn't agree with</p> <p>5 satisfying a superpriority. Is that accurate?</p> <p>6 A. Yes.</p> <p>7 Q. We don't have to go to the page, but we did see</p> <p>8 the sales results. I guess it's on 101. There's a</p> <p>9 later version of this that ACS had with another column.</p> <p>10 Is that accurate?</p> <p>11 A. Correct.</p> <p>12 Q. And that later column you used later on in the</p> <p>13 process indicated what?</p> <p>14 A. Whether or not a bank paid a superpriority.</p> <p>15 Q. And what is the reason, if you know, why it</p> <p>16 wasn't on this particular version of the sales results?</p> <p>17 A. We hadn't hashed that out yet.</p> <p>18 Q. Okay. Do you know about when you added that</p> <p>19 column?</p> <p>20 A. March of, I want to say, either 2012 or '13.</p> <p>21 Q. Okay. And so at this time, even if amounts were</p> <p>22 received, would that have been announced at the</p> <p>23 foreclosure sale?</p> <p>24 A. No.</p> <p>25 Q. Okay. Now, the lien which was recorded on</p>

<p style="text-align: right;">Page 86</p> <p>1 2015 amendments?</p> <p>2 A. Yes. It's still not paid in full. As far as is</p> <p>3 the priority paid in full? Yes, I can accept that kind</p> <p>4 of wording on a check. But account paid in full I</p> <p>5 can't.</p> <p>6 Q. I'm not asking that. The second paragraph</p> <p>7 doesn't say that. What the second paragraph says is, "I</p> <p>8 am making you aware that it is our view without the</p> <p>9 action of foreclosure, a 9 month Statement of Account is</p> <p>10 not valid."</p> <p>11 Is that still your view?</p> <p>12 A. No.</p> <p>13 Q. We're only talking about 2015 to -- prior to</p> <p>14 2015. The answer is no?</p> <p>15 A. Correct.</p> <p>16 Q. And then the third paragraph says, "As discussed,</p> <p>17 any statement of account from us will show the entire</p> <p>18 amount owed." Correct?</p> <p>19 A. Correct.</p> <p>20 Q. That will include whatever assessments are there.</p> <p>21 Correct?</p> <p>22 A. Correct.</p> <p>23 Q. It says, "We intend to proceed on the</p> <p>24 above-mentioned account up to and including</p> <p>25 foreclosure."</p>	<p style="text-align: right;">Page 87</p> <p>1 Now, the Rock Jung letter at BLAHA 81, the third</p> <p>2 paragraph on the second page it says, "Please let me</p> <p>3 know what the status of any HOA foreclosure sale is, if</p> <p>4 any. My client does not want these issues to become</p> <p>5 further exacerbated by a wrongful HOA sale, and it is my</p> <p>6 client's goal and intent to have these issues resolved</p> <p>7 as soon as possible. Please refrain from taking further</p> <p>8 action to enforce this HOA lien until my client and the</p> <p>9 HOA have had an opportunity to speak to attempt to fully</p> <p>10 resolve all issues."</p> <p>11 Did you read that?</p> <p>12 A. I do.</p> <p>13 Q. Do you know if the HOA ever spoke with Mr. Jung</p> <p>14 or the Bank of America or Miles Bauer?</p> <p>15 A. No.</p> <p>16 Q. Okay. You don't know or they didn't?</p> <p>17 A. I don't know.</p> <p>18 Q. Okay. Your letter clearly responds that "We</p> <p>19 intend to proceed with the above-mentioned account up to</p> <p>20 and including foreclosure" subsequent to Mr. Jung's</p> <p>21 letter?</p> <p>22 A. Correct.</p> <p>23 Q. So you're tell him "We're not stopping"?</p> <p>24 A. Correct.</p> <p>25 Q. And then you go on to say, "All such</p>
<p style="text-align: right;">Page 88</p> <p>1 notifications have been and will be sent to all</p> <p>2 interested parties."</p> <p>3 Again, counsel asked you about that. Interested</p> <p>4 parties are the secured parties and people who are</p> <p>5 requesting the Notice of Sale. Correct?</p> <p>6 A. Correct. That appear on the TSG.</p> <p>7 Q. In this case, clearly Bank of America. Correct?</p> <p>8 A. Correct.</p> <p>9 Q. And, "We recognize your client's position as the</p> <p>10 first mortgage company as the senior lienholder."</p> <p>11 Now, this is prior to the HOA foreclosure sale.</p> <p>12 Correct?</p> <p>13 A. Correct.</p> <p>14 Q. So they are still senior lienholder?</p> <p>15 A. Per NRS, yes.</p> <p>16 Q. "Should you provide us with a recorded Notice of</p> <p>17 Default or Notice of Sale, we will hold our action so</p> <p>18 your client may proceed."</p> <p>19 Do you know if they ever had a Notice of Default</p> <p>20 or Notice of Sale filed on this property prior to the</p> <p>21 foreclosure sale?</p> <p>22 A. Not to my knowledge.</p> <p>23 Q. Okay. But they certainly had opportunity.</p> <p>24 Correct?</p> <p>25 A. Correct.</p>	<p style="text-align: right;">Page 89</p> <p>1 Q. When did the foreclosure sale actually occur in</p> <p>2 this case?</p> <p>3 A. April 2011.</p> <p>4 Q. Your correspondence was sent September 21st,</p> <p>5 2010.</p> <p>6 A. Correct.</p> <p>7 Q. Not for seven months. Right?</p> <p>8 A. Correct.</p> <p>9 Q. During that period of time, it would have been</p> <p>10 possible for them to have conducted their entire</p> <p>11 foreclosure process and had the house foreclosed upon</p> <p>12 given the standard time frames. Correct?</p> <p>13 MR. MAURICE: Objection. Lacks foundation</p> <p>14 and ignores the fact that Mr. Perez filed bankruptcy.</p> <p>15 MR. HADBAS: Join. Calls for speculation</p> <p>16 and legal conclusion.</p> <p>17 BY MR. CROTEAU:</p> <p>18 Q. Go ahead and answer anyway.</p> <p>19 A. I'm not familiar with how fast they work. I just</p> <p>20 know it's a bit out of my scope.</p> <p>21 Q. Do you do 107 sales at all? NRS 107?</p> <p>22 A. No. But some of the NRS 116 incorporates 107, as</p> <p>23 far as mailings.</p> <p>24 Q. Do you know what the first step is in an NRS 107?</p> <p>25 A. Notice of Default.</p>

<p style="text-align: right;">Page 94</p> <p>1 time to allow them to continue or not. Correct?</p> <p>2 A. Correct.</p> <p>3 Q. It was nothing but a courtesy. Correct?</p> <p>4 A. Correct.</p> <p>5 Q. It was a nonpaid-for consideration of any kind?</p> <p>6 A. Correct.</p> <p>7 Q. Nonbinding. Correct?</p> <p>8 A. Correct.</p> <p>9 Q. But it was your willingness or the HOA's</p> <p>10 willingness to work with the bank?</p> <p>11 A. Board's, yes.</p> <p>12 Q. Board's position. Right?</p> <p>13 A. Yes.</p> <p>14 MR. CROTEAU: No further.</p> <p>15 MR. HABDAS: I have one last hanging</p> <p>16 question I forgot to ask.</p> <p>17 FURTHER EXAMINATION</p> <p>18 BY MR. HABDAS:</p> <p>19 Q. On your letter 79, on that last paragraph it</p> <p>20 says, "Per our previous conversation," and it goes on</p> <p>21 and it says, "if after reviewing the information above."</p> <p>22 When you're saying "the information above,"</p> <p>23 you're talking of those first three paragraphs.</p> <p>24 Correct?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">Page 95</p> <p>1 Q. So you're saying if after seeing our views on</p> <p>2 what this is, you still want a statement of account,</p> <p>3 here's how you get it. Is that accurate?</p> <p>4 A. Correct.</p> <p>5 Q. Why are you referencing in there if after</p> <p>6 reviewing what is above you still want it? Do you know</p> <p>7 why you wrote that in there?</p> <p>8 A. That's a good question for the counsel that wrote</p> <p>9 it.</p> <p>10 Q. So you didn't write it. Okay.</p> <p>11 MR. HABDAS: Nothing further.</p> <p>12 MR. CROTEAU: Nothing.</p> <p>13 MR. MAURICE: Thank you.</p> <p>14 (Proceedings concluded at 12:43 p.m.)</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">Page 96</p> <p>1 CERTIFICATE OF REPORTER</p> <p>2 STATE OF NEVADA)</p> <p>3) ss:</p> <p>4 COUNTY OF CLARK)</p> <p>5 I, KELE R. SMITH, a Certified Court Reporter in</p> <p>6 Clark County, State of Nevada, do hereby certify: That</p> <p>7 I reported the taking of the deposition of KELLY</p> <p>8 MITCHELL, commencing on Tuesday, September 25, 2018, at</p> <p>9 10:43 a.m.</p> <p>10 That prior to being deposed, the witness was by</p> <p>11 me duly sworn to testify to the truth, that I thereafter</p> <p>12 transcribed my said shorthand notes into typewriting, and</p> <p>13 that the typewritten transcript is a complete, true, and</p> <p>14 accurate transcription of said shorthand notes and that</p> <p>15 witness was not asked to review and correct the</p> <p>16 transcript.</p> <p>17 I further certify that I am not a relative or</p> <p>18 employee of counsel of any of the parties, nor a</p> <p>19 relative or employee of the parties involved in said</p> <p>20 action, nor a person financially interested in the</p> <p>21 action.</p> <p>22 IN WITNESS WHEREOF, I have set my hand in my</p> <p>23 office in the County of Clark, State of Nevada, this</p> <p>24 8th day of October, 2018.</p> <p>25 </p> <p>KELE R. SMITH, NV CCR #672, CA CSR #13405</p>	