IN THE SUPREME COURT OF THE STATE OF NEVADA

***

VEGAS UNITED INVESTMENT SERIES 105, INC., A NEVADA DOMESTIC CORPORATION, Appellant, vs. CELTIC BANK CORPORATION, SUCCESSOR-IN-INTEREST TO SILVER STATE BANK BY ACQUISITION OF ASSETS FROM THE FDIC AS RECEIVER FOR SILVER STATE BANK, A UTAH BANKING CORPORATION ORGANIZED AND IN GOOD STANDING WITH THE LAWS OF THE STATE OF UTAH, Respondent.	)	Supreme Court No. 74163

APPEAL

From the Eighth Judicial District Court,
The Honorable Susan Johnson, District Judge
District Court Case No. A-15-728233-C

APPELLANT'S OPENING BRIEF

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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.

Vegas United Investment Series 105, Inc. is a privately owned Nevada corporation with no publicly held corporation owning 10% or more of its stock.

Vegas United Investment Series 105, Inc. is represented by Roger P. Croteau and Timothy E. Rhoda of Roger P. Croteau & Associates, Ltd.

JURISDICTIONAL STATEMENT

This is an appeal from Findings of Fact, Conclusions of Law and Judgment entered by the district court on August 25, 2017, subsequent to a trial on the merits. Appendix ("App"), 0306. Appellant timely filed a Notice of Appeal on September 27, 2018. App 0516. On November 6, 2017, Appellant filed an Amended Notice of Appeal (App 0532) to also appeal a subsequent Order and Judgment re: Memorandum of Costs and Disbursements which was entered on or about October 2, 2017. App 0524.

On February 23, 2018, this Court entered an Order to Show Cause directing that the Appellant show cause why the appeal should not be dismissed for lack of jurisdiction. Specifically, this Court advised that the Order appealed from did not dispose of all of the parties and claims and that it was therefore not a final appealable judgment. Appellant filed its Response to the Order to Show Cause on March 26, 2018, requesting an additional period of time in which to finalize the judgment. Thereafter, a Stipulation and Order to Certify Final Judgment was entered by the district court on or about May 8, 2018. App 0543. On May 29, 2018, this Court entered an Order finding that the judgment had been properly certified as final and concluding that jurisdiction exists.

ROUTING STATEMENT

The instant matter should presumptively be retained by the Nevada Supreme Court because this appeal raises as a principal issue a question of first impression under common law. NRAP 17(a)(10). Specifically, at issue is the applicability of NRS Chapter 116 to commercial property where the applicable CC&Rs state that the provisions of the Uniform Common Interest Ownership Act ("UCIOA") are applicable "to the extent permitted under NRS 278A.170." In addition, the matter raises a question of statewide public importance. NRAP 17(a)(11).

STATEMENT OF ISSUES FOR REVIEW

1. Whether NRS 116.3116 through 116.31168 governs a commercial property owners association where the applicable CC&Rs state that the provisions of the Uniform Common Interest Ownership Act (*"UCIOA"*), codified in Chapter 116 of the Nevada Revised Statutes, are applicable "to the extent permitted under NRS 278A.170."
2. Whether the Respondent's claimed secured interest in the real property at issue was extinguished at the time of the Association's foreclosure sale.
3. Whether the district court's Findings of Fact, Conclusions of Law and Judgment were erroneous as a matter of law.

STATEMENT OF THE CASE

The Court is familiar with the general nature of this appeal, which deals with the application, force and effect of NRS Chapter 116. At issue in this case is commercial property commonly known as 181 Gibson Road, Henderson, Nevada (*the "Property"*). The Appellant, Vegas United Investments Series 105, Inc. (*"Vegas United"*) purchased the Property at a foreclosure sale (*"Association Foreclosure Sale"*) conducted on behalf of the Gibson Business Center Property Owners Association (*"Association"*) dated March 21, 2014. Respondent, Celtic Bank Corporation (*"Celtic Bank" or the "Bank"*), purports to have possessed a secured interest recorded against the Property at the time of the Foreclosure Sale.

Celtic Bank filed its Complaint (App 0001) on November 25, 2015, asserting a single cause of action for Judicial Foreclosure. On January 4, 2016, Vegas United filed its Answer and Counterclaim, asserting affirmative causes of action for Quiet Title/Declaratory Relief and Slander of Title. App 0108. Pursuant to its Counterclaim, Vegas United generally disputed Celtic Bank's right to judicially foreclose upon the Property, asserting that any security interest that it may have possessed was subordinate to the Association's Lien and therefore extinguished as a matter of law at the time of the Association Foreclosure Sale. App 0108, generally.

The matter ultimately proceeded to a trial on the merits on August 9, 10, 11, 2017. Subsequent to trial, the district court entered its Findings of Fact, Conclusions of Law and Judgment (*"FFCL"*). App 0306. Pursuant to the FFCL, the district court found that NRS Chapter 116 did not govern the Property pursuant to the applicable CC&Rs. As a result, the district court determined that Celtic Bank's deed of trust was not extinguished and that Vegas United had purchased the Property subject to said security interest. Thus, the district court granted Celtic Bank leave to judicially foreclose upon the Property.

Vegas United timely appealed on September 28, 2017. App 0516. The district court thereafter awarded Celtic Bank costs in the amount of $10,442.96 by way of Order filed on October 2, 2017. App 0524. Vegas United timely amended its Notice of Appeal on November 6, 2017, to also appeal the award of costs.

STATEMENT OF THE FACTS

The parties stipulated to many of the facts at the time of trial. The following stipulated facts are set forth in the parties' Joint Pre-Trial Memorandum filed on August 4, 2017. App 0223. Specifically, the parties stipulated as follows:

A. Plaintiff's Loan Documents

1. On or about January 18, 2006, Gibson Road, LLC as Borrower executed a Promissory Note (*the "Note"*) wherein Silver State Bank (*"Silver State"*), Plaintiff's predecessor in interest, agreed to loan Seven Hundred Forty-Eight Thousand, Dollars and 00/100 ($748,000.00) to Borrower.

2. On or about December 9, 2005, and in order to secure payment of the Note, Borrower executed and delivered to Silver State a first priority deed of trust (*the "Deed of Trust"*). Plaintiff alleges that the Deed of Trust encumbers 181 N. Gibson Road, Henderson, Nevada (*the "Property"*); however, the Deed of Trust does not reflect either the Property's address or the corresponding assessor's parcel number on its face. The Deed of Trust was recorded in Book No. 20051230 as Instrument No. 0002937 in the Official Records of the Clark County Recorder's Office on December 30, 2005 and re-recorded on January 23, 2006 in Book No. 20060123 as Instrument No. 0000482.

3. On September 5, 2008, Silver State was closed by the Nevada Financial Institutions Division and the Federal Deposit Insurance Corporation (*"FDIC"*) was named Receiver.

4. On September 24, 2009, the FDIC as Receiver for Silver State assigned the Note and Deed of Trust to Plaintiff. The Assignment of Deed of Trust was recorded in Book No. 20091109 as Instrument No. 0001572 in the Official Records of the Clark County Recorder's Office on November 9, 2009 *(the "Assignment of DOT"*). The Assignment of DOT identified an address for Celtic Bank Corp. of 340 East 400 South, Salt Lake City, Utah 84111.

B. The Association's Lien and Foreclosure Documents

5. On August 23, 2011, Red Rock Financial Services (*"Red Rock"*) as agent for the Gibson Business Center Property Owners Association recorded a Lien for Delinquent Assessments (*"Assessment Lien"*).

6. The Assessment Lien references that the Lien is "in accordance with Nevada Revised Statutes 116 and outlined in the Association Covenants, Conditions, and Restrictions, herein also called CC&Rs, recorded on 10/24/1994, in Book Number , as Instrument Number 19940240000285 and including any and all Amendments and Annexations et seq. of Official

Records of Clark County, Nevada, which have been supplied to and agreed upon by said owner."

7. There is a document recorded as First Amendment to Declaration of Protective Covenants, Conditions and Restrictions (*"First Amendment"*) recorded in the Recorder's Office of the Clark County Recorder with an Instrument Number of 199410240000285.

8. On October 14, 2011, a Notice of Default (*"NOD"*) was recorded by Red Rock.

9. The NOD references the recorded Assessment Lien.

10. The NOD was sent by certified mail, return receipt requested to Celtic Bank at the address set forth on the Assignment of DOT and signed for by a Celtic Bank employee.

11. On February 26, 2014, Red Rock Financial Services recorded a Notice of Foreclosure Sale which references the Assessment Lien recorded on August 23, 2011 and the NOD recorded on October 14, 2011.

12. The Notice of Foreclosure Sale further states that the sale "will be made to satisfy the indebtedness secured by the Lien, with interest thereon, as provided in the Declaration of Covenants, Conditions and Restrictions, recorded on 10/24/1994, in Book Number , as Instrument Number

19940240000285 of the Official Records in the Office of the Recorder and any subsequent amendments or updates that may have been recorded."

13. The Notice of Sale was sent to Celtic Bank at the address set forth on the Assignment of DOT by way of certified mail, return receipt requested but was not signed for by Celtic Bank.

14. The Association foreclosure sale took place on March 21, 2014.

15. Vegas United was the highest bidder at the foreclosure sale, paying valuable consideration in the amount of Thirty Thousand Dollars ($30,000.00).

16. On April 17, 2014, Vegas United recorded a Foreclosure Deed.

C. Clark County Treasurer Documents

17. On December 26, 2013, the County Treasurer placed a lien on the Property for past due taxes recorded in Book No. 20131226 as Instrument No. 00891 in the Official Records of the Clark County Recorder's Office.

18. On June 11, 2015, the Clark County Treasurer recorded a Tax Trustee Deed which deeded the Property to Clark County.

19. On October 29, 2015, Celtic Bank paid the past due taxes to the Clark County Treasurer in the amount of $18,281.67.

20. On November 5, 2015, the Clark County Treasurer recorded a Treasurer's Deed of Reconveyance.

D. Vegas United's Amended Foreclosure Deed

21. On April 4, 2016, Defendant re-recorded its Foreclosure Deed.

Although the above stipulated facts covered many of the factual matters at issue, and particularly the facts associated with the Association Sale, they do not comprehensively cover all of the critical facts. Of particular importance is the fact that the Property was and is governed by not one, but two, separate associations. Specifically, in addition to the Association, the Property was and is also governed by the Gibson Business Park Property Owners' Association (*"Gibson Business Park OA"*). This compared to the Association which actually foreclosed upon the Property – the Gibson Business Center Property Owners Association. As stipulated by the parties and confirmed by the documents related to the Association Sale, the Association Sale was carried out on behalf of the Association – not the Gibson Business Park OA.

The CC&Rs related to the Gibson Business Park OA were originally recorded on September 11, 1989 (*"1989 CC&Rs"*). See Trial Exhibit 1. App 0174. The 1989 CC&Rs specifically provided at section 1.01 that the association to which they related was the "Gibson Business Park Property Owners' Association." *Id*. The 1989 CC&Rs were thereafter amended in 1994 pursuant to the First Amendment recorded in the Office of the Clark County Recorder as

Instrument Number 199410240000285. See Trial Exhibit 2. App 1124. Pursuant to the 1994 Amendment, certain property was withdrawn from Gibson Business Park OA. *Id*. Again, both the 1989 CC&Rs and the First Amendment related to the Gibson Business Park OA – not the Association. Indeed, as set forth below, the Association had not yet even been formed. Thus, the 1989 CC&Rs and First Amendment are completely irrelevant to the Association.

On March 18, 2004, an entirely new set of CC&Rs were recorded in the Office of the Clark County Recorder as Instrument Number 20040318-03472 (*"2004 CC&Rs"*). See Trial Exhibit 3. App 1130. Pursuant to the 2004 CC&Rs, the Association was formed – it did not previously exist. Thereafter, the Property was governed by both the Gibson Business Park OA and the Association.

The Association Foreclosure Sale was conducted by Red Rock on behalf of the Association. See Trial Exhibits 9, 10, 15, 17. App 1240, 1242, 1273, 1285. The CC&Rs applicable to the Association were the 2004 CC&Rs. See Trial Exhibit 3. App 1130. The 1989 CC&Rs and First Amendment related only to the Gibson Business Park OA, which indisputably did not foreclose upon the Property. See Trial Exhibits 1, 2. App 1074, 1124. The 1989 CC&Rs and First Amendment are nothing more than a red herring in this action.

SUMMARY OF THE ARGUMENTS

For the past several years, the purchasers of real properties at homeowners association lien foreclosure sales have been embroiled in litigation with purportedly secured deed of trust holders such as the Respondent herein, regarding the force and effect of NRS §116.3116, which provides an HOA with a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. In a nutshell, the purchasers of these properties have always asserted that HOA lien foreclosure sales served to extinguish all junior liens, including a first position deed of trust, pursuant to black letter lien law. Deed of trust holders such as the Respondent incorrectly asserted that their security interests survived the HOA lien foreclosure sales.

The conflicting positions of the purchasers and the purported secured mortgage holders were the subject of significant dispute for a lengthy period of time. However, on September 18, 2014, the Nevada Supreme Court, in the matter of *SFR Investments Pool I, LLC v. U.S. Bank, N.A.*, 130 Nev. ___, 334 P.3d 408, 2014 WL 4656471 (Adv. Op. No. 75, Sept. 18, 2014), definitively determined that the foreclosure of a HOA's superpriority lien does indeed extinguish a first deed of trust, stating as follows:

> We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

"The SFR decision made winners out of the investors who purchased foreclosure properties in HOA sales and losers of the lenders who gambled on the opposite result, elected not to satisfy the HOA liens to prevent foreclosure, and thus saw their interests wiped out by sales that often yielded a small fraction of the loan balance." *Freedom Mortg. Corp. v. Las Vegas Dev. Grp., LLC*, 2015 U.S. Dist. LEXIS 66249, 1-2 (D. Nev. May 19, 2015) (Dorsey, J.).

Pursuant to its decision in *SFR Investments*, the Nevada Supreme Court resolved the divergent opinions that previously existed in the state and federal courts of the State of Nevada regarding the force, effect and interpretation of NRS §116.3116 *et seq*. In doing so, the Nevada Supreme Court clarified that the statute provides a homeowners association with a true superpriority lien over real property that can and does extinguish a first deed of trust when non-judicially foreclosed. *Id.* The Nevada Supreme Court also recognized that a foreclosure deed "reciting compliance with notice provisions of NRS 116.31162 through NRS 116.31168 'is conclusive' as to the recitals 'against the unit's former owner, his or

her heirs and assigns and all other persons.'" *See id.* at *3 (citing NRS 116.3116.31166(2)).

The Property in this case is commercial property. At the time of trial, the district court seems to have been somewhat distracted by this fact. Indeed, NRS 116.12075 provides that the provisions of NRS Chapter 116 do not apply to nonresidential property except to the extent that the CC&RS provide as much. NRS 116.12075 specifically provides as follows:

> 1. The provisions of this chapter do not apply to a nonresidential condominium except to the extent that the declaration for the nonresidential condominium provides that:
> (a) This entire chapter applies to the condominium;
> (b) Only the provisions of NRS 116.001 to 116.2122, inclusive, and 116.3116 to 116.31168, inclusive, apply to the condominium; or
> (c) **Only the provisions of NRS 116.3116 to 116.31168, inclusive, apply to the condominium.**

NRS 116.12075. (Emphasis added).

In this case, it is undisputed that the 2004 CC&Rs which governed the Property provided that "[t]he Real Property shall not be subject to the provisions of the Uniform Common Interest Ownership Act, codified in Chapter 116 of the Nevada Revised Statutes ('NRS') except to the extent permitted under NRS 278A.170." See Trial Exhibit 3. App 1130. As discussed above and below, the 2004 CC&Rs are the only CC&Rs that were applicable to the Association or the

Association Foreclosure Sale. The earlier CC&Rs related to a wholly different association that had nothing to do with the Association Foreclosure Sale.

NRS 278A.170 specifically permits a nonresidential community association to utilize the procedures for enforcing payment of assessments set forth in NRS 116.3116 to 116.31168, stating as follows:

> **Common open space: Procedures for enforcing payment of assessment.** The procedures for enforcing payment of an assessment for the maintenance of common open space provided in NRS 116.3116 to 116.31168, inclusive, are also available to any organization for the ownership and maintenance of common open space established other than under this chapter or chapter 116 of NRS and entitled to receive payments from owners of property for such maintenance under a recorded declaration of restrictions, deed restriction, restrictive covenant or equitable servitude which provides that any reasonable and ratable assessment thereon for the organization's costs of maintaining the common open space constitutes a lien or encumbrance upon the property.

While seeming to acknowledge that the procedures for enforcing assessment payments applied to the Association herein, the district court found that the provisions regarding the priority of liens somehow did not apply. This was contrary to the law.

NRS 278A.170 clearly authorizes a nonresidential association to utilize NRS 116.3116 to 116.31168 to enforce payment of assessments. NRS 116.12075 clearly provides that NRS Chapter 116 applies to nonresidential property if the

declaration provides that "Only the provisions of NRS 116.3116 to 116.31168, inclusive, apply to the condominium." Thus, by stating that NRS Chapter 116 is applicable to the extent permitted by NRS 278A.170, the Association effectively stated that only the provisions of NRS 116.3116 to 116.31168 applied to the Property.

In this case, the Association's CC&Rs expressly provided that NRS Chapter 116 applies to the Association **to the extent permitted** by NRS 278A.170. NRS 278A.170 explicitly authorizes a nonresidential association to utilize the procedures of NRS 116.3116 to 116.31168 to enforce payment of assessments. Thus, the provisions of NRS 116.3116 to 116.31168 fully applied to the Association herein. This included the priority of the Association Lien versus Celtic Bank's deed of trust. This Court has confirmed this to be the case in the matter of *Saticoy Bay, LLC v. LNV Corp.*, 2015 Nev. Unpub. LEXIS 1575.

N.R.S. 116.3116(2) (2014) provided that an Association Lien has priority over all other liens and encumbrances except:

> (a) Liens and encumbrances recorded before the recordation of the declaration and, in a cooperative, liens and encumbrances which the association creates, assumes or takes subject to;
> (b) A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent or, in a cooperative, the first security interest encumbering only the unit's

> owner's interest and perfected before the date on which the assessment sought to be enforced became delinquent; and
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

However, N.R.S. 116.3116(2) (2014) further provided that a portion of the Association Lien has priority over even a first security interest in the Property, stating as follows:

> The lien is also prior to all security interests described in paragraph (b) to the extent of any charges incurred by the association on a unit pursuant to NRS 116.310312 and to the extent of the assessments for common expenses based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien[.]

The district court found that the provisions regarding lien priority were somehow carved out of the statute. No evidence whatsoever indicated that this was the case. On the contrary, the applicable CC&Rs specifically stated that NRS Chapter 116 applied to the Association to the extent permitted by NRS 278A.170. NRS 278A.170 specifically recites and incorporates NRS 116.3116 to 116.31168, which specifically include the lien priority provisions that make the Association Lien superior to a deed of trust. As a result, the deed of trust was necessarily subordinate to the Assessment Lien and therefore extinguished by the Association Sale.

Aside from the foregoing, even if the Court somehow finds that NRS Chapter 116 was not applicable to the Property and the Association Foreclosure Sale, the evidence indicated that Celtic Bank's deed of trust was not even properly recorded against the Property. As such, the deed of trust was not secured by the Property and no authority exists for a judicial foreclosure of the Property.

ARGUMENT

1. THE ASSOCIATION WAS THE FORECLOSING ENTITY AT THE TIME OF THE ASSOCIATION SALE

As discussed above, two associations govern the Property. These two associations included the Association – specifically, Gibson Business Center Property Owners Association; as well as Gibson Business Park OA, properly known as "Gibson Business Park Property Owners' Association." Notably, the two associations differ only with regard to a single word: "Park" vs. "Center." It is undisputed in this case that the Association, and not Gibson Business Park OA, was the entity that foreclosed upon the Property at the time of the Association Sale. This is confirmed by all of the documents related to the Association Sale.

The Assessment Lien stated on its face as follows "Red Rock Financial Services, a division of RMI Management LLC, officially assigned as agent by the Gibson Business Center Property Owners Association, herein also called the

Association. . ." Trial Exhibit 9. App 1240. Similarly, the NOD provided that "Red Rock Financial Services officially assigned as agent by the Gibson Business Center Property Owners Association. . ." Trial Exhibit 10. App 1242. Finally, the Notice of Sale stated "Red Rock Financial Services officially assigned as agent by the Gibson Business Center Property Owners Association. . ." Trial Exhibit 15. App 1273. Finally, the Foreclosure Deed itself stated that "Red Rock Financial Services, herein called agent for (Gibson Business Center Property Owners Association), was the duly appointed agent. . ." Trial Exhibit 17. App 1285. Gibson Business Park OA, on the other hand, was not mentioned in any of the documents. Trial Exhibits 9, 10, 15, 17. App 1240, 1242, 1273, 1285.

Aside from the foregoing, Celtic Bank named Gibson Business Center Property Owners Association as a defendant in the instant action, but not Gibson Business Park OA. See Complaint. App 0001. Based upon all of the foregoing, it is readily apparent that the Association was the party that foreclosed upon the Property at the time of the Association Foreclosure Sale. Because the Association was the foreclosing entity, both it and the Association Foreclosure Sale were necessarily governed by the CC&Rs related to the Association and not the earlier CC&Rs related to Gibson Business Park OA. The 1989 CC&Rs and First Amendment thereto are again nothing more than a red herring.

2. THE ASSOCIATION WAS AND IS GOVERNED SOLELY BY THE 2004 CC&RS

Based upon the evidence presented at the time of trial, it is apparent that the CC&Rs governing the Association were recorded in 2004, when the Association was first formed. See Trial Exhibit 3, App 1130. The 2004 CC&Rs related to the Association – the Gibson Business Center Property Owner's Association. *Id*. It is undisputed that the 2004 CC&Rs did not relate to the Gibson Business Park OA, which was formed by way of the 1989 CC&Rs as amended by the First Amendment in 1999. *Id*. It is equally clear that the 1989 CC&Rs and First Amendment did not govern the Association but rather only the Gibson Business Park OA. See Trial Exhibits 1 and 2. App 1074, 1124.

Celtic Bank's counsel acknowledged these facts at that time of trial, stating as follows:

> There are two separate sets of CC&Rs, the 1989 master CC&Rs, to different declarants, two different encumbrances on the property. So one does not amend the other or incorporate or otherwise amend or restate or update the other. There are two separate encumbrances on the property.

Trial Transcript, p. 111, ll. 3-8. App 0557. Under such circumstances, the 1989 CC&Rs and the First Amendment thereto were and are wholly irrelevant to this matter because they governed only the Gibson Business Park OA – which did not

foreclose upon the Property or, in fact, have anything to do with the Association Foreclosure Sale. The 1989 CC&Rs and the First Amendment have no relevance to the instant matter and simply confused the district court at the time of trial. In fact, the terms of the 1989 CC&Rs and the First Amendment have literally nothing to do with this action.

3. THE 2004 CC&RS CLEARLY INCORPORATED NRS CHAPTER 116

It is abundantly clear that the Association was created and governed by the 2004 CC&Rs. The 2004 CC&Rs clearly provided that "[t]he Real Property shall not be subject to the provisions of the Uniform Common Interest Ownership Act, codified in Chapter 116 of the Nevada Revised Statutes ('NRS') **except to the extent permitted under NRS 278A.170**." See Trial Exhibit 3. App 1130. (Emphasis added). As discussed above, NRS 278A.170 specifically permits a nonresidential community association to utilize the procedures for enforcing payment of assessments set forth in NRS 116.3116 to 116.31168, stating as follows:

> **Common open space: Procedures for enforcing payment of assessment.** The procedures for enforcing payment of an assessment for the maintenance of common open space provided in NRS 116.3116 to 116.31168, inclusive, are also available to any organization for the ownership and maintenance of common open

> space established other than under this chapter or chapter 116 of NRS and entitled to receive payments from owners of property for such maintenance under a recorded declaration of restrictions, deed restriction, restrictive covenant or equitable servitude which provides that any reasonable and ratable assessment thereon for the organization's costs of maintaining the common open space constitutes a lien or encumbrance upon the property.

Thus, by stating that NRS Chapter 116 was applicable to the Property "to the extent permitted by NRS 278A.170," the 2004 CC&Rs incorporated NRS 116.3116 to 116.31168 to the fullest extent possible. This necessarily indicates that NRS 116.3116 to 116.31168 was and is applicable to the Property and that the Association was governed by the entirety of these code provisions.

To the extent that any doubt might exist, the 2004 CC&Rs further provided in pertinent part as follows:

> Section 1.16. Lien. "Lien" shall mean a lien against any Lot or Lots arising pursuant to this Declaration.
> . . .
>
> Section 10.2. Enforcement of Liens. In the event that Declarant, prior to the Turnover Date, and/ or the Association has incurred costs and expenses by reason of a violation under Article VI or Section 10.1 hereof, **or in the event that any Owner is delinquent in the payment of any Common Area Assessments**, then Declarant, prior to the Turnover Date, and/or the Association (as applicable) may establish a Lien against the violating Lot or Lots, by recording a document in the Public Records which specifies the Lot or Lots in violation, describes the nature of the violations and sets forth the amount of the delinquency. . . **At any time after the Lien has been recorded and a copy thereof has been served upon the offending**

> **Owner or Owners and their Mortgagee (if any), Declarant or the Association (as applicable) may bring an action to foreclose the Lien** upon the offending Lot or Lots in any manner now or hereafter permitted by Nevada law, including, to the extent permitted by applicable law, enforcement of such Lien **pursuant to a sale conducted in accordance with the provisions of** (i) Covenants Nos. 6, 7 and 8 of NRS 107.030 and/or **(ii) NRS 116.3116 to NRS 116.31168, inclusive**, or any successor laws hereafter in effect. . .

See Trial Exhibit 3, App. 1130 (Emphasis added). Thus, there is no doubt whatsoever that the Association was authorized to utilize NRS 116.3116 to NRS 116.31168 to enforce its Assessment Lien. This is exactly what it did.

As discussed above, the district court's FFCL found as follows:

> 5. While NRS 278A.170 outlines the procedures for enforcing assessment payments for the maintenance of "common open space" provided in NRS 116.3116 to 116.31168, it does not state, substantively, the priority of the encumbrances upon the proeprty and the exceptions thereto outlined in NRS 116.3116 are to be applied. As pertinent here, NRS 278A.170 does not state the associations assessments' lien charged for the nine-month period immediately preceding the action is prior to any first-security interest. That is, while NRS 278A.170 provides, procedurally, the association's assessments shall be enforced as provided in NRS 116.3116 to 116.31168, it does not state the assessments, or any part thereof, shall take priority over any other liens.

App 0306. Thus, although the 2004 CC&Rs specifically incorporated NRS 116.3116 to 116.31168 to the fullest extent possible through NRS 278A.170, the district court somehow found that only portions of these sections were applicable to the Association and Association Foreclosure Sale. This constituted error.

Because the 2004 CC&Rs incorporated NRS 116.3116 to 116.31168, which specifically included the lien priority provisions that made the Association Lien superior to a deed of trust, to the fullest extent possible, these sections necessarily applied to the Association Foreclosure Sale. This is so pursuant to NRS 116.12075(1)(c), which provides that NRS Chapter 116 is applicable to nonresidential property if the declaration provides that "only the provisions of NRS 116.3116 to 116.31168, inclusive, apply to the condominium." As a result, Celtic Bank's deed of trust was necessarily subordinate to the Assessment Lien and therefore extinguished by the Association Sale. This fact is further confirmed by the language of section 10.2 of the 2004 CC&Rs, which required that notice be given to a mortgagee such as Celtic Bank.

Section 10.2 of the 2004 CC&Rs provides that the Association shall have a lien "in the event that any Owner is delinquent in the payment of any Common Area Assessments." Thereafter, the 2004 CC&Rs provide that:

> At any time after the Lien has been recorded **and a copy thereof has been served upon the offending Owner or Owners and their Mortgagee** (if any), Declarant or the Association (as applicable) may bring an action to foreclose the Lien upon the offending Lot or Lots in any manner now or hereafter permitted by Nevada law, including, to the extent permitted by applicable law, enforcement of such Lien **pursuant to a sale conducted in accordance with the provisions of** (i) Covenants Nos. 6, 7 and 8 of NRS 107.030 and/or **(ii) NRS**

> **116.3116 to NRS 116.31168, inclusive**, or any successor laws hereafter in effect. . .

See Trial Exhibit 3, App 1130. (Emphasis added). Thus, the 2004 CC&Rs required that notice be required to a mortgagee such as Celtic Bank such that it was able to protect its interest. In this case, the evidence is undisputed that notice was so provided. Furthermore, the 2004 CC&Rs provided that enforcement of the lien shall be in accordance with the provisions of NRS 116.3116 to 116.31168, which, again, include the superpriority lien provisions making the Assessment Lien superior to Celtic Bank's deed of trust. Thus, the deed of trust was extinguished at the time of the Association Foreclosure Sale.

It is likely that Celtic Bank will argue that although NRS 116.3116 to 116.31168 may have provided for a superpriority lien, the 2004 CC&Rs did not specifically so state. This Court has already addressed this issue under substantially similar facts, holding that while a commercial association may grant the association a superpriority lien, it is not required to do so. *Saticoy Bay, LLC v. LNV Corp.*, 2015 Nev. Unpub. LEXIS 1575, *11.

In *Saticoy Bay*, this Court addressed the question of whether the incorporation of superpriority language from NRS Chapter 116 in a commercial common interest community's (*"CIC"*) CC&Rs rendered *SFR Investments*

applicable to the CIC's foreclosure. *Saticoy Bay, LLC v. LNV Corp.*, 2015 Nev. Unpub. LEXIS 1575, *2. The CC&Rs at issue in *Saticoy Bay* incorporated only NRS 116.31162 (2013) and NRS 116.31164 (2005) when granting it a power of sale, and not NRS 116.3116 (2013). *Saticoy Bay*, 2015 Nev. Unpub. LEXIS 1575, *6. However, Section 6.18 of the CC&Rs also set forth substantially the same language as NRS 116.3116(2) (2013)'s "superpriority" language in full. *Saticoy Bay*, 2015 Nev. Unpub. LEXIS 1575, *5.

The deed of trust holder in *Saticoy Bay* (who just so happened to be represented by the same counsel representing Celtic Bank herein) argued that because the CIC was nonresidential and incorporated only NRS 116.31162 (2013) and NRS 116.31164 (2005) when granting it a power of sale, and not NRS 116.3116 (2013), this Court's precedent interpreting NRS 116.3116(2) (2013) had no relevance to the lien priority outlined in the CC&Rs. *Saticoy Bay*, 2015 Nev. Unpub. LEXIS 1575, *6. This Court rejected the lender's argument, pointing out that the CC&Rs incorporated NRS 116.3116(2) (2013)'s superpriority language verbatim, rather than just by citation. *Id*.

In this case, the Association expressly incorporated NRS 116.3116 through NRS 116.31168 into the 2004 CC&Rs through NRS 278A.170. Pursuant to NRS 116.12075(1)(c) the provisions of NRS Chapter 116 apply to a nonresidential

condominium if the declaration states that only the provisions of NRS 116.3116 through NRS 116.31168 apply. Such is the case herein with the entirety of NRS 116.3116 through 116.31168 applying. Under such circumstances, the Assessment Lien possessed superpriority over Celtic Bank's deed of trust.

4. RED ROCK ERRED BY RECITING THE WRONG CC&RS IN THE FORECLOSURE NOTICES BUT SUCH ERROR WAS HARMLESS

It is undisputed by the parties that the notices related to the Association Foreclosure Sale were appropriately mailed to Celtic Bank at the address that was set forth on its recorded Assignment of Deed of Trust. App 1234. It is equally undisputed that the NOD was received by Celtic Bank and signed for by a Celtic Bank employee. App 1242. The Notice of Sale was also mailed by Red Rock to Celtic Bank at the address set forth on its recorded Assignment of Deed of Trust although the evidence did not indicate that it was signed for by Celtic Bank. App 1268. Although Celtic Bank acknowledges that the Notice of Sale was properly mailed, it claimed that the Notice of Sale was not received by it because it had left that office location. App 0306. At any rate, there is no dispute that the foreclosure notices were appropriately served according to the law and that Celtic Bank thus possessed actual notice of the foreclosure proceedings.

It is further undisputed that the foreclosure notices contained certain errors. For example, the Assessment Lien stated that it was prepared "in accordance with Nevada Revised Statutes 116 and outlined in the Association Covenants, Conditions, and Restrictions, herein also called CC&Rs, recorded on 10/24/1994, in Book Number , as Instrument Number 19940240000285 and including any and all Amendments and Annexations et seq. of Official Records of Clark County, Nevada, which have been supplied to and agreed upon by said owner." Thus, the Assessment Lien incorrectly recited the 1994 CC&Rs which related to an entirely different association than that which was foreclosing rather than the 2004 CC&Rs that actually governed the foreclosing Association. Trial Exhibit 9. App 1240. In addition, a typographical error noted the instrument number as "19940240000285" rather than "199410240000285." *Id*.

Similarly, the Notice of Foreclosure Sale stated that the sale "will be made to satisfy the indebtedness secured by the Lien, with interest thereon, as provided in the Declaration of Covenants, Conditions and Restrictions, recorded on 10/24/1994, in Book Number , as Instrument Number 19940240000285 of the Official Records in the Office of the Recorder and any subsequent amendments or updates that may have been recorded." Trial Exhibit 10. App 1242. Again, the

notice not only recited inapplicable CC&Rs but also misstated the instrument number by omitting the number "1" after "1994." *Id*.

Although the foreclosure notices contained certain errors, these errors were of no consequence. First of all, the law did not require that Association or its agent identify the CC&Rs governing the Property in any manner whatsoever. Even if they did, the evidence indicates that Celtic Bank did not rely upon this information.

At the time of trial, Celtic Bank's representative was asked whether he had reviewed the 1989 CC&Rs at any time prior to his trial preparation. App 0557. In response, the witness responded "Not to the best of my recollection." *Id*. Because Celtic Bank claims to have never received the Notice of Foreclosure Sale, it also could not have relied upon that document in any manner whatsoever. Thus, the fact that the foreclosure notices made mention of incorrect CC&Rs constituted nothing more than harmless error that had no effect whatsoever.

5. A MORTGAGEE PROTECTION CLAUSE IS UNENFORCEABLE AS A MATTER OF LAW AS AGAINST NRS 116.3116 TO 116.31168

The district court made mention of certain clauses contained within the CC&Rs which purport to protect certain encumbrances, including mortgages and

deeds of trust. However, even if the CC&Rs contain a so-called "mortgagee protection clause" such clauses are unenforceable.

In the matter of *SFR Investments*, US Bank argued that even if NRS 116.3116(2) allowed nonjudicial foreclosure of a superpriority lien, the mortgage savings clause in the homeowners association's CC&Rs subordinated the association's superpriority lien to the first deed of trust. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408, 418 (Nev. 2014). The Nevada Supreme Court summarily rejected this argument, stating as follows:

> NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived . . . [e]xcept as *expressly* provided in' Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." See *7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1153; The mortgage savings clause thus does not affect NRS 116.3116(2)'s application in this case. See *Boulder Oaks Cmty. Assn v. B & J Andrews Enters., LLC*, 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding that a CC&Rs clause that created a statutorily prohibited voting class was void and unenforceable).

SFR Invs. Pool 1, LLC, 334 P.3d at 419.

In this case, because NRS 116.3116 through 116.31168 applied to the Association and Association Foreclosure Sale, the so-called mortgagee protection clause contained in the 2004 CC&Rs provides Celtic Bank with no relief. This Court has also confirmed this to be the case in *Saticoy Bay*, stating as follows:

> LNV further argues that applying the holding in *SFR Investments* here would interfere with its vested contractual rights, citing to *Coral Lakes Community Ass'n, Inc. v. Busey Bank, N.A.*, 30 So. 3d 579, 581-84 & n.3 (Fla. Dist. Ct. App. 2010) (holding that a CC&R clause that subordinated the association's lien to the first mortgage's interest controlled over a later-enacted statute that would have interfered with that subordination because the statute came into effect after the CC&Rs and thus would have implicated "constitutional concerns about impairment of vested contractual rights"). This court recognized *Coral Lakes* in *SFR Investments*, and found its concerns did not apply because the CC&Rs at issue, which contained a mortgage savings clause, were recorded after the Legislature adopted NRS Chapter 116 so the respondent bank was aware that the statutory superpriority lien existed and could not be waived per NRS 116.1104. *SFR Invs.*, 130 Nev. Adv. Op. 75, 334 P.3d at 419 & n.7 (recognizing that NRS Chapter 116 prohibited waiver of rights conferred by it unless expressly allowed).
>
> Similarly, LNV's security interest did not come into existence until 2007, well after the 1991 enactment of NRS Chapter 116 and the 1996 recordation of the CIC's CC&Rs; thus, there is no analogous later-enacted statute that might threaten LNV's contractual rights. The priority language in Section 6.18 being interpreted here has remained unchanged in the CC&Rs since their original recordation, and using *SFR Investments* as persuasive authority to interpret that language is not the same as enacting a new statutory rule. And that the NRS Chapter 116 non-waiver provision does not apply to the CIC further proves our point, the drafter of the CC&Rs was not legally obligated to grant the CIC a superpriority lien, but nevertheless did.

Saticoy Bay, LLC v. LNV Corp., 2015 Nev. Unpub. LEXIS 1575, *9-11

Here, as in *Saticoy Bay*, Celtic Bank's security interest did not come into existence until many years after the 1991 enactment of NRS Chapter 116. As such, the mortgagee protection clause is irrelevant and provides no relief to Celtic

Bank. Celtic Bank is a sophisticated business entity that have known or should have known at all points in time that the mortgagee protection clause provided no protections under the law.

6. THE PAYMENT OF PROPERTY TAXES BY CELTIC BANK WAS OF NO CONSEQUENCE

Although not a basis for its FFCL, the district court noted that Celtic Bank satisfied a property tax lien which resulted in a reconveyance of the Property to Gibson Road, LLC. Vegas United simply points out that the fact that Celtic Bank may have chosen to pay a property tax lien at its own behest, and no one else's, had no effect whatsoever on the state of the title as between Vegas United and Gibson Road, LLC.

CONCLUSION

For the reasons set forth herein, the district court erred in determining that the Association and Association Foreclosure were not governed by NRS 116.3116 through 116.31168, which provided the Assessment Lien with superpriority over the deed of trust held by Celtic Bank. As a result of its holding, the district court determined that Celtic Bank's secured interest in the Property was not extinguished and that Vegas United purchased the Property subject to the deed of trust. This Court should reverse the district court's decision and remand with

instructions that the deed of trust was, in fact, extinguished at the time of the Association Foreclosure Sale and that Vegas United is the owner of the Property free and clear of any interest of Celtic Bank.

DATED this 1st day of November, 2018.

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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 X6 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 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6552 words. Counsel has relied upon the word count application of the word processing program in this regard.

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. 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 1st day of November, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 1st day of November, 2018, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

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____ VIA U.S. MAIL: by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, addressed as indicated on service list below in the United States mail at Las Vegas, Nevada.

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/s/ *Timothy E. Rhoda*
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