

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

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4       VEGAS UNITED INVESTMENT  
5       SERIES 105, INC., a Nevada  
6       Domestic Corporation

7                                   Appellant,

8       v.

9  
10       CELTIC BANK CORPORATION,  
11       Successor-in-Interest to SILVER  
12       STATE BANK by acquisition of assets  
13       from the FDIC as Receiver for  
14       SILVER STATE BANK, a Utah  
15       Banking Corporation organized and in  
16       good standing with the laws of the  
17       State of Utah,

18                                   Respondent.

Electronically Filed  
Supreme Court No. 74163-20 2018 07:55 a.m.  
Elizabeth A. Brown  
District Court Case No. 6-17-2018 Supreme Court

**RESPONSE TO EMERGENCY  
MOTION UNDER NRAP 27(e)  
NRAP 8 MOTION FOR  
INJUNCTION PENDING APPEAL**

**\*\*\*ACTION REQUIRED BY  
NOVEMBER 21, 2018\*\*\***

19               Respondent, CELTIC BANK CORPORATION, (“Respondent”), by and  
20 through its attorney, Allyson R. Noto, Esq. of the law firm of Sylvester &  
21 Polednak, Ltd., respectfully submits this Response to Emergency Motion Under  
22 NRAP 27(e) NRAP 8 Motion for Injunction Pending Appeal (“Motion”).

23                                   **I. INTRODUCTION**

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25               This case arises from Respondent’s exercise of its rights pursuant to its first  
26 priority Deed of Trust recorded against a commercial property located at 181 N.  
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1 Gibson Road, Henderson, Nevada (the "Property"). Appellant purchased the  
2 Property for \$30,000 at an Owner's Association foreclosure sale ("Association  
3 Sale"). Respondent argued that the Association Sale did not extinguish  
4 Respondent's first priority Deed of Trust recorded against the commercial  
5 property. The trial court agreed.  
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8 After trial, the court ordered that Respondent could judicially foreclose  
9 upon the Property.  
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11 The trial court then denied Appellant's request for injunction finding that  
12 Appellant failed to meet its burden regarding the requisite elements to obtain an  
13 injunction pending appeal.  
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15 The trial court based its decision, in part, due to Appellant's continued lack  
16 of interest in protecting the Property from third-party claims. The trial court  
17 considered all the factors enumerated in *Mikohn Gaming Corp. v. McCrea*, 120  
18 Nev. 248 (2004)(citing *Fritz Hansen A/S v. District Court*, 116 Nev. 650, 659  
19 (2000)). The trial court was concerned about the irreparable harm to the  
20 Respondent if Appellant's stay is granted. Further, the trial court found that  
21 Appellant did not enjoy a likelihood of success on the merits. Thus, two of the  
22 factors weighed heavily in favor of Respondent and the injunction was denied.  
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26 The foreclosure sale occurred on November 21, 2017.  
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1 Contrary to Appellant's representation throughout the instant Motion, this  
2 Court did not previously determine "Vegas United presently possesses a right of  
3 redemption until November 21, 2018" but rather noted "NRS 21.200 and 21.210  
4 may be applicable to this case." Notwithstanding, Appellant does not fall into the  
5 category of persons entitled to a right of redemption as Appellant is not a  
6 judgment debtor or judgment debtor's successor in interest nor a judgment  
7 creditor as enumerated in NRS 21.200 or NRS 21.210. Even if Appellant is  
8 entitled to a right of redemption, which Respondent vehemently denies, the instant  
9 emergency Motion is unnecessary and a waste of judicial resources as Appellant  
10 could simply post a bond to prevent further transfer of the Property.  
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## 15 **II. LEGAL ARGUMENT**

16 Respondent agrees with the factors this Court must address in determining  
17 whether an injunction pending appeal should be granted. Those factors are: (1)  
18 whether the object of the appeal will be defeated if the stay is denied, (2) whether  
19 appellant will suffer irreparable or serious injury if the stay is denied, (3) whether  
20 respondent will suffer irreparable or serious injury if the stay is granted, and (4)  
21 whether appellant is likely to prevail on the merits in the appeal. This Court has  
22 not indicated that any one factor carries more weight than the others, although if  
23 one or two factors are especially strong, they may counterbalance other weak  
24 factors. *Mikohn Gaming Corp. v. McCrea*, 120 Nev. 248 (2004)(citing *Fritz*  
25 *Hansen A/S v. District Court*, 116 Nev. 650, 659 (2000)).  
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1           1.     An Injunction is Not Appropriate Based Upon the Relevant Factors.

2           A.     **Object of the Appeal.**

3           Respondent does not dispute the one year right of redemption period  
4 following the judicial foreclosure expires on November 21, 2018. Accordingly,  
5 Respondent agrees that this factor weighs in favor of a stay. However, this Court  
6 must consider all factors and if a stay is granted, an appropriate amount of the  
7 bond must be set.  
8

9           B.     **Irreparable or Serious Harm.**

10          Respondent also agrees with Appellant that this Court has held that the loss  
11 of a property right is generally irreparable. This is where the inquiry in this case  
12 becomes particularly important as recognized by the trial court. This Court must  
13 look to the serious injury to each side when determining whether to grant or deny  
14 the relief requested. Notably, this Appeal has been pending since September 28,  
15 2017 and due to Appellant's dilatory conduct Appellant's Opening Brief was only  
16 recently filed on November 2, 2018. The following is the pertinent timeline of  
17 events:  
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22       **Timeline of Events:**

23       09.05.17 – Notice of Entry of Finding of Facts, Conclusions of Law, and  
24 Judgment Entered by trial court

25       09.28.17 – Notice of Appeal  
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1 11.06.17 – Notice of Amended Appeal

2 11.08.17 – Motion for Injunction Pending Appeal on OST filed in lower court

3  
4 11.21.17 – Notice of Entry of Order Denying Motion for Injunction Pending  
5 Appeal on OST Entered

6 11.21.17 – Foreclosure Sale

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8 02.23.18 – Court Issued Order to Show Cause re: Jurisdiction

9 03.26.18 – Appellant's Response to Court Issued Order to Show Cause re:  
10 Jurisdiction

11 05.10.18 – Notice of Entry of Stipulation and Order to Certify Judgment

12 05.29.18 – Order Reinstating Briefing

13 08.28.18 – Motion to Extend Time to File Brief and Appendix – First Request

14 09.06.18 – Order Granting Motion to Extend Time to File Brief and Appendix –  
15 First Request

16 10.11.18 - Motion to Extend Time to File Brief and Appendix – Second Request

17 10.17.18 - Order Denying Motion to Extend Time to File Brief and Appendix

18  
19 The delays in the Appeal directly impact the Respondent's rights as it  
20 relates to the real Property, and further prejudice to Respondent. Respondent  
21 prevailed on a judicial foreclosure action in the court below and has foreclosed on  
22 the subject property. The one year right of redemption period following the  
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1 judicial foreclosure expires on November 21, 2018. Since the foreclosure sale,  
2 Respondent has incurred the “carrying costs” associated with protecting its  
3 interest in the Property while awaiting the expiration of the right of redemption.  
4

5 Should this Court stay any sale or transfer of the Property, Respondent  
6 would be required to continue to pay to protect its interest in the Property well  
7 after the redemption period contemplated under Nevada law, to Respondent’s  
8 detriment.  
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10 Further, as explained above, contrary to Appellant’s assertion, this Court  
11 has not determined Appellant “possesses a right of redemption” but rather noted in  
12 its previous denial of Appellant’s request for injunction that NRS 21.200 and NRS  
13 21.210 may apply. Here, Appellant will not suffer irreparable harm upon the  
14 expiration of the redemption period because Appellant does not fall within the  
15 category of persons entitled to redeem the Property under Nevada law. Appellant  
16 is not the Borrower under Respondent’s first priority deed of trust. Accordingly,  
17 this factor weighs heavily in favor of Respondent.  
18

19  
20 **C. Likelihood of Success on the Merits.**

21 Appellant does not have a likelihood of success on the merits of this case.  
22 In order to prevail on appeal, this Court must find that the trial court abused its  
23 discretion. Based upon all of the evidence, the trial court found:

24 NRS Chapter 116 codifies the Uniform Common-Interest Ownership  
25 Act or UCIOA, and applies to all common-interest communities  
26 created within the State of Nevada, subject to certain exceptions. *See*  
27 NRS 116.1201(I). One of those exceptions is set forth in NRS  
28 116.1201(2)(b). It states NRS Chapter 116 does not apply to “[a]

1 planned community in which all units are restricted exclusively to  
2 nonresidential use unless the declaration provides that this chapter or  
3 a part of this chapter does not apply to that planned community  
4 pursuant to NRS 116.12075.”

5 Clearly, as set forth in NRS 116.1201 and 116.12075, NRS Chapter 116  
6 does not apply to non-residential common-interest communities *except* to the  
7 extent set forth by their CC&Rs. In this case, there is no question the subject  
8 property is non-residential and located within a business or industrial park. The  
9 trial court considered the terms set forth in the CC&Rs in determining whether  
10 exceptions exist for NRS Chapter 116 applied.

11 The trial court recognized that there are two separate declarations of  
12 covenants, conditions and restrictions recorded against the property. The first  
13 CC&Rs, referred to as the 1989 Master CC&Rs was recorded over two years  
14 before NRS Chapter 116 was enacted on December 31, 1991. Neither the 1989  
15 Master CC&Rs nor its 1994 First Amendment mentions NRS Chapter 116, much  
16 less indicates this statutory scheme, or any part thereof, applies to the subject  
17 property. Further, there is no language contained within the 1989 Master CC&Rs  
18 and its First Amendment to suggest a lien for delinquent association assessments  
19 has priority over first security interest. While the 2004 CC&Rs does mention  
20 NRS Chapter 116, it also specifies “[t]he Real Property shall not be subject to the  
21 provisions of the Uniform Common Interest Ownership Act, codified in Chapter  
22 116 of the Nevada Revised Statutes (‘NRS’) except to the extent permitted under  
23 NRS 278A.170.” (Emphasis added)

24 As argued by Respondent and adopted by the trial court, NRS 278A.170  
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1 outlines the *procedures* for enforcing assessment payments for the maintenance of  
2 “common open space” provided in NRS 116.3116 to 116.31168, it does not state,  
3 substantively, the priority of the encumbrances upon the property and the  
4 exceptions thereto outlined in NRS 116.3116 are to be applied. NRS 278A.170  
5 does not state the association’s assessments’ lien charged for the nine-month  
6 period immediately preceding the action is prior to any first-security interest. The  
7 trial court found that while NRS 278A.170 provides, procedurally, the  
8 association’s assessments shall be enforced as provided in NRS 116.3116 to  
9 116.31168, it does not state the assessments, or any part thereof, shall take priority  
10 over any other liens.  
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12  
13 In addition, the CC&Rs also contain clauses which protect certain  
14 encumbrances, which include mortgages and deeds of trust. Specifically, “[n]o  
15 violation of any provision of this Declaration, nor any remedy exercised  
16 hereunder, shall defeat or render invalid the lien of any Mortgage made in good  
17 faith and for failure upon any portion of the Project, nor shall any Lien created  
18 hereunder be superior to any such Mortgage unless such Lien shall have been  
19 recorded in the Public Records prior to the recordation... of such Mortgage.”  
20 Further, “[n]o violation or breach of, or failure to comply with, any provision of  
21 this Declaration, and no action to enforce any such provision, shall affect, defeat,  
22 render invalid or impair the lien of any mortgage, deed of trust or other lien on  
23 any Lot or part of the Premises taken in good faith and for value; nor shall any  
24 violation, breach, failure to comply or action to enforce affect, defeat, render  
25 invalid or impair the title or interest of the holder of any such mortgage, deed of  
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1 trust or other lien or title or any interest acquired by any purchaser upon  
2 foreclosure of any such mortgage, deed of trust or other lien;...” In short, except  
3 to the extent the Association can utilize the procedures set forth in NRS 116.3116  
4 to 116.31168 for collecting its assessment lien against a delinquent property  
5 owner, NRS Chapter 116 does not apply with respect to establishing the priority  
6 of such debt, or any part thereof, over the first-security interest held by  
7 Respondent. The trial court determined that as NRS Chapter 116 does not apply,  
8 the statutory scheme does not render invalid any provision of the two governing  
9 documents. *Cf.* NRS 116.2103(1).  
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12 After trial and reviewing all the evidence, the trial court held that the  
13 Respondent is entitled to judicially foreclose given its first-security interest  
14 recorded against the property. It is submitted that based upon the foregoing,  
15 Appellant is not likely to prevail on the merits of its appeal.  
16

17 2. If an Injunction is Granted Appellant Must Post an Appropriate  
18 Bond.

19 District courts have the authority to stay judgment pending appeal. *See*  
20 NRCP 62(d); NRAP 8(a)(1)(A). “The purpose of security for a stay pending  
21 appeal is to protect the judgment creditor’s ability to collect the judgment if it is  
22 affirmed by preserving the status quo and preventing prejudice to the creditor  
23 arising from the stay.” *Nelson v. Heer*, 121 Nev. 832, 835, 122 P.3d 1252, 1254  
24 (2005) *See also*; *Liu Jui-Kwa Chen v. Eighth Judicial District Court*, 390 P.3d 166  
25 (2017).  
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1 In *Liu Jui-Kwa Chen*, this Court recognized that a bond is appropriate in  
2 cases in which real property is at issue and no monetary damages have been  
3 awarded. In the instant matter, the bond necessary to protect Respondent includes  
4 the value of the property which it may lose if a stay is granted. If a stay is  
5 granted, in order to preserve the status quo and prevent prejudice to Respondent  
6 arising from the stay, Appellant must post bond in the amount of \$660,000 (which  
7 is the value of the property) plus remove all encumbrances now existing on the  
8 property and agree to pay all property taxes and assessments pending appeal.  
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12 DATED this 19<sup>th</sup> day of November, 2018.

13 **SYLVESTER & POLEDNAK, LTD.**

14  
15  
16 By 

17 Allyson R. Noto, Esq.  
18 1731 Village Center Circle  
19 Las Vegas, NV 89134  
20 *Attorneys for Respondent*  
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