IN THE SUPREME COURT OF THE STATE OF NEVADA

VEGAS UNITED INVESTMENT SERIES 105, INC., A NEVADA DOMESTIC CORPORATION,

Appellant,

v.

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 Case No. 74163
Case No. A-15-728233-C

RESPONDENT CELTIC BANK CORPORATION'S ANSWERING 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:

Respondent, 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, has no parent corporations or corporate stock.

The law firm of Sylvester & Polednak, Ltd. has appeared for Respondent in this case and is expected to appear in this Court.

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I.

INTRODUCTION

This appeal follows a bench trial in which the district court found in favor of the Respondent and allowed Respondent to proceed with a judicial foreclosure. The dispute between the parties centers on the priority of Respondent's first security interest in a commercial (non-residential) property following a foreclosure sale held by a commercial business park owner's association for failure of the commercial tenant to pay assessments. Appellant erroneously argued to the district court that NRS Chapter 116 was applicable to the instant matter and as such, this Court's decision in *SFR Investments Pool 1 v. U.S. Bank*, 130 Nev. 742, 334 P.3d 408 (2014), *holding modified by Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., a Div. of Wells Fargo Bank, N.A.*, 388 P.3d 970 (Nev. 2017) and its progeny controlled and wiped out Respondent's first deed of trust. As explained below, all of the evidence presented at the time of trial, as well as Nevada law, establish that the district court was correct in its analysis and ultimate decision which provided that if Appellant purchased the commercial property, Appellant purchased subject to Respondent's first deed of trust.

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II.

STATEMENT OF JURISDICTION

This Appeal follows entry of Findings of Fact, Conclusions of Law and Judgment entered in favor of the Respondent by the district court on August 25, 2017, subsequent to a bench trial on the merits. Joint Appendix ("JA") 0306-0322. Appellant filed a Notice of Appeal on September 27, 2018. JA 0516. On November 6, 2017, Appellant filed an Amended Notice of Appeal to also appeal a subsequent Order and Judgment re: Memorandum of Costs and Disbursements which was entered on or about October 2, 2017. JA 0524. A Stipulation and Order to Certify Final Judgment was entered by the district court on or about May 8, 2018. JA 0543.

III.

ISSUES PRESENTED

1) Whether the district court was correct as a matter of law in determining that NRS Chapter 116 does not apply to non-residential common-interest communities except to the extent set forth in their CC&Rs.

2) Whether the district court was correct in determining that as a matter of fact that the CC&Rs at issue in this matter did not contain any language to suggest a lien for delinquent association assessments has priority over the undisputed first security interest held by Respondent.

3) Whether the district court was correct as a matter of law that except to the extent the Association can utilize the procedures set forth in NRS Chapter 116.3116-116.31168 for collecting its assessment lien as referenced in Nev. Rev. Stat. Ann. § 278A.170, NRS Chapter 116 does not apply with respect to establishing the priority of such debt, or any part thereof, over the first security interest held by Respondent.

IV.

FACTUAL BACKGROUND

I. STATEMENT OF UNDISPUTED FACTS

A. Respondent's Right to Enforce the Loan Documents.

On or about January 18, 2006, Gibson Road, LLC as Borrower executed a Promissory Note (the "Note") wherein Silver State Bank ("Silver State"), Respondent's predecessor in interest, agreed to loan Seven Hundred Forty-Eight Thousand Dollars and 00/100 ($748,000.00) to Borrower for the purchase of non-residential property. JA 1162-1167.

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") encumbering 181 N. Gibson Road, Henderson, Nevada (the "Property"). JA 1168-1207. The Property is located within two common interest communities encompassing the same business or industrial park, i.e. Gibson

Business Park, Phase One and Gibson Business Center Property Owners Association, both of which are governed by certain covenant conditions and restrictions ("CC&Rs"). There are two separate declarations of CC&Rs recorded against the Property. JA 1074-1123 and JA 1130-1161.

On September 5, 2008, Silver State was closed by the Nevada Financial Institutions Division and the Federal Deposit Insurance Corporation ("FDIC") was named Receiver. On September 24, 2009, the FDIC as Receiver for Silver State assigned the Note and Deed of Trust to Respondent. 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"). JA 1234-1236. Collectively, the Note, Deed of Trust and Assignment of DOT are referred herein as (the "Loan Documents").

B. The Association's Lien and Foreclosure Documents Reference CC&Rs Which Do Not Incorporate NRS Chapter 116.

On August 23, 2011, Red Rock Financial Services ("Red Rock") as purported agent for the Gibson Business Center Property Owners Association recorded a Lien for Delinquent Assessments ("Assessment Lien") which listed the owner of the Property as "Trustee Clark County Treasurer, c/o Gibson Road, LLC." JA 1240-1241. The Assessment Lien provided a legal description which identified the entirety of Gibson Business Park and did not identify the particular parcel to which the lien attached. *Id.*

The Assessment Lien also referenced 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." *Id.*

A review of the Official Records of Clark County, Nevada shows there were no CC&Rs recorded against the Property on 10/24/1994 with Instrument Number 19940240000285.

There is, however, a document recorded against the Property on 10/24/1994 to wit, the "First Amendment to Declaration of Protective Covenants, Conditions and Restrictions" ("First Amendment") with an Instrument Number of 199410240000285 (which is one number different than the Instrument Number referenced in the Association Lien). JA 1124-1129. The First Amendment amends that certain document entitled "Declaration of Protective Covenants, Conditions and Restrictions" ("1989 Master CC&Rs") which were recorded by Declarant AmPac Development Company in 1989 as Instrument Number 198909110000173. JA 1074-1123.

Neither the 1989 Master CC&Rs nor the 1994 Amendment referenced in the Association Lien incorporate, reference, or even mention NRS Chapter 116 nor

provide any language that a lien for delinquent assessments prime a first priority deed of trust. In fact, Section 8.09 and Section 11.03 of the 1989 Master CC&Rs state to the contrary. *Id.*

Section 11.03 of the 1989 CC&Rs state:

> 11.03 Protection of Encumbrances
>
> (a) No violation or breach of, or failure to comply with, any provision of this Declaration, and no action to enforce any such provision, shall affect, defeat, render invalid or impair the lien of any mortgage, deed of trust or other lien on any Lot or part of the Premises taken in good faith and for value; nor shall any violation, breach, failure to comply or action to enforce affect, defeat, render invalid or impair the title or interest of the holder of any such mortgage, deed of trust or other lien or title of any interest acquired by any purchaser upon foreclosure of any such mortgage, deed of trust or other lien, or result in any liability, personal or otherwise, of any such holder or purchaser. *Id.*

NRS Chapter 116 was enacted in 1991. The 1989 Master CC&Rs were recorded prior to NRS Chapter 116 being enacted and as such, have no reference to NRS Chapter 116 nor any "super-priority" status of an HOA lien.

The First Amendment recorded in 1994 amends the 1989 Master CC&Rs and also has no reference to NRS Chapter 116. Its stated purpose was solely to remove some of the property originally encumbered by the Declarant of the 1989 Master CC&Rs. JA 1124-1129.

On October 14, 2011, a Notice of Default ("NOD") was recorded by Red Rock. The NOD references the recorded Assessment Lien and includes the same

incorrect legal description and incorrect Instrument Number. JA 1242-1245.

The NOD references that the obligation under "Covenants Conditions and Restrictions recorded on 10/24/1994" (albeit with an incorrect Instrument Number) "has been breached." *Id.*

On December 21, 2011, Respondent received correspondence from Red Rock, Trustee for the Association, advising **"[t]he Association's Lien for Delinquent Assessment is Junior only to the Senior Lender/Mortgage Holder."** JA 1260-1267. (Emphasis added).

Respondent was undisputedly the Senior Lender/Mortgage Holder in 2011 and thus, the letter sent by Red Rock specifically and expressly advised Respondent that its security interest was senior to the Assessment Lien recorded in 2011. *Id.* The letter was therefore consistent with the representations in the Assessment Lien and the NOD that the Association foreclosure was pursuant to the 1989 Master CC&Rs as amended in the 1994 Amendment thereto. The 1989 Master CC&Rs as amended do not provide a super-priority lien position over Respondent's Deed of Trust.

On February 26, 2014, Red Rock recorded a Notice of Foreclosure Sale which again references the Assessment Lien recorded on August 23, 2011 and the NOD recorded on October 14, 2011. JA 1273-1281.

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." *Id.* No subsequent amendments or updates were recorded. The Notice of Sale references "CC&Rs" recorded on 10/24/1994. *Id.* Accordingly, the Notice of Sale references, if anything at all given the incorrect description and instrument number, that it was being conducted pursuant to the 1989 Master CC&Rs as amended on October 24, 1994. The 1994 Amendment did not otherwise alter the terms of the 1989 Master CC&Rs or incorporate in any manner the lien priority set forth in NRS Chapter 116.

C. The 2004 CC&Rs Are Recorded After the 1989 Master CC&Rs and Are a Separate Encumbrance on the Property.

The Gibson Business Center Property Owners Association (the "Association") was not formed until December 16, 2003. On March 18, 2004, Declarant, Gibson American Pacific, LLC, recorded a Declaration of Covenants, Conditions and Restrictions ("2004 CC&Rs") for the Association as Book No. 20040318, Instrument Number 03472. JA 1130-1162.

The 2004 CC&Rs do not amend the 1989 Master CC&Rs nor the 1994 First Amendment. *Id.*

Article II of the 2004 CC&Rs provide in the General Declaration that

"Declarant hereby declares that all of the Project, including the Real Property, is hereby made subject to this Declaration and shall be conveyed, hypothecated, encumbered, leased, occupied, built upon or otherwise used, improved or transferred in whole or in part, subject to this Declaration and the Master Declaration." *Id.* (Emphasis added.)

The "Master Declaration" is a defined term in the 2004 CC&Rs and states that 'Master Declaration' shall mean that certain Declaration of Protective Covenants, Conditions and Restrictions of record as recorded by American Pacific Development Company, a Nevada Corporation and applicable to the Real Property together with certain other adjoining real property, and the terms and conditions of which are incorporated herein by this reference." Thus, the 2004 CC&Rs make it clear that there are two separate sets of CC&Rs which encumber the Property. Each set of CC&Rs provide for collection of assessments and the ability of the declarant to foreclose on property encumbered by the CC&Rs.

The 2004 CC&Rs also provide in the Recitals 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 Nev. Rev. Stat. Ann. § 278A.170." *Id.* (Emphasis added.) A discussion of Nev. Rev. Stat. Ann. § 278A.170 is included below.

The 2004 CC&Rs provide that "no foreclosure sale shall occur until the

lapse of sixty (60) days following delivery of notice of such pending sale to any Mortgagee or such Owner and the failure of such Owner or Mortgagee to fully cure such violation." *Id.* The required 60 days did not elapse between the Notice of Sale and the sale of the Property. Only 23 days elapsed between the recording of the Notice of Sale and the actual sale date. Of course, if this Court finds, as argued by Appellant, that the foreclosure sale was conducted pursuant to the 2004 CC&Rs, then the sale was in violation of the terms of the 2004 CC&Rs and is therefore null and void.

As a result of Borrower's default under the Respondent's Loan Documents, the Respondent's Notice of Default was recorded March 2, 2015 in Book No. 20150302 as Instrument No. 0003758 in the Official Records of the Clark County Recorder's Office ("Celtic NOD"). JA 1300-1306. There was no challenge at the time of trial that Respondent was validly assigned the original Note and Deed of Trust but rather the dispute centered solely on whether Respondent's first security interest had been extinguished by way of the Association foreclosure sale.

D. The Foreclosure Sale Did Not Transfer Title to the Defendant Free and Clear of Respondent's First Priority Deed of Trust.

As set forth above, the recorded documents related to the foreclosure sale, as well as correspondence sent to Respondent from Red Rock, all evidence that the foreclosure sale at issue in this case, if proper at all, was held pursuant to the 1989 Master CC&Rs as amended in 1994, although it can be fairly argued that none of

the recorded documents properly reference any CC&Rs or Amendments thereto encumbering the Property. As such, Respondent had no notice, constructive or otherwise as it relates to its rights or responsibilities pursuant to the foreclosure sale which Appellant argues wiped out Respondent's first security interest.

Appellant has argued that there is no statutory requirement to provide any reference to the recorded documents or CC&Rs in the notices provided. As such, Appellant wants this Court to simply ignore the actual notice that was provided to Respondent. Appellant asked the district court and now this Court to simply ignore the actual information provided to Respondent prior to the foreclosure sale. In reviewing each and every document and notice provided to Respondent, there was never any information provided that would indicate to Respondent that its first security interest could be extinguished by virtue of the Association Foreclosure Sale. To the contrary, every notice and communication with Respondent affirmatively indicated that Respondent's first priority Deed of Trust would remain a senior encumbrance on the Property.

As NRS Chapter 116 was not yet enacted in 1989, the NOD and Notice of Sale attempting (unsuccessfully) to reference an amendment to the 1989 Master CC&Rs as the basis for the foreclosure sale could not have provided notice to Respondent that its first Deed of Trust was in jeopardy. In addition, contrary to Appellant's argument even the 2004 CC&Rs do not reference nor incorporate the

provisions of NRS Chapter 116, or otherwise provide that the Assessment lien had superpriority status over Respondent's first Deed of Trust.

As none of the notices for the foreclosure sale recorded or sent to the Respondent reference the 2004 CC&Rs but rather attempt to reference other documents recorded against the Property, the foreclosure sale could not have been conducted pursuant to the 2004 CC&Rs. Further, the 2004 CC&Rs expressly provide that the Property shall not be subject to the provisions of NRS Chapter 116, except to the extent permitted under Nev. Rev. Stat. Ann. § 278A.170. Of note, the 1989 Master CC&Rs also address Nev. Rev. Stat. Ann. § 278A.170 in Section 8.09, which were recorded prior to the enactment of NRS Chapter 116.

V.

LEGAL ARGUMENT

1. The CC&RS Governing the Foreclosure Sale Do Not Incorporate NRS Chapter 116 and Were Recorded Prior to Its Enactment so Vegas United Purchased the Property Subject to Celtic Bank's First Priority Deed of Trust.

Appellant has mischaracterized this case as one which "deals with the application, force, and effect of NRS Chapter 116." Appellant relies upon the holding in *SFR Investments Pool 1*, 130 Nev. 742 and its progeny to claim that the district court erred in determining that Respondent could judicially foreclose on the Property and the Appellant did not prevail on its claim for quiet title. However, neither *SFR* nor any of the recent Nevada Supreme Court decisions interpreting

NRS Chapter 116 apply to the instant matter for numerous reasons. First, the Property at issue in this case is a non-residential property. Nev. Rev. Stat. Ann. § 116 codifies the Uniform Common-Interest Ownership Act or UCIOA and applies to common-interest communities subject to certain exceptions. One of the exceptions, applicable to this case, is an exception for a planned community restricted exclusively to nonresidential use unless the declaration provides that NRS Chapter 116 or a part thereof does apply pursuant to Nev. Rev. Stat. Ann. § 116.12075.

Nev. Rev. Stat. Ann. § 116.12075 provides:

> 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 NRS 116.3116 to 116.31167, inclusive, apply to the condominium; or
>
> (c) Only the provisions of NRS 116.3116 to 116.31168, inclusive, apply to the condominium.

Clearly, as set forth in NRS 116.1201 and 116.12075, NRS Chapter 116 does not apply to non-residential common-interest communities *except* to the extent expressly set forth in their CC&Rs. In this case, after hearing the evidence, the district court determined that there is "no question" the subject property is non-residential and located within a business or industrial park. JA 0306-0322. The district court then considered the terms set forth in the CC&Rs in determining

whether exceptions exist for NRS Chapter 116 to apply to the case. After reviewing the 1989 Master CC&Rs and the 2004 CC&Rs, the district court properly determined that NRS Chapter 116 did not apply. *Id.* In doing so the court considered that there are two separate declarations of covenants, conditions and restrictions recorded against the subject property. The district court reviewed the 1989 Master CC&Rs (recorded over two years before NRS Chapter 116 was enacted on December 31, 1991) and its 1994 First Amendment and ultimately concluded that "neither the 1989 Master CC&Rs nor its 1994 First Amendment mentions NRS Chapter 116, much less indicates this statutory scheme, or any part thereof, applies to the subject property." *Id.* The district court determined that "there is no language contained within the 1989 Master CC&Rs and its 1994 First Amendment to suggest a lien for delinquent association assessments has priority over the first security interest." *Id.* The district court acknowledged that "[w]hile the 2004 CC&Rs does mention NRS Chapter 116, it also specifies "[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. (Emphasis added)." *Id.*

Appellant argues that the mortgage savings provisions cannot apply because the sale was conducted pursuant to the 2004 CC&Rs (an argument that was not raised below) and thus *SFR* and its progeny apply and prohibit a waiver of the

superpriority status through the mortgage savings clause. However, as it is clear the foreclosure sale was not conducted pursuant to the 2004 CC&Rs but, if anything, pursuant to the 1989 Master CC&Rs, the mortgage savings clause remains valid because the 1989 Master CC&Rs were recorded prior to the enactment of NRS Chapter 116.

In reaching its decision, the *SFR* Court held that although the CC&Rs at issue in that case contained a mortgage savings clause, that clause did not apply because the CC&Rs in that case were recorded after the Uniform Act was enacted and Nev. Rev. Stat. Ann. § 116.1104 provides that the "provisions [of Chapter 116] may not be varied by agreement, and rights conferred by it may not be waived...except as *expressly* provided in, NRS 116." (Emphasis added). *Id.* at 419.

The *SFR* Court acknowledged that there may be a contractual right to subordinate the superpriority lien to a first deed of trust when there is no statute implicated. *Id.* at 419 citing *Coral Lakes Cmty. Ass'n, Inc. v. Busey Bank, N.A.*, 30 So. 3d 579 (Fla. Dist. Ct. App. 2010). In *Coral Lakes Community Ass'n, Inc.*, 30 So. 3d 579, the CC&Rs contained a subordination clause that was in place before the statute limiting the ability to subrogate association liens took effect. *Id.* at 581–84 & 582n.3. The *Coral Lakes* court refused to enforce the statute because disturbing the prior contractual relationship "would implicate constitutional

concerns about the impairment of vested contractual rights." *Id.* at 584.

Here, the foreclosure sale was conducted, as can best be reasonably ascertained from the deficient notices, pursuant to the 1989 Master CC&Rs that do not and could not incorporate NRS Chapter 116. Thus, unlike *SFR* there is no statute limiting the ability to subrogate the association lien to Respondent's first deed of trust.

The contractual language of the 1989 Master CC&Rs does not include any language that would give rise to "super-priority" status of any assessment lien. In fact, Section 8.09 provides:

> 8.09 Liens to Secure Assessments. All Assessments, including interest and other amounts due with respect to unpaid assessments, shall constitute, and shall be secured by, a separately valid and existing lien on the portion of the Premises to which they relate, and upon all Improvements at any time erected or constructed thereon. The provisions of Nev. Rev. Stat. Ann. § 278A.170 are incorporated herein by this reference.

The 1989 Master CC&Rs have a contractual Mortgage Savings Provision which states:

> 11.03 Protection of Encumbrances
>
> (a) No violation or breach of, or failure to comply with, any provision of this Declaration, and no action to enforce any such provision, shall affect, defeat, render invalid or impair the lien of any mortgage, deed of trust or other lien on any Lot or part of the Premises taken in good faith and for value; nor shall any violation, breach, failure to comply or action to enforce affect, defeat, render invalid or impair the title or interest of the holder of any such mortgage, deed of trust or other lien or title of any interest acquired by

> any purchaser upon foreclosure of any such mortgage, deed of trust or other lien, or result in any liability, personal or otherwise, of any such holder or purchaser.

In addition, on December 21, 2011, Respondent received correspondence from Red Rock Financial Services, Trustee for the Association, advising **"[t]he Association's Lien for Delinquent Assessment is Junior only to the Senior Lender/Mortgage Holder."** (Emphasis added.) JA 1260-1266.

At the time of trial, evidence was introduced that Red Rock also sent an e-mail to the Association on August 12, 2013 which attached a form advising the Board of Directors that there were two possible "outcomes" related to the foreclosure sale; 1) if a 3rd party buyer steps in but that would "usually only occur if there is equity and/or no mortgage"; or 2) the property reverted back to the Association and "the first mortgage would remain on the property." JA 1268-1270.

Accordingly, all of the evidence provided to the district court is consistent that any purchaser would take the Property subject to Respondent's first priority Deed of Trust. Under no set of circumstances pursuant to the "CC&Rs" referenced in the Assessment Lien, the NOD, or the Notice of Foreclosure Sale could foreclosure of the Assessment Lien have extinguished Respondent's first priority Deed of Trust. As a result, when Appellant purchased the Property at the Association's foreclosure sale, it took the Property subject to Respondents Deed of

Trust.

Notwithstanding the fact that NRS Chapter 116 does not apply in this case, the holding in *SFR* cannot be extended to apply in this instance as the plain language of the 1989 Master CC&Rs (which are the controlling contract in this case) and the 2004 CC&Rs unequivocally state that the first deed of trust maintains a superior position to the Assessment Lien.

Appellant has argued that *Saticoy Bay, LLC Series 2301 Haren v. LNV Corp.*, 2015 WL 9484709 stands for the proposition that NRS Chapter 116 renders *SFR* applicable to a commercial property and thus is applicable to this case. The facts and holding in *Saticoy Bay* are instructive but not for the reasons argued by the Appellant. In fact, the holding in *Saticoy Bay* supports Respondent's position.

In *Saticoy Bay,* this Court identified the main issue on appeal as "whether the incorporation of superpriority language from NRS Chapter 116 in a common interest community's (CIC) CC&Rs renders this court's *SFR* decision applicable to the CIC's foreclosure." *Id.* at *1. This Court further recognized that "NRS Chapter 116 does not by its terms apply" because the property was located in a non-residential community. As in *Saticoy Bay*, the Property in this case is located in a non-residential community and as such, NRS Chapter 116 does not, by its terms, apply. That is where the similarities between this case and *Saticoy Bay* begin and end.

The CC&Rs in *Saticoy Bay* specifically and expressly incorporated the superpriority language from NRS Chapter 116. Thus, this Court held that *SFR* "provided meaningful guidance to interpret the CC&Rs" in the *Saticoy Bay* case. This Court held in *Saticoy Bay* that by incorporating the superpriority language of NRS Chapter 116 into the CC&Rs, the Court could interpret the contractual language of the CC&Rs to confer superpriority status on the assessment lien. In addition, the CC&Rs in *Saticoy Bay* were recorded subsequent to the enactment of NRS Chapter 116. In the instant matter, the CC&Rs referenced in the Notices to Respondent at issue in this case (the 1989 Master CC&Rs) were recorded prior to the enactment of NRS Chapter 116. Accordingly, they could not possibly have contemplated or incorporated the superpriority language as it was not yet in existence. Further, as recognized by the district court in the instant matter, neither the 1989 Master CC&Rs nor the 2004 CC&Rs "incorporate, refer to or mention NRS Chapter 116 which was enacted December 31, 1991." JA 0306-0322. As such, this Court's holding in *Saticoy Bay* is inapplicable to this case other than for the proposition that NRS Chapter 116 does not by its terms apply because the Property at issue here is located in a non-residential community. Even if this Court determines that the Association foreclosure sale was conducted pursuant to the 2004 CC&Rs, unlike *Saticoy Bay*, there is no language in the 2004 CC&Rs which incorporates the superpriority language of NRS Chapter 116.

Based upon the language contained in both the 1989 Master CC&Rs, the 1994 Amendment, and the 2004 CC&Rs, the district court should be affirmed.

2. The Notices Provided to Respondent Did Not Satisfy Due Process Required to Extinguish Its First Priority Deed of Trust.

In Nevada, in order to satisfy the minimum requirements of due process, there must be compliance with the statutory requirements of notice. *Bogart v. Lathrop*, 90 Nev. 230, 523 P.2d 838 (1974). An inadequate description of the property has rendered a sale void because adequate notice was not given. *Jackson v. Harris*, 64 Nev. 339, 183 P.2d 161 (1947)(See also; *Provenzano v. Clark Cty.*, 73 Nev. 348, 319 P.2d 855 (1957)).

If the Court accepts Appellant's argument that the foreclosure sale was conducted pursuant to the 2004 CC&Rs (despite the fact that none of the notices for the foreclosure sale provided to the Respondent reference same), the district court must be affirmed based upon equity principles. It would be fundamentally unfair to allow Respondent's first priority Deed of Trust to be wiped out based upon the actual notices Respondent received.

As the Court in *Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc.* 132 Nev. Adv. Op. 5, 366 P.3d 1105 (2016) proclaimed, "[w]hen sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood* at 1115 (citing *In re Petition of Nelson*, 495 N.W.2d 200, 203 (Minn. 1993), *as amended on denial of*

reh'g (Mar. 23, 1993)(considering whether the totality of the circumstances supported granting equitable relief to set aside a sale when the former owner had failed to act during the redemption period)); see also *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867, 880 (9th Cir. 2014)(remanding for reconsideration of a district court's decision granting a permanent injunction because the district court's analysis did not discuss a fact relevant to the weighing of the equities); *Murray v. Cadle Co.*, 257 S.W.3d 291, 301 (Tex. App. 2008)(considering the totality of the circumstances to determine whether to uphold the lower court's equitable subrogation decision); *Savage v. Walker*, 2009 VT 8, 185 Vt. 603, 969 A.2d 121, 125 (2009)(noting trial courts should consider the totality of the circumstances to determine if a constructive trust, an equitable remedy, was warranted). This includes considering the status and actions of all parties involved, including whether an innocent party may be harmed by granting the desired relief. *Smith v. United States*, 373 F.2d 419, 424 (4th Cir. 1966)("Equitable relief will not be granted to the possible detriment of innocent third parties."); see also *IIn re Vlasek*, 325 F.3d 955, 963 (7th Cir. 2003)("[I]t is an age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties."); *Riganti v. McElhinney*, 248 Cal. App. 2d 116, 56 Cal. Rptr. 195, 199 (Ct. App. 1967)where it would work a gross injustice upon innocent third parties.").

In the instant case, all of the circumstances set forth above support affirming the district court's decision on equity grounds. Respondent received notice from the Association's agent, Red Rock, that its security interest was not in jeopardy. JA 1260-1267. Despite Appellant's argument to the contrary, Respondent relied on the information provided that its security interest would remain in place following the Associations' foreclosure sale. At trial, Brian Zern, as representative for the Respondent, testified that Respondent relied on information provided by Red Rock that its security interest was protected. To wit, Mr. Zern testified:

> Q And when Celtic Bank received this letter, did it believe that it had any obligation to pay off any assessment liens to protect its security interest?
>
> A No. Because we were in a senior position, we didn't, and our borrower was in default as well. JA 0557-0798, p. 26; 6-10.

Thereafter, Mr. Zern testified:

> Q: All right. The second -- the fourth paragraph, which you read into the record earlier today, it says, The association's lien for delinquent assessment is junior only to the senior mortgage holder, right, and that's what you said the bank absolutely relied upon; correct?
>
> A: I think I'd be careful with that, saying that I said, "absolutely relied upon." Like I've said, we've relied upon several sources of information along the way to tell us that, but, yeah, that was one of the things that told us that.
> *Id.* p. 94; 1-9.

Accordingly, based upon the actual notices received, including correspondence sent directly to Respondent affirmatively advising its security

interest was protected, it would be inequitable to "rewrite history" and now utilize those same defective notices to wipe out Respondent's first deed of trust. Accordingly, it is respectfully submitted that this Court affirm the district court.

3. If the Court Determines that the Foreclosure Sale was Properly Conducted Pursuant to NRS Chapter 116 and The 2004 CC&Rs, Reversal is Not Warranted as Appellant Waived Such Argument and The Foreclosure Sale Was Conducted In Violation Of The CC&Rs.

Even if this Court determines that the district court erred in determining the foreclosure sale did not implicate NRS Chapter 116, Appellant's argument that the foreclosure sale was conducted pursuant to the 2004 CC&Rs wholly contradicts Appellant's position at trial. Appellant argued at the time of trial that NRS Chapter 116 was implicated through the 1994 Amendment to the 1989 Master CC&Rs. Appellant never asserted at the time of trial that the foreclosure sale was conducted pursuant to the 2004 CC&Rs, thus the doctrine of waiver applies. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting that matters not properly presented to the trial court generally will not be addressed as a basis for reversal by this court); *see Hackes v. Hackes*, 446 A.2d 396, 398 (D.C. 1982) ("Parties may not assert one theory at trial and another theory on appeal."), *abrogated on other grounds by Wagley v. Evans*, 971 A.2d 205 (D.C. 2009).

If this Court determines waiver principles do not apply and the foreclosure sale was conducted pursuant to the 2004 CC&Rs, (which Respondent argues is not

supported by the evidence at trial), the sale was conducted in violation of the clear and unambiguous contractual provisions in the 2004 CC&Rs requiring the lapse of sixty (60) days between *delivery* of the notice of sale and the actual sale. The 2004 CC&Rs Section 10.2 Enforcement of Liens provides in relevant part:

> "Notwithstanding anything contained herein to the contrary, no such foreclosure sale shall occur until the lapse of sixty (60) days following *delivery* of notice of such pending sale to any Mortgagee of such Owner and the failure of such Owner or Mortgagee to fully cure such violation." (Emphasis added). JA 1130-1161.

"The rules of construction governing the interpretation of contracts apply to the interpretation of restrictive covenants for real property." *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665–66 (2004). In interpreting a contract, "a specific provision will qualify the meaning of a general provision." *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003). Nevada law makes it clear that rules governing CC&Rs are the same as rules governing other contracts. *Tompkins v. Buttrum Const. Co. of Nevada*, 99 Nev. 142, 659 P.2d 865 (1983).

In *Tompkins*, the Nevada Supreme Court determined that "[t]he rules governing the construction of covenants imposing restrictions on the use of real property are the same as those applicable to any contract, i.e., the words must be given their plain, ordinary and popular meaning." *citing S. Shore Homes Ass'n, Inc. v. Holland Holiday's*, 219 Kan. 744, 549 P.2d 1035, 1042 (1976) *Collins v. Goetsch*, 59 Haw. 481, 583 P.2d 353, 355 (1978) Here, the 2004 CC&Rs require

the lapse of sixty (60) days following *delivery* of the Notice of Sale before a foreclosure sale shall occur.

Appellant argues that the Notice of Default triggered the 60 day time period under the 2004 CC&Rs but, to the contrary, a Notice of Default is simply a notice to cure the default. A Notice of Default is not notice of a pending sale. Pursuant to *Tompkins* the words in the CC&Rs must be given their plain, ordinary and popular meaning which requires 60 days notice of a pending sale. Giving the words of the 2004 CC&Rs the plain, ordinary, and popular meaning clearly requires 60 days from the Notice of Sale which sets forth the pending sale.

The Notice of Sale was recorded by the Association on February 26, 2014. There was no evidence at the time of trial presented by the Appellant as to when the Notice of Sale was *delivered* to Respondent. Respondent did not dispute it was sent to a former address. Assuming for argument's sake, that this Court considers the Notice of Sale "delivered" as of the recordation date on February 26, 2014 (it could not have been "sent" or delivered before then), the March 21, 2014 sale was still conducted in violation of the 2004 CC&Rs sixty (60) day requirement. Only 23 days elapsed between the recorded notice and sale. Thus, if the foreclosure sale was conducted pursuant to the 2004 CC&Rs, the Association's foreclosure sale was conducted contrary to, and in violation of its terms and cannot be a basis for this Court to reverse the district court. The 2004 CC&Rs are clear

and must be interpreted by their plain meaning.

4. The District Court's Analysis Of Nev. Rev. Stat. Ann. § 278A.170 Was Correct In That It Does Not Provide For Priority Of Lien Encumbrances.

As set forth above, Appellant has argued that Nev. Rev. Stat. Ann. § 278A.170 as referenced in both the 1989 Master CC&Rs and the 2004 CC&Rs provide a basis upon which Respondent's first security interest was wiped out in the Association foreclosure sale. The current version of Nev. Rev. Stat. Ann. § 278A.170 states:

> The procedures for enforcing payment of an assessment for the maintenance of common open space provided in Nev. Rev. Stat. Ann. § 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 cost of maintaining the common open space constitutes a lien or encumbrance upon the property. (Emphasis added).

As the district court determined, while Nev. Rev. Stat. Ann. § 278A.170 outlines the *procedures* for enforcing assessment payments for the maintenance of "common open space" provided in Nev. Rev. Stat. Ann. § 116.3116 to 116.31168 "it does not state, substantively, the priority of the encumbrances upon the property and the exceptions thereto outlined in Nev. Rev. Stat. Ann. § 116.3116 are to be applied." JA 0306-0322. The district court correctly found that Nev. Rev. Stat.

Ann. § 278A.170 "does not state the association's assessments' lien charges for the nine-month period immediately preceding the action is prior to any first-security interest. That is, while Nev. Rev. Stat. Ann. § 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." *Id.*

Further, the 1989 Master CC&Rs also reference 278A.170 which was added by laws in 1975 and stated at the time:

> The procedures for enforcing payment of an assessment for the maintenance of common open space provided in sections 6 and 7 of this act are also available to any organization for the ownership and maintenance of common open space established other than under this chapter 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. (Emphasis added.)

The district court's assessment of NRS 278A.170 as procedural in nature and not that the priority of the encumbrances are to be applied, is correct and should be affirmed.

NRS Chapter 116 simply does not apply in this case with respect to establishing the priority over the first-security interest held by Respondent. Further, the district court found as NRS Chapter 116 does not apply, the "statutory scheme

does not render invalid any provision of the two governing documents. *Cf.* Nev. Rev. Stat. Ann. § 116.2103(1)." Thus, the district court was correct that if Appellant purchased the property at the foreclosure sale, it took title subject to Respondent's Deed of Trust.

V.

CONCLUSION

Based upon the foregoing, Respondent respectfully requests that this Court affirm the district court's Findings of Facts, Conclusions of Law and Judgment entered on September 5, 2017.[1]

DATED this 3rd day of December, 2018.

SYLVESTER & POLEDNAK, LTD.

By _____

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[1] Respondent also argued at the time of trial that the Association foreclosure sale should be set aside on grounds of unfairness and/or commercial unreasonableness and fully incorporates those arguments raised in its trial brief and at the time of trial herein. However, the district court did not reach those issues given its conclusion regarding the priority of interests.

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief, complies with the formatting requirements of Nev. R. App. P. 32(a)(4) the type requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because:

[X] This brief has been prepared in a proportionally spaced typeface using WordPerfect in 14- point New Times Roman font; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C) it is either:

[X] Proportionally spaced, has a typeface of 14 points or more, and contains 6,629 words, or

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[ ] Does not exceed ____ pages.

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 Nev. R. App. P. 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 AA 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 3rd day of December, 2018.

SYLVESTER & POLEDNAK, LTD.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SYLVESTER & POLEDNAK, LTD. and that on this 3rd day of December, 2018, I caused to be served a copy of the above-entitled document on the parties set forth below via electronic service with the Nevada Supreme Court as follows:

Roger P. Croteau, Esq.
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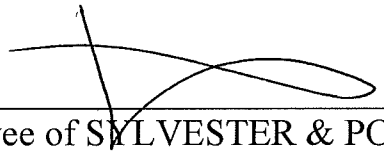

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