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 REPLY BRIEF

Roger P. Croteau, Esq.
Nevada Bar No. 4958
Timothy E. Rhoda, Esq.
Nevada Bar No. 7878
ROGER P. CROTEAU AND ASSOCIATES, LTD
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
Telephone: (702) 254-7775
Facsimile: (702) 228-7719
Attorneys for Defendant/Appellant
Vegas United Investment Series 105, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

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.

INTRODUCTION

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 for good and valuable consideration 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 Association Foreclosure Sale. Specifically, Celtic Bank claims to be the holder of a deed of trust recorded against the Property 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 (*"First Deed of Trust"*).

The foreclosure proceedings leading up to the Association Foreclosure Sale began on August 23, 2011, when Red Rock Financial Services (*"Red Rock"*) as agent for the Association recorded a Lien for Delinquent Assessments (*"Assessment Lien"*). The Association Foreclosure Sale ultimately took place on March 21, 2014. Vegas United was the highest bidder at the foreclosure sale,

paying valuable consideration in the amount of Thirty Thousand Dollars ($30,000.00).

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 is 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 Foreclosure Sale, the Association Foreclosure 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 – **the non-foreclosing association** – 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 an amendment (*"First Amendment"*) recorded in the Office of the Clark County Recorder as Instrument Number 199410240000285. See Trial Exhibit 2. App 1124. Pursuant to the First 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 did not yet even exist. 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. Thus, the 1989 CC&Rs and First Amendment are nothing more than a red herring in this action.

//

//

//

ARGUMENT

1. THE ASSOCIATION AND ASSOCIATION FORECLOSURE SALE WERE NECESSARILY GOVERNED BY THE 2004 CC&RS

Celtic Bank discusses the 1989 CC&Rs and First Amendment thereto at relative length in its Answering Brief. However, as discussed above and in the Opening Brief, these documents are, in fact, irrelevant to this matter because they relate to an entirely separate and distinct legal entity other than the Association, which actually foreclosed upon the Property.

As discussed above, the Property is governed by two associations: 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." The two associations are very similarly named and only differ with regard to a single word: "Park" vs. "Center." Nonetheless, it is undisputed that each association is a separate and distinct legal entity. It is further undisputed that the Association Foreclosure Sale was conducted on behalf of the Association and not Gibson Business Park OA. See Trial Exhibits 9, 10, 15, 17. App 1240, 1242, 1273, 1285.

It is also undisputed that the 1989 CC&Rs related to Gibson Business Park OA. App 1076. Likewise, the First Amendment to the 1994 CC&Rs obviously

related to Gibson Business Park OA as well. App 1124. Thus, both the 1989 CC&Rs and the First Amendment thereto related to an association that **did not foreclose upon the Property** and are therefore irrelevant.

The Association was formed on or about March 18, 2004, when the 2004 CC&Rs were recorded. App 1130. Prior to that time, the Association did not exist. It is patently obvious that both the Association and the Association Foreclosure Sale were necessarily governed by the 2004 CC&Rs, which related to the Association. The Association could not foreclose upon the Property based upon CC&Rs that related to an entirely different association. Indeed, the Association was not a party to the 1994 CC&Rs or the First Amendment. Quite simply, the terms of the 1989 CC&Rs and First Amendment are completely immaterial to this action.

2. PURSUANT TO THE 2004 CC&RS, THE PROPERTY AND ASSOCIATION FORECLOSURE SALE WERE AND ARE GOVERNED BY THE PROVISIONS OF NRS CHAPTER 116

It is undisputed that the Property is nonresidential, commercial property. As the Appellee points out, NRS Chapter 116 is inapplicable to nonresidential property unless the applicable declaration states otherwise. To that end, NRS 116.12075 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, the 2004 CC&Rs that govern the Property and the Association provide 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). 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.

NRS 278A.170.

The 2004 CC&Rs effectively state that the Property shall be governed by NRS 116.3116 to 116.31168 to the extent permitted by NRS 278A.170. Because NRS 278A.170 permits a nonresidential community association to utilize the procedures for enforcing payment of assessments set forth in NRS 116.3116 to 116.31168, the 2004 CC&Rs incorporated NRS Chapter 116 to the fullest extent possible.

To the extent that any doubt might exist, the 2004 CC&Rs further provide 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. Moreover, the entirety of NRS 116.3116 to 116.31168 is applicable to the Property. This includes the provisions of NRS 116.3116 which provide that "[t]he 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's finding to the contrary was erroneous.

3. CELTIC BANK WAS NOT DENIED DUE PROCESS

The Bank argues that its rights to due process were somehow violated in association with the Association Foreclosure Sale. This assertion is seemingly

based upon a claim that the notices related to the Association Foreclosure Sale incorrectly stated that the Association Foreclosure Sale was being conducted "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."

a. THE STATUTE DOES NOT IMPLICATE DUE PROCESS

On January 26, 2017, this Court issued a decision in the matter of *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Div. of Wells Fargo Bank*, N.A., 133 Nev. Adv. Op. 5, ___ P.3d ___, 2017 WL 398426 (Nev. Jan. 26, 2017), holding that no state action supports a challenge to NRS Chapter 116 under the Due Process Clause of the United States Constitution. Thus, Celtic Bank's arguments are without merit.

//

//

//

//

b. EVEN IF DUE PROCESS IS IMPLICATED, THE FAILURE TO ACCURATELY IDENTIFY THE APPLICABLE CC&RS WAS HARMLESS

As discussed in Vegas United's Opening Brief, there exists no requirement in NRS Chapter 116 that a homeowners association identify its CC&Rs by recorded instrument number or otherwise in its foreclosure notices. Here, it appears that Red Rock erroneously attempted to identify the First Amendment that was recorded on October 24, 1994. As discussed above, this document related not to the Association that foreclosed upon the Property but to Gibson Business Park OA, which did not foreclose nor have anything to do with the instant matter. However, as the Appellant points out, the notices did not even properly identify this document.

It is undisputed that the instrument number for the CC&Rs recited in each of the applicable foreclosure notices was "19940240000285" rather than "199410240000285." Thus, as Celtic Bank itself argues, "it can be fairly argued that none of the recorded documents properly reference any CC&Rs or Amendments thereto encumbering the Property." Answering Brief, p. 10-11. This is in keeping with the fact that the notices were not required to do so. Moreover, as discussed in the Opening Brief, the evidence at trial indicated that

Celtic Bank did not even review the CC&Rs prior to trial. Specifically, when asked "Have you read these CC&Rs at any time prior to your trial preparation?," the Bank's representative replied "Not to the best of my recollection." App 661. Moreover, the Bank's representative testified that the Bank did not possess a copy of the CC&Rs in its file. App 651-652. Thus, the Bank could not have relied to its detriment upon any of the CC&Rs.

c. THE CORRESPONDENCE FROM RED ROCK TO CELTIC BANK AND HOA DID NOT CHANGE THE PRIORITY OF THE ASSOCIATION LIEN VIS A VIS A BANK'S FIRST DEED OF TRUST

The Bank next argues that Red Rock sent it correspondence on December 21, 2011, which advised that "[t]he Association's Lien for Delinquent Assessment is Junior only to the Senior Lender/Mortgage Holder." App 1262. In addition, the Bank points to email correspondence between Red Rock and the HOA which identified two possible "outcomes" related to the Association Foreclosure Sale. App 1268-1270. The Bank asserts that this evidence "is consistent that any purchaser would take the Property subject to Respondent's first priority Deed of Trust." Answering Brief, p. 17. Basically, the Bank is arguing that, based upon

the subject correspondence, the Association Foreclosure Sale was estopped from extinguishing the First Deed of Trust.

"To establish promissory estoppel four elements must exist: (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped." *Cheqer, Inc. v. Painters & Decorators Joint Committee, Inc.*, 98 Nev. 609, 614, 655 P.2d 996, 998-999 (1982). Here, the elements of promissory estoppel are woefully lacking.

Addressing first the email correspondence between Red Rock and the Association, no evidence was presented at trial or otherwise that the subject email correspondence was ever provided to Celtic Bank prior to the instant litigation. To the contrary, the document was obtained through discovery. The correspondence was between the Association and its agent, Red Rock. There was no intention on the part of any party that Celtic Bank rely upon this correspondence. Celtic Bank was not, and could not have been, aware of this correspondence at the time that the Association's foreclosure proceedings were ongoing. Nor could Celtic Bank have conceivably relied upon any

correspondence of which it was unaware. In short, the subject correspondence indicates nothing other than a lack of understanding on the part of Red Rock regarding the force and effect of the foreclosure proceedings. It certainly presents no basis upon which to ignore the force and effect of the law.

As to the correspondence that was sent to Celtic Bank by Red Rock, it stated as follows:

> The Association's Lien for Delinquent Assessments is Junior only to the Senior Lender/Mortgage Holder. This Lien may affect your position. To reinstate the above account, you must contact Red Rock Financial Services to obtain "up to date" payoff figures. Payment must be made payable to Red Rock Financial Services.

App 1262. The letter very specifically notified Celtic Bank that the Association Lien "**may affect [its] position**." Thus, contrary to the claims of the Appellant, Red Rock explicitly notified Celtic Bank that its lien interest in the Property might be extinguished by the Association Foreclosure Sale.

It is well established that all citizens are presumptively charged with knowledge of the law. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925). It is without doubt that Celtic Bank is a sophisticated business entity that has availed itself of doing business in the State of Nevada. As a business entity that conducts business within the State of Nevada, Celtic Bank is charged with

knowledge of the law. This includes knowledge of the force and effect of NRS Chapter 116.

At the time of trial, the testimony indicated that Celtic Bank was painfully unaware of Nevada law. Specifically, when asked "Are you aware that in the state of Nevada under the previous version of Chapter 116 that this property was foreclosed upon, that in order to preserve your position, you had to pay nine months of assessments?," the Bank's representative reply was "I'm not aware of that." App 650-651. Indeed, this explains the testimony cited by the Bank in its Answering Brief to the effect that the Bank did not believe that it had any obligation to pay any assessment liens to protect its security interest. Answering Brief, p. 22. Indeed, in response to such question, the Bank's witness simply said "No. Because we were in a senior position, we didn't, and our borrower was in default as well." App 582. The Bank was quite simply ignorant regarding the requirements of NRS Chapter 116.

Given the fact that the Bank was unaware that an Association Lien possessed priority over its First Deed of Trust to the extent of 9 months of assessments, it is unsurprising that the Bank did nothing in response to the foreclosure notices that were undisputably served upon it. Now, because the Bank

was ignorant regarding Nevada law, the Bank attempts to circumvent the force and effect of NRS Chapter 116.

To the extent that Red Rock may be interpreted to have suggested that the Bank's security interest was not subordinate to the Association Lien, it is clear that Red Rock was also unaware of the true facts. There exists no evidence that Red Rock intended that Celtic Bank do anything other than pay the Association Lien in order to protect its interest – which Red Rock specifically stated may be "affected." Moreover, because it is charged with knowledge of the law, Celtic Bank cannot be deemed to be ignorant of the true state of facts; specifically, that its interest was subordinate to the Association Lien to the extent of 9 months of assessments. Under such circumstances, Celtic Bank cannot be deemed to have detrimentally relied upon Red Rock's correspondence.

d. <u>THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF VEGAS UNITED</u>

As noted by the Appellee, "[w]hen sitting in equity, however, courts must consider the entirety of the circumstances that bear upon the equities." *Shadow Wood Homeowners Assoc., Inc. v. N.Y. Cmty. Bancorp, Inc*., 366 P.3d 1105, 1110 (Nev. 2016). The Bank goes on to assert that "all of the circumstances set forth

above support affirming the district court's decision on equity grounds." Answering Brief, p. 22. This is a ridiculous statement.

Vegas United appeared at the Association Foreclosure Sale in good faith and purchased the Property for Thirty Thousand Dollars ($30,000.00) – hardly a pittance. It did so with knowledge of the fact that Nevada law provides that a foreclosure sale is presumed to be valid. N.R.S. 47.250(16)-(18) (stating that there are disputable presumptions "that the law has been obeyed"; "that a trustee or other person, whose duty it was to convey real property to a particular person, has actually conveyed to that person, when such presumption is necessary to perfect the title of such person or a successor in interest"; "that private transactions have been fair and regular"; and "that the ordinary course of business has been followed."). Vegas United was completely unaware of **any** correspondence that may have been sent by Red Rock to Celtic Bank, including any purported representations regarding the priority of the Association's lien versus the First Deed of Trust.

Celtic Bank, on the other hand, was provided with actual notice of the Association's foreclosure proceedings. It was undisputed at trial that Celtic Bank actually received the Association's Notice of Default. Although the Notice of Sale was not actually received by Celtic Bank because it changed addresses and

neglected to notify the Association, Red Rock and general public of such change (at least insofar as the First Deed of Trust was concerned), it is undisputed that the Notice of Sale was properly mailed. In response to the notices, Celtic Bank did absolutely nothing – likely as a result of its ignorance regarding the force and effect of NRS Chapter 116 and the fact that it was required to pay 9 months of assessments in order to protect the priority of its First Deed of Trust.

It is difficult to conceive how the balance of the equities could possibly weigh in favor of the Bank as against Vegas United. Vegas United is a wholly innocent party that simply appeared at a publicly noticed foreclosure sale and purchased real property for valuable consideration. The Bank, on the other hand, possessed actual knowledge of the foreclosure proceedings and the means to prevent the Association Foreclosure Sale from taking place. Vegas United paid tens of thousands of dollars in good faith to purchase the Property. Celtic Bank sat on its hands and watched.

Celtic Bank is a sophisticated business entity. Despite this fact, the Bank admitted that it was ignorant of the fact that NRS Chapter 116 gave the Association Lien priority over its First Deed of Trust. It is undisputed that the Bank was provided with actual knowledge of the foreclosure proceedings. Nonetheless, it did NOTHING. Celtic Bank's inattention and inaction on the one

hand can hardly outweigh Vegas United's good faith purchase where Vegas United possessed no responsibility for the manner in which the Association Foreclosure Sale was conducted or any knowledge whatsoever of any correspondence between the Association, Red Rock and Celtic Bank.

4. VEGAS UNITED DID NOT WAIVE ARGUMENTS AT TRIAL AND THE ASSOCIATION FORECLOSURE SALE WAS NOT CONDUCTED IN VIOLATION OF THE CC&RS

The Bank next makes a rather confusing argument, asserting that Vegas United's current argument contradicts its position at trial. Obviously, the Appellant is and was entitled to make alternative arguments. In addition, the Bank asserts that if the 2004 CC&Rs are applicable, the Association Foreclosure Sale was conducted in violation thereof. Neither argument has merit.

a. VEGAS UNITED WAIVED NO ARGUMENTS REGARDING THE 2004 CC&RS

It is unclear how the Bank can suggest that "Appellant never asserted at the time of trial that the foreclosure sale was conducted pursuant to the 2004 CC&Rs." Answering Brief, p. 23. Indeed, in her closing arguments, the Bank's counsel stated exactly as follows:

> But if this Court finds that the notices, defective as they are, recorded by Red Rock really meant that the sale was conducted pursuant to the 2004 CC&Rs because Red Rock is the agent of the declarant of the 2004 CC&Rs, then you have to look to that language. And the sale was absolutely conducted in violation of the contractual language of the 2004 CC&Rs. And I would point to Section 10.02.

App 946. Counsel went on to state as follows:

> Under the 2004 CC&Rs, although Celtic doesn't believe that they apply, if they do, then the sale was required to be conducted pursuant to its contractual terms. And the contractual terms under the 2004 CC&Rs in Section 10.02 provide that no sale can be conducted unless 60 days have lapsed between the notice of a pending sale and the actual sale, and notice of that pending sale has to be delivered to the mortgagee. In this case there is no evidence that the notice of sale was ever delivered to Celtic Bank. We'd concede that it was mailed. And if that's considered by this Court to be delivered under the language of the CC&Rs, then okay. But it's still not 60 days between the sale.

App 947. Thus, while alternative arguments may have been presented at trial, it is patently clear that the Bank was fully aware that it had been argued that the 2004 CC&Rs governed the Association Foreclosure Sale. Certainly, counsel acknowledged during her argument that the Court might rule in such a manner. No argument regarding the 2004 CC&Rs was waived.

b. <u>THE ASSOCIATION FORECLOSURE SALE WAS NOT CONDUCTED IN VIOLATION OF THE 2004 CC&RS</u>

The Bank goes on to assert that if the Association Foreclosure Sale was conducted pursuant to the 2004 CC&Rs, then it was conducted in violation

thereof. This assertion is based upon section 10.2 of the 2004 CC&Rs, which purports to require that a period of 60 days lapse between delivery of the notice of sale to a mortgagee and the actual sale. See App 1151. Specifically, the Bank asserts that the "sale was conducted in violation of the clear and unambiguous contractual provisions of in the 2004 CC&Rs requiring the lapse of sixty (60) days between delivery of the notice of sale and the actual sale." Answering Brief, p. 24. This argument fails.

i. The Notice of Sale Must be Deemed Delivered Upon Mailing

First, the Bank asserts that the Notice of Sale was not delivered to the Bank. This is technically the case although the Bank does not dispute that the Notice of Sale was, in fact, mailed to the Bank at its last known address (to which the Notice of Default mailed and at which the same was actually received) before it changed office addresses. The Bank presented no evidence whatsoever that it ever advised either the Association or Red Rock of its new mailing address at any point in time.

NRS 47.250(13) provides that a disputable presumption exists "that a letter duly directed and mailed was received in the regular course of the mail." Here, it is undisputed that the Notice of Sale was duly directed and mailed to Celtic Bank's former address. It must be presumed that the Notice of Sale was forwarded to

Celtic Bank at its new address. Moreover, to the extent that the Notice of Sale was not received by the Bank, this was the fault of the Bank for failure to notify the Association or Red Rock of its new address. This was the case despite the fact that the Bank possessed actual notice of the pending foreclosure proceedings. It would be patently unfair for the Bank to benefit from its own negligent failure to ensure that Red Rock and the Association were provided with a current mailing address.

ii. The Bank is Not a Party to the CC&Rs

The Bank notes that under Nevada law, the rules governing CC&Rs are the same as the rules governing other contracts. What the Bank ignores is the fact that the Bank is not a party to any contract that exists pursuant to the CC&Rs. On the contrary, the CC&Rs constitute a contract between the Association and the property owners that own real property governed by the Association. The Bank is neither and is thus not a party to the contract. For this reason alone, the Bank's argument must be rejected. Nor is the Bank a third party beneficiary of the CC&Rs.

iii. The Bank is not a Third Party Beneficiary of the CC&Rs

The obtain the benefits of third party beneficiary status, there must clearly appear a promissory intent to benefit the third party and ultimately it must be

shown that the third party's reliance thereon is foreseeable. *Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 824-825, 1977 Nev. LEXIS 571, *15. In this case, no evidence was presented that the Association intended to benefit the Bank when the CC&Rs were drafted. Nor does there exist any evidence that the Bank relied upon the CC&Rs. To the contrary, as discussed above, the evidence at trial indicated that Celtic Bank did not even review the CC&Rs prior to trial. Specifically, when asked "Have you read these CC&Rs at any time prior to your trial preparation?," the Bank's representative replied "Not to the best of my recollection." App 661. Moreover, the Bank's representative testified that the Bank did not even possess a copy of the CC&Rs in its file. App 651-652.

It is abundantly clear that the Bank did not rely upon the CC&Rs. Moreover, it is not even foreseeable that the Bank might rely upon the CC&Rs since the Bank did not even possess them. There is simply no way that the Bank could rely upon something of which it was unaware.

Because the Bank is neither a party to the contract evidenced by the 2004 CC&Rs nor a third party beneficiary thereof, it lacks standing to complain of any failure by Red Rock to abide by the 2004 CC&Rs which purported to give the Bank a lengthier period of notice than that required by NRS 116.311635. Under such circumstances, the Bank's argument lacks fails.

5. NO BASIS EXISTS TO CARVE OUT THE LIEN PRIORITY PROVISIONS FROM NRS CHAPTER 116

The district court found, and the Bank argues, that NRS 278A.170 simply allowed the Association to utilize the procedures of NRS 116.3116 to 116.31168 but that it did not incorporate the lien priority provisions contained in those very same sections of the law. As discussed above, this simply makes no sense. Pursuant to the 2004 CC&Rs, and the incorporation of NRS 116.3116 to 116.31168 to the extent allowed pursuant to NRS 278A.170, the Association incorporated NRS 116.3116 to 116.31168 to the fullest extent possible. This included all of the provisions of said sections. It makes no sense that the Association would exclude the lien priority provisions that are contained within said sections of NRS Chapter 116. Indeed, if the lien priority provisions were not incorporated, what would be the purpose of providing notice to the Bank?

The Bank's argument suggests its lien interest could not be extinguished under any circumstances. If this were the case, there would be no reason for the Bank to be provided with notice and all of the provisions requiring notice to the Bank would be superfluous and unnecessary.

//

//

CONCLUSION

For the reasons set forth herein, 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. In the alternative, this Court should remand this matter for further proceedings consistent with its decision.

DATED this 19th day of February, 2019.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda

ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
(702) 254-7775
Attorney for Appellant
Vegas United Investment Series 105, Inc.

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 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 5134 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.

ROGER P. CROTEAU & ASSOCIATES, LTD.

/s/ Timothy E. Rhoda

ROGER P. CROTEAU, ESQ.
Nevada Bar No. 4958
TIMOTHY E. RHODA, ESQ.
Nevada Bar No. 7878
9120 West Post Road, Suite 100
Las Vegas, Nevada 89148
(702) 254-7775
Attorney for Appellant
Vegas United Investment Series 105, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of ROGER P. CROTEAU & ASSOCIATES, LTD. and that on the 19th day of February, 2019, I caused a true and correct copy of the foregoing document to be served on all parties as follows:

__X__ VIA ELECTRONIC SERVICE: through the Nevada Supreme Court's eflex e-file and serve system.

____ 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.

____ VIA FACSIMILE: by causing a true copy thereof to be telecopied to the number indicated on the service list below.

____ VIA PERSONAL DELIVERY: by causing a true copy hereof to be hand delivered on this date to the addressee(s) at the address(es) set forth on the service list below.

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