

**Case No. 74416**

IN THE SUPREME COURT OF NEVADA

SFR INVESTMENTS POOL 1, LLC,  
A NEVADA LIMITED LIABILITY  
COMPANY,

Appellant,

vs.

MARCHAI B.T., A BANK TRUST,

Respondent.

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Dec 03 2018 08:41 a.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

**APPEAL**

From the Eighth Judicial District Court, Clark County  
The Honorable LINDA MARIE BELL  
District Court Case No. A-13-689461-C, Consolidated With A-16-742327-C

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**JOINT APPENDIX VOLUME 5**

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<b>Vol.</b>	<b>Tab</b>	<b>Date Filed</b>	<b>Document</b>	<b>Bates Number</b>
1	3	11/07/2013	Affidavit of Service	JA_0074
1	4	11/12/2013	Affidavit of Service	JA_0076
1	8	12/19/2013	Affidavit of Service	JA_0106
1	9	12/27/2013	Affidavit of Service	JA_0108
5	25	09/14/2016	Affidavit of Service	JA_1118
5	26	09/14/2016	Affidavit of Service	JA_1122
5	27	09/14/2016	Affidavit of Service	JA_1126
3	13	01/14/2016	Appendix of Exhibits to Marchai's Motion for Summary Judgment	JA_0544
2	12	01/14/2016	Appendix of Exhibits to Marchia's Motion for Summary Judgment	JA_0272
5	19	02/22/2016	Certificate of Service	JA_1015
1	1	09/30/2013	Complaint	JA_0001
5	20	03/22/2016	Decision and Order	JA_1017
7	38	10/03/2017	Decision and Order	JA_1483
5	23	08/25/2016	Exempt from Arbitration Action Concerning Title to Real Estate Complaint	JA_1099
5	24	08/25/2016	Initial Appearance Fee Disclosure	JA_1115
7	48	8/6/2018	Judgment	JA_1592
7	46	4/26/2018	Judgment against Cristela Perez and U.S. Bank	JA_1581
1	7	12/03/2013	Marchai's Answer to Counterclaim	JA_0098
1	10	01/14/2016	Marchai's Motion for Summary Judgment	JA_0110
7	39	10/4/2017	Marchai's Notice of Entry of Decision and Order	JA_1499
7	49	8/7/2018	Marchai's Notice of Entry of Judgment	JA_1597

7	45	12/30/2017	Marchai's Notice of Entry of Order	JA_1575
1	6	11/13/2013	Marchai's Notice of Lis Pendens	JA_0095
1	2	10/03/2013	Marchai's Notice of Pendency of Action	JA_0068
5	18	02/15/2016	Marchai's Opposition to Counter-Motions to Strike Pursuant to NRCP Rule 37	JA_0993
6	35	08/14/2017	Marchai's Opposition to SFR's & Wyeth Ranch's Motion for Summary Judgment	JA_1365
4	14	02/03/2016	Marchai's Opposition to SFR's Motion for Summary Judgment	JA_0816
7	43	11/8/2017	Marchai's Opposition to SFR's Motion to Retax and Settle Memorandum of Costs and Disbursements	JA_1560
4	16	02/08/2016	Marchai's Reply in Support of Motion for Summary Judgment	JA_0884
7	40	10/10/2017	Memorandum of Costs and Disbursements	JA_1517
5	28	12/13/2016	Notice of Entry of Order	JA_1130
5	29	12/13/2016	Notice of Entry of Order	JA_1135
5	30	12/13/2016	Order Lifting Stay and Consolidating Cases	JA_1140
7	51	8/29/2017	Recorder's Transcript of Defendant SFR's Motion for Summary Judgment	JA_1608
7	50	8/8/2018	SFR's Amended Notice of Appeal	JA_1604
5	32	02/06/2017	SFR's Answer to Complaint	JA_1154
1	5	11/13/2013	SFR's Answer, Counterclaim, and Cross Claim	JA_0078
1	11	01/14/2016	SFR's Motion for Summary Judgment	JA_0192
5	33	07/21/2017	SFR's Motion for Summary Judgment	JA_1164
7	41	10/19/2017	SFR's Motion to Retax and Settle Memorandum of Costs and Disbursements	JA_1549
7	42	11/3/2017	SFR's Notice of Appeal	JA_1556

5	21	03/23/2016	SFR's Notice of Entry of Decision and Order	JA_1043
5	22	03/24/2016	SFR's Notice of Entry of Decision and Order	JA_1071
7	47	4/27/2018	SFR's Notice of Entry of Judgment	JA_1585
4	15	02/04/2016	SFR's Opposition to Marchai's Motion for Summary Judgment	JA_0852
7	44	11/13/2017	SFR's Reply in Support of its Motion to Retax and Settle Memorandum of Costs and Disbursements	JA_1569
4	17	02/09/2016	SFR's Reply in Support of Motion for Summary Judgment and Counter-Motions to Strike	JA_0908
6	36	08/21/2017	SFR's Reply in Support of SFR's Motion for Summary Judgment	JA_1434
5	31	01/31/2017	Wyeth Ranch Community Association's Answer and Affirmative Defenses	JA_1143
6	34	07/21/2017	Wyeth Ranch Community Association's Motion for Summary Judgment	JA_1277
7	37	08/21/2017	Wyeth Ranch's Reply in Support of Motion for Summary Judgment	JA_1470

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indicate the state's privilege will being invoked; and

(b) The following information shall be provided in the objection, unless  
divulgence of such information would cause disclosure of the allegedly privileged information:

For documents: (i) the type of document, *e.g.*, letter or memorandum; (ii) the  
general subject matter of the document; (iii) the date of the document; and (iv)  
such other information as is sufficient to identify the document for a subpoena  
duces tecum, including, where appropriate, the author of the document, the  
addressees of the document, and any other recipients shown in the document,  
and, where not apparent, the relationship of the author, addressees, and  
recipients to each other;

For oral communications: (i) the name of the person making the  
communication and the names of persons present while the communication  
was made and, where not apparent, the relationship of the persons present to  
the person making the communication; (ii) the date and place of the  
communication; and (iii) the general subject matter of the communication.

### INTERROGATORIES

**INTERROGATORY NO. 1:** State the name, address, occupation and relationship to the  
parties of each individual who assisted in the answering of these interrogatories.

**INTERROGATORY NO. 2:** Did you, in the process of answering these interrogatories,  
the request for production of documents, and requests for admissions served contemporaneously  
herewith, make a due and diligent search of all related documents, books, reports, memos,  
photos, writing, and computer records within your possession and control, in order to obtain  
information with respect to this action? If not, please explain why you have not undertaken such  
a search.

**INTERROGATORY NO. 3:** Do any of your agents, employees, former agents or  
former employees possess any information, facts, writings or evidence that you believe might  
relate to your defense of this litigation? If so, please identify each and every item of information,  
fact, writing or evidence specifically and in detail, and in addition, identify the person or persons



possessing such information by stating each person's name, address, title, and relationship to the parties herein.

**INTERROGATORY NO. 4:** To the extent you answered any of the Requests for Admissions served upon you contemporaneously herewith, anything other than an unqualified "Admit" then for each and every such answer, set forth the specific basis or grounds for your answer, whether you are aware of any information, facts, writings or evidence whatsoever relating to this litigation that either supports or contradicts your answer, and the identity of all persons who have any knowledge or information which either supports or contradicts each of your answers which are not an unqualified admission.

**INTERROGATORY NO. 5:** Identify the facts, information and evidence of which you are aware that supports your assertion that you were not properly noticed of the Association foreclosure sale.

**INTERROGATORY NO. 6:** Identify all communications between you and the Association and/or the Association's agents regarding the Property.

**INTERROGATORY NO. 7:** Please identify any pooling and servicing agreement and/or servicing guidelines applicable to your security interest in the Property.

**INTERROGATORY NO. 8:** Identify all communications between you and the servicer of your loan regarding any association lien on the Property.

**INTERROGATORY NO. 9:** Describe your practices, policies and procedures for handling competing liens recorded on properties in which you have a security interest.

**INTERROGATORY NO. 10:** Please provide a detailed list of each and every monetary payment tendered to the Association or its agents relating to an Association lien on the Property. For each payment, please include the date of payment, amount of payment, the name and address of the person/entity to whom the payment was tendered, the method and manner the payment was tendered, the name of the person who tendered the payment, and whether the payment was accepted or rejected.

**INTERROGATORY NO. 11:** What entity is currently the holder of the beneficial interest in the First Deed of Trust and underlying promissory note?

**INTERROGATORY NO. 12:** Are you the holder or agent of the holder of the beneficial interest in the Second Deed of Trust and underlying promissory note?

**INTERROGATORY NO. 13:** Identify the transaction(s) through which you obtained an interest in the Property and describe the document(s) through which you obtained an interest in the Property.

**INTERROGATORY NO. 14:** Please provide a detailed list of the previous beneficiaries of the First Deed of Trust and underlying promissory note.

**INTERROGATORY NO. 15:** Were you aware before you obtained an interest in the Property that Nevada's statutory scheme allowed associations a lien that could potentially take priority over a first security interest?

**INTERROGATORY NO. 16:** Were you aware before you obtained an interest in the Property that the Property was located within the Association and was subject to the Association's declaration of covenants, conditions and restrictions?

**INTERROGATORY NO. 17:** Did you ever become aware that the Borrower was delinquent on the assessments due to the Association? If so, when?

**INTERROGATORY NO. 18:** When did the Borrower first become delinquent on payments owed to you pursuant to the First Deed of Trust and underlying promissory note?

**INTERROGATORY NO. 19:** Identify any communications, including correspondence, with the Borrower relating to the Association and the Borrower's obligation to pay assessments to the Association.

**INTERROGATORY NO. 20:** Identify any steps you took to ensure the Association received the assessments owed in relation to the Property.

**INTERROGATORY NO. 21:** Did you or any of your predecessors in interest receive any foreclosure notices from the Association or its agents relating to an Association lien the Property?

**INTERROGATORY NO. 22:** If your answer to Interrogatory No. 21 is "yes," please describe any action you or your predecessors in interest took relating to the Association lien, if any, after receiving the foreclosure notices.

1 **INTERROGATORY NO. 23:** Identify all facts, information, and evidence of which you  
2 are aware that supports Plaintiff's assertion that it was a bona fide purchaser for value at the  
3 Association foreclosure sale.

4 **INTERROGATORY NO. 24:** Identify all facts, information, and evidence of which you  
5 are aware that contradicts Plaintiff's assertion that it was a bona fide purchaser for value at the  
6 Association foreclosure sale.

7 **INTERROGATORY NO. 25:** Identify your practices, policies and procedures that are  
8 specific to lending in communities that are part of an association.

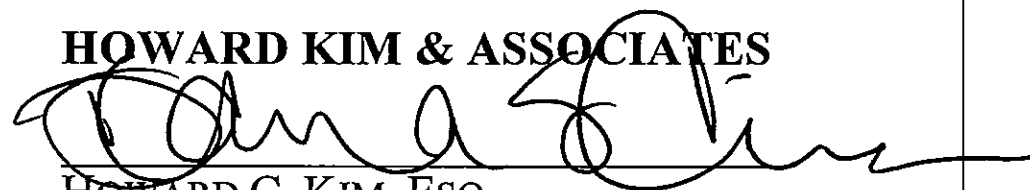
9 **INTERROGATORY NO. 26:** Identify your practices, policies and procedures for  
10 servicing its loans that are specific to states where association liens may obtain priority over a  
11 first security interest.

12 **INTERROGATORY NO. 27:** Describe the impact, if any, the percentage of delinquent  
13 accounts within an association has on your lending within that association.

14 **INTERROGATORY NO. 28:** Identify any trustee's sale guarantee or title report you  
15 obtained in preparation for the non-judicial foreclosure sale of the Property pursuant to the First  
16 Deed of Trust.

17 DATED this 10 day of June, 2014.

19 **HOWARD KIM & ASSOCIATES**



20 HOWARD C. KIM, ESQ.

21 Nevada Bar No. 10386

22 DIANA S. CLINE, ESQ.

23 Nevada Bar No. 10580

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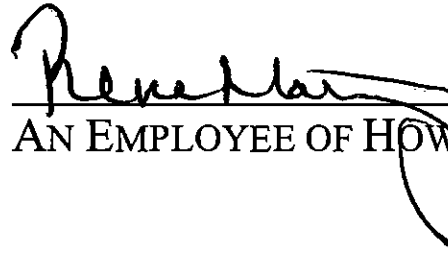
HENDERSON, NEVADA 89014

(702) 485-3300 FAX (702) 485-3301

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 10<sup>th</sup> day of June, 2014, pursuant to NCRP 5(b), I served via U.S. mail the foregoing **INTERROGATORIES TO MARCHAI B.T.**, to the following parties:

Benjamin D. Petiprin, Esq.  
LAW OFFICES OF LES ZIEVE  
3753 Howard Hughes Parkway, Suite 200  
Las Vegas, NV 89169  
*Attorney for Marchai B T Bank Trust*



AN EMPLOYEE OF HOWARD KIM & ASSOCIATES

# EXHIBIT A-7

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Attorney for Plaintiff, MARCHAI, B.T.

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MARCHAI, B.T., a Bank Trust,

Plaintiff,

vs.

CRISTELA PEREZ, an individual; SFR  
INVESTMENTS POOL 1, LLC, a limited  
liability company; U.S. BANK  
NATIONAL ASSOCIATION, N.D., a  
national association, DOES I through X,  
and ROE CORPORATIONS 1 through  
10, inclusive,

Defendants.

ALL RELATED CLAIMS

**CASE NO.: A-13-689461-C**

**DEPT. NO.: XXVI**

**RESPONSES AND OBJECTIONS  
OF PLAINTIFF MARCHAI, B.T., TO  
AMENDED INTERROGATORIES  
PROPOUNDED BY DEFENDANT SFR  
INVESTMENTS POOL 1, LLC**

**PROPOUNDING PARTY: SFR INVESTMENTS POOL 1, LLC**

**RESPONDING PARTY: MARCHAI, B.T.**

**PRELIMINARY STATEMENT**

Pursuant to Nevada Rule of Civil Procedure Section 34, Plaintiff Marchai, B.T. ("MARCHAI" or "Responding Party"), responds to the First Set of Interrogatories ("Request"), propounded by SFR Investments Pool 1, LLC ("SFR" or "Propounding Party").

Each response set forth herein, is subject to the stated limitations and to this Preliminary Statement, and is as complete as the information reasonably available to Responding Party as

1 of the date of these responses. Responding Party's pre-trial discovery, investigation, and  
2 analysis are continuing, and Responding Party may learn of additional information subsequent  
3 to the date of these responses. The responses set forth herein are subject to being amended  
4 with information and documents subsequently discovered, inadvertently omitted, or mistakenly  
5 identified in these initial responses. Moreover, as discovery, investigation, and legal research  
6 progress, new facts may be discovered and previously known facts may take on new meaning  
7 or significance, thereby changing any conclusions, opinions, representations, objections, and/or  
8 statements made herein.

9 All evidentiary objections shall be reserved for the time of trial and no waiver of any  
10 objection is to be implied from this Response or any production made pursuant hereto. By this  
11 Response and the ensuing production, Responding Party is not making any writing admissible  
12 at the time of trial which would otherwise be inadmissible.

13 To the extent that this Response or any production pursuant hereto might waive,  
14 whether implicitly or explicitly, any otherwise assertable objection to discovery, such waiver  
15 shall be limited to this Response and to the ensuing production only, and shall not extend to  
16 any further requests for production or to any discovery proceedings or to any requests or  
17 subpoenas for the production of any such writings at the time of trial.

18 To the extent that all or any of the requests seek information and/or documents subject  
19 to the attorney-client privilege then the Responding Party asserts the attorney-client and/or  
20 work product privileges to each of such requests as appropriate and to the extent necessary to  
21 avoid a waiver of such privileges.

22 Responding Party responds to each and every discovery request subject to the  
23 foregoing, and each of the foregoing statements and objections are incorporated by reference  
24 into each of the following responses.

25 **INTERROGATORY NO. 1:**

26 State the name, address, occupation and relationship to the parties of each individual  
27 who provided the factual information needed to answer these interrogatories.

1 **RESPONSE TO INTERROGATORY NO. 1:**

2       Objection. This interrogatory is unreasonably burdensome, oppressive, and overbroad.  
3 Without waiving these objections, Peak Loan Servicing, LLC, is the custodian of records for  
4 the security instruments that are the subject of the instant action. Peak Loan Servicing, LLC,  
5 may be contacted through counsel the Law Offices of Les Zieve.

6 **INTERROGATORY NO. 2:**

7       Do any of your agents, employees, former agents or former employees possession any  
8 information, facts, writings or evidence that you intent to rely upon in your defense of this  
9 litigation? If so, please identify each and every item of information, fact, writing or evidence  
10 specifically and in detail, and in addition, identify the person or persons possessing such  
11 information by stating each person's name, address, title, and relationship to the parties herein.

12 **RESPONSE TO INTERROGATORY NO. 2:**

13       Objection. This interrogatory seeks information that is neither admissible nor likely to  
14 lead to the discovery of admissible evidence. It also seeks information potentially protected by  
15 the attorney-client privilege. It is unreasonably burdensome, oppressive, and overbroad.  
16 Without waiving these objections, Peak Loan Servicing, LLC, is the custodian of records for  
17 the security instruments that are the subject of the instant action. Peak Loan Servicing, LLC,  
18 may be contacted through counsel the Law Offices of Les Zieve.

19 **INTERROGATORY NO. 3:**

20       Did you have notice the Association was enforcing its lien against the Property before  
21 the date of the Association foreclosure sale?

22 **RESPONSE TO INTERROGATORY NO. 3:**

23       Objection. This interrogatory seeks information that is a matter of public record and  
24 that record speaks for itself. Without waiving said objection, while Responding Party had  
25 constructive notice of the foreclosure sale, Responding Party did not have proper notice that  
26 the Association was foreclosing on its super-priority portion because said notice did not specify  
27 the amount of the super-priority portion of the lien.



1 **INTERROGATORY NO. 4:**

2 If the answer to Interrogatory No. 3 is “yes,” for each time you obtained notice the  
3 Association was enforcing its lien against the Property, please identify how, when and by what  
4 method(s) you obtained notice the Association was enforcing its lien against the Property.

5 **RESPONSE TO INTERROGATORY NO. 4:**

6 Objection. Responding Party objects to this request on the grounds that this request  
7 seeks documents that are within the possession, custody and control of requesting party.  
8 Responding Party refers Propounding Party to the exhibits attached to its Complaint, the  
9 exhibits attached to its 16.1 Initial Disclosures, two sets of Supplemental Disclosures (Wyeth  
10 Ranch Community Association and Alessi & Koenig subpoena documents), and its Response  
11 to Request for Production No. 1 served contemporaneously herewith.

12 **INTERROGATORY NO. 5:**

13 If your answer to Interrogatory No. 3 is “yes,” please describe any action you or your  
14 predecessors in interest took relating to the Association lien, if any, after receiving notice that  
15 the Association was enforcing its lien against the Property.

16 **RESPONSE TO INTERROGATORY NO. 5:**

17 Due to the HOA’s failure to provide proper notice of the super priority amount to either  
18 Responding Party or its predecessor in interest, no action could be taken to tender payment of  
19 the super-priority portion of the HOA’s lien.

20 **INTERROGATORY NO. 6:**

21 If the answer to Interrogatory no. 3 is “no,” please describe in detail each and every  
22 step of the process you used to determine you did not have notice the Association was  
23 enforcing its lien against the Property before the date of the Association foreclosure sale,  
24 including what practices, policies and/or procedures upon which you relied during said  
25 process.

26 ///

27 ///

**RESPONSE TO INTERROGATORY NO. 6:**

Objection. This interrogatory is unreasonably burdensome, oppressive, and overbroad. It is also incomprehensible because Responding Party could not have taken any steps to ensure it did not have proper notice of the sale when it did not have such proper notice of that sale in the first place. Without waiving said objections, the public record speaks for itself, as the HOA lien, HOA's Notice of Default, and HOA's Notice of Trustee's Sale all do not specify the super-priority amount of the HOA's lien.

**INTERROGATORY NO. 7:**

Identify all communications between you and the Association and/or the Association's agents specific to the Property for the time period beginning when the Borrower applied for the loan secured by the Deed of Trust to present.

**RESPONSE TO INTERROGATORY NO. 7:**

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, overbroad, and seeks information that is equally available to the Propounding Party. Without waiving said objection, see Response to Interrogatory No. 4.

**INTERROGATORY NO. 8:**

Identify any and all communications between you and HUD specific to the First Deed of Trust and/or the underlying promissory note. This interrogatory is limited to time period beginning when the Borrower applied for the loan secured by the First Deed of Trust to present.

**RESPONSE TO INTERROGATORY NO. 8:**

Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome, oppressive, overbroad, and seeks information that is not reasonably calculated to lead to the discovery of relevant or admissible evidence. Without waiving said objections, this is not a HUD loan.

///

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1 **INTERROGATORY NO. 9:**

2 Please identify provisions of any pooling and servicing agreement and/or servicing  
3 guidelines applicable to your security interest in the Property that mention or are applicable to  
4 associations, association liens or association foreclosures. This interrogatory is limited to time  
5 period beginning when the Borrower applied for the loan secured by the First Deed of Trust to  
6 present.

7 **RESPONSE TO INTERROGATORY NO. 9:**

8 Objection. This interrogatory seeks information that is not reasonably calculated to lead  
9 to the discovery of relevant or admissible evidence, and seeks information that is equally  
10 available to the Propounding Party. Without waiving said objections, Responding Party has  
11 general servicing guidelines to protect the lien priority status but is unaware of any provision of  
12 the pooling and servicing agreement or servicing guidelines that specifically mention HOA  
13 liens or foreclosures. Responding Party reserves the right to supplement this response at a later  
14 date.

15 **INTERROGATORY NO. 10:**

16 If you allege that this loan is insured by FHA, please describe the terms of the policy,  
17 any claim(s) made under the policy and the status of such claim(s).

18 **RESPONSE TO INTERROGATORY NO. 10:**

19 Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome,  
20 oppressive, overbroad, and seeks information that is not reasonably calculated to lead to the  
21 discovery of relevant or admissible evidence. Without waiving said objections, this loan is not  
22 insured by FHA.

23 **INTERROGATORY NO. 11:**

24 Identify any and all of your practices, policies or procedures applicable to the Property  
25 for handling homeowners association liens. This interrogatory is limited to time period  
26 beginning when the Borrower applied for the loan secured by the First Deed of Trust to the  
27 date of the Association foreclosure sale.

1 **RESPONSE TO INTERROGATORY NO. 11:**

2       Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome,  
3 oppressive, overbroad, and seeks information that is not reasonably calculated to lead to the  
4 discovery of relevant or admissible evidence. Without waiving said objections, Responding  
5 Party has general practices, policies, and procedures to protect the lien priority status is  
6 unaware of any practices, policies or procedures that specifically relate to just HOA liens or  
7 foreclosures. Responding Party reserves the right to supplement this response at a later date.

8 **INTERROGATORY NO. 12:**

9       Please provide a detailed list of each and every monetary payment made by you to the  
10 Association and/or its agents relating to an Association lien on the Property. For each  
11 payment, please include the date of payment, amount of payment, the name and address of the  
12 person/entity to whom the payment was made, the method and manner the payment was made,  
13 the name of the person who made the payment, and whether the payment was accepted or  
14 rejected.

15 **RESPONSE TO INTERROGATORY NO. 12:**

16       Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome,  
17 oppressive, and overbroad. Without waiving these objections, Responding Party was unable to  
18 tender any payment to the HOA because it did not receive proper notice of the super-priority  
19 portion of the HOA's lien.

20 **INTERROGATORY NO. 13:**

21       For any monetary payment described in Interrogatory No. 12 that you allege was  
22 rejected, please describe in detail the facts and circumstances of any such rejection including  
23 the date, time, location, manner and individuals involved.

24 **RESPONSE TO INTERROGATORY NO. 13:**

25       See Response to Interrogatory No. 12.

26 ///

27 ///

1 **INTERROGATORY NO. 14:**

2 If you allege that you were unable to estimate the payoff amount or make a payment  
3 because of any action by the Association or its agents, please identify all such actions, the date  
4 and individuals involved.

5 **RESPONSE TO INTERROGATORY NO. 14:**

6 Responding Party cannot identify such actions by the HOA or its agents because the  
7 HOA's failure to provide the super priority payoff amount to Responding Party constitutes a  
8 non-action.

9 **INTERROGATORY NO. 15:**

10 Did you at any time attempt to contact the Borrower to obtain consent/authorization to  
11 obtain account specific information from the Association or its agents?

12 **RESPONSE TO INTERROGATORY NO. 15:**

13 Objection. This interrogatory seeks information that is not reasonably calculated to  
14 lead to the discovery of relevant or admissible evidence, as the HOA is required to provide  
15 notice of the super priority amount to Responding Party so it can protect its lien interest  
16 irrespective of whether or not Responding Party has obtained consent from the Borrower to  
17 obtain account specific information from the HOA. Without waiving said objection, no.

18 **INTERROGATORY NO. 16:**

19 Please describe in detail your alleged interest(s) in the promissory note secured by the  
20 First Deed of Trust for the time period beginning when the First Deed of Trust was recorded to  
21 present.

22 **RESPONSE TO INTERROGATORY NO. 16:**

23 Responding Party is the holder of the promissory note.

24 **INTERROGATORY NO. 17:**

25 Please describe in detail your alleged interest(s) in the First Deed of Trust for the time  
26 period beginning when the First Deed of Trust was recorded to present.

1 **RESPONSE TO INTERROGATORY NO. 17:**

2         Responding Party objects to this request on the grounds that this request seeks  
3 documents that are within the possession, custody and control of requesting party. Without  
4 waiving said objections, Responding Party was assigned beneficial interest in the Deed of  
5 Trust. Responding Party refers Propounding Party to the exhibits attached to its Complaint, the  
6 exhibits attached to its 16.1 Initial Disclosures [MBT0047-0051], and its Response to Request  
7 for Production No. 1 served contemporaneously herewith.

8 **INTERROGATORY NO. 18:**

9         If you allege you are entitled to enforce the promissory note secured by the First Deed  
10 of Trust, please describe the document(s) and/or transaction(s) that provide you authority to  
11 enforce the promissory note secured by the First Deed of Trust.

12 **RESPONSE TO INTERROGATORY NO. 18:**

13         Objection. This request seeks documents that are within the possession, custody and  
14 control of requesting party. Without waiving said objection, see Response to Interrogatory No.  
15 17.

16 **INTERROGATORY NO. 19:**

17         Please identify any other entity or person of which you are aware that currently claims  
18 an interest in the promissory note secured by the First Deed of Trust.

19 **RESPONSE TO INTERROGATORY NO. 19:**

20         None.

21 **INTERROGATORY NO. 20:**

22         Please identify any other entity or person of which you are aware that currently claims  
23 an interest in the First Deed of Trust.

24 **RESPONSE TO INTERROGATORY NO. 20:**

25         None.

26 ///

27 ///

1 **INTERROGATORY NO. 21:**

2 Please provide a detailed list of the previous entities/persons of which you aware that  
3 claimed an interest in the First Deed of Trust.

4 **RESPONSE TO INTERROGATORY NO. 21:**

5 Objection. Responding Party objects to this request on the grounds that this request  
6 seeks documents that are within the possession, custody and control of requesting party, and  
7 seeks information that is equally available to the Propounding Party. Without waiving said  
8 objections, see Response to No. 17.

9 **INTERROGATORY NO. 22:**

10 Please provide a detailed list of the previous entities/persons that claims an interest in  
11 the promissory note secured by the First Deed of Trust.

12 **REPONSE TO INTERROGATORY NO. 22:**

13 See Response to Interrogatory No. 17.

14 **INTERROGATORY NO. 23:**

15 Were you aware before you obtained an interest in the Property that the Property was  
16 located within the Association and was subject to the Association's declaration of covenants,  
17 conditions and restrictions?

18 **RESPONSE TO INTERROGATORY NO. 23:**

19 Objection. This interrogatory seeks information that is equally available to the  
20 Propounding Party. Without waiving said objection, the public record speaks for itself.

21 **INTERROGATORY NO. 24:**

22 When and how did you first become aware that the Borrower was delinquent on the  
23 assessments due to the Association?

24 **RESPONSE TO INTERROGATORY NO. 24:**

25 Objection. This interrogatory seeks information that is equally available to the  
26 Propounding Party and seeks documents that are within the possession, custody and control of  
27 requesting party. Without waiving said objection, see Response to Interrogatory No. 4.

**INTERROGATORY NO. 25:**

When did the Borrower first become delinquent on payments owed to you pursuant to the First Deed of Trust and underlying promissory note?

**RESPONSE TO INTERROGATORY NO. 25:**

October 1, 2008.

**INTERROGATORY NO. 26:**

Identify any communications, including correspondence, with the Borrower mentioning the Association and/or the Borrower's obligation to pay assessments to the Association.

**RESPONSE TO INTERROGATORY NO. 26:**

Objection. This interrogatory is unreasonably burdensome, oppressive, overbroad, and seeks information that is equally available to the Propounding Party. Without waiving said objection, Responding Party refers Propounding Party to its Response to Request for Production No. 1 served contemporaneously herewith.

**INTERROGATORY NO. 27:**

Identify any steps you took to ensure the Association received the assessments owed in relation to the Property.

**RESPONSE TO INTERROGATORY NO 27:**

Objection. This interrogatory seeks information that is not reasonably calculated to lead to the discovery of relevant or admissible evidence, as it is not Responding Party's responsibility to ensure that Borrower makes all payments to the HOA and a lender need only tender payment of the super priority amount after receiving proper notice of same to protect its lien interest. Without waiving said objection, see also Response to Interrogatory No. 5.

**INTERROGATORY NO. 28:**

Did you ever receive a trustee's sale guarantee or title report that referenced the Association's lien?

///

///



1 **RESPONSE TO INTERROGATORY NO. 28:**

2 Yes. Responding Party refers Propounding Party to its Response to Request for  
3 Production No. 1 served contemporaneously herewith.

4 **INTERROGATORY NO. 29:**

5 Did you, in the process of answering these interrogatories, the request for production of  
6 documents, and requests for admission served contemporaneously herewith, make a due and  
7 diligent search of all related documents, books, reports, memos, photos, writing, and computer  
8 records within your possession and control, in order to obtain information with respect to this  
9 action? If not, please explain why you have not undertaken such a search.

10 **RESPONSE TO INTERROGATORY 29:**

11 Yes.

12 **INTERROGATORY NO. 30:**

13 To the extent you answered any of the Requests for Admissions served upon you  
14 contemporaneously herewith, anything other than an unqualified "Admit" then for each and  
15 every such answer, whether you are aware of any information, facts, writings or evidence  
16 whatsoever relating to this litigation that either supports or contradicts your answer, and the  
17 identity of all persons who have any knowledge or information which either supports or  
18 contradicts each of your answers which are not an unqualified admission.

19 **RESPONSE TO INTERROGATORY NO. 30:**

20 Objection. This interrogatory is also unreasonably burdensome, oppressive, and  
21 overbroad. Without waiving these objections, Responding Party directs Propounding Party to  
22 the documents produced with Plaintiff's responses to request for production of documents, the  
23 documents attached as exhibits in Plaintiff's Complaint for judicial foreclosure of deed of trust,  
24 and the documents submitted in Plaintiff's initial disclosure of witnesses and documents  
25 pursuant to NRCP 16.1. Peak Loan Servicing, LLC, is the custodian of records for the security  
26 instruments that are the subject of the instant action. Peak Loan Servicing, LLC, may be  
27 contacted through counsel the Law Offices of Les Zieve.

1 **INTERROGATORY NO. 31:**

2 Identify any and all communications between you and FHFA specific to the First Deed  
3 of Trust and/or the underlying promissory note. This interrogatory is limited to time period  
4 beginning when the Borrower applied for the loan secured by the First Deed of Trust to  
5 present.

6 **RESPONSE TO INTERROGATORY NO. 31:**

7 Objection. This interrogatory is vague, ambiguous, is unreasonably burdensome,  
8 oppressive, overbroad, and seeks information that is not reasonably calculated to lead to the  
9 discovery of relevant or admissible evidence. Without waiving said objection, this is not a  
10 FHFA loan.

11  
12 DATED: November 25, 2015

LAW OFFICES OF LES ZIEVE

13 By: /s/ Sherry A. Moore  
14 Sherry A. Moore, Esq.  
15 Benjamin D. Petiprin, Esq.  
16 Attorneys for Plaintiff,  
17 MARCHAI, B.T.  
18  
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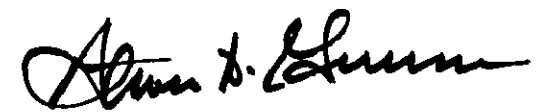
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(X) by serving the following parties electronically through CM/ECF/WIZNET as set forth below;

( ) by depositing a copy in the United States Mail postage prepaid to the parties listed below:

/s/ Jenny Humphrey  
Jenny Humphrey, an employee of  
Law Offices of Les Zieve

# **TAB 18**



CLERK OF THE COURT

1 **OPPM**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 MARCHAI, B.T., a Nevada business )  
14 trust, )

15 Plaintiff, )

16 vs. )

17 CRISTELA PEREZ, an individual; *et al.* )

18 Defendants. )

19 AND ALL RELATED CLAIMS )

Case No.: A-13-689461-C  
Dept. No. VII

20 **MARCHAI, B.T.'S OPPOSITION TO COUNTER-MOTIONS TO**  
21 **STRIKE PURSUANT TO NRCP RULE 37(d) AND EIGHTH**  
22 **JUDICIAL DISTRICT COURT RULE 2.20(a)**

23 **I. INTRODUCTION**

24 The proverb "Those who live in glass houses should not throw stones" is  
25 particularly apt after reviewing SFR Investment Pool 1, LLC's "Counter-Motions" to  
26 Strike Pursuant to NRCP 37(d) and Eighth Judicial District Court Rule 2.20(a).  
27 SFR's countermotion has two components: one purely procedural, and the second a  
28 discovery dispute. First, SFR argues that this Court should strike any pages over

1 thirty from Marchai, B.T.'s Motion for Summary Judgment because even though  
2 Marchai included a table of contents and table of authorities as required by EDCR  
3 2.20(a), Marchai inadvertently did not request leave of Court to file an overlength  
4 brief. Second, SFR asks this Court to strike two declarations—one from Chaim  
5 Freeman, Marchai's trustee, and the other from Scott Sawyer, an employee of Peak  
6 Loan Servicing who acts as Marchai's servicer—because Marchai did not present a  
7 witness at a noticed Rule 30(b)(6) deposition and did not serve a verification with its  
8 answers to interrogatories.

9       Although Marchai already addressed SFR's argument concerning the filing of  
10 an overlength brief,<sup>1</sup> SFR's procedural argument is the most hypocritical given  
11 SFR's multiple procedural failings. For example, SFR filed its reply brief on  
12 February 9, 2016, but because of the intervening President's Day holiday, SFR's  
13 deadline to file its reply brief was February 8, 2016. Thus, the very brief in which  
14 SFR criticizes Marchai for not complying with EDCR 2.20, also fails to comply with  
15 EDCR 2.20 and was filed one day late. In addition, SFR attempted to file "counter-  
16 motions" in a reply brief, even though EDCR 2.20 authorizes the filing of a counter-  
17 motion only in an opposition and Nevada law provides that a party cannot raise  
18 new arguments for the first time in a reply. SFR also violated EDCR 2.34  
19 because—even though it had two months to do so—it failed to file its motion seeking  
20 discovery sanctions with the Discovery Commissioner before filing it with this  
21 Court.

22       Nevertheless, even if this Court overlooks SFR's own procedural missteps,  
23 this Court should not sanction Marchai by striking any testimony because Marchai  
24 did not willfully fail to comply with a court order or halt the adversary process.  
25 Because there was no order compelling Marchai to appear for a deposition, Marchai  
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27 <sup>1</sup> See Marchai B.T.'s Reply in Supp. of Mot. for Summ. J. at 1–2 n.1 (Feb. 8, 2016).

1 could not have willfully failed to comply with an order. In addition, Marchai's non-  
2 appearance did not halt the adversary process. Marchai's representative did not  
3 appear for his deposition due to a misunderstanding between Marchai and its prior  
4 counsel. Marchai's representative understood that its prior counsel would prepare  
5 him for the deposition, but prior counsel never made any such arrangements, partly  
6 because new counsel substituted into the case on the day of the deposition and did  
7 not know about the deposition until the day before. In addition, Marchai produced  
8 several documents it obtained through subpoenas duces tecum to Alessi & Koenig,  
9 LLC and Wyeth Ranch Community Association that essentially confirm the  
10 testimony set forth in Mr. Sawyer's and Mr. Freeman's declaration. Thus, SFR  
11 cannot claim surprise or ignorance since it had these documents in its possession for  
12 months.

13 Finally, even if the Court strikes Mr. Sawyer's and Mr. Freeman's  
14 declarations and limits Marchai's motion for summary judgment to the first thirty  
15 pages, SFR has not, did not, and cannot refute Marchai's argument that the prior  
16 owner, Cristela Perez, satisfied the superpriority portion of the lien when she paid  
17 far in excess of nine months of association dues following Wyeth Ranch's institution  
18 of an action to enforce the lien. Accordingly, Wyeth Ranch could only have  
19 foreclosed upon a subordinate lien and, to the extent SFR even purchased Wyeth  
20 Ranch's interest, it purchased subject to Marchai's deed of trust.

21 Consequently, this Court should deny the countermotions, deny SFR's motion  
22 for summary judgment, and enter summary judgment in favor of Marchai.

## 23 II. STATEMENT OF FACTS

24 On November 18, 2015, SFR's counsel, Diana Cline Ebron, notified Marchai's  
25 prior counsel, Benjamin Petiprin, that she could conduct a deposition of Marchai's  
26 person most knowledgeable on December 2, 2015, at 3:00 p.m., which was one day  
27

1 past the discovery cut-off.<sup>2</sup> Mr. Petiprin responded that same day advising that  
2 December 2nd at 3:00 p.m. was an agreeable date for the deposition.<sup>3</sup> On November  
3 18, 2015, Chaim Freeman, Marchai, B.T.'s trustee, learned that SFR had set the  
4 deposition of Marchai's person most knowledgeable for December 2, 2015 and that  
5 counsel would contact him to prepare him for his deposition.<sup>4</sup> Mr. Petiprin never  
6 contacted Mr. Freeman to arrange a date to prepare him for his deposition.<sup>5</sup>

7 On November 30, 2015, Marchai decided to retain David J. Merrill, P.C. to  
8 represent its interests in this action.<sup>6</sup> On December 1, 2015, Mr. Merrill learned,  
9 for the first time, that SFR had noticed Marchai's deposition for December 2, 2015.<sup>7</sup>  
10 Mr. Merrill also learned that Mr. Petiprin had not contacted Mr. Freeman to  
11 prepare him for the deposition scheduled the very next day and, because of this, Mr.  
12 Freeman did not understand that SFR still intended to proceed with the  
13 deposition.<sup>8</sup> Thus, Marchai asked to reschedule the deposition as Mr. Freeman was  
14 traveling to Florida on December 2nd.<sup>9</sup> Mr. Petiprin contacted Ms. Ebron to notify  
15 her that Mr. Freeman could not attend the deposition on December 2, and asked  
16  
17  
18

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19 <sup>2</sup> See Email from Ebron to Petiprin (Nov. 18, 2015), attached as Ex. A-3 to Reply in Supp. of  
20 Mot. for Summ. J. & Counter-mot. to Strike Pursuant to NRCP Rule 37(d) & EDCR 2.20(a) (Feb. 9,  
2016).

21 <sup>3</sup> See Email from Petiprin to Ebron (Nov. 18, 2015), attached as Ex. A-3 to Reply in Supp. of  
22 Mot. for Summ. J. & Counter-mot. to Strike Pursuant to NRCP Rule 37(d) & EDCR 2.20(a).

23 <sup>4</sup> See Decl. of Chaim Freeman ¶ 2, attached as Ex. 1.

24 <sup>5</sup> See *id.* ¶ 3.

25 <sup>6</sup> See Decl. of David J. Merrill ¶ 2, attached as Ex. 2.

26 <sup>7</sup> See Merrill Decl. ¶ 3.

27 <sup>8</sup> See *id.* ¶ 4; see also Freeman Decl. ¶ 3.

28 <sup>9</sup> See Freeman Decl. ¶ 4.



1 Ms. Ebron to contact Mr. Merrill to reschedule.<sup>10</sup> SFR refused to reschedule at that  
2 time, and insisted on going forward with a notice of non-appearance.<sup>11</sup>

3 At the time of the scheduled deposition, Mr. Merrill and Sherry Moore, an  
4 attorney from Mr. Petiprin's office, attended the deposition.<sup>12</sup> Ms. Ebron noted the  
5 non-appearance of Marchai's person most knowledgeable.<sup>13</sup> Mr. Merrill stated on  
6 the record that he was in the process of substituting into the case, that SFR knew  
7 on December 1 that Marchai's representative could not attend the deposition, and  
8 that Marchai is willing to reschedule to a mutually convenient date.<sup>14</sup> Ms. Moore  
9 stated that she was notified on December 1 that Mr. Merrill would substitute into  
10 the case, which is one of the reasons was Marchai's representative was not  
11 present.<sup>15</sup>

12 At the conclusion of the deposition, counsel for Marchai and SFR discussed  
13 alternative dates for Marchai's deposition.<sup>16</sup> SFR's counsel proposed December 10th  
14 or 11th, but Mr. Freeman was not available on those days.<sup>17</sup> On December 7, 2015,  
15 Mr. Merrill sent Ms. Ebron an e-mail informing her that neither December 10 nor  
16

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17  
18 <sup>10</sup> See email from Petiprin to Ebron (Dec. 1, 2015), attached as Ex. A-3 to Reply in Supp. of Mot.  
for Summ. J. & Counter-mot. to Strike Pursuant to NRCP Rule 37(d) & EDCR 2.20(a).

19 <sup>11</sup> See email from Ebron to Petiprin & Merrill (Dec. 1, 2015), attached as Ex. A-3 to Reply in  
20 Supp. of Mot. for Summ. J. & Counter-mot. to Strike Pursuant to NRCP Rule 37(d) & EDCR 2.20(a).

21 <sup>12</sup> See Dep. of 30(b)(6) Marchai, B.T. at 2:1-12 (Dec. 2, 2015), attached as Ex. A-1 to Reply in  
22 Supp. of Mot. for Summ. J. & Counter-mot. to Strike Pursuant to NRCP Rule 37(d) & EDCR 2.20(a).

23 <sup>13</sup> See *id.* at 4:8-24.

24 <sup>14</sup> See *id.* at 5:4-15.

25 <sup>15</sup> See *id.* at 5:16-20.

26 <sup>16</sup> See Merrill Decl. ¶¶ 6-7; see also email from Merrill to Ebron (Dec. 7, 2015), attached as Ex.  
2-A.

27 <sup>17</sup> See Merrill Decl. ¶ 6; see also Ex. 2-A.

December 11 would work for the deposition, but asked Ms. Ebron if December 14 or 15 were available.<sup>18</sup> Mr. Merrill never received a response to his e-mail.<sup>19</sup>

### III. ARGUMENT

#### A. SFR's brief violates EDCR 2.20(h) because SFR filed it one day late.

SFR is quick to criticize Marchai for partially complying with EDCR 2.20(a), yet in a cruel twist of irony, SFR has no justification for completely failing to comply with EDCR 2.20(h). Specifically, SFR filed its reply within five days of the hearing without obtaining court approval.

EDCR 2.20(h) states:

A moving party may file a reply memorandum of points and authorities *not later than* 5 days before the matter is set for hearing. A reply memorandum *must not be filed* within 5 days of the hearing . . . unless court approval is first obtained.<sup>20</sup>

When the time period prescribed by a rule is less than eleven days, then the Court must exclude Saturdays, Sundays, and non-judicial days in its computation.<sup>21</sup>

Here, the Court set a hearing on SFR's Motion for Summary Judgment for Tuesday, February 16, 2016. Normally, a movant would have until February 9, 2016, to file a reply in support of the motion, which consists of five days, excluding Saturday and Sunday. However, Monday, February 15, 2016 is President's Day, a non-judicial day. Thus, the deadline for SFR to file its reply in support of its motion for summary judgment was *Monday, February 8, 2016*.<sup>22</sup> Here, however, SFR filed its reply on February 9, 2016, one day late, and did not obtain court approval before

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<sup>18</sup> See *id.*

<sup>19</sup> See Merrill Decl. ¶ 8.

<sup>20</sup> EDCR 2.20(h) (emphasis added).

<sup>21</sup> N.R.C.P. 6(a).

<sup>22</sup> See EDCR 2.20(h) & N.R.C.P. 6(a).

1 filing the reply.<sup>23</sup> Marchai, on the other hand, timely filed its reply on February 8,  
2 2016.<sup>24</sup> Accordingly, if the Court is inclined to strike any pages over thirty from  
3 Marchai's motion for summary judgment in accordance with EDCR 2.20(a), the  
4 Court should also strike SFR's reply as untimely and not filed in compliance with  
5 EDCR 2.20(h).

6  
7 **B. SFR's "countermotion" violates EDCR 2.20(f), which only**  
8 **recognizes the filing of a countermotion with an opposition,**  
9 **not a reply.**

EDCR 2.20(f) states, in pertinent part:

10 *An opposition to a motion which contains a motion related to the same*  
11 *subject matter will be considered as a counter-motion.*<sup>25</sup>

12 Notably, EDCR 2.20 does not recognize the filing of a counter-motion with a reply  
13 brief.<sup>26</sup> That is not surprising since under Nevada law parties cannot raise issues  
14 for the first time in a reply brief.<sup>27</sup> Here, SFR has violated EDCR 2.20(f) by  
15 improperly filing a "counter-motion" with a reply brief.<sup>28</sup> Accordingly, Marchai  
16 respectfully requests that the Court deny the countermotions as procedurally  
17 improper.

18 **C. SFR's "counter-motion" for sanctions under N.R.C.P. 37(d)**  
19 **violates EDCR 2.34(a), which required SFR to first present the**  
20 **motion to the Discovery Commissioner.**

N.R.C.P. 37(d) grants the Court authority to impose sanctions if a party fails  
to appear for a properly noticed deposition or for failing to respond to

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21 <sup>23</sup> See Reply in Supp. of Mot. for Summ. J. & Counter-Mots. to Strike Pursuant to NRCP Rule  
22 37(d) & EDCR 2.20(a) (Feb. 9, 2016); *see also* EDCR 2.20(h).

23 <sup>24</sup> See Marchai, B.T.'s Reply in Supp. of Mot. for Summ. J. (Feb. 8, 2016).

24 <sup>25</sup> EDCR 2.20(f) (emphasis added).

25 <sup>26</sup> *See generally* EDCR 2.20.

26 <sup>27</sup> *See Nevada v. Montero*, 124 Nev. 573, 577, 188 P.3d 47, 49 n.9 (2008).

27 <sup>28</sup> *See* EDCR 2.20(f); *see also Montero*, 124 Nev. at 577, 188 P.3d at 49 n.9.

1 interrogatories.<sup>29</sup> However, EDCR 2.34(a) provides that “[u]nless otherwise  
2 ordered, *all discovery disputes* must first be heard by the discovery commissioner.”<sup>30</sup>  
3 Here, SFR is seeking *discovery sanctions* in accordance with N.R.C.P. 37(d).<sup>31</sup>  
4 Despite the fact that Marchai served its answers to interrogatories on November 25,  
5 2015, and did not have a representative attend the deposition scheduled for  
6 December 2, 2015—both of which occurred more than two months ago—SFR never  
7 filed a motion for sanctions with the Discovery Commissioner. Accordingly, this  
8 Court should refuse to consider SFR’s counter-motion under N.R.C.P. 37(d), but  
9 should instead instruct SFR to file a motion with the Discovery Commissioner.<sup>32</sup>

10  
11 **D. Even if this Court considers the late-filed, improper “counter-**  
12 **motions” without giving the Discovery Commissioner the right**  
13 **to hear the dispute first, this Court should not strike the**  
14 **Sawyer or Freeman declarations because the failure to appear**  
15 **for the deposition was not the willful violation of a court order,**  
16 **nor did it halt the adversary process.**

17 Although N.R.C.P. 37(d) authorizes a court to impose sanctions when a party  
18 does not appear for a scheduled deposition, the Nevada Supreme Court has  
19 cautioned that “sanctions may only be imposed where there has been willful  
20 noncompliance with a court order or where the adversary process has been halted  
21 by the actions of the unresponsive party.”<sup>33</sup> Here, Marchai did not willfully fail to  
22 comply with a court order nor was the adversary process halted as Marchai made  
23 efforts to submit to a deposition well before the dispositive motion deadline.

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24 <sup>29</sup> See N.R.C.P. 37(d).

25 <sup>30</sup> See EDCR 2.34(a) (emphasis added).

26 <sup>31</sup> See Reply in Supp. of Mot. for Summ. J. & Counter-mots. to Strike Pursuant to N.R.C.P.  
27 37(d) & EDCR 2.20(a) at 2:25–28 (Feb. 9, 2016).

28 <sup>32</sup> See EDCR 2.34(a). In addition, both EDCR 2.34(d) and N.R.C.P. 37(d) required SFR to meet  
and confer before filing a motion for sanctions with respect to the lack of a verification on the  
answers to interrogatories. SFR has also failed to comply with this procedural rule.

<sup>33</sup> *GNLV Corp. v. Service Control Corp.*, 111 Nev. 866, 869, 900 P.2d 323, 325 (1995).

1 First, there was no court order requiring Marchai to attend a deposition on  
2 December 2, 2015, with which Marchai willfully failed to comply.

3 Second, the adversary process was not halted from Mr. Freeman's inability to  
4 appear for deposition on December 2, 2015. Mr. Freeman did not appear for the  
5 deposition because he was never contacted by prior counsel to prepare him for his  
6 deposition. Thus, he did not understand that the deposition would go forward on  
7 December 2nd until it was too late. Nevertheless, Marchai offered additional dates  
8 for SFR to take Mr. Freeman's deposition, but SFR never responded.

9 Further, the information contained in Mr. Freeman's declaration was readily  
10 available through the production of documents by Alessi & Koenig. Mr. Freeman's  
11 declaration simply notes that Marchai had no knowledge of Wyeth Ranch  
12 Homeowners Association's lien or efforts to foreclose until after the sale occurred.<sup>34</sup>  
13 SFR had to know this however, because none of the mailings that Alessi & Koenig  
14 produced in connection with this action show a mailing to Marchai.<sup>35</sup> Marchai  
15 produced copies of those documents to SFR on November 24, 2015.<sup>36</sup>

16 Likewise, the information contained in Mr. Sawyer's declaration was also  
17 available in documents produced to SFR. Specifically, Mr. Sawyer's declaration  
18 details his efforts to contact Alessi & Koenig asking them to postpone the  
19 foreclosure so that Marchai could tender payment of the lien.<sup>37</sup> However, Wyeth  
20

21  
22  
23 <sup>34</sup> See Decl. of Chaim Freeman ¶ 2, attached as Ex. 2 to Marchai, B.T.'s Opp'n to SFR  
Investments Pool 1, LLC's Mot. for Summ. J. (Feb. 3, 2016).

24 <sup>35</sup> See Ex. A-11 to SFR Investments Pool 1, LLC's Mot. for Summ. J.

25 <sup>36</sup> See Decl. of David J. Merrill ¶¶ 4-5 (Jan. 14, 2016), attached as Ex. 1 to App. of Exs. to  
26 Marchai B.T.'s Mot. for Summ. J. (Jan. 14, 2016).

27 <sup>37</sup> See Sawyer Decl. ¶¶ 2-6 (Feb. 3, 2016), attached as Ex. 1 to Marchai, B.T.'s Opp'n to SFR  
Investments Pool 1, LLC's Mot. for Summ. J. (Feb. 3, 2016).

1 Ranch produced e-mails that memorialize these conversations.<sup>38</sup> Marchai produced  
2 those documents to SFR on October 19, 2015.<sup>39</sup>

3 Thus, SFR had all of the information set forth in the declarations available to  
4 it through the documents produced in the case and, if it needed further clarification,  
5 had the opportunity to depose Mr. Freeman well in excess of the dispositive motion  
6 deadline. Because Marchai did not refuse to comply with a court order and its  
7 actions did not halt the adversary proceedings, sanctions are not warranted.<sup>40</sup>

8  
9 **E. Even if this Court disregards Mr. Freeman and Mr. Sawyer's**  
10 **declarations and limits its review to the first thirty pages of**  
11 **Marchai's motion, this Court must still grant summary**  
12 **judgment in favor of Marchai and against SFR because Perez**  
13 **satisfied the superpriority portion of the lien when she paid far**  
14 **in excess of nine months of association dues following the**  
15 **institution of an action to enforce the lien.**

16 SFR challenges Mr. Freeman's and Mr. Sawyer's declarations that Marchai  
17 attached to Marchai, B.T.'s Opposition to SFR Investments Pool 1, LLC's Motion for  
18 Summary Judgment.<sup>41</sup> In addition, SFR asks this Court to strike any pages over  
19 thirty in Marchai's motion for summary judgment.<sup>42</sup> However, on pages 26 through  
20 28 of Marchai's motion for summary judgment (thus within the thirty page limit),  
21 Marchai argued, based upon facts set forth in pages 7 through 20 that SFR *does not*  
22 *dispute*, that Perez *paid* well in excess of nine months of association dues following  
23 Wyeth Ranch's institution of an action to enforce its lien.<sup>43</sup> Marchai does not rely

24  
25 <sup>38</sup> See Merrill Decl. ¶¶ 4–6 (Feb. 3, 2016), attached as Ex. 3 to Marchai, B.T.'s Opp'n to SFR  
26 Investments Pool 1, LLC's Mot. for Summ. J. (Feb. 3, 2016); see also Ex. 3-A to Marchai, B.T.'s Opp'n  
27 to SFR Investments Pool 1, LLC's Mot. for Summ. J.

28 <sup>39</sup> See Merrill Decl. ¶ 5 (Feb. 3, 2016).

<sup>40</sup> See *GNLV Corp.*, 111 Nev. at 869, 900 P.2d at 325.

<sup>41</sup> See Reply in Supp. of Mot. for Summ. J. & Counter-mots. to Strike Pursuant to N.R.C.P.  
37(d) & EDCR 2.20(a) at 3:5–7 (Feb. 9, 2016).

<sup>42</sup> See *id.* at 2:12–21.

<sup>43</sup> See Marchai, B.T.'s Mot. for Summ. J. at 27:14–28:6 (Jan. 14, 2016).

1 upon either Mr. Freeman's or Mr. Sawyer's declarations to support this argument.<sup>44</sup>

2 Thus, any order by this Court on the counter-motions *have no effect upon this*  
3 *argument. Nevertheless, not once in SFR's sixty-seven pages of briefs on the*  
4 *competing motions for summary judgment does SFR factually or legally*  
5 *dispute Marchai's argument that Perez satisfied the superpriority portion*  
6 *of the lien and, therefore, SFR, to the extent it acquired anything, could*  
7 *only have acquired an interest subject to Marchai's deed of trust.*

8 Accordingly, this Court should quickly dispense with SFR's attempt to make an  
9 issue of non-issues and grant summary judgment in favor of Marchai based upon  
10 the simple fact that Wyeth Ranch could only have foreclosed on a lien subordinate  
11 to Marchai's deed of trust once Perez paid the superpriority portion of the lien.<sup>45</sup>

#### 12 IV. CONCLUSION

13 When parties, like SFR, stray from arguing the merits of the dispute and  
14 instead focus upon alleged procedural issues, it is usually a sign that the party, like  
15 SFR here, knows it will lose and is simply hoping to generate some insignificant  
16 appealable issue to distract this Court, and hopefully the Nevada Supreme Court,  
17 from the real issues in the case. Simply put, SFR cannot win. Perez satisfied the  
18 superpriority portion of the lien, leaving only a subordinate lien for Wyeth Ranch to  
19 foreclose. Thus, Marchai's deed of trust survived Wyeth Ranch's foreclosure. SFR's  
20 "counter-motions" to strike—which are not only improper, untimely, and lack any  
21 justification for sanctions—ultimately will have no bearing upon this Court's  
22 conclusion that summary judgment in favor of Marchai and against SFR is  
23

---


24 <sup>44</sup> See *id.*; see also Exs. 1 & 2 to Marchai, B.T.'s Opp'n to SFR Investments Pool 1, LLC's Mot.  
25 for Summ. J. (Feb. 3, 2016).

26 <sup>45</sup> See *Prop. Plus Investments, LLC v. Bank of Am., N.A.*, Case No. A-13-692200-C, Decision and  
27 Order at 5:8–17 (July 14, 2015) (Bell, J.) (granting summary judgment and noting that payment or  
28 tender of the superpriority portion of the lien discharges that portion of the lien).

1 appropriate because Marchai's deed of trust survived Wyeth Ranch's foreclosure of  
2 its *purely subordinate lien*. Accordingly, Marchai respectfully requests that this  
3 Court deny SFR's "counter-motions" and SFR's motion for summary judgment and,  
4 instead, grant Marchai's motion for summary judgment.

5 DATED this 15th day of February 2016.

6 DAVID J. MERRILL, P.C.

7  
8 By:   
9 DAVID J. MERRILL  
10 Nevada Bar No. 6060  
11 10161 Park Run Drive, Suite 150  
12 Las Vegas, Nevada 89145  
13 (702) 566-1935  
14 Attorneys for MARCHAI, B.T.  
15  
16  
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**CERTIFICATE OF SERVICE**

I hereby certify that on the 15th day of February 2016, a copy of the foregoing Marchai, B.T.'s Opposition to Counter-motions to Strike Pursuant to NRCP 37(d) and Eighth Judicial District Court Rule 2.20(a) was served electronically to the following through the Court's electronic service system:

---

**Howard Kim & Associates**

Contact	Email
Diana S. Cline	<u>diana@hkimlaw.com</u>
Sarah Felts	<u>sarah@hkimlaw.com</u>
Tomas Valerio	<u>tomas@hkimlaw.com</u>

---

**Howard Kim & Associates**

Contact	Email
E-Service for Howard Kim	<u>eservice@hkimlaw.com</u>

---

  
An employee of David J. Merrill, P.C.

# **EXHIBIT 1**

## **DECLARATION OF CHAIM FREEMAN**

**I, Chaim Freeman, declare as follows:**

**1. I am the trustee of Marchai, B.T., a business trust formed under the laws of the State of Nevada, plaintiff in *Marchai, B.T. v. Perez*, Case No. A-13-689461-C, which is pending in the Eighth Judicial District Court, Clark County, Nevada. I have made this declaration in support of Marchai, B.T.'s Opposition to Counter-Motions to Strike Pursuant to NRCP Rule 37(d) and Eighth Judicial District Court Rule 2.20(a). I have personal knowledge of and am competent to testify to the facts set forth herein.**

**2. On November 18, 2015, I learned that SFR Investments Pool 1, LLC had set the deposition of Marchai's person most knowledgeable for December 2, 2015 at 3:00 p.m. I also learned that my counsel, Benjamin Petiprin, would contact me to arrange a date and time to prepare me for the deposition. However, between November 18, 2015 and December 1, 2015, Mr. Petiprin never contacted me to arrange a time to prepare me for my deposition.**


**3. As I never received any further communication about the deposition or preparation for the deposition, I did not understand that it would proceed as scheduled.**

**4. Unfortunately, on December 2, 2015, I was traveling to Florida and unable to attend the deposition.**

**I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.**

EXECUTED on this 14<sup>th</sup> day of February 2016 in Los Angeles,

California.

  
\_\_\_\_\_  
CHAIM FREEMAN

## **EXHIBIT 2**

## **DECLARATION OF DAVID J. MERRILL**

I, David J. Merrill, declare as follows:

1. I am a shareholder of David J. Merrill, P.C., attorney of record for Marchai, B.T. in *Marchai, B.T. v. Perez*, Case No. A-13-689461-C, which is pending in the Eighth Judicial District Court, Clark County, Nevada. I have made this declaration in support of Marchai, B.T.'s Opposition to Counter-motions to Strike Pursuant to NRCP Rule 37(d) and Eighth Judicial District Court Rule 2.20(a). I have personal knowledge of and am competent to testify to the facts set forth herein.

2. On November 30, 2015, I was contacted by a representative of Marchai about my firm representing Marchai in *Marchai, B.T. v. Perez*. As a result of this contact, Marchai decided to retain my firm.

3. On December 1, 2015, I received a telephone call from Benjamin Petiprin, prior counsel for Marchai, in which Mr. Petiprin informed me that SFR had noticed a deposition for the person most knowledgeable for Marchai for December 2, 2015. This took me by surprise since it was my understanding that the discovery cut-off was December 1, 2015.

4. Following my conversation with Mr. Petiprin on December 1, 2015, I learned that Mr. Petiprin had not prepared or arranged to prepare Chaim Freeman, Marchai's trustee, for the following day's deposition. Because of this, it is my understanding that Mr. Freeman did not expect his deposition to proceed on December 2, 2015.

5. When SFR Investments Pool 1, LLC's counsel refused to reschedule the deposition and insisted on making a notice of non-appearance, I decided to show up at the deposition and express Marchai's willingness to present a witness at a mutually convenient date and time. Consequently, I appeared for the deposition on December 2, 2015 at 3:00 p.m.

6. Immediately following the notice of non-appearance, I had a conversation with Diane Cline Ebron about rescheduling Mr. Freeman's deposition. Ms. Cline offered dates on December 10 or 11, 2015.

7. On December 7, 2015, I sent Ms. Ebron an e-mail informing her that neither December 10 nor 11 worked with our schedule, but that we could be available on December 14 or 15. Attached to this declaration as Exhibit A is a true and correct copy of my e-mail to Ms. Ebron.

8. I never received a response to my December 7, 2015 e-mail.

I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED on this 12th day of February 2016 in Las Vegas, Nevada.

  
\_\_\_\_\_  
DAVID J. MERRILL

# **EXHIBIT A**



From: **David J. Merrill** david@djmerrillpc.com  
Subject: **Marchai, B.T. v. Perez: Deposition dates**  
Date: **December 7, 2015 at 8:17 PM**  
To: **Diana Cline** diana@hkmlaw.com



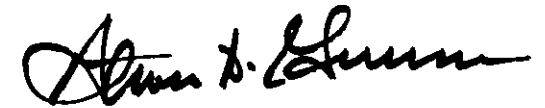
Diana,

I checked with my client and he is not available the 10th or the 11th, but I believe he is available the 14th or 15th. Do either of those dates work for you?

David J. Merrill  
David J. Merrill, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 566-1935 (Work)  
(702) 577-0268 (Mobile)  
(702) 993-8841 (Fax)  
[david@djmerrillpc.com](mailto:david@djmerrillpc.com)

This e-mail message is a confidential communication from David J. Merrill, P.C. and is intended only for the named recipient(s) above and may contain information that is a trade secret, proprietary, privileged, attorney work product, or otherwise protected by law. If you have received this message in error, or are not the named or intended recipient(s), please immediately notify the sender at (702) 566-1935 and delete this e-mail message and any attachments from your workstation and network mail system.

# **TAB 19**



CLERK OF THE COURT

1 CSERV  
2 DAVID J. MERRILL  
3 Nevada Bar No. 6060  
4 DAVID J. MERRILL, P.C.  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 DISTRICT COURT  
12 CLARK COUNTY, NEVADA

13 MARCHAI, B.T., a Nevada business  
14 trust,

15 Plaintiff,

16 vs.

17 CRISTELA PEREZ, an individual; *et al.*

18 Defendants.

Case No.: A-13-689461-C  
Dept. No. XXVI

19 AND ALL RELATED CLAIMS

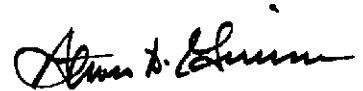
20 CERTIFICATE OF SERVICE

21 In accordance with NRS § 30.130, I hereby certify that on the 20th day of  
22 January 2016, a copy of Marchai, B.T.'s Motion for Summary Judgment and  
23 Appendix of Exhibits to Marchai, B.T.'s Motion for summary judgment was served  
24 upon the Honorable Adam Paul Laxalt, Attorney General of the State of Nevada,  
25 Office of the Attorney General, 100 North Carson Street, Carson City, Nevada  
26 89701.

27   
28 An employee of David J. Merrill, P.C.

DAVID J. MERRILL, P.C.  
10161 PARK RUN DRIVE, SUITE 150  
LAS VEGAS, NEVADA 89145  
(702) 566-1935

# **TAB 20**



CLERK OF THE COURT

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARCHAI B.T.,

Plaintiff,

vs.

CRISTELA PEREZ; SFR INVESTMENTS POOL 1, LLC;  
U.S. BANK NATIONAL ASSOCIATION, N.D.; DOES I  
through X; and ROE CORPORATIONS 1 through 10,  
inclusive,

Defendants.

Case No. A-13-689461-C

Dep't No. VII

And all related actions.

**DECISION AND ORDER**

This case arises from a homeowners' association's (HOA) non-judicial foreclosure sale of residential real property located at 7119 Wolf Rivers Avenue in Las Vegas, Nevada. Now before the Court are Defendant SFR Investments Pool 1 ("SFR") and Plaintiff Marchai's Motions for Summary Judgment and SFR's Motion to Strike. These matters came before the Court on February 16, 2015. The Court denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.

**I. Factual Background**

The residential property in this case, the Wolf Rivers property, is subject to the terms of the Wyeth Ranch Community Association's ("the HOA") Declaration of Covenants, Conditions and Restrictions (CC&Rs). In 2004, Cristela Perez entered into two loan agreements with Countrywide Home Loans in order to purchase the property. The loans were secured by two deeds of trust on the Wolf Rivers property. Perez refinanced these two

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

1 loans through an agreement with CMG Mortgage. CMG Mortgage recorded a deed of trust  
2 against the property on November 9, 2005.

3 **A. First Notice of Delinquent Assessment Lien**

4 The HOA recorded its first Notice of Delinquent Assessment Lien on October 8,  
5 2008. At that time, the HOA collected \$140.00 per month in association dues. At the  
6 beginning of 2009, the HOA increased its monthly dues to \$152.50. The HOA recorded a  
7 Notice of Default and Election to Sell on January 7, 2009. The HOA recorded a Notice of  
8 Trustee's Sale on January 14, 2010. In 2010, the HOA increased its monthly dues to  
9 \$159.50.

10 On February 3, 2010, the HOA sent a demand letter to Perez. On February 12, 2010,  
11 Perez paid the HOA \$900.00. On April 13, 2010, the HOA proposed a payment plan to  
12 Perez. On May 11, 2010, Perez paid the HOA \$300.00. Perez failed, however to comply  
13 with the payment plan.

14 On July 13, 2010, the HOA mailed a Pre-Notice of Trustee Sale and Notice of Default  
15 and Election to Sell to Perez. Perez paid the HOA \$645.00 between August 2 and  
16 November 30, 2010. The HOA recorded a Rescission of Notice of Sale on March 9, 2011.  
17 Perez paid the HOA \$160.00 on March 10, 2011.

18 On March 29, 2011, the HOA recorded a second Notice of Sale. On July 27, 2011, the  
19 HOA sent Perez a letter stating Perez was in breach of the payment plan. On August 4,  
20 2011, Perez paid the HOA \$165.00.

21 **B. Second Notice of Delinquent Assessment Lien**

22 On December 20, 2011, the HOA recorded a second Notice of Delinquent  
23 Assessment lien. The HOA recorded a Notice of Default and Election to Sell on February  
24 28, 2012. Perez paid the HOA \$760.00 between March 19 and July 26, 2012. CMG  
25 Mortgage assigned its deed of trust to CitiMortgage in May of 2012. CitiMortgage assigned  
26 the deed to U.S. Bank in July of 2012. The HOA recorded a Notice of Trustee's Sale on  
27 October 31, 2012. Perez paid the HOA \$300.00 on November 13, 2012.  
28

1 In March of 2013, U.S. Bank assigned its deed of trust to Marchai. Neither U.S.  
2 Bank nor Marchai recorded the transfer of interest for approximately five months. During  
3 this gap, U.S. Bank did not inform Marchai of the HOA's foreclosure proceedings. The  
4 HOA mailed a Notice of Trustee's sale to CMG Mortgage, CitiMortgage, and U.S. Bank on  
5 July 29, 2013. Marchai recorded its interest in the Wolf Rivers property on August 12,  
6 2013. Marchai's loan servicer received notice of the trustee's sale on August 27, 2013, the  
7 day before the sale was scheduled to take place. The servicer contacted the HOA's trustee  
8 conducting the sale, Alessi & Koenig, to ask that the sale be postponed. The HOA declined.

9 Alessi & Koenig as trustee for the HOA conducted a foreclosure sale of the Wolf  
10 Rivers property on August 28, 2013. SFR purchased the property for \$21,000.00. SFR  
11 recorded a trustee's deed upon sale on September 9, 2013 identifying SFR as the grantee  
12 and the HOA as the foreclosing beneficiary. The trustee's deed states:

13 Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
14 Trustee under that certain Notice of Delinquent Assessment Lien...  
15 does hereby grant, without warranty expressed or implied to: SFR... all  
16 its right, title and interest in the property...

17 This conveyance is made pursuant to the powers conferred upon the  
18 Trustee by NRS 116 et seq... All requirements of law regarding the  
19 mailing of copies of notices and the posting and publication of the  
20 copies of the Notice of Sale have been complied with.

21 At the time of sale, Perez owed the HOA \$14,677.80. As of January 14, 2016, Perez owes  
22 Marchai \$489,372.77 based the agreement secured by the deed of trust. Marchai asserts  
23 Perez is now in default on the agreement between Perez and Marchai.

## 24 **II. Procedural History**

25 On September 30, 2013, Marchai filed a complaint against Perez, SFR, and U.S.  
26 Bank. Marchai seeks to judicially foreclose on the Wolf Rivers property based on Perez's  
27 breach of the agreement secured by the deed of trust. On November 13, 2013, SFR filed an  
28 answer, counterclaim, and crossclaim. SFR brought counterclaims and crossclaims for  
declaratory relief/quiet title and injunctive relief. Specifically, SFR alleges Marchai's

1 interest in the Wolf Rivers property was extinguished by the non-judicial foreclosure of the  
2 HOA's super-priority lien established pursuant to NRS Chapter 116. The super-priority lien  
3 brands certain HOA liens as "prior to all other liens and encumbrances," excluding those  
4 recorded before the applicable CC&Rs. See NRS 116.3116(2)(a)-(b). The Court has entered  
5 defaults against Perez and U.S. Bank in this case.

6 On July 9, 2014, the Court ordered that the case be stayed pending a ruling from the  
7 Nevada Supreme Court on an HOA foreclosure's effect on a first deed of trust. The Nevada  
8 Supreme Court issued its ruling in SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408  
9 (Nev. 2014) on September 18, 2014. The Nevada Supreme Court denied a rehearing on  
10 October 16, 2014. The Court lifted the stay in the instant case on January 28, 2015.

11 Both Marchai and SFR filed motions for summary judgment on January 14, 2016.  
12 The parties dispute whether NRS Chapter 116 is constitutional and whether the HOA  
13 foreclosure procedure in the instant case complied with NRS Chapter 116. The parties filed  
14 oppositions to each other's motions on February 3 and 4, 2016. The parties filed replies on  
15 February 8 and 9, 2016. SFR's reply contained a countermotion to strike portions of  
16 Marchai's motion for summary judgment and opposition. SFR asserts Marchai's motion  
17 exceeded the appropriate page limit. SFR also argues Marchai's opposition contains  
18 evidence not properly disclosed in the discovery process.

### 19 **III. Discussion**

#### 20 **A. Motion to Strike**

21 The parties do not dispute that Marchai violated EDCR 2.20(a) by failing to obtain  
22 leave of Court before filing a brief in support of its motion for summary judgment that  
23 exceeded thirty pages. The parties also agree that Marchai's person most knowledgeable  
24 failed to appear at a properly noticed deposition on December 2, 2015. Marchai asserts that  
25 its failure to request leave of the Court to file an over-length brief was inadvertent. Marchai  
26 argues its failure to provide a person most knowledgeable for deposition was the result of  
27 miscommunication between substituted counsel. The parties have communicated  
28 regarding rescheduling the deposition. SFR argues these irregularities necessitate the



1 Court striking the excess pages in Marchai's motion for summary judgment and certain  
2 declarations submitted in support of Marchai's opposition to SFR's motion for summary  
3 judgment.

4 The Court finds the interests of deciding this motion on its merits outweigh the need  
5 to sanction Marchai for technical violations of Court rules. The Court also finds that SFR  
6 will not be prejudiced by the Court's decision to deny its motion. The table of contents in  
7 Marchai's motion for summary judgment uses extremely descriptive headings containing  
8 the factual and legal assertions Marchai makes throughout its motion. Using just these  
9 headings and Marchai's exhibits, the Court would be able to evaluate Marchai's arguments.  
10 In addition, though Marchai's person most knowledgeable failed to attend the scheduled  
11 December 2, 2015 deposition, Marchai has presented an explanation to the Court. The  
12 substitution of counsel created confusion regarding the deposition. This does not excuse  
13 Marchai from presenting its person most knowledgeable at a subsequent deposition, which  
14 the parties are working towards.

15 Failure to ask for leave, which would have been granted, and to attend one  
16 deposition does not justify the level of sanctions contemplated by SFR's motion to strike.  
17 The Court and the parties are benefitted by the Court considering all relevant, appropriate  
18 material in rendering a decision. Therefore, the Court denies SFR's motion to strike.

19 **B. Motions for Summary Judgment**

20 Summary judgment is appropriate "when the pleadings and other evidence on file  
21 demonstrate that no genuine issue as to any material fact remains and that the moving  
22 party is entitled to a judgment as a matter of law." Wood v. Safeway, Inc., 121 P.3d 1026,  
23 1029 (Nev. 2005) (internal quotation marks and alterations omitted). "If the party moving  
24 for summary judgment will bear the burden of persuasion at trial, that party 'must present  
25 evidence that would entitle it to a judgment as a matter of law in the absence of contrary  
26 evidence.'" Francis v. Wynn Las Vegas, LLC, 262 P.3d 705, 714 (Nev. 2011) (citing Cuzze v.  
27 Univ. & Cmty. Coll. Sys. of Nev., 172 P.3d 131, 134 (Nev. 2007)). "When requesting  
28 summary judgment, the moving party bears the initial burden of production to

1 demonstrate the absence of a genuine issue of material fact. If the moving party meets its  
2 burden, then the nonmoving party bears the burden of production to demonstrate that  
3 there is a genuine issue of material fact. Las Vegas Metro. Police Dep't v. Coregis Ins. Co.,  
4 256 P.3d 958, 961 (Nev. 2011) (internal citations omitted).

5 Marchai and SFR seek summary judgment on each of their claims. SFR argues the  
6 HOA foreclosure sale extinguished Marchai's interest in the Wolf Rivers property. Marchai  
7 argues its interest survived the foreclosure sale and is superior to SFR's interest. To  
8 determine what interests remain on the Wolf Rivers property and the interests' priority, the  
9 Court must evaluate NRS Chapter 116 and the foreclosure process in this particular case.

10 **1. Retroactive Application of the SFR Decision**

11 Marchai argues the decision in SFR Investments Pool 1 v. U.S. Bank, 334  
12 P.3d 408 (Nev. 2014), reh'g denied (Oct. 16, 2014) should only be applied prospectively.  
13 SFR was decided on September 18, 2014. In the instant case, the foreclosure sale took place  
14 on August 28, 2013.

15 The Nevada Supreme Court has ruled that:

16 In determining whether a new rule of law should be limited to  
17 prospective application, courts have considered three factors: (1) "the  
18 decision to be applied nonretroactively must establish a new principle  
19 of law, either by overruling clear past precedent on which litigants may  
20 have relied, or by deciding an issue of first impression whose resolution  
21 was not clearly foreshadowed;" (2) the court must "weigh the merits  
22 and demerits in each case by looking to the prior history of the rule in  
23 question, its purpose and effect, and whether retrospective operation  
24 will further or retard its operation;" and (3) courts consider whether  
25 retroactive application "could produce substantial inequitable results."

22 Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting  
23 Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

24 In the SFR decision, the Nevada Supreme Court noted, "Nevada's state and federal  
25 district courts are divided on whether NRS 116.3116 establishes a true priority lien." SFR  
26 Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412 (Nev. 2014), reh'g denied (Oct. 16,  
27 2014). There was no clear past precedent on the issue. The superpriority of HOA liens was  
28

1 a matter of first impression for the Nevada Supreme Court, but the resolution was  
2 foreshadowed. The Nevada Supreme Court relied on the language of NRS Chapter 116 and  
3 official comments to the Uniform Common Interest Ownership Act of 1982. Id. The  
4 language establishing the nature of the superpriority lien was amended in 2009, several  
5 years before the foreclosure sale in this case. The SFR decision also relied on a December  
6 2012 Nevada Real Estate Division advisory opinion holding an HOA could enforce its  
7 superpriority lien through a non-judicial foreclosure. 334 P.3d at 416-417.

8 In addition, the Court finds that applying the SFR decision to the facts of this case  
9 does not interfere with the prior history of the rule in question and will not produce  
10 substantial inequitable results. NRS 116.3116 was adopted in 1991. The original 1991  
11 language states that an HOA lien is prior to a first security interest on the property “to the  
12 extent of the assessments for common expenses based on the periodic budget adopted by  
13 the association pursuant to section 99 of this act which would have become due in the  
14 absence of acceleration during the 6 months immediately preceding institution of an action  
15 to enforce the lien.” At this point, holders of first deeds of trust were on notice of a potential  
16 priority conflict.

17 The Court finds that applying SFR to the facts in this case does not implicate any  
18 concerns about retroactive application of a new principle of law. Therefore, in evaluating  
19 the constitutionality and application of NRS Chapter 116, the Court will refer to the decision  
20 in SFR.

## 21 **2. Constitutionality of NRS Chapter 116**

22 Marchai argues the HOA foreclosure provisions of NRS Chapter 116 are  
23 unconstitutional, which would prevent the HOA sale from extinguishing Marchai’s interest  
24 in the Wolf Rivers property. Specifically, Marchai cites the due process clause, takings  
25 clause, and void for vagueness doctrine.

### 26 **a. Procedural Requirements of NRS Chapter 116**

27 Nevada Revised Statute Chapter 116 provides the procedural  
28 requirements for homeowners’ associations seeking to secure a lien for unpaid assessments

1 and fees. “NRS 116.3116(2)... splits an HOA lien into two pieces, a superpriority piece and a  
2 subpriority piece. The superpriority piece, consisting of the last nine months of unpaid  
3 HOA dues and maintenance and nuisance-abatement charges, is ‘prior to’ a first deed of  
4 trust.” SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 411 (Nev. 2014), reh’g denied  
5 (Oct. 16, 2014). That super-priority portion of the lien was held by the Nevada Supreme  
6 Court to be a true super-priority lien, which will extinguish a first deed of trust if foreclosed  
7 upon pursuant to Chapter 116’s requirements. Id. at 419. Specifically, “[t]he sale of a unit  
8 pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the  
9 unit’s owner without equity or right of redemption.” NRS 116.31166(3); see also SFR v. U.S.  
10 Bank, 334 P.3d at 412.

11 For an HOA foreclosure sale to be valid, Chapter 116 requires the foreclosing HOA  
12 and its agent comply with several requirements related to notifying interested parties,  
13 including junior lienholders, of the impending foreclosure sale. To initiate foreclosure  
14 under Chapter 116, a Nevada HOA must first notify the owner of the delinquent  
15 assessments. See NRS 116.31162(1)(a). If the owner does not pay within thirty days, the  
16 HOA must then provide the owner a notice of default and election to sell. See NRS  
17 116.31162(1)(b).

18 After recording the notice of default and election to sell, Chapter 116 requires the  
19 HOA to mail a copy of the notice of default and election to sell to “[e]ach person who has  
20 requested notice pursuant to NRS 107.090 or 116.31168.” NRS 116.31163(1). At closer look,  
21 this provision of Chapter 116 requires the HOA to mail the notice of default to “[e]ach  
22 person who has recorded a request for a copy of the notice” and “[e]ach other person with  
23 an interest whose interest or claimed interest is subordinate to the [association’s lien].”  
24 NRS 107.090(2)-(4) (reading NRS 107.090 and 116.31168 together, “deed of trust” has been  
25 replaced with “association’s lien”); see NRS 116.31168(1) (“NRS 107.090 appl[ies] to the  
26 foreclosure of an association’s lien as if a deed of trust were being foreclosed”). In addition  
27 to noticing those interested persons, Chapter 116 requires the HOA to mail notice to “[a]ny  
28 holder of a recorded security interest encumbering the unit’s owner’s interest who has

1 notified the association, 30 days before the recordation of the notice of default, of the  
2 existence of the security interest.” NRS 116.31163(2); see NRS 111.320 (“record[ing]...  
3 must from the time of filing... impart notice to all persons of the contents thereof”); see  
4 also First Nat. Bank v. Meyers, 161 P. 929, 931 (Nev. 1916) (“One need but revert to the fact  
5 that recordation is for the purpose of giving notice to the world”). In sum, a foreclosing  
6 HOA must mail the notice of default and election to sell to (1) persons who have recorded a  
7 request for notice, (2) persons holding or claiming a subordinate interest, and (3) holders of  
8 security interests recorded at least 30 days before notice of default.

9 Then, if the lien has not been paid off within 90 days, the HOA may continue with  
10 the foreclosure process. See NRS 116.31162(1)(c). The HOA must next mail a notice of sale  
11 to all those who were entitled to receive the prior notice of default and election to sell, as  
12 well as the holder of a recorded security interest if the security interest holder “has notified  
13 the association, before the mailing of the notice of sale of the existence of the security  
14 interest.” See NRS 116.311635(1)(a)(1), (b)(2). As this Court interprets the “notified-the-  
15 association” provision, this additional notice requirement simply means the HOA must  
16 mail the notice of sale to any holder of a security interest who has recorded its interest prior  
17 to the mailing of the notice of sale.

18 **b. Due Process Clause**

19 Marchai alleges NRS 116.3116 is unconstitutional because Chapter 116’s  
20 express notice provisions do not require HOAs to provide mandatory notice to lenders of an  
21 impending non-judicial foreclosure; rather, Chapter 116 requires lenders to request notice  
22 in advance of foreclosure in order to receive notice of foreclosure. Marchai argues Chapter  
23 116’s notice provisions, on their face, fail to meet the notice requirements of the due process  
24 clause and therefore render Chapter 116’s non-judicial foreclosure scheme unconstitutional  
25 on its face.

26 **i. Constitutional Notice Requirement**

27 “[P]rior to an action which will affect an interest in life, liberty,  
28 or property protected by the Due Process Clause of the Fourteenth Amendment, a State

1 must provide 'notice reasonably calculated, under all circumstances, to apprise interested  
2 parties of the pendency of the action and afford them an opportunity to present their  
3 objections.'" Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983) (holding  
4 statutory notice requirements posting and publishing announcement of pending tax sale  
5 did not meet requirements of the Due Process Clause of the Fourteenth Amendment)  
6 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). "In  
7 Mennonite, the Supreme Court applied this principle and found that mere constructive  
8 notice afforded inadequate due process to a readily ascertainable mortgage holder." Cont'l  
9 Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984). The Court held that personal service or  
10 mailed notice is required: "Notice by mail or other means as certain to ensure actual notice  
11 is a minimum constitutional precondition to a proceeding which will adversely affect the  
12 liberty or property interests of any party, whether unlettered or well versed in commercial  
13 practice, if its name and address are reasonably ascertainable." Mennonite, 462 U.S. at  
14 800 (emphasis in original).

15 Under NRS 116.31162, HOAs are required to give actual notice of their impending  
16 lien foreclosures to record owners of the property at issue. Although Chapter 116 requires  
17 actual notice be given to the property owner, the United States Supreme Court has long  
18 held, "[n]otice to the property owner, who is not in privity with his creditor and who has  
19 failed to take steps necessary to preserve his own property interest, also cannot be expected  
20 to lead to actual notice to the mortgagee." Mennonite, 462 U.S. at 799. The question here  
21 becomes, does Chapter 116 provide mortgage holders actual notice — "notice mailed to the  
22 mortgagee's last known available address, or by personal service." See Mennonite, 462 U.S.  
23 at 798.

24 Marchai argues Nevada law shifts the burden of giving notice to the mortgagee  
25 because associations need only give actual notice to a lienholder "who has notified the  
26 association, 30 days before the recordation of the notice of default, of the existence of [its]  
27 security interest." NRS 116.31163(2). Statutory provisions that require a party to give  
28 notice in order to get notice are often referred to as "opt-in" or "request-notice" provisions.

1 In Small Engine Shop, Inc. v. Cascio, the Fifth Circuit Court of Appeals held that  
2 Louisiana's "request-notice" statute "prospectively shift[ed] the entire burden of ensuring  
3 adequate notice to an interested property owner regardless of the circumstances." 878 F.2d  
4 883, 884 (5th Cir. 1989). Such a shift in the burden of ensuring adequate notice, the Small  
5 Engine Court held, does not afford a defaulting property owner facing foreclosure adequate  
6 notice under Menonite and therefore violates the Due Process Clause. Id. at 890; see also  
7 USX Corp. v. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993) ("[second mortgagee]'s  
8 interest, even though terminable by foreclosure of the superior loan was sufficient to trigger  
9 due process"). For that reason, the court held the "request-notice" statute only serves to  
10 supplement the preexisting notice scheme, to allow creditors who are not otherwise  
11 reasonably ascertainable to become ascertainable. Small Engine, 878 F.2d at 892-3.

12 Chapter 116, if read in a vacuum, could lead to the erroneous interpretation that a  
13 mortgage holder is only entitled to receive notice of a homeowners' association's impending  
14 foreclosure if that mortgage holder requests such notice from the association; however, this  
15 reading would ignore the well-established canon of statutory interpretation—  
16 constitutional avoidance. "It is elementary when the constitutionality of a statute is  
17 assailed, if the statute be reasonably susceptible of two interpretations, by one of which it  
18 would be unconstitutional and by the other valid, it is our plain duty to adopt that  
19 construction which will save the statute from constitutional infirmity." U S ex rel Attorney  
20 Gen. v. Delaware & Hudson Co, 213 U.S. 366 (1909); see also State v. Curler, 67 P. 1075,  
21 1076 (Nev. 1902) ("it is a well-established rule of this and other courts that constitutional  
22 questions will never be passed upon, except when absolutely necessary to properly dispose  
23 of the particular case").

24 The reading of Chapter 116's notice requirements in a way to be constitutionally valid  
25 requires that a foreclosing homeowners' association must provide notice to the following  
26 parties:

27 (1) Any interested person who has recorded a request for notice with the proper  
28 county recorder must be mailed copies of the notice of default and election to sell and the

1 notice of sale. See NRS 116.31163(1) (notice of default must be given to “[e]ach person who  
2 has requested notice pursuant to NRS 107.090 or 116.31168”), NRS 107.090(2) (a “request  
3 for a copy of the notice of default or of sale” must be “record[ed] in the office of the county  
4 recorder of the county in which any part of the real property is situated”), and NRS  
5 116.31168(1) (“The request must identify the lien by stating the names of the unit's owner  
6 and the common-interest community.”); see also NRS 116.311635(1)(b)(1) (notice of sale  
7 must be mailed to all persons entitled to receive a copy of the notice of default). This  
8 request-notice provision exists to allow interested parties who are not otherwise  
9 ascertainable an opportunity to receive notice and protect their interest.

10 (2) Any other person holding or claiming an interest subordinate to the association’s  
11 lien must be mailed copies of the notice of default and election to sell and the notice of sale.  
12 See NRS 116.31163(1) and .311635(1)(b)(1), supra; see also NRS 116.31168(1) (incorporating  
13 requirements of NRS 107.090 to HOA foreclosures) and NRS 107.090(3)(b) (notice must  
14 be mailed to “[e]ach other person with an interest whose interest or claimed interest is  
15 subordinate to the [association’s lien].”). This catch-all provision exists to provide notice to  
16 any other interested party whose identity is reasonably ascertainable.

17 (3) Any holders of a recorded security interest that encumbers the homeowner’s  
18 interest must be mailed copies of (a) the notice of default and election to sell, if the security  
19 interest was recorded at least 30 days before notice of default was recorded, and (b) the  
20 notice of sale, if the security interest was recorded prior to the mailing of the notice of sale.  
21 See NRS 116.31163(2), supra, and NRS 116.311635(1)(b)(2) (HOA must mail notice of sale  
22 to security interest holder that “has notified the association, before the mailing of the notice  
23 of sale of the existence of the security interest.”); see also NRS 111.320, supra, and First Nat.  
24 Bank v. Meyers, 161 P. at 931 (recording of the security interest gives notice to the world of  
25 that interest).

26 This actual notice provision explicitly requires the foreclosing homeowners’  
27 association to provide notice to mortgage holders that have timely recorded interest in the  
28 subject property. Therefore, Marchai’s facial challenge of Chapter 116’s notice



1 requirements fails because the provisions of Chapter 116 read as a whole and in conjunction  
2 with well-established related law ensures mortgage holders and other interested parties  
3 receive actual notice of a homeowners' association's impending non-judicial foreclosure  
4 sale.

5 **b. State Action Requirement**

6 Although Chapter 116, on its face, provides for notice firmly grounded  
7 within the boundaries of the Due Process Clause of the Fourteenth Amendment, the Court  
8 questions whether the mandates of the Due Process Clause are in fact triggered. Marchai  
9 must identify some "state action" that runs afoul of the Fourteenth Amendment. See Lugar  
10 v. Edmondson Oil Co., 457 U.S. 922, 930 (1982) ("the Due Process Clause protects  
11 individuals only from governmental and not from private action, plaintiffs had to  
12 demonstrate that the sale of their goods was accomplished by state action"); see also  
13 S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 247 (Nev. 2001) ("The general rule is that  
14 the Constitution does not apply to private conduct."). "Embedded in our Fourteenth  
15 Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny  
16 under the Amendment's Due Process Clause, and private conduct, against which the  
17 Amendment affords no shield, no matter how unfair that conduct may be." Nat'l Collegiate  
18 Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding state university's imposition  
19 of sanctions against legendary basketball coach Jerry Tarkanian in furtherance of the  
20 NCAA's rules and recommendations did not transform NCAA's private conduct into state  
21 action).

22 In analyzing the state-action issue where a private party's decisive conduct has  
23 caused harm to another private party, the question becomes "whether the State was  
24 sufficiently involved to treat that decisive conduct as state action." Tarkanian, 488 U.S. at  
25 192. In general, the State's involvement may transform private conduct into state action  
26 when the State delegates its authority to the private actor; the State knowingly accepts  
27 benefits derived from unconstitutional behavior; or when the State creates the legal  
28 framework governing the private conduct. Id. (citing for each proposition, respectively,

1 West v. Atkins, 487 U.S. 42 (1988); Burton v. Wilmington Parking Authority, 365 U.S. 715,  
2 722 (1961); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)  
3 (holding state's garnishment statute, which permitted writ of garnishment to be issued in  
4 pending actions by court clerk, denied due process of law)).

5 The conduct at issue in this case, a non-judicial foreclosure authorized by Nevada  
6 law, centers the state-action analysis on the Nevada's creation of the legal framework  
7 governing HOA non-judicial foreclosure actions. The inquiry here turns on whether the  
8 Nevada Legislature's enactment of the legal framework governing non-judicial foreclosure  
9 of homeowners' association liens constitutes sufficient state action to trigger the due  
10 process protections of the Fourteenth Amendment for mortgage holders. This Court finds  
11 it is not.

12 The "State is responsible for the... act of a private party when the State, by its law,  
13 has compelled the act." Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970). However,  
14 a State's mere acquiescence in a private action does not convert that action into that of the  
15 State. See Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

16 In Flagg Bros. v. Brooks, Ms. Brooks had fallen on hard times, faced eviction, and  
17 was forced by circumstance to place her belongings in storage. Ms. Books filed a lawsuit  
18 against the storage company, Flagg Brothers, alleging a violation of her Fourteenth  
19 Amendment rights. Specifically, the issue centered on Flagg Brothers's threat to sell Ms.  
20 Brooks's belongings pursuant to New York Uniform Commercial Code unless she paid her  
21 storage fee. Id., 436 U.S. at 153. Ms. Brooks argued that "Flagg Brothers' proposed action  
22 [wa]s properly attributable to the State because the State ha[d] authorized and encouraged  
23 it in enacting [the statutory framework authorizing the sale of her property to satisfy the  
24 storage lien]." Id., 436 U.S. at 164. The Court held that the state statute, together with  
25 private action conforming to the statute, was insufficient to establish state action,  
26 reasoning:

27 Here, the State of New York has not compelled the sale of a  
28 bailor's goods, but has merely announced the circumstances  
under which its courts will not interfere with a private sale.

1 Indeed, the crux of respondents' complaint is not that the State  
2 has acted, but that it has refused to act. This statutory refusal to  
3 act is no different in principle from an ordinary statute of  
4 limitations whereby the State declines to provide a remedy for  
5 private deprivations of property after the passage of a given  
6 period of time.

7 Flagg Bros., 436 U.S. at 166 (emphasis in original).

8 Here, the State of Nevada, by enacting the provisions of Chapter 116, has merely  
9 announced the requirements a homeowners' association must fulfill to legally foreclose on a  
10 lien; the State of Nevada has not compelled homeowners' associations to act. Like the State  
11 of New York in Flagg Bros., here the State of Nevada has announced circumstances in  
12 which it will not interfere with the foreclosure of homeowners' association liens. Therefore,  
13 because the State of Nevada has merely acquiesced to, and not compelled, the non-judicial  
14 foreclosure of homeowners' association liens, this Court finds state action does not exist in  
15 this situation sufficient to implicate the protections of the due process clause.

16 Marchai cannot show that legislative enactment of Chapter 116 is a due process  
17 violation. Therefore, the Court denies Marchai's motion for summary judgment on this  
18 ground.

19 **b. Taking Clause**

20 Marchai argues that NRS Chapter 116 effects a regulatory taking. The  
21 Fifth Amendment to the United States Constitution prohibits "private property be[ing]  
22 taken for public use without just compensation." U.S. Const. amend. V. Article One of the  
23 Nevada Constitution correspondingly provides that "[p]rivate property shall not be taken  
24 for public use without just compensation having been first made, or secured." Nev. Const.  
25 art. I, § 8(6). The Nevada Supreme Court clarified regulatory taking jurisprudence as  
26 follows: "a per se regulatory taking occurs when a public agency seeking to acquire property  
27 for a public use... fails to follow the [statutory eminent domain] procedures... and  
28 appropriates or permanently invades private property for public use without first paying  
just compensation." See McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1127 (Nev. 2006).  
"In deciding whether a particular governmental action has effected a taking, this Court

1 focuses... both on the character of the action and on the nature and extent of the  
2 interference with rights in the parcel as a whole.” Tahoe-Sierra Pres. Council, Inc. v.  
3 Tahoe Reg'l Planning Agency, 535 U.S. 302, 327 (2002) (quoting San Diego Gas & Elec.  
4 Co. v. San Diego, 450 U.S. 621, 636 (1981)).

5 The Nevada Legislature’s enactment of the statutory framework encompassing HOA  
6 liens and non-judicial foreclosures does not rise to the level of a government taking for a  
7 public purpose. The enactment of the statutory framework alone is insufficient government  
8 action to establish such a taking. The character of the legislative action is simply to create a  
9 legal framework for private conduct to operate within, and because the foreclosure action is  
10 non-judicial, the nature of the government interference in private property is minimal,  
11 possibly even non-existent. In fact, one of the many complaints about Chapter 116’s  
12 framework, is the prescription that HOA liens may be foreclosed upon without government  
13 intervention or judicial approval. That being so, the foreclosure of an HOA lien is not an  
14 action of the government, but instead is that of a private party — the HOA and its  
15 foreclosure agent.

16 In SFR v. U.S. Bank, the Court found the private interest at stake here was “essential  
17 for common-interest communities,” stating, “Otherwise, when a homeowner walks away  
18 from the property and the first deed of trust holder delays foreclosure, the HOA has to  
19 ‘either increase the assessment burden on the remaining unit/parcel owners or reduce the  
20 services the association provides (e.g., by deferring maintenance on common amenities).”  
21 SFR v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014), reh'g denied (Oct. 16, 2014) (quoting  
22 Uniform Law Commission’s Joint Editorial Board for Uniform Real Property Acts, The Six–  
23 Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest  
24 Ownership Act, at 5-6). The Court noted that the true super-priority lien was created “[t]o  
25 avoid having the community subsidize first security holders who delay foreclosure, whether  
26 strategically or for some other reason.” Id. A homeowners’ association is a private entity  
27 that serves an exclusively private interest; therefore, any taking that occurs as a result of a  
28 foreclosure of an HOA lien is a private action to benefit a private interest.

1 Marchai cannot show that legislative enactment of Chapter 116 is a government  
2 taking by regulation or that a private foreclosure of an HOA lien serves to further a public  
3 purpose. Therefore, the Court denies Marchai's motion for summary judgment on this  
4 ground.

5 **c. Void for Vagueness Doctrine**

6 Marchai argues NRS Chapter 116 is unconstitutionally vague. Nevada's  
7 two-factor test for vagueness examines whether the statute, "(1) fails to provide notice  
8 sufficient to enable persons of ordinary intelligence to understand what conduct is  
9 prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even  
10 failing to prevent arbitrary and discriminatory enforcement." Flamingo Paradise Gaming,  
11 LLC v. Chanos, 217 P.3d 546, 553-54 (Nev. 2009) (quoting Silvar v. Eighth Judicial Dist.  
12 Court ex rel. County of Clark, 129 P.3d 682, 684-85 (Nev. 2006). "A statute which does not  
13 impinge on First Amendment freedoms... may be stricken as unconstitutionally vague only  
14 if it is found to be so in all its applications. Additionally, the standard of review is less strict  
15 under a challenge for vagueness where the review is directed at economic regulations."  
16 State v. Rosenthal, 819 P.2d 1296, 1300 (Nev. 1991). "Enough clarity to defeat a vagueness  
17 challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a  
18 statute's words their well settled and ordinarily understood meaning, and by looking to the  
19 common law definitions of the related term or offense." Busefink v. State, 286 P.3d 599,  
20 605 (Nev. 2012) (quoting Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2718  
21 (2010)).

22 For the purposes of this Order, the Court will not dispute Marchai's assertion that  
23 NRS Chapter 116 is inartfully drafted; however, this is not enough for the Court to refuse to  
24 apply NRS Chapter 116. See Fairbanks v. Pavlikowski, 423 P.2d 401, 404 (Nev. 1967). The  
25 Court finds that NRS Chapter 116 is not unconstitutionally vague. As previously discussed  
26 in the Court's decision to apply the decision of SFR in this case, Chapter 116's original 1991  
27 language put holders of first deeds of trust on notice of a potential priority conflict. Though  
28 there were conflicting interpretations of Chapter 116 prior to the SFR decision, judicial

1 enforcement was not arbitrary or discriminatory. The decision in SFR has clarified some  
2 ambiguities in the statutes. Because this statute does not infringe on constitutionally  
3 protected rights, as previously discussed, the standard for the Court to find  
4 unconstitutional vagueness is high. The language of Chapter 116 and the SFR decision is  
5 sufficient for this Court to find NRS Chapter 116 is not unconstitutionally vague.

6 Marchai cannot show that NRS Chapter 116 is unconstitutionally vague. Therefore,  
7 the Court denies Marchai's motion for summary judgment on this ground.

8 **3. Alleged Issues Prior to Sale**

9 Marchai asserts there are issues with the HOA's foreclosure process prior to  
10 the foreclosure sale. Marchai argues issues regarding notice and tender prevent the HOA  
11 foreclosure sale from extinguishing Marchai's deed of trust.

12 **a. Notice**

13 Marchai argues that the HOA failed to comply with several notice  
14 provisions of NRS Chapter 116, including requirements that notices be mailed via first class  
15 mail and notices be mailed to all parties with an interest in the property. SFR argues the  
16 foreclosure deed conclusively establishes that the notice provisions of NRS Chapter 116  
17 were met.

18 The foreclosure deed's recitals are conclusive evidence of compliance with the notice  
19 provisions of NRS 116.31162 through 116.31168. NRS 116.31166(2). The deed in this case  
20 states all statutory notices were given. SFR can rely on the deed's recitals as proof that the  
21 HOA fulfilled the notice provisions of NRS Chapter 116.

22 The foreclosure deed's recitals are not unassailable, however. The Nevada Supreme  
23 Court recently held:

24 The long-standing and broad inherent power of a court to sit in equity  
25 and quiet title, including setting aside a foreclosure sale if the  
26 circumstances support such action, the fact that the recitals made  
27 conclusive by operation of NRS 116.31166 implicate compliance only  
28 with the statutory prerequisites to foreclosure, and the foreign  
precedent cited under which equitable relief may still be available in

1 the face of conclusive recitals, at least in cases involving fraud, lead us  
2 to the conclusion that the Legislature, through NRS 116.31166's  
3 enactment, did not eliminate the equitable authority of the courts to  
4 consider quiet title actions when an HOA's foreclosure deed contains  
5 conclusive recitals.

6 Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6 (2016).

7 Based on the language in Shadow Wood and the Court's equitable powers, the Court  
8 is not persuaded that sending notices via certified mail as opposed to first class mail would  
9 justify setting aside a foreclosure sale or its effect if the parties actually received notice in a  
10 timely manner. Absent some further showing that notice was not actually received, recitals  
11 in the foreclosure deed are sufficient to establish that the HOA complied with NRS Chapter  
12 116.

13 Marchai only provides evidence that notice was not received by an interested party  
14 in one case. Marchai asserts it did not receive the notice of trustee's sale mailed on July 29,  
15 2013. At the time, Marchai had an interest in the Wolf Rivers property; however, Marchai  
16 did not have a recorded interest in the property. Though U.S. Bank transferred its deed of  
17 trust to Marchai in March of 2013, neither party recorded the transfer until August 12,  
18 2013. U.S. Bank did receive the notice of trustee's sale mailed on July 29, 2013. Marchai's  
19 failure to receive notice can be attributed to its own actions and the actions of U.S. Bank.  
20 The HOA mailed notices to all parties that it could have known had an interest in the  
21 property.

22 Marchai failed to show the HOA violated the notice provisions of NRA Chapter 116.  
23 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

24 **b. Tender**

25 Marchai asserts the homeowner tendered the HOA lien's superpriority  
26 amount prior to the HOA foreclosure sale. Marchai argues this tender causes Marchai's  
27 deed of trust to survive the HOA foreclosure sale.

28 The Court is faced with a novel set of facts in this case. The foreclosure process,  
from the first notice of delinquent assessment to the actual foreclosure sale, spanned

1 almost five years. During this period, Perez, the homeowner, paid the HOA \$3,230.00.  
2 This is definitely more than the value of nine months of assessment fees, regardless of  
3 which year's rate is applied. At the end of the period, however, Perez still owed the HOA  
4 \$14,677.80.

5 The Court must determine whether the homeowner's payments to an HOA in this  
6 case constitute tender of the superpriority amount. NRS 116.3116(2) states the HOA lien is  
7 prior to first deeds of trust "to the extent of the assessments for common expenses based on  
8 the periodic budget adopted by the association... which would have become due in the  
9 absence of acceleration during the 9 months immediately preceding institution of an action  
10 to enforce the lien..." The statute does not state who can satisfy the superpriority portion of  
11 the lien.

12 The Court finds the answer relies on the definition of "tender" rather than  
13 distinguishing between homeowners and first deed of trust holders. A party's tender of the  
14 super-priority amount is sufficient to extinguish the super-priority character of the lien,  
15 leaving only a junior lien. See SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 414  
16 (2014), reh'g denied (Oct. 16, 2014) and Sears v. Classen Garage & Serv. Co., 612 P.2d 293,  
17 295 (Okla. Civ. App. 1980) ("a proper and sufficient tender of payment operates to  
18 discharge a lien"). The common law definition of tender is "an offer of payment that is  
19 coupled either with no conditions or only with conditions upon which the tendering party  
20 has a right to insist." Fresk v. Kraemer, 99 P.3d 282, 286-7 (Or. 2004); see also 74 Am.  
21 Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or  
22 obligation, coupled with the present ability of immediate performance, so that if it were not  
23 for the refusal of cooperation by the party to whom tender is made, the condition or  
24 obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of  
25 Contracts, § 1808 (3d. ed. 1972).

26 In the case of a first deed of trust holder offering to pay the HOA nine months of  
27 assessments, a tender is undoubtedly taking place in order to satisfy the superpriority  
28 amount. The deed of trust holder offers to perform a specific condition that the HOA is



1 clearly aware of. In the case of a homeowner paying an HOA, the case is not so clear. The  
2 homeowner has a responsibility to pay the HOA fees every month. Payments to the HOA  
3 could be directed towards old or new monthly fees. The homeowner paying the HOA is not  
4 a clear offer to satisfy the HOA's superpriority lien amount. It could be an offer to satisfy  
5 the homeowner's newer debts to the HOA.

6 The Court finds that further factual development is needed to determine whether  
7 Perez's payments to the HOA constituted a valid tender. Marchai is careful in its motion for  
8 summary judgment to phrase Perez's payments to the HOA during the foreclosure process  
9 as continually being in response to the HOA's notices of delinquent liens and sales. If this  
10 was the intent of Perez, Marchai can make the case that Perez's payments to the HOA were  
11 designed to satisfy the HOA lien's superpriority amount. This would potentially protect  
12 Perez, as Marchai would be able to sell the Wolf Rivers property to collect Perez's debt  
13 rather than directly pursue Perez under the agreement secured by the deed of trust. On the  
14 other hand, SFR could prove Perez was attempting to keep up with her monthly dues and  
15 had no intent of directing her payments towards the HOA's superpriority amount. The  
16 foreclosure process's length of time in this case further complicates the issue for both sides.

17 The Court finds genuine issues of material fact exist on the issue of tender.  
18 Therefore, the Court denies both Marchai and SFR's motion for summary judgment on this  
19 ground.

20 **4. Alleged Issues With Foreclosure Sale**

21 Marchai asserts there are also issues with the HOA's foreclosure sale.  
22 Marchai argues issues regarding the wording in the foreclosure deed and commercial  
23 reasonableness prevent the foreclosure sale from extinguishing Marchai's interest in the  
24 property. SFR argues any issues in the foreclosure process cannot impact SFR's interest in  
25 the property as a bona fide purchaser.

26 //

27 //

1                   **a.     Alessi & Koenig's Interest in the Property**

2                   Marchai argues SFR actually purchased Alessi & Koenig's interest in  
3 the Wolf Rivers property rather than the HOA's interest. Marchai bases its argument on a  
4 sentence in the foreclosure deed:

5                   Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
6 Trustee under that certain Notice of Delinquent Assessment Lien...  
7 does hereby grant, without warranty expressed or implied to: SFR... all  
8 its right, title and interest in the property...

9                   While the Court agrees this sentence is inartfully drafted, the Court does not agree  
10 that it conclusively establishes that Alessi & Koenig were the grantors at the HOA  
11 foreclosure sale. At most, this sentence creates an ambiguity in the deed. The deed  
12 identifies the HOA as the foreclosing beneficiary. The deed also states:

13                   This conveyance is made pursuant to the powers conferred upon the  
14 Trustee by NRS 116 et seq... All requirements of law regarding the  
15 mailing of copies of notices and the posting and publication of the  
16 copies of the Notice of Sale have been complied with.

17                   This ambiguity cannot be resolved in favor of Marchai on a motion for summary judgment.  
18 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

19                   **b.     Commercial Reasonableness**

20                   Marchai argues the HOA foreclosure sale was commercially  
21 unreasonable. SFR argues that there is no requirement that the sale be reasonable or, in  
22 the alternative, there is not sufficient proof to demonstrate that the sale was unreasonable.

23                   The decision in SFR did not address what commercial reasonableness was required  
24 in HOA foreclosure sales. SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 418 n.6  
25 (Nev. 2014), reh'g denied (Oct. 16, 2014). NRS Chapter 116, however, states, "[e]very  
26 contract or duty governed by this chapter imposes an obligation of good faith in its  
27 performance or enforcement." NRS 116.1113.

28                   It used to be clear that "[m]ere inadequacy of price is not sufficient to justify setting  
aside a foreclosure sale, absent a showing of fraud, unfairness or oppression." Long v.

1 Towne, 639 P.2d 528, 530 (Nev. 1982). The Nevada Supreme Court recently created room  
2 for debate on this issue in its Shadow Wood decision. The Nevada Supreme Court states,  
3 “demonstrating that an association sold a property at its foreclosure sale for an inadequate  
4 price is not enough to set aside that sale; there must also be a showing of fraud, unfairness,  
5 or oppression. Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6  
6 (2016). In the next sentence, the Nevada Supreme Court appears to distinguish a merely  
7 inadequate price from a price that is “grossly inadequate as a matter of law” and indicates  
8 that gross inadequacy may be sufficient grounds to set aside a sale. Id.

9 The Court finds that some other evidence of fraud, unfairness or oppression is still  
10 required to set aside an HOA foreclosure sale, regardless of the price. Shadow Wood cites  
11 Golden v. Tomiyasu, 387 P.2d 989, 995 (Nev. 1963) which required some showing of fraud  
12 “in addition to gross inadequacy of price” for a court to set aside a transaction. Though a  
13 sales price may be extremely low, as in the instant case before the Court, the price alone is  
14 insufficient proof of commercial unreasonableness.

15 The Court finds Marchai has established that there are material issues of fact  
16 regarding whether the HOA foreclosure sale was commercially reasonable. Price is one  
17 factor the Court may consider. Marchai also argues the HOA sale was conducted after the  
18 homeowner tendered the superpriority amount to the HOA. Arguments regarding notice  
19 that the Court negated in this Order could also be relevant on the issue of commercial  
20 reasonableness with further factual development.

21 Marchai fails to establish as a matter of law that the HOA sale was commercially  
22 unreasonable. Therefore, the Court denies Marchai’s motion for summary judgment on  
23 this ground.

24 **c. Bona Fide Purchaser**

25 SFR argues that any alleged deficiencies with the HOA foreclosure sale in this  
26 case do not impact SFR’s quiet title claim because SFR is a bona fide purchaser for value.  
27 The Nevada Supreme Court recently held that potential harm to alleged bona fide  
28 purchasers must be evaluated, but it is possible to “demonstrate that the equities swayed so

1 far in [the homeowner's] favor as to support setting aside [the] foreclosure sale." Shadow  
2 Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*10 (2016).

3 Questions as to SFR's bona fide purchaser status and the balance of equities in this  
4 case are questions of fact. This is especially true in the instant case. The HOA's foreclosure  
5 proceedings lasted almost five years. Multiple notices of delinquency, default, and sale  
6 were recorded. The Court cannot rule on whether a reasonable purchaser would be put on  
7 notice by these circumstances at the summary judgment stage.

8 SFR fails to establish as a matter of law that it was a bona fide purchaser and that the  
9 equities in this case prevent setting aside the foreclosure sale. Therefore, the Court denies  
10 SFR's motion for summary judgment on this ground.

#### 11 IV. Conclusion

12 The Court finds that genuine issues of material fact remain in this case. The Court  
13 denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.  
14

15  
16 DATED this 13<sup>th</sup> day of February, 2016.

17  
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20  
21 LINDA MARIE BELL  
DISTRICT COURT JUDGE  
22  
23  
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25  
26  
27  
28

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
David J. Merrill, Esq. David J. Merrill, P.C.	Counsel for Marchai, B.T.
Diana Cline Ebron, Esq. Jacqueline A. Gilbert, Esq. Karen L. Hanks, Esq. Kim Gilbert Ebron	Counsel for SFR Investments Pool 1, LLC

  
SHELBY DAHL  
LAW CLERK, DEPARTMENT VII

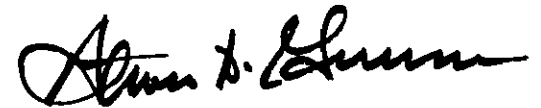
**AFFIRMATION**

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A689461 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell Date 3/21/2016  
District Court Judge

# **TAB 21**



CLERK OF THE COURT

DIANA CLINE EBRON, ESQ.  
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Attorneys for SFR Investment Pool 1, LLC

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MARCHAI B.T.,

Plaintiff,

vs.

CRISTELA PEREZ; SFR INVESTMENTS  
POOL 1, LLC; U.S. BANK NATIONAL  
ASSOCIATION, N.D.; DOES I through X;  
and ROE CORPORATIONS 1 through 10,  
inclusive,

Defendants.

And all related actions.

Case No. A-13-689461-C

Dept. No. VII

**NOTICE OF ENTRY OF DECISION AND  
ORDER**

PLEASE TAKE NOTICE that on March 22, 2016 this Court entered a **Decision and Order**. A copy of said Order is attached hereto.

DATED this 23<sup>rd</sup> day of March, 2016.

**KIM GILBERT EBRON**

/s/ Diana Cline Ebron  
DIANA CLINE EBRON, ESQ.  
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(702) 485-3300 FAX (702) 485-3301

**CERTIFICATE OF SERVICE**

I hereby certify that on this 23<sup>rd</sup> day of March, 2016, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY OF DECISION AND ORDER** to the following parties:

**David J. Merrill P.C.**

**Contact**

David J. Merrill

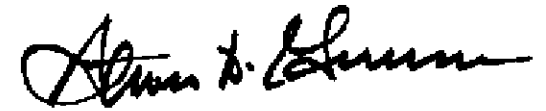
**Email**

[david@djmerillpc.com](mailto:david@djmerillpc.com)

/s/ Tomas Valerio

An Employee of Kim Gilbert Ebron





CLERK OF THE COURT

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARCHAI B.T.,

Plaintiff,

vs.

CRISTELA PEREZ; SFR INVESTMENTS POOL 1, LLC;  
U.S. BANK NATIONAL ASSOCIATION, N.D.; DOES I  
through X; and ROE CORPORATIONS 1 through 10,  
inclusive,

Defendants.

Case No. A-13-689461-C

Dep't No. VII

And all related actions.

**DECISION AND ORDER**

This case arises from a homeowners' association's (HOA) non-judicial foreclosure sale of residential real property located at 7119 Wolf Rivers Avenue in Las Vegas, Nevada. Now before the Court are Defendant SFR Investments Pool 1 ("SFR") and Plaintiff Marchai's Motions for Summary Judgment and SFR's Motion to Strike. These matters came before the Court on February 16, 2015. The Court denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.

**I. Factual Background**

The residential property in this case, the Wolf Rivers property, is subject to the terms of the Wyeth Ranch Community Association's ("the HOA") Declaration of Covenants, Conditions and Restrictions (CC&Rs). In 2004, Cristela Perez entered into two loan agreements with Countrywide Home Loans in order to purchase the property. The loans were secured by two deeds of trust on the Wolf Rivers property. Perez refinanced these two

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

1 loans through an agreement with CMG Mortgage. CMG Mortgage recorded a deed of trust  
2 against the property on November 9, 2005.

3 **A. First Notice of Delinquent Assessment Lien**

4 The HOA recorded its first Notice of Delinquent Assessment Lien on October 8,  
5 2008. At that time, the HOA collected \$140.00 per month in association dues. At the  
6 beginning of 2009, the HOA increased its monthly dues to \$152.50. The HOA recorded a  
7 Notice of Default and Election to Sell on January 7, 2009. The HOA recorded a Notice of  
8 Trustee's Sale on January 14, 2010. In 2010, the HOA increased its monthly dues to  
9 \$159.50.

10 On February 3, 2010, the HOA sent a demand letter to Perez. On February 12, 2010,  
11 Perez paid the HOA \$900.00. On April 13, 2010, the HOA proposed a payment plan to  
12 Perez. On May 11, 2010, Perez paid the HOA \$300.00. Perez failed, however to comply  
13 with the payment plan.

14 On July 13, 2010, the HOA mailed a Pre-Notice of Trustee Sale and Notice of Default  
15 and Election to Sell to Perez. Perez paid the HOA \$645.00 between August 2 and  
16 November 30, 2010. The HOA recorded a Rescission of Notice of Sale on March 9, 2011.  
17 Perez paid the HOA \$160.00 on March 10, 2011.

18 On March 29, 2011, the HOA recorded a second Notice of Sale. On July 27, 2011, the  
19 HOA sent Perez a letter stating Perez was in breach of the payment plan. On August 4,  
20 2011, Perez paid the HOA \$165.00.

21 **B. Second Notice of Delinquent Assessment Lien**

22 On December 20, 2011, the HOA recorded a second Notice of Delinquent  
23 Assessment lien. The HOA recorded a Notice of Default and Election to Sell on February  
24 28, 2012. Perez paid the HOA \$760.00 between March 19 and July 26, 2012. CMG  
25 Mortgage assigned its deed of trust to CitiMortgage in May of 2012. CitiMortgage assigned  
26 the deed to U.S. Bank in July of 2012. The HOA recorded a Notice of Trustee's Sale on  
27 October 31, 2012. Perez paid the HOA \$300.00 on November 13, 2012.  
28

1 In March of 2013, U.S. Bank assigned its deed of trust to Marchai. Neither U.S.  
2 Bank nor Marchai recorded the transfer of interest for approximately five months. During  
3 this gap, U.S. Bank did not inform Marchai of the HOA's foreclosure proceedings. The  
4 HOA mailed a Notice of Trustee's sale to CMG Mortgage, CitiMortgage, and U.S. Bank on  
5 July 29, 2013. Marchai recorded its interest in the Wolf Rivers property on August 12,  
6 2013. Marchai's loan servicer received notice of the trustee's sale on August 27, 2013, the  
7 day before the sale was scheduled to take place. The servicer contacted the HOA's trustee  
8 conducting the sale, Alessi & Koenig, to ask that the sale be postponed. The HOA declined.

9 Alessi & Koenig as trustee for the HOA conducted a foreclosure sale of the Wolf  
10 Rivers property on August 28, 2013. SFR purchased the property for \$21,000.00. SFR  
11 recorded a trustee's deed upon sale on September 9, 2013 identifying SFR as the grantee  
12 and the HOA as the foreclosing beneficiary. The trustee's deed states:

13 Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
14 Trustee under that certain Notice of Delinquent Assessment Lien...  
15 does hereby grant, without warranty expressed or implied to: SFR... all  
16 its right, title and interest in the property...

17 This conveyance is made pursuant to the powers conferred upon the  
18 Trustee by NRS 116 et seq... All requirements of law regarding the  
19 mailing of copies of notices and the posting and publication of the  
20 copies of the Notice of Sale have been complied with.

21 At the time of sale, Perez owed the HOA \$14,677.80. As of January 14, 2016, Perez owes  
22 Marchai \$489,372.77 based the agreement secured by the deed of trust. Marchai asserts  
23 Perez is now in default on the agreement between Perez and Marchai.

## 24 **II. Procedural History**

25 On September 30, 2013, Marchai filed a complaint against Perez, SFR, and U.S.  
26 Bank. Marchai seeks to judicially foreclose on the Wolf Rivers property based on Perez's  
27 breach of the agreement secured by the deed of trust. On November 13, 2013, SFR filed an  
28 answer, counterclaim, and crossclaim. SFR brought counterclaims and crossclaims for  
declaratory relief/quiet title and injunctive relief. Specifically, SFR alleges Marchai's

1 interest in the Wolf Rivers property was extinguished by the non-judicial foreclosure of the  
2 HOA's super-priority lien established pursuant to NRS Chapter 116. The super-priority lien  
3 brands certain HOA liens as "prior to all other liens and encumbrances," excluding those  
4 recorded before the applicable CC&Rs. See NRS 116.3116(2)(a)-(b). The Court has entered  
5 defaults against Perez and U.S. Bank in this case.

6 On July 9, 2014, the Court ordered that the case be stayed pending a ruling from the  
7 Nevada Supreme Court on an HOA foreclosure's effect on a first deed of trust. The Nevada  
8 Supreme Court issued its ruling in SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408  
9 (Nev. 2014) on September 18, 2014. The Nevada Supreme Court denied a rehearing on  
10 October 16, 2014. The Court lifted the stay in the instant case on January 28, 2015.

11 Both Marchai and SFR filed motions for summary judgment on January 14, 2016.  
12 The parties dispute whether NRS Chapter 116 is constitutional and whether the HOA  
13 foreclosure procedure in the instant case complied with NRS Chapter 116. The parties filed  
14 oppositions to each other's motions on February 3 and 4, 2016. The parties filed replies on  
15 February 8 and 9, 2016. SFR's reply contained a countermotion to strike portions of  
16 Marchai's motion for summary judgment and opposition. SFR asserts Marchai's motion  
17 exceeded the appropriate page limit. SFR also argues Marchai's opposition contains  
18 evidence not properly disclosed in the discovery process.

### 19 **III. Discussion**

#### 20 **A. Motion to Strike**

21 The parties do not dispute that Marchai violated EDCR 2.20(a) by failing to obtain  
22 leave of Court before filing a brief in support of its motion for summary judgment that  
23 exceeded thirty pages. The parties also agree that Marchai's person most knowledgeable  
24 failed to appear at a properly noticed deposition on December 2, 2015. Marchai asserts that  
25 its failure to request leave of the Court to file an over-length brief was inadvertent. Marchai  
26 argues its failure to provide a person most knowledgeable for deposition was the result of  
27 miscommunication between substituted counsel. The parties have communicated  
28 regarding rescheduling the deposition. SFR argues these irregularities necessitate the

1 Court striking the excess pages in Marchai's motion for summary judgment and certain  
2 declarations submitted in support of Marchai's opposition to SFR's motion for summary  
3 judgment.

4 The Court finds the interests of deciding this motion on its merits outweigh the need  
5 to sanction Marchai for technical violations of Court rules. The Court also finds that SFR  
6 will not be prejudiced by the Court's decision to deny its motion. The table of contents in  
7 Marchai's motion for summary judgment uses extremely descriptive headings containing  
8 the factual and legal assertions Marchai makes throughout its motion. Using just these  
9 headings and Marchai's exhibits, the Court would be able to evaluate Marchai's arguments.  
10 In addition, though Marchai's person most knowledgeable failed to attend the scheduled  
11 December 2, 2015 deposition, Marchai has presented an explanation to the Court. The  
12 substitution of counsel created confusion regarding the deposition. This does not excuse  
13 Marchai from presenting its person most knowledgeable at a subsequent deposition, which  
14 the parties are working towards.

15 Failure to ask for leave, which would have been granted, and to attend one  
16 deposition does not justify the level of sanctions contemplated by SFR's motion to strike.  
17 The Court and the parties are benefitted by the Court considering all relevant, appropriate  
18 material in rendering a decision. Therefore, the Court denies SFR's motion to strike.

19 **B. Motions for Summary Judgment**

20 Summary judgment is appropriate "when the pleadings and other evidence on file  
21 demonstrate that no genuine issue as to any material fact remains and that the moving  
22 party is entitled to a judgment as a matter of law." Wood v. Safeway, Inc., 121 P.3d 1026,  
23 1029 (Nev. 2005) (internal quotation marks and alterations omitted). "If the party moving  
24 for summary judgment will bear the burden of persuasion at trial, that party 'must present  
25 evidence that would entitle it to a judgment as a matter of law in the absence of contrary  
26 evidence.'" Francis v. Wynn Las Vegas, LLC, 262 P.3d 705, 714 (Nev. 2011) (citing Cuzze v.  
27 Univ. & Cmty. Coll. Sys. of Nev., 172 P.3d 131, 134 (Nev. 2007)). "When requesting  
28 summary judgment, the moving party bears the initial burden of production to

1 demonstrate the absence of a genuine issue of material fact. If the moving party meets its  
2 burden, then the nonmoving party bears the burden of production to demonstrate that  
3 there is a genuine issue of material fact. Las Vegas Metro. Police Dep't v. Coregis Ins. Co.,  
4 256 P.3d 958, 961 (Nev. 2011) (internal citations omitted).

5 Marchai and SFR seek summary judgment on each of their claims. SFR argues the  
6 HOA foreclosure sale extinguished Marchai's interest in the Wolf Rivers property. Marchai  
7 argues its interest survived the foreclosure sale and is superior to SFR's interest. To  
8 determine what interests remain on the Wolf Rivers property and the interests' priority, the  
9 Court must evaluate NRS Chapter 116 and the foreclosure process in this particular case.

10 **1. Retroactive Application of the SFR Decision**

11 Marchai argues the decision in SFR Investments Pool 1 v. U.S. Bank, 334  
12 P.3d 408 (Nev. 2014), reh'g denied (Oct. 16, 2014) should only be applied prospectively.  
13 SFR was decided on September 18, 2014. In the instant case, the foreclosure sale took place  
14 on August 28, 2013.

15 The Nevada Supreme Court has ruled that:

16 In determining whether a new rule of law should be limited to  
17 prospective application, courts have considered three factors: (1) "the  
18 decision to be applied nonretroactively must establish a new principle  
19 of law, either by overruling clear past precedent on which litigants may  
20 have relied, or by deciding an issue of first impression whose resolution  
21 was not clearly foreshadowed;" (2) the court must "weigh the merits  
22 and demerits in each case by looking to the prior history of the rule in  
23 question, its purpose and effect, and whether retrospective operation  
24 will further or retard its operation;" and (3) courts consider whether  
25 retroactive application "could produce substantial inequitable results."

22 Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting  
23 Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

24 In the SFR decision, the Nevada Supreme Court noted, "Nevada's state and federal  
25 district courts are divided on whether NRS 116.3116 establishes a true priority lien." SFR  
26 Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412 (Nev. 2014), reh'g denied (Oct. 16,  
27 2014). There was no clear past precedent on the issue. The superpriority of HOA liens was  
28

1 a matter of first impression for the Nevada Supreme Court, but the resolution was  
2 foreshadowed. The Nevada Supreme Court relied on the language of NRS Chapter 116 and  
3 official comments to the Uniform Common Interest Ownership Act of 1982. Id. The  
4 language establishing the nature of the superpriority lien was amended in 2009, several  
5 years before the foreclosure sale in this case. The SFR decision also relied on a December  
6 2012 Nevada Real Estate Division advisory opinion holding an HOA could enforce its  
7 superpriority lien through a non-judicial foreclosure. 334 P.3d at 416-417.

8 In addition, the Court finds that applying the SFR decision to the facts of this case  
9 does not interfere with the prior history of the rule in question and will not produce  
10 substantial inequitable results. NRS 116.3116 was adopted in 1991. The original 1991  
11 language states that an HOA lien is prior to a first security interest on the property “to the  
12 extent of the assessments for common expenses based on the periodic budget adopted by  
13 the association pursuant to section 99 of this act which would have become due in the  
14 absence of acceleration during the 6 months immediately preceding institution of an action  
15 to enforce the lien.” At this point, holders of first deeds of trust were on notice of a potential  
16 priority conflict.

17 The Court finds that applying SFR to the facts in this case does not implicate any  
18 concerns about retroactive application of a new principle of law. Therefore, in evaluating  
19 the constitutionality and application of NRS Chapter 116, the Court will refer to the decision  
20 in SFR.

## 21 **2. Constitutionality of NRS Chapter 116**

22 Marchai argues the HOA foreclosure provisions of NRS Chapter 116 are  
23 unconstitutional, which would prevent the HOA sale from extinguishing Marchai’s interest  
24 in the Wolf Rivers property. Specifically, Marchai cites the due process clause, takings  
25 clause, and void for vagueness doctrine.

### 26 **a. Procedural Requirements of NRS Chapter 116**

27 Nevada Revised Statute Chapter 116 provides the procedural  
28 requirements for homeowners’ associations seeking to secure a lien for unpaid assessments

1 and fees. “NRS 116.3116(2)... splits an HOA lien into two pieces, a superpriority piece and a  
2 subpriority piece. The superpriority piece, consisting of the last nine months of unpaid  
3 HOA dues and maintenance and nuisance-abatement charges, is ‘prior to’ a first deed of  
4 trust.” SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 411 (Nev. 2014), reh’g denied  
5 (Oct. 16, 2014). That super-priority portion of the lien was held by the Nevada Supreme  
6 Court to be a true super-priority lien, which will extinguish a first deed of trust if foreclosed  
7 upon pursuant to Chapter 116’s requirements. Id. at 419. Specifically, “[t]he sale of a unit  
8 pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the  
9 unit’s owner without equity or right of redemption.” NRS 116.31166(3); see also SFR v. U.S.  
10 Bank, 334 P.3d at 412.

11 For an HOA foreclosure sale to be valid, Chapter 116 requires the foreclosing HOA  
12 and its agent comply with several requirements related to notifying interested parties,  
13 including junior lienholders, of the impending foreclosure sale. To initiate foreclosure  
14 under Chapter 116, a Nevada HOA must first notify the owner of the delinquent  
15 assessments. See NRS 116.31162(1)(a). If the owner does not pay within thirty days, the  
16 HOA must then provide the owner a notice of default and election to sell. See NRS  
17 116.31162(1)(b).

18 After recording the notice of default and election to sell, Chapter 116 requires the  
19 HOA to mail a copy of the notice of default and election to sell to “[e]ach person who has  
20 requested notice pursuant to NRS 107.090 or 116.31168.” NRS 116.31163(1). At closer look,  
21 this provision of Chapter 116 requires the HOA to mail the notice of default to “[e]ach  
22 person who has recorded a request for a copy of the notice” and “[e]ach other person with  
23 an interest whose interest or claimed interest is subordinate to the [association’s lien].”  
24 NRS 107.090(2)-(4) (reading NRS 107.090 and 116.31168 together, “deed of trust” has been  
25 replaced with “association’s lien”); see NRS 116.31168(1) (“NRS 107.090 appl[ies] to the  
26 foreclosure of an association’s lien as if a deed of trust were being foreclosed”). In addition  
27 to noticing those interested persons, Chapter 116 requires the HOA to mail notice to “[a]ny  
28 holder of a recorded security interest encumbering the unit’s owner’s interest who has



1 notified the association, 30 days before the recordation of the notice of default, of the  
2 existence of the security interest.” NRS 116.31163(2); see NRS 111.320 (“record[ing]...  
3 must from the time of filing... impart notice to all persons of the contents thereof”); see  
4 also First Nat. Bank v. Meyers, 161 P. 929, 931 (Nev. 1916) (“One need but revert to the fact  
5 that recordation is for the purpose of giving notice to the world”). In sum, a foreclosing  
6 HOA must mail the notice of default and election to sell to (1) persons who have recorded a  
7 request for notice, (2) persons holding or claiming a subordinate interest, and (3) holders of  
8 security interests recorded at least 30 days before notice of default.

9 Then, if the lien has not been paid off within 90 days, the HOA may continue with  
10 the foreclosure process. See NRS 116.31162(1)(c). The HOA must next mail a notice of sale  
11 to all those who were entitled to receive the prior notice of default and election to sell, as  
12 well as the holder of a recorded security interest if the security interest holder “has notified  
13 the association, before the mailing of the notice of sale of the existence of the security  
14 interest.” See NRS 116.311635(1)(a)(1), (b)(2). As this Court interprets the “notified-the-  
15 association” provision, this additional notice requirement simply means the HOA must  
16 mail the notice of sale to any holder of a security interest who has recorded its interest prior  
17 to the mailing of the notice of sale.

18 **b. Due Process Clause**

19 Marchai alleges NRS 116.3116 is unconstitutional because Chapter 116’s  
20 express notice provisions do not require HOAs to provide mandatory notice to lenders of an  
21 impending non-judicial foreclosure; rather, Chapter 116 requires lenders to request notice  
22 in advance of foreclosure in order to receive notice of foreclosure. Marchai argues Chapter  
23 116’s notice provisions, on their face, fail to meet the notice requirements of the due process  
24 clause and therefore render Chapter 116’s non-judicial foreclosure scheme unconstitutional  
25 on its face.

26 **i. Constitutional Notice Requirement**

27 “[P]rior to an action which will affect an interest in life, liberty,  
28 or property protected by the Due Process Clause of the Fourteenth Amendment, a State

1 must provide ‘notice reasonably calculated, under all circumstances, to apprise interested  
2 parties of the pendency of the action and afford them an opportunity to present their  
3 objections.’” Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983) (holding  
4 statutory notice requirements posting and publishing announcement of pending tax sale  
5 did not meet requirements of the Due Process Clause of the Fourteenth Amendment)  
6 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). “In  
7 Mennonite, the Supreme Court applied this principle and found that mere constructive  
8 notice afforded inadequate due process to a readily ascertainable mortgage holder.” Cont’l  
9 Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984). The Court held that personal service or  
10 mailed notice is required: “Notice by mail or other means as certain to ensure actual notice  
11 is a minimum constitutional precondition to a proceeding which will adversely affect the  
12 liberty or property interests of any party, whether unlettered or well versed in commercial  
13 practice, if its name and address are reasonably ascertainable.” Mennonite, 462 U.S. at  
14 800 (emphasis in original).

15 Under NRS 116.31162, HOAs are required to give actual notice of their impending  
16 lien foreclosures to record owners of the property at issue. Although Chapter 116 requires  
17 actual notice be given to the property owner, the United States Supreme Court has long  
18 held, “[n]otice to the property owner, who is not in privity with his creditor and who has  
19 failed to take steps necessary to preserve his own property interest, also cannot be expected  
20 to lead to actual notice to the mortgagee.” Mennonite, 462 U.S. at 799. The question here  
21 becomes, does Chapter 116 provide mortgage holders actual notice — “notice mailed to the  
22 mortgagee’s last known available address, or by personal service.” See Mennonite, 462 U.S.  
23 at 798.

24 Marchai argues Nevada law shifts the burden of giving notice to the mortgagee  
25 because associations need only give actual notice to a lienholder “who has notified the  
26 association, 30 days before the recordation of the notice of default, of the existence of [its]  
27 security interest.” NRS 116.31163(2). Statutory provisions that require a party to give  
28 notice in order to get notice are often referred to as “opt-in” or “request-notice” provisions.

1 In Small Engine Shop, Inc. v. Cascio, the Fifth Circuit Court of Appeals held that  
2 Louisiana's "request-notice" statute "prospectively shift[ed] the entire burden of ensuring  
3 adequate notice to an interested property owner regardless of the circumstances." 878 F.2d  
4 883, 884 (5th Cir. 1989). Such a shift in the burden of ensuring adequate notice, the Small  
5 Engine Court held, does not afford a defaulting property owner facing foreclosure adequate  
6 notice under Mennonite and therefore violates the Due Process Clause. Id. at 890; see also  
7 USX Corp. v. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993) ("[second mortgagee]'s  
8 interest, even though terminable by foreclosure of the superior loan was sufficient to trigger  
9 due process"). For that reason, the court held the "request-notice" statute only serves to  
10 supplement the preexisting notice scheme, to allow creditors who are not otherwise  
11 reasonably ascertainable to become ascertainable. Small Engine, 878 F.2d at 892-3.

12 Chapter 116, if read in a vacuum, could lead to the erroneous interpretation that a  
13 mortgage holder is only entitled to receive notice of a homeowners' association's impending  
14 foreclosure if that mortgage holder requests such notice from the association; however, this  
15 reading would ignore the well-established canon of statutory interpretation—  
16 constitutional avoidance. "It is elementary when the constitutionality of a statute is  
17 assailed, if the statute be reasonably susceptible of two interpretations, by one of which it  
18 would be unconstitutional and by the other valid, it is our plain duty to adopt that  
19 construction which will save the statute from constitutional infirmity." U S ex rel Attorney  
20 Gen. v. Delaware & Hudson Co, 213 U.S. 366 (1909); see also State v. Curler, 67 P. 1075,  
21 1076 (Nev. 1902) ("it is a well-established rule of this and other courts that constitutional  
22 questions will never be passed upon, except when absolutely necessary to properly dispose  
23 of the particular case").

24 The reading of Chapter 116's notice requirements in a way to be constitutionally valid  
25 requires that a foreclosing homeowners' association must provide notice to the following  
26 parties:

27 (1) Any interested person who has recorded a request for notice with the proper  
28 county recorder must be mailed copies of the notice of default and election to sell and the

1 notice of sale. See NRS 116.31163(1) (notice of default must be given to “[e]ach person who  
2 has requested notice pursuant to NRS 107.090 or 116.31168”), NRS 107.090(2) (a “request  
3 for a copy of the notice of default or of sale” must be “record[ed] in the office of the county  
4 recorder of the county in which any part of the real property is situated”), and NRS  
5 116.31168(1) (“The request must identify the lien by stating the names of the unit’s owner  
6 and the common-interest community.”); see also NRS 116.311635(1)(b)(1) (notice of sale  
7 must be mailed to all persons entitled to receive a copy of the notice of default). This  
8 request-notice provision exists to allow interested parties who are not otherwise  
9 ascertainable an opportunity to receive notice and protect their interest.

10 (2) Any other person holding or claiming an interest subordinate to the association’s  
11 lien must be mailed copies of the notice of default and election to sell and the notice of sale.  
12 See NRS 116.31163(1) and .311635(1)(b)(1), supra; see also NRS 116.31168(1) (incorporating  
13 requirements of NRS 107.090 to HOA foreclosures) and NRS 107.090(3)(b) (notice must  
14 be mailed to “[e]ach other person with an interest whose interest or claimed interest is  
15 subordinate to the [association’s lien].”). This catch-all provision exists to provide notice to  
16 any other interested party whose identity is reasonably ascertainable.

17 (3) Any holders of a recorded security interest that encumbers the homeowner’s  
18 interest must be mailed copies of (a) the notice of default and election to sell, if the security  
19 interest was recorded at least 30 days before notice of default was recorded, and (b) the  
20 notice of sale, if the security interest was recorded prior to the mailing of the notice of sale.  
21 See NRS 116.31163(2), supra, and NRS 116.311635(1)(b)(2) (HOA must mail notice of sale  
22 to security interest holder that “has notified the association, before the mailing of the notice  
23 of sale of the existence of the security interest.”); see also NRS 111.320, supra, and First Nat.  
24 Bank v. Meyers, 161 P. at 931 (recording of the security interest gives notice to the world of  
25 that interest).

26 This actual notice provision explicitly requires the foreclosing homeowners’  
27 association to provide notice to mortgage holders that have timely recorded interest in the  
28 subject property. Therefore, Marchai’s facial challenge of Chapter 116’s notice

1 requirements fails because the provisions of Chapter 116 read as a whole and in conjunction  
2 with well-established related law ensures mortgage holders and other interested parties  
3 receive actual notice of a homeowners' association's impending non-judicial foreclosure  
4 sale.

5 **b. State Action Requirement**

6 Although Chapter 116, on its face, provides for notice firmly grounded  
7 within the boundaries of the Due Process Clause of the Fourteenth Amendment, the Court  
8 questions whether the mandates of the Due Process Clause are in fact triggered. Marchai  
9 must identify some "state action" that runs afoul of the Fourteenth Amendment. See Lugar  
10 v. Edmondson Oil Co., 457 U.S. 922, 930 (1982) ("the Due Process Clause protects  
11 individuals only from governmental and not from private action, plaintiffs had to  
12 demonstrate that the sale of their goods was accomplished by state action"); see also  
13 S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 247 (Nev. 2001) ("The general rule is that  
14 the Constitution does not apply to private conduct."). "Embedded in our Fourteenth  
15 Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny  
16 under the Amendment's Due Process Clause, and private conduct, against which the  
17 Amendment affords no shield, no matter how unfair that conduct may be." Nat'l Collegiate  
18 Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding state university's imposition  
19 of sanctions against legendary basketball coach Jerry Tarkanian in furtherance of the  
20 NCAA's rules and recommendations did not transform NCAA's private conduct into state  
21 action).

22 In analyzing the state-action issue where a private party's decisive conduct has  
23 caused harm to another private party, the question becomes "whether the State was  
24 sufficiently involved to treat that decisive conduct as state action." Tarkanian, 488 U.S. at  
25 192. In general, the State's involvement may transform private conduct into state action  
26 when the State delegates its authority to the private actor; the State knowingly accepts  
27 benefits derived from unconstitutional behavior; or when the State creates the legal  
28 framework governing the private conduct. Id. (citing for each proposition, respectively,

1 West v. Atkins, 487 U.S. 42 (1988); Burton v. Wilmington Parking Authority, 365 U.S. 715,  
2 722 (1961); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)  
3 (holding state's garnishment statute, which permitted writ of garnishment to be issued in  
4 pending actions by court clerk, denied due process of law)).

5 The conduct at issue in this case, a non-judicial foreclosure authorized by Nevada  
6 law, centers the state-action analysis on the Nevada's creation of the legal framework  
7 governing HOA non-judicial foreclosure actions. The inquiry here turns on whether the  
8 Nevada Legislature's enactment of the legal framework governing non-judicial foreclosure  
9 of homeowners' association liens constitutes sufficient state action to trigger the due  
10 process protections of the Fourteenth Amendment for mortgage holders. This Court finds  
11 it is not.

12 The "State is responsible for the... act of a private party when the State, by its law,  
13 has compelled the act." Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970). However,  
14 a State's mere acquiescence in a private action does not convert that action into that of the  
15 State. See Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

16 In Flagg Bros. v. Brooks, Ms. Brooks had fallen on hard times, faced eviction, and  
17 was forced by circumstance to place her belongings in storage. Ms. Books filed a lawsuit  
18 against the storage company, Flagg Brothers, alleging a violation of her Fourteenth  
19 Amendment rights. Specifically, the issue centered on Flagg Brothers's threat to sell Ms.  
20 Brooks's belongings pursuant to New York Uniform Commercial Code unless she paid her  
21 storage fee. Id., 436 U.S. at 153. Ms. Brooks argued that "Flagg Brothers' proposed action  
22 [wa]s properly attributable to the State because the State ha[d] authorized and encouraged  
23 it in enacting [the statutory framework authorizing the sale of her property to satisfy the  
24 storage lien]." Id., 436 U.S. at 164. The Court held that the state statute, together with  
25 private action conforming to the statute, was insufficient to establish state action,  
26 reasoning:

27 Here, the State of New York has not compelled the sale of a  
28 bailor's goods, but has merely announced the circumstances  
under which its courts will not interfere with a private sale.

1 Indeed, the crux of respondents' complaint is not that the State  
2 has acted, but that it has refused to act. This statutory refusal to  
3 act is no different in principle from an ordinary statute of  
4 limitations whereby the State declines to provide a remedy for  
5 private deprivations of property after the passage of a given  
6 period of time.

7 Flagg Bros., 436 U.S. at 166 (emphasis in original).

8 Here, the State of Nevada, by enacting the provisions of Chapter 116, has merely  
9 announced the requirements a homeowners' association must fulfill to legally foreclose on a  
10 lien; the State of Nevada has not compelled homeowners' associations to act. Like the State  
11 of New York in Flagg Bros., here the State of Nevada has announced circumstances in  
12 which it will not interfere with the foreclosure of homeowners' association liens. Therefore,  
13 because the State of Nevada has merely acquiesced to, and not compelled, the non-judicial  
14 foreclosure of homeowners' association liens, this Court finds state action does not exist in  
15 this situation sufficient to implicate the protections of the due process clause.

16 Marchai cannot show that legislative enactment of Chapter 116 is a due process  
17 violation. Therefore, the Court denies Marchai's motion for summary judgment on this  
18 ground.

19 **b. Taking Clause**

20 Marchai argues that NRS Chapter 116 effects a regulatory taking. The  
21 Fifth Amendment to the United States Constitution prohibits "private property be[ing]  
22 taken for public use without just compensation." U.S. Const. amend. V. Article One of the  
23 Nevada Constitution correspondingly provides that "[p]rivate property shall not be taken  
24 for public use without just compensation having been first made, or secured." Nev. Const.  
25 art. I, § 8(6). The Nevada Supreme Court clarified regulatory taking jurisprudence as  
26 follows: "a per se regulatory taking occurs when a public agency seeking to acquire property  
27 for a public use... fails to follow the [statutory eminent domain] procedures... and  
28 appropriates or permanently invades private property for public use without first paying  
just compensation." See McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1127 (Nev. 2006).  
"In deciding whether a particular governmental action has effected a taking, this Court

1 focuses... both on the character of the action and on the nature and extent of the  
2 interference with rights in the parcel as a whole.” Tahoe-Sierra Pres. Council, Inc. v.  
3 Tahoe Reg’l Planning Agency, 535 U.S. 302, 327 (2002) (quoting San Diego Gas & Elec.  
4 Co. v. San Diego, 450 U.S. 621, 636 (1981)).

5 The Nevada Legislature’s enactment of the statutory framework encompassing HOA  
6 liens and non-judicial foreclosures does not rise to the level of a government taking for a  
7 public purpose. The enactment of the statutory framework alone is insufficient government  
8 action to establish such a taking. The character of the legislative action is simply to create a  
9 legal framework for private conduct to operate within, and because the foreclosure action is  
10 non-judicial, the nature of the government interference in private property is minimal,  
11 possibly even non-existent. In fact, one of the many complaints about Chapter 116’s  
12 framework, is the prescription that HOA liens may be foreclosed upon without government  
13 intervention or judicial approval. That being so, the foreclosure of an HOA lien is not an  
14 action of the government, but instead is that of a private party — the HOA and its  
15 foreclosure agent.

16 In SFR v. U.S. Bank, the Court found the private interest at stake here was “essential  
17 for common-interest communities,” stating, “Otherwise, when a homeowner walks away  
18 from the property and the first deed of trust holder delays foreclosure, the HOA has to  
19 ‘either increase the assessment burden on the remaining unit/parcel owners or reduce the  
20 services the association provides (e.g., by deferring maintenance on common amenities).”  
21 SFR v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014), reh’g denied (Oct. 16, 2014) (quoting  
22 Uniform Law Commission’s Joint Editorial Board for Uniform Real Property Acts, The Six–  
23 Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest  
24 Ownership Act, at 5-6). The Court noted that the true super-priority lien was created “[t]o  
25 avoid having the community subsidize first security holders who delay foreclosure, whether  
26 strategically or for some other reason.” Id. A homeowners’ association is a private entity  
27 that serves an exclusively private interest; therefore, any taking that occurs as a result of a  
28 foreclosure of an HOA lien is a private action to benefit a private interest.



1 Marchai cannot show that legislative enactment of Chapter 116 is a government  
2 taking by regulation or that a private foreclosure of an HOA lien serves to further a public  
3 purpose. Therefore, the Court denies Marchai's motion for summary judgment on this  
4 ground.

5 **c. Void for Vagueness Doctrine**

6 Marchai argues NRS Chapter 116 is unconstitutionally vague. Nevada's  
7 two-factor test for vagueness examines whether the statute, "(1) fails to provide notice  
8 sufficient to enable persons of ordinary intelligence to understand what conduct is  
9 prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even  
10 failing to prevent arbitrary and discriminatory enforcement." Flamingo Paradise Gaming,  
11 LLC v. Chanos, 217 P.3d 546, 553-54 (Nev. 2009) (quoting Silver v. Eighth Judicial Dist.  
12 Court ex rel. County of Clark, 129 P.3d 682, 684-85 (Nev. 2006). "A statute which does not  
13 impinge on First Amendment freedoms... may be stricken as unconstitutionally vague only  
14 if it is found to be so in all its applications. Additionally, the standard of review is less strict  
15 under a challenge for vagueness where the review is directed at economic regulations."  
16 State v. Rosenthal, 819 P.2d 1296, 1300 (Nev. 1991). "Enough clarity to defeat a vagueness  
17 challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a  
18 statute's words their well settled and ordinarily understood meaning, and by looking to the  
19 common law definitions of the related term or offense." Busefink v. State, 286 P.3d 599,  
20 605 (Nev. 2012) (quoting Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2718  
21 (2010)).

22 For the purposes of this Order, the Court will not dispute Marchai's assertion that  
23 NRS Chapter 116 is inartfully drafted; however, this is not enough for the Court to refuse to  
24 apply NRS Chapter 116. See Fairbanks v. Pavlikowski, 423 P.2d 401, 404 (Nev. 1967). The  
25 Court finds that NRS Chapter 116 is not unconstitutionally vague. As previously discussed  
26 in the Court's decision to apply the decision of SFR in this case, Chapter 116's original 1991  
27 language put holders of first deeds of trust on notice of a potential priority conflict. Though  
28 there were conflicting interpretations of Chapter 116 prior to the SFR decision, judicial

1 enforcement was not arbitrary or discriminatory. The decision in SFR has clarified some  
2 ambiguities in the statutes. Because this statute does not infringe on constitutionally  
3 protected rights, as previously discussed, the standard for the Court to find  
4 unconstitutional vagueness is high. The language of Chapter 116 and the SFR decision is  
5 sufficient for this Court to find NRS Chapter 116 is not unconstitutionally vague.

6 Marchai cannot show that NRS Chapter 116 is unconstitutionally vague. Therefore,  
7 the Court denies Marchai's motion for summary judgment on this ground.

8 **3. Alleged Issues Prior to Sale**

9 Marchai asserts there are issues with the HOA's foreclosure process prior to  
10 the foreclosure sale. Marchai argues issues regarding notice and tender prevent the HOA  
11 foreclosure sale from extinguishing Marchai's deed of trust.

12 **a. Notice**

13 Marchai argues that the HOA failed to comply with several notice  
14 provisions of NRS Chapter 116, including requirements that notices be mailed via first class  
15 mail and notices be mailed to all parties with an interest in the property. SFR argues the  
16 foreclosure deed conclusively establishes that the notice provisions of NRS Chapter 116  
17 were met.

18 The foreclosure deed's recitals are conclusive evidence of compliance with the notice  
19 provisions of NRS 116.31162 through 116.31168. NRS 116.31166(2). The deed in this case  
20 states all statutory notices were given. SFR can rely on the deed's recitals as proof that the  
21 HOA fulfilled the notice provisions of NRS Chapter 116.

22 The foreclosure deed's recitals are not unassailable, however. The Nevada Supreme  
23 Court recently held:

24 The long-standing and broad inherent power of a court to sit in equity  
25 and quiet title, including setting aside a foreclosure sale if the  
26 circumstances support such action, the fact that the recitals made  
27 conclusive by operation of NRS 116.31166 implicate compliance only  
28 with the statutory prerequisites to foreclosure, and the foreign  
precedent cited under which equitable relief may still be available in

1 the face of conclusive recitals, at least in cases involving fraud, lead us  
2 to the conclusion that the Legislature, through NRS 116.31166's  
3 enactment, did not eliminate the equitable authority of the courts to  
4 consider quiet title actions when an HOA's foreclosure deed contains  
5 conclusive recitals.

6 Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6 (2016).

7 Based on the language in Shadow Wood and the Court's equitable powers, the Court  
8 is not persuaded that sending notices via certified mail as opposed to first class mail would  
9 justify setting aside a foreclosure sale or its effect if the parties actually received notice in a  
10 timely manner. Absent some further showing that notice was not actually received, recitals  
11 in the foreclosure deed are sufficient to establish that the HOA complied with NRS Chapter  
12 116.

13 Marchai only provides evidence that notice was not received by an interested party  
14 in one case. Marchai asserts it did not receive the notice of trustee's sale mailed on July 29,  
15 2013. At the time, Marchai had an interest in the Wolf Rivers property; however, Marchai  
16 did not have a recorded interest in the property. Though U.S. Bank transferred its deed of  
17 trust to Marchai in March of 2013, neither party recorded the transfer until August 12,  
18 2013. U.S. Bank did receive the notice of trustee's sale mailed on July 29, 2013. Marchai's  
19 failure to receive notice can be attributed to its own actions and the actions of U.S. Bank.  
20 The HOA mailed notices to all parties that it could have known had an interest in the  
21 property.

22 Marchai failed to show the HOA violated the notice provisions of NRA Chapter 116.  
23 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

24 **b. Tender**

25 Marchai asserts the homeowner tendered the HOA lien's superpriority  
26 amount prior to the HOA foreclosure sale. Marchai argues this tender causes Marchai's  
27 deed of trust to survive the HOA foreclosure sale.

28 The Court is faced with a novel set of facts in this case. The foreclosure process,  
from the first notice of delinquent assessment to the actual foreclosure sale, spanned

1 almost five years. During this period, Perez, the homeowner, paid the HOA \$3,230.00.  
2 This is definitely more than the value of nine months of assessment fees, regardless of  
3 which year's rate is applied. At the end of the period, however, Perez still owed the HOA  
4 \$14,677.80.

5 The Court must determine whether the homeowner's payments to an HOA in this  
6 case constitute tender of the superpriority amount. NRS 116.3116(2) states the HOA lien is  
7 prior to first deeds of trust "to the extent of the assessments for common expenses based on  
8 the periodic budget adopted by the association... which would have become due in the  
9 absence of acceleration during the 9 months immediately preceding institution of an action  
10 to enforce the lien..." The statute does not state who can satisfy the superpriority portion of  
11 the lien.

12 The Court finds the answer relies on the definition of "tender" rather than  
13 distinguishing between homeowners and first deed of trust holders. A party's tender of the  
14 super-priority amount is sufficient to extinguish the super-priority character of the lien,  
15 leaving only a junior lien. See SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 414  
16 (2014), reh'g denied (Oct. 16, 2014) and Sears v. Classen Garage & Serv. Co., 612 P.2d 293,  
17 295 (Okla. Civ. App. 1980) ("a proper and sufficient tender of payment operates to  
18 discharge a lien"). The common law definition of tender is "an offer of payment that is  
19 coupled either with no conditions or only with conditions upon which the tendering party  
20 has a right to insist." Fresk v. Kraemer, 99 P.3d 282, 286-7 (Or. 2004); see also 74 Am.  
21 Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or  
22 obligation, coupled with the present ability of immediate performance, so that if it were not  
23 for the refusal of cooperation by the party to whom tender is made, the condition or  
24 obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of  
25 Contracts, § 1808 (3d. ed. 1972).

26 In the case of a first deed of trust holder offering to pay the HOA nine months of  
27 assessments, a tender is undoubtedly taking place in order to satisfy the superpriority  
28 amount. The deed of trust holder offers to perform a specific condition that the HOA is

1 clearly aware of. In the case of a homeowner paying an HOA, the case is not so clear. The  
2 homeowner has a responsibility to pay the HOA fees every month. Payments to the HOA  
3 could be directed towards old or new monthly fees. The homeowner paying the HOA is not  
4 a clear offer to satisfy the HOA's superpriority lien amount. It could be an offer to satisfy  
5 the homeowner's newer debts to the HOA.

6 The Court finds that further factual development is needed to determine whether  
7 Perez's payments to the HOA constituted a valid tender. Marchai is careful in its motion for  
8 summary judgment to phrase Perez's payments to the HOA during the foreclosure process  
9 as continually being in response to the HOA's notices of delinquent liens and sales. If this  
10 was the intent of Perez, Marchai can make the case that Perez's payments to the HOA were  
11 designed to satisfy the HOA lien's superpriority amount. This would potentially protect  
12 Perez, as Marchai would be able to sell the Wolf Rivers property to collect Perez's debt  
13 rather than directly pursue Perez under the agreement secured by the deed of trust. On the  
14 other hand, SFR could prove Perez was attempting to keep up with her monthly dues and  
15 had no intent of directing her payments towards the HOA's superpriority amount. The  
16 foreclosure process's length of time in this case further complicates the issue for both sides.

17 The Court finds genuine issues of material fact exist on the issue of tender.  
18 Therefore, the Court denies both Marchai and SFR's motion for summary judgment on this  
19 ground.

20 **4. Alleged Issues With Foreclosure Sale**

21 Marchai asserts there are also issues with the HOA's foreclosure sale.  
22 Marchai argues issues regarding the wording in the foreclosure deed and commercial  
23 reasonableness prevent the foreclosure sale from extinguishing Marchai's interest in the  
24 property. SFR argues any issues in the foreclosure process cannot impact SFR's interest in  
25 the property as a bona fide purchaser.

26 //

27 //

1                   **a.     Alessi & Koenig's Interest in the Property**

2                   Marchai argues SFR actually purchased Alessi & Koenig's interest in  
3 the Wolf Rivers property rather than the HOA's interest. Marchai bases its argument on a  
4 sentence in the foreclosure deed:

5                   Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
6 Trustee under that certain Notice of Delinquent Assessment Lien...  
7 does hereby grant, without warranty expressed or implied to: SFR... all  
8 its right, title and interest in the property...

9                   While the Court agrees this sentence is inartfully drafted, the Court does not agree  
10 that it conclusively establishes that Alessi & Koenig were the grantors at the HOA  
11 foreclosure sale. At most, this sentence creates an ambiguity in the deed. The deed  
12 identifies the HOA as the foreclosing beneficiary. The deed also states:

13                   This conveyance is made pursuant to the powers conferred upon the  
14 Trustee by NRS 116 et seq... All requirements of law regarding the  
15 mailing of copies of notices and the posting and publication of the  
16 copies of the Notice of Sale have been complied with.

17                   This ambiguity cannot be resolved in favor of Marchai on a motion for summary judgment.  
18 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

19                   **b.     Commercial Reasonableness**

20                   Marchai argues the HOA foreclosure sale was commercially  
21 unreasonable. SFR argues that there is no requirement that the sale be reasonable or, in  
22 the alternative, there is not sufficient proof to demonstrate that the sale was unreasonable.

23                   The decision in SFR did not address what commercial reasonableness was required  
24 in HOA foreclosure sales. SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 418 n.6  
25 (Nev. 2014), reh'g denied (Oct. 16, 2014). NRS Chapter 116, however, states, "[e]very  
26 contract or duty governed by this chapter imposes an obligation of good faith in its  
27 performance or enforcement." NRS 116.1113.

28                   It used to be clear that "[m]ere inadequacy of price is not sufficient to justify setting  
aside a foreclosure sale, absent a showing of fraud, unfairness or oppression." Long v.

1 Towne, 639 P.2d 528, 530 (Nev. 1982). The Nevada Supreme Court recently created room  
2 for debate on this issue in its Shadow Wood decision. The Nevada Supreme Court states,  
3 “demonstrating that an association sold a property at its foreclosure sale for an inadequate  
4 price is not enough to set aside that sale; there must also be a showing of fraud, unfairness,  
5 or oppression. Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6  
6 (2016). In the next sentence, the Nevada Supreme Court appears to distinguish a merely  
7 inadequate price from a price that is “grossly inadequate as a matter of law” and indicates  
8 that gross inadequacy may be sufficient grounds to set aside a sale. Id.

9 The Court finds that some other evidence of fraud, unfairness or oppression is still  
10 required to set aside an HOA foreclosure sale, regardless of the price. Shadow Wood cites  
11 Golden v. Tomiyasu, 387 P.2d 989, 995 (Nev. 1963) which required some showing of fraud  
12 “in addition to gross inadequacy of price” for a court to set aside a transaction. Though a  
13 sales price may be extremely low, as in the instant case before the Court, the price alone is  
14 insufficient proof of commercial unreasonableness.

15 The Court finds Marchai has established that there are material issues of fact  
16 regarding whether the HOA foreclosure sale was commercially reasonable. Price is one  
17 factor the Court may consider. Marchai also argues the HOA sale was conducted after the  
18 homeowner tendered the superpriority amount to the HOA. Arguments regarding notice  
19 that the Court negated in this Order could also be relevant on the issue of commercial  
20 reasonableness with further factual development.

21 Marchai fails to establish as a matter of law that the HOA sale was commercially  
22 unreasonable. Therefore, the Court denies Marchai’s motion for summary judgment on  
23 this ground.

24 **c. Bona Fide Purchaser**

25 SFR argues that any alleged deficiencies with the HOA foreclosure sale in this  
26 case do not impact SFR’s quiet title claim because SFR is a bona fide purchaser for value.  
27 The Nevada Supreme Court recently held that potential harm to alleged bona fide  
28 purchasers must be evaluated, but it is possible to “demonstrate that the equities swayed so

1 far in [the homeowner's] favor as to support setting aside [the] foreclosure sale." Shadow  
2 Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*10 (2016).

3 Questions as to SFR's bona fide purchaser status and the balance of equities in this  
4 case are questions of fact. This is especially true in the instant case. The HOA's foreclosure  
5 proceedings lasted almost five years. Multiple notices of delinquency, default, and sale  
6 were recorded. The Court cannot rule on whether a reasonable purchaser would be put on  
7 notice by these circumstances at the summary judgment stage.

8 SFR fails to establish as a matter of law that it was a bona fide purchaser and that the  
9 equities in this case prevent setting aside the foreclosure sale. Therefore, the Court denies  
10 SFR's motion for summary judgment on this ground.

#### 11 IV. Conclusion

12 The Court finds that genuine issues of material fact remain in this case. The Court  
13 denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.  
14

15  
16 DATED this 13<sup>th</sup> day of February, 2016.

17  
18  
19 

20 LINDA MARIE BELL  
21 DISTRICT COURT JUDGE  
22  
23  
24  
25  
26  
27  
28



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
David J. Merrill, Esq. David J. Merrill, P.C.	Counsel for Marchai, B.T.
Diana Cline Ebron, Esq. Jacqueline A. Gilbert, Esq. Karen L. Hanks, Esq. Kim Gilbert Ebron	Counsel for SFR Investments Pool 1, LLC

  
\_\_\_\_\_  
SHELBY DAHL  
LAW CLERK, DEPARTMENT VII

**AFFIRMATION**

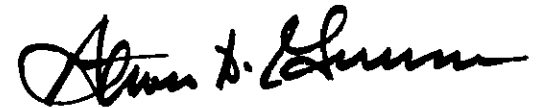
Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A689461 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell Date 3/21/2016  
District Court Judge

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

# **TAB 22**



CLERK OF THE COURT

DIANA CLINE EBRON, ESQ.  
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Attorneys for SFR Investment Pool 1, LLC

**EIGHTH JUDICIAL DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MARCHAI B.T.,

Plaintiff,

vs.

CRISTELA PEREZ; SFR INVESTMENTS  
POOL 1, LLC; U.S. BANK NATIONAL  
ASSOCIATION, N.D.; DOES I through X;  
and ROE CORPORATIONS 1 through 10,  
inclusive,

Defendants.

AND ALL RELATED ACTIONS.

Case No. A-13-689461-C

Dept. No. VII

**NOTICE OF ENTRY OF DECISION AND  
ORDER**

PLEASE TAKE NOTICE that on March 22, 2016 this Court entered a **Decision and  
Order**. A copy of said Decision and Order is attached hereto.

DATED this 24<sup>th</sup> day of March, 2016.

**KIM GILBERT EBRON**

/s/ Diana Cline Ebron  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 24<sup>th</sup> day of March, 2016, pursuant to NRCP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **NOTICE OF ENTRY OF DECISION AND ORDER** to the following parties:

**David J. Merrill P.C.**

**Contact**

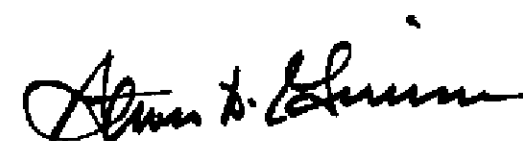
David J. Merrill

**Email**

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/s/ Tomas Valerio

An Employee of Kim Gilbert Ebron



CLERK OF THE COURT

DAO

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

MARCHAI B.T.,

Plaintiff,

vs.

CRISTELA PEREZ; SFR INVESTMENTS POOL 1, LLC;  
U.S. BANK NATIONAL ASSOCIATION, N.D.; DOES I  
through X; and ROE CORPORATIONS 1 through 10,  
inclusive,

Defendants.

Case No. A-13-689461-C

Dep't No. VII

And all related actions.

**DECISION AND ORDER**

This case arises from a homeowners' association's (HOA) non-judicial foreclosure sale of residential real property located at 7119 Wolf Rivers Avenue in Las Vegas, Nevada. Now before the Court are Defendant SFR Investments Pool 1 ("SFR") and Plaintiff Marchai's Motions for Summary Judgment and SFR's Motion to Strike. These matters came before the Court on February 16, 2015. The Court denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.

**I. Factual Background**

The residential property in this case, the Wolf Rivers property, is subject to the terms of the Wyeth Ranch Community Association's ("the HOA") Declaration of Covenants, Conditions and Restrictions (CC&Rs). In 2004, Cristela Perez entered into two loan agreements with Countrywide Home Loans in order to purchase the property. The loans were secured by two deeds of trust on the Wolf Rivers property. Perez refinanced these two

1 loans through an agreement with CMG Mortgage. CMG Mortgage recorded a deed of trust  
2 against the property on November 9, 2005.

3 **A. First Notice of Delinquent Assessment Lien**

4 The HOA recorded its first Notice of Delinquent Assessment Lien on October 8,  
5 2008. At that time, the HOA collected \$140.00 per month in association dues. At the  
6 beginning of 2009, the HOA increased its monthly dues to \$152.50. The HOA recorded a  
7 Notice of Default and Election to Sell on January 7, 2009. The HOA recorded a Notice of  
8 Trustee's Sale on January 14, 2010. In 2010, the HOA increased its monthly dues to  
9 \$159.50.

10 On February 3, 2010, the HOA sent a demand letter to Perez. On February 12, 2010,  
11 Perez paid the HOA \$900.00. On April 13, 2010, the HOA proposed a payment plan to  
12 Perez. On May 11, 2010, Perez paid the HOA \$300.00. Perez failed, however to comply  
13 with the payment plan.

14 On July 13, 2010, the HOA mailed a Pre-Notice of Trustee Sale and Notice of Default  
15 and Election to Sell to Perez. Perez paid the HOA \$645.00 between August 2 and  
16 November 30, 2010. The HOA recorded a Rescission of Notice of Sale on March 9, 2011.  
17 Perez paid the HOA \$160.00 on March 10, 2011.

18 On March 29, 2011, the HOA recorded a second Notice of Sale. On July 27, 2011, the  
19 HOA sent Perez a letter stating Perez was in breach of the payment plan. On August 4,  
20 2011, Perez paid the HOA \$165.00.

21 **B. Second Notice of Delinquent Assessment Lien**

22 On December 20, 2011, the HOA recorded a second Notice of Delinquent  
23 Assessment lien. The HOA recorded a Notice of Default and Election to Sell on February  
24 28, 2012. Perez paid the HOA \$760.00 between March 19 and July 26, 2012. CMG  
25 Mortgage assigned its deed of trust to CitiMortgage in May of 2012. CitiMortgage assigned  
26 the deed to U.S. Bank in July of 2012. The HOA recorded a Notice of Trustee's Sale on  
27 October 31, 2012. Perez paid the HOA \$300.00 on November 13, 2012.  
28

1 In March of 2013, U.S. Bank assigned its deed of trust to Marchai. Neither U.S.  
2 Bank nor Marchai recorded the transfer of interest for approximately five months. During  
3 this gap, U.S. Bank did not inform Marchai of the HOA's foreclosure proceedings. The  
4 HOA mailed a Notice of Trustee's sale to CMG Mortgage, CitiMortgage, and U.S. Bank on  
5 July 29, 2013. Marchai recorded its interest in the Wolf Rivers property on August 12,  
6 2013. Marchai's loan servicer received notice of the trustee's sale on August 27, 2013, the  
7 day before the sale was scheduled to take place. The servicer contacted the HOA's trustee  
8 conducting the sale, Alessi & Koenig, to ask that the sale be postponed. The HOA declined.

9 Alessi & Koenig as trustee for the HOA conducted a foreclosure sale of the Wolf  
10 Rivers property on August 28, 2013. SFR purchased the property for \$21,000.00. SFR  
11 recorded a trustee's deed upon sale on September 9, 2013 identifying SFR as the grantee  
12 and the HOA as the foreclosing beneficiary. The trustee's deed states:

13 Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
14 Trustee under that certain Notice of Delinquent Assessment Lien...  
15 does hereby grant, without warranty expressed or implied to: SFR... all  
16 its right, title and interest in the property...

17 This conveyance is made pursuant to the powers conferred upon the  
18 Trustee by NRS 116 et seq... All requirements of law regarding the  
19 mailing of copies of notices and the posting and publication of the  
20 copies of the Notice of Sale have been complied with.

21 At the time of sale, Perez owed the HOA \$14,677.80. As of January 14, 2016, Perez owes  
22 Marchai \$489,372.77 based the agreement secured by the deed of trust. Marchai asserts  
23 Perez is now in default on the agreement between Perez and Marchai.

## 24 **II. Procedural History**

25 On September 30, 2013, Marchai filed a complaint against Perez, SFR, and U.S.  
26 Bank. Marchai seeks to judicially foreclose on the Wolf Rivers property based on Perez's  
27 breach of the agreement secured by the deed of trust. On November 13, 2013, SFR filed an  
28 answer, counterclaim, and crossclaim. SFR brought counterclaims and crossclaims for  
declaratory relief/quiet title and injunctive relief. Specifically, SFR alleges Marchai's

1 interest in the Wolf Rivers property was extinguished by the non-judicial foreclosure of the  
2 HOA's super-priority lien established pursuant to NRS Chapter 116. The super-priority lien  
3 brands certain HOA liens as "prior to all other liens and encumbrances," excluding those  
4 recorded before the applicable CC&Rs. See NRS 116.3116(2)(a)-(b). The Court has entered  
5 defaults against Perez and U.S. Bank in this case.

6 On July 9, 2014, the Court ordered that the case be stayed pending a ruling from the  
7 Nevada Supreme Court on an HOA foreclosure's effect on a first deed of trust. The Nevada  
8 Supreme Court issued its ruling in SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408  
9 (Nev. 2014) on September 18, 2014. The Nevada Supreme Court denied a rehearing on  
10 October 16, 2014. The Court lifted the stay in the instant case on January 28, 2015.

11 Both Marchai and SFR filed motions for summary judgment on January 14, 2016.  
12 The parties dispute whether NRS Chapter 116 is constitutional and whether the HOA  
13 foreclosure procedure in the instant case complied with NRS Chapter 116. The parties filed  
14 oppositions to each other's motions on February 3 and 4, 2016. The parties filed replies on  
15 February 8 and 9, 2016. SFR's reply contained a countermotion to strike portions of  
16 Marchai's motion for summary judgment and opposition. SFR asserts Marchai's motion  
17 exceeded the appropriate page limit. SFR also argues Marchai's opposition contains  
18 evidence not properly disclosed in the discovery process.

### 19 III. Discussion

#### 20 A. Motion to Strike

21 The parties do not dispute that Marchai violated EDCR 2.20(a) by failing to obtain  
22 leave of Court before filing a brief in support of its motion for summary judgment that  
23 exceeded thirty pages. The parties also agree that Marchai's person most knowledgeable  
24 failed to appear at a properly noticed deposition on December 2, 2015. Marchai asserts that  
25 its failure to request leave of the Court to file an over-length brief was inadvertent. Marchai  
26 argues its failure to provide a person most knowledgeable for deposition was the result of  
27 miscommunication between substituted counsel. The parties have communicated  
28 regarding rescheduling the deposition. SFR argues these irregularities necessitate the



1 Court striking the excess pages in Marchai's motion for summary judgment and certain  
2 declarations submitted in support of Marchai's opposition to SFR's motion for summary  
3 judgment.

4 The Court finds the interests of deciding this motion on its merits outweigh the need  
5 to sanction Marchai for technical violations of Court rules. The Court also finds that SFR  
6 will not be prejudiced by the Court's decision to deny its motion. The table of contents in  
7 Marchai's motion for summary judgment uses extremely descriptive headings containing  
8 the factual and legal assertions Marchai makes throughout its motion. Using just these  
9 headings and Marchai's exhibits, the Court would be able to evaluate Marchai's arguments.  
10 In addition, though Marchai's person most knowledgeable failed to attend the scheduled  
11 December 2, 2015 deposition, Marchai has presented an explanation to the Court. The  
12 substitution of counsel created confusion regarding the deposition. This does not excuse  
13 Marchai from presenting its person most knowledgeable at a subsequent deposition, which  
14 the parties are working towards.

15 Failure to ask for leave, which would have been granted, and to attend one  
16 deposition does not justify the level of sanctions contemplated by SFR's motion to strike.  
17 The Court and the parties are benefitted by the Court considering all relevant, appropriate  
18 material in rendering a decision. Therefore, the Court denies SFR's motion to strike.

19 **B. Motions for Summary Judgment**

20 Summary judgment is appropriate "when the pleadings and other evidence on file  
21 demonstrate that no genuine issue as to any material fact remains and that the moving  
22 party is entitled to a judgment as a matter of law." Wood v. Safeway, Inc., 121 P.3d 1026,  
23 1029 (Nev. 2005) (internal quotation marks and alterations omitted). "If the party moving  
24 for summary judgment will bear the burden of persuasion at trial, that party 'must present  
25 evidence that would entitle it to a judgment as a matter of law in the absence of contrary  
26 evidence.'" Francis v. Wynn Las Vegas, LLC, 262 P.3d 705, 714 (Nev. 2011) (citing Cuzze v.  
27 Univ. & Cmty. Coll. Sys. of Nev., 172 P.3d 131, 134 (Nev. 2007)). "When requesting  
28 summary judgment, the moving party bears the initial burden of production to

1 demonstrate the absence of a genuine issue of material fact. If the moving party meets its  
2 burden, then the nonmoving party bears the burden of production to demonstrate that  
3 there is a genuine issue of material fact. Las Vegas Metro. Police Dep't v. Coregis Ins. Co.,  
4 256 P.3d 958, 961 (Nev. 2011) (internal citations omitted).

5 Marchai and SFR seek summary judgment on each of their claims. SFR argues the  
6 HOA foreclosure sale extinguished Marchai's interest in the Wolf Rivers property. Marchai  
7 argues its interest survived the foreclosure sale and is superior to SFR's interest. To  
8 determine what interests remain on the Wolf Rivers property and the interests' priority, the  
9 Court must evaluate NRS Chapter 116 and the foreclosure process in this particular case.

10 **1. Retroactive Application of the SFR Decision**

11 Marchai argues the decision in SFR Investments Pool 1 v. U.S. Bank, 334  
12 P.3d 408 (Nev. 2014), reh'g denied (Oct. 16, 2014) should only be applied prospectively.  
13 SFR was decided on September 18, 2014. In the instant case, the foreclosure sale took place  
14 on August 28, 2013.

15 The Nevada Supreme Court has ruled that:

16 In determining whether a new rule of law should be limited to  
17 prospective application, courts have considered three factors: (1) "the  
18 decision to be applied nonretroactively must establish a new principle  
19 of law, either by overruling clear past precedent on which litigants may  
20 have relied, or by deciding an issue of first impression whose resolution  
21 was not clearly foreshadowed;" (2) the court must "weigh the merits  
22 and demerits in each case by looking to the prior history of the rule in  
23 question, its purpose and effect, and whether retrospective operation  
24 will further or retard its operation;" and (3) courts consider whether  
25 retroactive application "could produce substantial inequitable results."

22 Breithaupt v. USAA Prop. & Cas. Ins. Co., 867 P.2d 402, 405 (Nev. 1994) (quoting  
23 Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07 (1971)).

24 In the SFR decision, the Nevada Supreme Court noted, "Nevada's state and federal  
25 district courts are divided on whether NRS 116.3116 establishes a true priority lien." SFR  
26 Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 412 (Nev. 2014), reh'g denied (Oct. 16,  
27 2014). There was no clear past precedent on the issue. The superpriority of HOA liens was  
28

1 a matter of first impression for the Nevada Supreme Court, but the resolution was  
2 foreshadowed. The Nevada Supreme Court relied on the language of NRS Chapter 116 and  
3 official comments to the Uniform Common Interest Ownership Act of 1982. Id. The  
4 language establishing the nature of the superpriority lien was amended in 2009, several  
5 years before the foreclosure sale in this case. The SFR decision also relied on a December  
6 2012 Nevada Real Estate Division advisory opinion holding an HOA could enforce its  
7 superpriority lien through a non-judicial foreclosure. 334 P.3d at 416-417.

8 In addition, the Court finds that applying the SFR decision to the facts of this case  
9 does not interfere with the prior history of the rule in question and will not produce  
10 substantial inequitable results. NRS 116.3116 was adopted in 1991. The original 1991  
11 language states that an HOA lien is prior to a first security interest on the property “to the  
12 extent of the assessments for common expenses based on the periodic budget adopted by  
13 the association pursuant to section 99 of this act which would have become due in the  
14 absence of acceleration during the 6 months immediately preceding institution of an action  
15 to enforce the lien.” At this point, holders of first deeds of trust were on notice of a potential  
16 priority conflict.

17 The Court finds that applying SFR to the facts in this case does not implicate any  
18 concerns about retroactive application of a new principle of law. Therefore, in evaluating  
19 the constitutionality and application of NRS Chapter 116, the Court will refer to the decision  
20 in SFR.

## 21 **2. Constitutionality of NRS Chapter 116**

22 Marchai argues the HOA foreclosure provisions of NRS Chapter 116 are  
23 unconstitutional, which would prevent the HOA sale from extinguishing Marchai’s interest  
24 in the Wolf Rivers property. Specifically, Marchai cites the due process clause, takings  
25 clause, and void for vagueness doctrine.

### 26 **a. Procedural Requirements of NRS Chapter 116**

27 Nevada Revised Statute Chapter 116 provides the procedural  
28 requirements for homeowners’ associations seeking to secure a lien for unpaid assessments

1 and fees. “NRS 116.3116(2)... splits an HOA lien into two pieces, a superpriority piece and a  
2 subpriority piece. The superpriority piece, consisting of the last nine months of unpaid  
3 HOA dues and maintenance and nuisance-abatement charges, is ‘prior to’ a first deed of  
4 trust.” SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 411 (Nev. 2014), reh’g denied  
5 (Oct. 16, 2014). That super-priority portion of the lien was held by the Nevada Supreme  
6 Court to be a true super-priority lien, which will extinguish a first deed of trust if foreclosed  
7 upon pursuant to Chapter 116’s requirements. Id. at 419. Specifically, “[t]he sale of a unit  
8 pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the  
9 unit’s owner without equity or right of redemption.” NRS 116.31166(3); see also SFR v. U.S.  
10 Bank, 334 P.3d at 412.

11 For an HOA foreclosure sale to be valid, Chapter 116 requires the foreclosing HOA  
12 and its agent comply with several requirements related to notifying interested parties,  
13 including junior lienholders, of the impending foreclosure sale. To initiate foreclosure  
14 under Chapter 116, a Nevada HOA must first notify the owner of the delinquent  
15 assessments. See NRS 116.31162(1)(a). If the owner does not pay within thirty days, the  
16 HOA must then provide the owner a notice of default and election to sell. See NRS  
17 116.31162(1)(b).

18 After recording the notice of default and election to sell, Chapter 116 requires the  
19 HOA to mail a copy of the notice of default and election to sell to “[e]ach person who has  
20 requested notice pursuant to NRS 107.090 or 116.31168.” NRS 116.31163(1). At closer look,  
21 this provision of Chapter 116 requires the HOA to mail the notice of default to “[e]ach  
22 person who has recorded a request for a copy of the notice” and “[e]ach other person with  
23 an interest whose interest or claimed interest is subordinate to the [association’s lien].”  
24 NRS 107.090(2)-(4) (reading NRS 107.090 and 116.31168 together, “deed of trust” has been  
25 replaced with “association’s lien”); see NRS 116.31168(1) (“NRS 107.090 appl[ies] to the  
26 foreclosure of an association’s lien as if a deed of trust were being foreclosed”). In addition  
27 to noticing those interested persons, Chapter 116 requires the HOA to mail notice to “[a]ny  
28 holder of a recorded security interest encumbering the unit’s owner’s interest who has

1 notified the association, 30 days before the recordation of the notice of default, of the  
2 existence of the security interest.” NRS 116.31163(2); see NRS 111.320 (“record[ing]...  
3 must from the time of filing... impart notice to all persons of the contents thereof”); see  
4 also First Nat. Bank v. Meyers, 161 P. 929, 931 (Nev. 1916) (“One need but revert to the fact  
5 that recordation is for the purpose of giving notice to the world”). In sum, a foreclosing  
6 HOA must mail the notice of default and election to sell to (1) persons who have recorded a  
7 request for notice, (2) persons holding or claiming a subordinate interest, and (3) holders of  
8 security interests recorded at least 30 days before notice of default.

9 Then, if the lien has not been paid off within 90 days, the HOA may continue with  
10 the foreclosure process. See NRS 116.31162(1)(c). The HOA must next mail a notice of sale  
11 to all those who were entitled to receive the prior notice of default and election to sell, as  
12 well as the holder of a recorded security interest if the security interest holder “has notified  
13 the association, before the mailing of the notice of sale of the existence of the security  
14 interest.” See NRS 116.311635(1)(a)(1), (b)(2). As this Court interprets the “notified-the-  
15 association” provision, this additional notice requirement simply means the HOA must  
16 mail the notice of sale to any holder of a security interest who has recorded its interest prior  
17 to the mailing of the notice of sale.

18 **b. Due Process Clause**

19 Marchai alleges NRS 116.3116 is unconstitutional because Chapter 116’s  
20 express notice provisions do not require HOAs to provide mandatory notice to lenders of an  
21 impending non-judicial foreclosure; rather, Chapter 116 requires lenders to request notice  
22 in advance of foreclosure in order to receive notice of foreclosure. Marchai argues Chapter  
23 116’s notice provisions, on their face, fail to meet the notice requirements of the due process  
24 clause and therefore render Chapter 116’s non-judicial foreclosure scheme unconstitutional  
25 on its face.

26 **i. Constitutional Notice Requirement**

27 “[P]rior to an action which will affect an interest in life, liberty,  
28 or property protected by the Due Process Clause of the Fourteenth Amendment, a State

1 must provide ‘notice reasonably calculated, under all circumstances, to apprise interested  
2 parties of the pendency of the action and afford them an opportunity to present their  
3 objections.’” Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 795 (1983) (holding  
4 statutory notice requirements posting and publishing announcement of pending tax sale  
5 did not meet requirements of the Due Process Clause of the Fourteenth Amendment)  
6 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). “In  
7 Mennonite, the Supreme Court applied this principle and found that mere constructive  
8 notice afforded inadequate due process to a readily ascertainable mortgage holder.” Cont’l  
9 Ins. Co. v. Moseley, 683 P.2d 20, 21 (Nev. 1984). The Court held that personal service or  
10 mailed notice is required: “Notice by mail or other means as certain to ensure actual notice  
11 is a minimum constitutional precondition to a proceeding which will adversely affect the  
12 liberty or property interests of any party, whether unlettered or well versed in commercial  
13 practice, if its name and address are reasonably ascertainable.” Mennonite, 462 U.S. at  
14 800 (emphasis in original).

15 Under NRS 116.31162, HOAs are required to give actual notice of their impending  
16 lien foreclosures to record owners of the property at issue. Although Chapter 116 requires  
17 actual notice be given to the property owner, the United States Supreme Court has long  
18 held, “[n]otice to the property owner, who is not in privity with his creditor and who has  
19 failed to take steps necessary to preserve his own property interest, also cannot be expected  
20 to lead to actual notice to the mortgagee.” Mennonite, 462 U.S. at 799. The question here  
21 becomes, does Chapter 116 provide mortgage holders actual notice — “notice mailed to the  
22 mortgagee’s last known available address, or by personal service.” See Mennonite, 462 U.S.  
23 at 798.

24 Marchai argues Nevada law shifts the burden of giving notice to the mortgagee  
25 because associations need only give actual notice to a lienholder “who has notified the  
26 association, 30 days before the recordation of the notice of default, of the existence of [its]  
27 security interest.” NRS 116.31163(2). Statutory provisions that require a party to give  
28 notice in order to get notice are often referred to as “opt-in” or “request-notice” provisions.

1 In Small Engine Shop, Inc. v. Cascio, the Fifth Circuit Court of Appeals held that  
2 Louisiana's "request-notice" statute "prospectively shift[ed] the entire burden of ensuring  
3 adequate notice to an interested property owner regardless of the circumstances." 878 F.2d  
4 883, 884 (5th Cir. 1989). Such a shift in the burden of ensuring adequate notice, the Small  
5 Engine Court held, does not afford a defaulting property owner facing foreclosure adequate  
6 notice under Mennonite and therefore violates the Due Process Clause. Id. at 890; see also  
7 USX Corp. v. Champlin, 992 F.2d 1380, 1385 (5th Cir. 1993) ("[second mortgagee]'s  
8 interest, even though terminable by foreclosure of the superior loan was sufficient to trigger  
9 due process"). For that reason, the court held the "request-notice" statute only serves to  
10 supplement the preexisting notice scheme, to allow creditors who are not otherwise  
11 reasonably ascertainable to become ascertainable. Small Engine, 878 F.2d at 892-3.

12 Chapter 116, if read in a vacuum, could lead to the erroneous interpretation that a  
13 mortgage holder is only entitled to receive notice of a homeowners' association's impending  
14 foreclosure if that mortgage holder requests such notice from the association; however, this  
15 reading would ignore the well-established canon of statutory interpretation—  
16 constitutional avoidance. "It is elementary when the constitutionality of a statute is  
17 assailed, if the statute be reasonably susceptible of two interpretations, by one of which it  
18 would be unconstitutional and by the other valid, it is our plain duty to adopt that  
19 construction which will save the statute from constitutional infirmity." U S ex rel Attorney  
20 Gen. v. Delaware & Hudson Co, 213 U.S. 366 (1909); see also State v. Curler, 67 P. 1075,  
21 1076 (Nev. 1902) ("it is a well-established rule of this and other courts that constitutional  
22 questions will never be passed upon, except when absolutely necessary to properly dispose  
23 of the particular case").

24 The reading of Chapter 116's notice requirements in a way to be constitutionally valid  
25 requires that a foreclosing homeowners' association must provide notice to the following  
26 parties:

27 (1) Any interested person who has recorded a request for notice with the proper  
28 county recorder must be mailed copies of the notice of default and election to sell and the

1 notice of sale. See NRS 116.31163(1) (notice of default must be given to “[e]ach person who  
2 has requested notice pursuant to NRS 107.090 or 116.31168”), NRS 107.090(2) (a “request  
3 for a copy of the notice of default or of sale” must be “record[ed] in the office of the county  
4 recorder of the county in which any part of the real property is situated”), and NRS  
5 116.31168(1) (“The request must identify the lien by stating the names of the unit’s owner  
6 and the common-interest community.”); see also NRS 116.311635(1)(b)(1) (notice of sale  
7 must be mailed to all persons entitled to receive a copy of the notice of default). This  
8 request-notice provision exists to allow interested parties who are not otherwise  
9 ascertainable an opportunity to receive notice and protect their interest.

10 (2) Any other person holding or claiming an interest subordinate to the association’s  
11 lien must be mailed copies of the notice of default and election to sell and the notice of sale.  
12 See NRS 116.31163(1) and .311635(1)(b)(1), supra; see also NRS 116.31168(1) (incorporating  
13 requirements of NRS 107.090 to HOA foreclosures) and NRS 107.090(3)(b) (notice must  
14 be mailed to “[e]ach other person with an interest whose interest or claimed interest is  
15 subordinate to the [association’s lien].”). This catch-all provision exists to provide notice to  
16 any other interested party whose identity is reasonably ascertainable.

17 (3) Any holders of a recorded security interest that encumbers the homeowner’s  
18 interest must be mailed copies of (a) the notice of default and election to sell, if the security  
19 interest was recorded at least 30 days before notice of default was recorded, and (b) the  
20 notice of sale, if the security interest was recorded prior to the mailing of the notice of sale.  
21 See NRS 116.31163(2), supra, and NRS 116.311635(1)(b)(2) (HOA must mail notice of sale  
22 to security interest holder that “has notified the association, before the mailing of the notice  
23 of sale of the existence of the security interest.”); see also NRS 111.320, supra, and First Nat.  
24 Bank v. Meyers, 161 P. at 931 (recording of the security interest gives notice to the world of  
25 that interest).

26 This actual notice provision explicitly requires the foreclosing homeowners’  
27 association to provide notice to mortgage holders that have timely recorded interest in the  
28 subject property. Therefore, Marchai’s facial challenge of Chapter 116’s notice



1 requirements fails because the provisions of Chapter 116 read as a whole and in conjunction  
2 with well-established related law ensures mortgage holders and other interested parties  
3 receive actual notice of a homeowners' association's impending non-judicial foreclosure  
4 sale.

5 **b. State Action Requirement**

6 Although Chapter 116, on its face, provides for notice firmly grounded  
7 within the boundaries of the Due Process Clause of the Fourteenth Amendment, the Court  
8 questions whether the mandates of the Due Process Clause are in fact triggered. Marchai  
9 must identify some "state action" that runs afoul of the Fourteenth Amendment. See Lugar  
10 v. Edmondson Oil Co., 457 U.S. 922, 930 (1982) ("the Due Process Clause protects  
11 individuals only from governmental and not from private action, plaintiffs had to  
12 demonstrate that the sale of their goods was accomplished by state action"); see also  
13 S.O.C., Inc. v. Mirage Casino-Hotel, 23 P.3d 243, 247 (Nev. 2001) ("The general rule is that  
14 the Constitution does not apply to private conduct."). "Embedded in our Fourteenth  
15 Amendment jurisprudence is a dichotomy between state action, which is subject to scrutiny  
16 under the Amendment's Due Process Clause, and private conduct, against which the  
17 Amendment affords no shield, no matter how unfair that conduct may be." Nat'l Collegiate  
18 Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (holding state university's imposition  
19 of sanctions against legendary basketball coach Jerry Tarkanian in furtherance of the  
20 NCAA's rules and recommendations did not transform NCAA's private conduct into state  
21 action).

22 In analyzing the state-action issue where a private party's decisive conduct has  
23 caused harm to another private party, the question becomes "whether the State was  
24 sufficiently involved to treat that decisive conduct as state action." Tarkanian, 488 U.S. at  
25 192. In general, the State's involvement may transform private conduct into state action  
26 when the State delegates its authority to the private actor; the State knowingly accepts  
27 benefits derived from unconstitutional behavior; or when the State creates the legal  
28 framework governing the private conduct. Id. (citing for each proposition, respectively,

1 West v. Atkins, 487 U.S. 42 (1988); Burton v. Wilmington Parking Authority, 365 U.S. 715,  
2 722 (1961); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)  
3 (holding state's garnishment statute, which permitted writ of garnishment to be issued in  
4 pending actions by court clerk, denied due process of law)).

5 The conduct at issue in this case, a non-judicial foreclosure authorized by Nevada  
6 law, centers the state-action analysis on the Nevada's creation of the legal framework  
7 governing HOA non-judicial foreclosure actions. The inquiry here turns on whether the  
8 Nevada Legislature's enactment of the legal framework governing non-judicial foreclosure  
9 of homeowners' association liens constitutes sufficient state action to trigger the due  
10 process protections of the Fourteenth Amendment for mortgage holders. This Court finds  
11 it is not.

12 The "State is responsible for the... act of a private party when the State, by its law,  
13 has compelled the act." Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970). However,  
14 a State's mere acquiescence in a private action does not convert that action into that of the  
15 State. See Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978).

16 In Flagg Bros. v. Brooks, Ms. Brooks had fallen on hard times, faced eviction, and  
17 was forced by circumstance to place her belongings in storage. Ms. Books filed a lawsuit  
18 against the storage company, Flagg Brothers, alleging a violation of her Fourteenth  
19 Amendment rights. Specifically, the issue centered on Flagg Brothers's threat to sell Ms.  
20 Brooks's belongings pursuant to New York Uniform Commercial Code unless she paid her  
21 storage fee. Id., 436 U.S. at 153. Ms. Brooks argued that "Flagg Brothers' proposed action  
22 [wa]s properly attributable to the State because the State ha[d] authorized and encouraged  
23 it in enacting [the statutory framework authorizing the sale of her property to satisfy the  
24 storage lien]." Id., 436 U.S. at 164. The Court held that the state statute, together with  
25 private action conforming to the statute, was insufficient to establish state action,  
26 reasoning:

27 Here, the State of New York has not compelled the sale of a  
28 bailor's goods, but has merely announced the circumstances  
under which its courts will not interfere with a private sale.

1 Indeed, the crux of respondents' complaint is not that the State  
2 has acted, but that it has refused to act. This statutory refusal to  
3 act is no different in principle from an ordinary statute of  
4 limitations whereby the State declines to provide a remedy for  
5 private deprivations of property after the passage of a given  
6 period of time.

7 Flagg Bros., 436 U.S. at 166 (emphasis in original).

8 Here, the State of Nevada, by enacting the provisions of Chapter 116, has merely  
9 announced the requirements a homeowners' association must fulfill to legally foreclose on a  
10 lien; the State of Nevada has not compelled homeowners' associations to act. Like the State  
11 of New York in Flagg Bros., here the State of Nevada has announced circumstances in  
12 which it will not interfere with the foreclosure of homeowners' association liens. Therefore,  
13 because the State of Nevada has merely acquiesced to, and not compelled, the non-judicial  
14 foreclosure of homeowners' association liens, this Court finds state action does not exist in  
15 this situation sufficient to implicate the protections of the due process clause.

16 Marchai cannot show that legislative enactment of Chapter 116 is a due process  
17 violation. Therefore, the Court denies Marchai's motion for summary judgment on this  
18 ground.

19 **b. Taking Clause**

20 Marchai argues that NRS Chapter 116 effects a regulatory taking. The  
21 Fifth Amendment to the United States Constitution prohibits "private property be[ing]  
22 taken for public use without just compensation." U.S. Const. amend. V. Article One of the  
23 Nevada Constitution correspondingly provides that "[p]rivate property shall not be taken  
24 for public use without just compensation having been first made, or secured." Nev. Const.  
25 art. I, § 8(6). The Nevada Supreme Court clarified regulatory taking jurisprudence as  
26 follows: "a per se regulatory taking occurs when a public agency seeking to acquire property  
27 for a public use... fails to follow the [statutory eminent domain] procedures... and  
28 appropriates or permanently invades private property for public use without first paying  
just compensation." See McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1127 (Nev. 2006).  
"In deciding whether a particular governmental action has effected a taking, this Court

1 focuses... both on the character of the action and on the nature and extent of the  
2 interference with rights in the parcel as a whole.” Tahoe-Sierra Pres. Council, Inc. v.  
3 Tahoe Reg’l Planning Agency, 535 U.S. 302, 327 (2002) (quoting San Diego Gas & Elec.  
4 Co. v. San Diego, 450 U.S. 621, 636 (1981)).

5 The Nevada Legislature’s enactment of the statutory framework encompassing HOA  
6 liens and non-judicial foreclosures does not rise to the level of a government taking for a  
7 public purpose. The enactment of the statutory framework alone is insufficient government  
8 action to establish such a taking. The character of the legislative action is simply to create a  
9 legal framework for private conduct to operate within, and because the foreclosure action is  
10 non-judicial, the nature of the government interference in private property is minimal,  
11 possibly even non-existent. In fact, one of the many complaints about Chapter 116’s  
12 framework, is the prescription that HOA liens may be foreclosed upon without government  
13 intervention or judicial approval. That being so, the foreclosure of an HOA lien is not an  
14 action of the government, but instead is that of a private party — the HOA and its  
15 foreclosure agent.

16 In SFR v. U.S. Bank, the Court found the private interest at stake here was “essential  
17 for common-interest communities,” stating, “Otherwise, when a homeowner walks away  
18 from the property and the first deed of trust holder delays foreclosure, the HOA has to  
19 ‘either increase the assessment burden on the remaining unit/parcel owners or reduce the  
20 services the association provides (e.g., by deferring maintenance on common amenities).”  
21 SFR v. U.S. Bank, 334 P.3d 408, 414 (Nev. 2014), reh’g denied (Oct. 16, 2014) (quoting  
22 Uniform Law Commission’s Joint Editorial Board for Uniform Real Property Acts, The Six-  
23 Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest  
24 Ownership Act, at 5-6). The Court noted that the true super-priority lien was created “[t]o  
25 avoid having the community subsidize first security holders who delay foreclosure, whether  
26 strategically or for some other reason.” Id. A homeowners’ association is a private entity  
27 that serves an exclusively private interest; therefore, any taking that occurs as a result of a  
28 foreclosure of an HOA lien is a private action to benefit a private interest.

1 Marchai cannot show that legislative enactment of Chapter 116 is a government  
2 taking by regulation or that a private foreclosure of an HOA lien serves to further a public  
3 purpose. Therefore, the Court denies Marchai's motion for summary judgment on this  
4 ground.

5 **c. Void for Vagueness Doctrine**

6 Marchai argues NRS Chapter 116 is unconstitutionally vague. Nevada's  
7 two-factor test for vagueness examines whether the statute, "(1) fails to provide notice  
8 sufficient to enable persons of ordinary intelligence to understand what conduct is  
9 prohibited and (2) lacks specific standards, thereby encouraging, authorizing, or even  
10 failing to prevent arbitrary and discriminatory enforcement." Flamingo Paradise Gaming,  
11 LLC v. Chanos, 217 P.3d 546, 553-54 (Nev. 2009) (quoting Silver v. Eighth Judicial Dist.  
12 Court ex rel. County of Clark, 129 P.3d 682, 684-85 (Nev. 2006). "A statute which does not  
13 impinge on First Amendment freedoms... may be stricken as unconstitutionally vague only  
14 if it is found to be so in all its applications. Additionally, the standard of review is less strict  
15 under a challenge for vagueness where the review is directed at economic regulations."  
16 State v. Rosenthal, 819 P.2d 1296, 1300 (Nev. 1991). "Enough clarity to defeat a vagueness  
17 challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a  
18 statute's words their well settled and ordinarily understood meaning, and by looking to the  
19 common law definitions of the related term or offense." Busefink v. State, 286 P.3d 599,  
20 605 (Nev. 2012) (quoting Holder v. Humanitarian Law Project, 130 S.Ct. 2705, 2718  
21 (2010)).

22 For the purposes of this Order, the Court will not dispute Marchai's assertion that  
23 NRS Chapter 116 is inartfully drafted; however, this is not enough for the Court to refuse to  
24 apply NRS Chapter 116. See Fairbanks v. Pavlikowski, 423 P.2d 401, 404 (Nev. 1967). The  
25 Court finds that NRS Chapter 116 is not unconstitutionally vague. As previously discussed  
26 in the Court's decision to apply the decision of SFR in this case, Chapter 116's original 1991  
27 language put holders of first deeds of trust on notice of a potential priority conflict. Though  
28 there were conflicting interpretations of Chapter 116 prior to the SFR decision, judicial

1 enforcement was not arbitrary or discriminatory. The decision in SFR has clarified some  
2 ambiguities in the statutes. Because this statute does not infringe on constitutionally  
3 protected rights, as previously discussed, the standard for the Court to find  
4 unconstitutional vagueness is high. The language of Chapter 116 and the SFR decision is  
5 sufficient for this Court to find NRS Chapter 116 is not unconstitutionally vague.

6 Marchai cannot show that NRS Chapter 116 is unconstitutionally vague. Therefore,  
7 the Court denies Marchai's motion for summary judgment on this ground.

8 **3. Alleged Issues Prior to Sale**

9 Marchai asserts there are issues with the HOA's foreclosure process prior to  
10 the foreclosure sale. Marchai argues issues regarding notice and tender prevent the HOA  
11 foreclosure sale from extinguishing Marchai's deed of trust.

12 **a. Notice**

13 Marchai argues that the HOA failed to comply with several notice  
14 provisions of NRS Chapter 116, including requirements that notices be mailed via first class  
15 mail and notices be mailed to all parties with an interest in the property. SFR argues the  
16 foreclosure deed conclusively establishes that the notice provisions of NRS Chapter 116  
17 were met.

18 The foreclosure deed's recitals are conclusive evidence of compliance with the notice  
19 provisions of NRS 116.31162 through 116.31168. NRS 116.31166(2). The deed in this case  
20 states all statutory notices were given. SFR can rely on the deed's recitals as proof that the  
21 HOA fulfilled the notice provisions of NRS Chapter 116.

22 The foreclosure deed's recitals are not unassailable, however. The Nevada Supreme  
23 Court recently held:

24 The long-standing and broad inherent power of a court to sit in equity  
25 and quiet title, including setting aside a foreclosure sale if the  
26 circumstances support such action, the fact that the recitals made  
27 conclusive by operation of NRS 116.31166 implicate compliance only  
28 with the statutory prerequisites to foreclosure, and the foreign  
precedent cited under which equitable relief may still be available in

1 the face of conclusive recitals, at least in cases involving fraud, lead us  
2 to the conclusion that the Legislature, through NRS 116.31166's  
3 enactment, did not eliminate the equitable authority of the courts to  
4 consider quiet title actions when an HOA's foreclosure deed contains  
5 conclusive recitals.

6 Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6 (2016).

7 Based on the language in Shadow Wood and the Court's equitable powers, the Court  
8 is not persuaded that sending notices via certified mail as opposed to first class mail would  
9 justify setting aside a foreclosure sale or its effect if the parties actually received notice in a  
10 timely manner. Absent some further showing that notice was not actually received, recitals  
11 in the foreclosure deed are sufficient to establish that the HOA complied with NRS Chapter  
12 116.

13 Marchai only provides evidence that notice was not received by an interested party  
14 in one case. Marchai asserts it did not receive the notice of trustee's sale mailed on July 29,  
15 2013. At the time, Marchai had an interest in the Wolf Rivers property; however, Marchai  
16 did not have a recorded interest in the property. Though U.S. Bank transferred its deed of  
17 trust to Marchai in March of 2013, neither party recorded the transfer until August 12,  
18 2013. U.S. Bank did receive the notice of trustee's sale mailed on July 29, 2013. Marchai's  
19 failure to receive notice can be attributed to its own actions and the actions of U.S. Bank.  
20 The HOA mailed notices to all parties that it could have known had an interest in the  
21 property.

22 Marchai failed to show the HOA violated the notice provisions of NRA Chapter 116.  
23 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

24 **b. Tender**

25 Marchai asserts the homeowner tendered the HOA lien's superpriority  
26 amount prior to the HOA foreclosure sale. Marchai argues this tender causes Marchai's  
27 deed of trust to survive the HOA foreclosure sale.

28 The Court is faced with a novel set of facts in this case. The foreclosure process,  
from the first notice of delinquent assessment to the actual foreclosure sale, spanned

1 almost five years. During this period, Perez, the homeowner, paid the HOA \$3,230.00.  
2 This is definitely more than the value of nine months of assessment fees, regardless of  
3 which year's rate is applied. At the end of the period, however, Perez still owed the HOA  
4 \$14,677.80.

5 The Court must determine whether the homeowner's payments to an HOA in this  
6 case constitute tender of the superpriority amount. NRS 116.3116(2) states the HOA lien is  
7 prior to first deeds of trust "to the extent of the assessments for common expenses based on  
8 the periodic budget adopted by the association... which would have become due in the  
9 absence of acceleration during the 9 months immediately preceding institution of an action  
10 to enforce the lien..." The statute does not state who can satisfy the superpriority portion of  
11 the lien.

12 The Court finds the answer relies on the definition of "tender" rather than  
13 distinguishing between homeowners and first deed of trust holders. A party's tender of the  
14 super-priority amount is sufficient to extinguish the super-priority character of the lien,  
15 leaving only a junior lien. See SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 414  
16 (2014), reh'g denied (Oct. 16, 2014) and Sears v. Classen Garage & Serv. Co., 612 P.2d 293,  
17 295 (Okla. Civ. App. 1980) ("a proper and sufficient tender of payment operates to  
18 discharge a lien"). The common law definition of tender is "an offer of payment that is  
19 coupled either with no conditions or only with conditions upon which the tendering party  
20 has a right to insist." Fresk v. Kraemer, 99 P.3d 282, 286-7 (Or. 2004); see also 74 Am.  
21 Jur. 2d Tender § 22. Tender is satisfied where there is "an offer to perform a condition or  
22 obligation, coupled with the present ability of immediate performance, so that if it were not  
23 for the refusal of cooperation by the party to whom tender is made, the condition or  
24 obligation would be immediately satisfied." 15 Williston, A Treatise on the Law of  
25 Contracts, § 1808 (3d. ed. 1972).

26 In the case of a first deed of trust holder offering to pay the HOA nine months of  
27 assessments, a tender is undoubtedly taking place in order to satisfy the superpriority  
28 amount. The deed of trust holder offers to perform a specific condition that the HOA is



1 clearly aware of. In the case of a homeowner paying an HOA, the case is not so clear. The  
2 homeowner has a responsibility to pay the HOA fees every month. Payments to the HOA  
3 could be directed towards old or new monthly fees. The homeowner paying the HOA is not  
4 a clear offer to satisfy the HOA's superpriority lien amount. It could be an offer to satisfy  
5 the homeowner's newer debts to the HOA.

6 The Court finds that further factual development is needed to determine whether  
7 Perez's payments to the HOA constituted a valid tender. Marchai is careful in its motion for  
8 summary judgment to phrase Perez's payments to the HOA during the foreclosure process  
9 as continually being in response to the HOA's notices of delinquent liens and sales. If this  
10 was the intent of Perez, Marchai can make the case that Perez's payments to the HOA were  
11 designed to satisfy the HOA lien's superpriority amount. This would potentially protect  
12 Perez, as Marchai would be able to sell the Wolf Rivers property to collect Perez's debt  
13 rather than directly pursue Perez under the agreement secured by the deed of trust. On the  
14 other hand, SFR could prove Perez was attempting to keep up with her monthly dues and  
15 had no intent of directing her payments towards the HOA's superpriority amount. The  
16 foreclosure process's length of time in this case further complicates the issue for both sides.

17 The Court finds genuine issues of material fact exist on the issue of tender.  
18 Therefore, the Court denies both Marchai and SFR's motion for summary judgment on this  
19 ground.

20 **4. Alleged Issues With Foreclosure Sale**

21 Marchai asserts there are also issues with the HOA's foreclosure sale.  
22 Marchai argues issues regarding the wording in the foreclosure deed and commercial  
23 reasonableness prevent the foreclosure sale from extinguishing Marchai's interest in the  
24 property. SFR argues any issues in the foreclosure process cannot impact SFR's interest in  
25 the property as a bona fide purchaser.

26 //

27 //

1                   **a.     Alessi & Koenig's Interest in the Property**

2                   Marchai argues SFR actually purchased Alessi & Koenig's interest in  
3 the Wolf Rivers property rather than the HOA's interest. Marchai bases its argument on a  
4 sentence in the foreclosure deed:

5                   Alessi & Koenig, LLC (herein called Trustee), as the duly appointed  
6 Trustee under that certain Notice of Delinquent Assessment Lien...  
7 does hereby grant, without warranty expressed or implied to: SFR... all  
8 its right, title and interest in the property...

9                   While the Court agrees this sentence is inartfully drafted, the Court does not agree  
10 that it conclusively establishes that Alessi & Koenig were the grantors at the HOA  
11 foreclosure sale. At most, this sentence creates an ambiguity in the deed. The deed  
12 identifies the HOA as the foreclosing beneficiary. The deed also states:

13                   This conveyance is made pursuant to the powers conferred upon the  
14 Trustee by NRS 116 et seq... All requirements of law regarding the  
15 mailing of copies of notices and the posting and publication of the  
16 copies of the Notice of Sale have been complied with.

17                   This ambiguity cannot be resolved in favor of Marchai on a motion for summary judgment.  
18 Therefore, the Court denies Marchai's motion for summary judgment on this ground.

19                   **b.     Commercial Reasonableness**

20                   Marchai argues the HOA foreclosure sale was commercially  
21 unreasonable. SFR argues that there is no requirement that the sale be reasonable or, in  
22 the alternative, there is not sufficient proof to demonstrate that the sale was unreasonable.

23                   The decision in SFR did not address what commercial reasonableness was required  
24 in HOA foreclosure sales. SFR Investments Pool 1 v. U.S. Bank, 334 P.3d 408, 418 n.6  
25 (Nev. 2014), reh'g denied (Oct. 16, 2014). NRS Chapter 116, however, states, "[e]very  
26 contract or duty governed by this chapter imposes an obligation of good faith in its  
27 performance or enforcement." NRS 116.1113.

28                   It used to be clear that "[m]ere inadequacy of price is not sufficient to justify setting  
aside a foreclosure sale, absent a showing of fraud, unfairness or oppression." Long v.

1 Towne, 639 P.2d 528, 530 (Nev. 1982). The Nevada Supreme Court recently created room  
2 for debate on this issue in its Shadow Wood decision. The Nevada Supreme Court states,  
3 “demonstrating that an association sold a property at its foreclosure sale for an inadequate  
4 price is not enough to set aside that sale; there must also be a showing of fraud, unfairness,  
5 or oppression. Shadow Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*6  
6 (2016). In the next sentence, the Nevada Supreme Court appears to distinguish a merely  
7 inadequate price from a price that is “grossly inadequate as a matter of law” and indicates  
8 that gross inadequacy may be sufficient grounds to set aside a sale. Id.

9 The Court finds that some other evidence of fraud, unfairness or oppression is still  
10 required to set aside an HOA foreclosure sale, regardless of the price. Shadow Wood cites  
11 Golden v. Tomiyasu, 387 P.2d 989, 995 (Nev. 1963) which required some showing of fraud  
12 “in addition to gross inadequacy of price” for a court to set aside a transaction. Though a  
13 sales price may be extremely low, as in the instant case before the Court, the price alone is  
14 insufficient proof of commercial unreasonableness.

15 The Court finds Marchai has established that there are material issues of fact  
16 regarding whether the HOA foreclosure sale was commercially reasonable. Price is one  
17 factor the Court may consider. Marchai also argues the HOA sale was conducted after the  
18 homeowner tendered the superpriority amount to the HOA. Arguments regarding notice  
19 that the Court negated in this Order could also be relevant on the issue of commercial  
20 reasonableness with further factual development.

21 Marchai fails to establish as a matter of law that the HOA sale was commercially  
22 unreasonable. Therefore, the Court denies Marchai’s motion for summary judgment on  
23 this ground.

24 **c. Bona Fide Purchaser**

25 SFR argues that any alleged deficiencies with the HOA foreclosure sale in this  
26 case do not impact SFR’s quiet title claim because SFR is a bona fide purchaser for value.  
27 The Nevada Supreme Court recently held that potential harm to alleged bona fide  
28 purchasers must be evaluated, but it is possible to “demonstrate that the equities swayed so

1 far in [the homeowner's] favor as to support setting aside [the] foreclosure sale." Shadow  
2 Wood HOA v. N.Y. Cmty. Bancorp., 132 Nev. Adv. Op. 5 at \*10 (2016).

3 Questions as to SFR's bona fide purchaser status and the balance of equities in this  
4 case are questions of fact. This is especially true in the instant case. The HOA's foreclosure  
5 proceedings lasted almost five years. Multiple notices of delinquency, default, and sale  
6 were recorded. The Court cannot rule on whether a reasonable purchaser would be put on  
7 notice by these circumstances at the summary judgment stage.

8 SFR fails to establish as a matter of law that it was a bona fide purchaser and that the  
9 equities in this case prevent setting aside the foreclosure sale. Therefore, the Court denies  
10 SFR's motion for summary judgment on this ground.

#### 11 IV. Conclusion

12 The Court finds that genuine issues of material fact remain in this case. The Court  
13 denies SFR and Marchai's Motions for Summary Judgment and SFR's Motion to Strike.

14  
15  
16 DATED this 13<sup>th</sup> day of March, 2016.

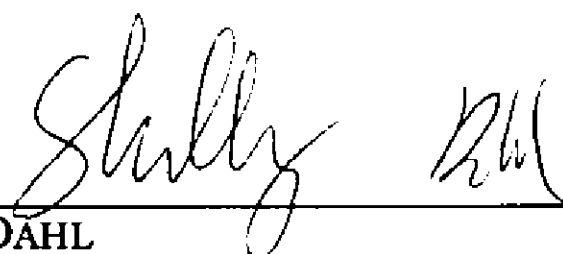
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20 LINDA MARIE BELL  
21 DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the date of filing, a copy of this Order was electronically served through the Eighth Judicial District Court EFP system or, if no e-mail was provided, by facsimile, U.S. Mail and/or placed in the Clerk's Office attorney folder(s) for:

Name	Party
David J. Merrill, Esq. David J. Merrill, P.C.	Counsel for Marchai, B.T.
Diana Cline Ebron, Esq. Jacqueline A. Gilbert, Esq. Karen L. Hanks, Esq. Kim Gilbert Ebron	Counsel for SFR Investments Pool 1, LLC

  
\_\_\_\_\_  
SHELBY DAHL  
LAW CLERK, DEPARTMENT VII

**AFFIRMATION**

Pursuant to NRS 239B.030

The undersigned does hereby affirm that the preceding Decision and Order filed in District Court case number A689461 DOES NOT contain the social security number of any person.

/s/ Linda Marie Bell Date 3/21/2016  
District Court Judge

LINDA MARIE BELL  
DISTRICT JUDGE  
DEPARTMENT VII

# **TAB 23**

## DISTRICT COURT CIVIL COVER SHEET A- 16 - 742327 - C

County, Nevada

Case No.

XXXI

(Assigned by Clerk's Office)

**I. Party Information** (provide both home and mailing addresses if different)

Plaintiff(s) (name/address/phone):	Defendant(s) (name/address/phone):
Marchai, B.T.	SFR Investments Pool 1, LLC
117 North Fuller	5030 Paradise Road, Suite B-214
Los Angeles, CA 90036	Las Vegas, NV 89119
Attorney (name/address/phone):	Attorney (name/address/phone):
David J. Merrill, P.C.	Kim Gilbert Ebron
10161 Park Run Drive, Suite 150	7625 Dean Martin Drive, Suite 110
Las Vegas, NV 89145	Las Vegas, NV 89139
(702) 566-1935	(702) 485-3300

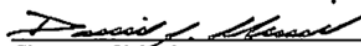
**II. Nature of Controversy** (please select the one most applicable filing type below)**Civil Case Filing Types**

<b>Real Property</b> <b>Landlord/Tenant</b> <input type="checkbox"/> Unlawful Detainer <input type="checkbox"/> Other Landlord/Tenant <b>Title to Property</b> <input type="checkbox"/> Judicial Foreclosure <input checked="" type="checkbox"/> Other Title to Property <b>Other Real Property</b> <input type="checkbox"/> Condemnation/Eminent Domain <input type="checkbox"/> Other Real Property	<b>Torts</b> <b>Other Torts</b> <input type="checkbox"/> Product Liability <input type="checkbox"/> Intentional Misconduct <input type="checkbox"/> Employment Tort <input type="checkbox"/> Insurance Tort <input type="checkbox"/> Other Tort
<b>Probate</b> <b>Probate</b> (select case type and estate value) <input type="checkbox"/> Summary Administration <input type="checkbox"/> General Administration <input type="checkbox"/> Special Administration <input type="checkbox"/> Set Aside <input type="checkbox"/> Trust/Conservatorship <input type="checkbox"/> Other Probate <b>Estate Value</b> <input type="checkbox"/> Over \$200,000 <input type="checkbox"/> Between \$100,000 and \$200,000 <input type="checkbox"/> Under \$100,000 or Unknown <input type="checkbox"/> Under \$2,500	<b>Construction Defect &amp; Contract</b> <b>Construction Defect</b> <input type="checkbox"/> Chapter 40 <input type="checkbox"/> Other Construction Defect <b>Contract Case</b> <input type="checkbox"/> Uniform Commercial Code <input type="checkbox"/> Building and Construction <input type="checkbox"/> Insurance Carrier <input type="checkbox"/> Commercial Instrument <input type="checkbox"/> Collection of Accounts <input type="checkbox"/> Employment Contract <input type="checkbox"/> Other Contract
<b>Civil Writ</b> <input type="checkbox"/> Writ of Habeas Corpus <input type="checkbox"/> Writ of Mandamus <input type="checkbox"/> Writ of Quo Warrant <input type="checkbox"/> Writ of Prohibition <input type="checkbox"/> Other Civil Writ	<b>Judicial Review/Appeal</b> <b>Judicial Review</b> <input type="checkbox"/> Foreclosure Mediation Case <input type="checkbox"/> Petition to Seal Records <input type="checkbox"/> Mental Competency <b>Nevada State Agency Appeal</b> <input type="checkbox"/> Department of Motor Vehicle <input type="checkbox"/> Worker's Compensation <input type="checkbox"/> Other Nevada State Agency <b>Appeal Other</b> <input type="checkbox"/> Appeal from Lower Court <input type="checkbox"/> Other Judicial Review/Appeal
<b>Other Civil Filing</b> <input type="checkbox"/> Compromise of Minor's Claim <input type="checkbox"/> Foreign Judgment <input type="checkbox"/> Other Civil Matters	

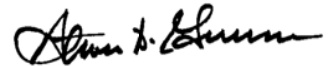
Business Court filings should be filed using the Business Court civil coversheet.

August 25, 2016

Date

  
 Signature of initiating party or representative

See other side for family-related case filings.



CLERK OF THE COURT

**COMP**  
DAVID J. MERRILL  
Nevada Bar No. 6060  
DAVID J. MERRILL, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone: (702) 566-1935  
Facsimile: (702) 993-8841  
E-mail: david@djmerrillpc.com  
Attorney for MARCHAI, B.T.

DISTRICT COURT  
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business trust,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a Nevada limited liability company;  
WYETH RANCH COMMUNITY ASSOCIATION, a Nevada non-profit corporation; ALESSI & KOENIG, LLC, a Nevada limited liability company;  
DOES 1 through 10, inclusive, and  
ROES 1 through 10, inclusive.

Defendants.

Case No.: A- 16 - 742327 - C  
Dept. No. XXXI

**EXEMPT FROM  
ARBITRATION: ACTION  
CONCERNING TITLE TO  
REAL ESTATE**

**COMPLAINT**

Marchai, B.T., a Nevada business trust, alleges as follows:

1. Marchai is a Nevada business trust authorized to transact business in the State of Nevada.

2. This action concerns real property located in the City of Las Vegas, County of Clark, State of Nevada. The property is commonly known as 7119 Wolf



1 Rivers Avenue, Las Vegas, Nevada 89131, Clark County Assessor's Parcel Number  
2 125-15-811-013.

3 3. Marchai is informed and believes that SFR Investments Pool 1, LLC is  
4 a Nevada limited liability company, which has an interest in the property by reason  
5 of the recording of a trustee's deed upon sale and is the record owner of the  
6 property.

7 4. Marchai is informed and believes that Wyeth Ranch Community  
8 Association is a Nevada non-profit corporation doing business in Clark County,  
9 Nevada.

10 5. Marchai is informed and believes that Alessi & Koenig, LLC is a  
11 Nevada limited liability company doing business in Clark County, Nevada.

12 6. Marchai is unaware of the true names and capacities of individual  
13 defendants sued herein as DOES 1 through 10, inclusive, and corporations,  
14 partnerships, or other business entities sued herein as ROES 1 through 10,  
15 inclusive, and therefore sues these defendants by such fictitious names. Marchai is  
16 informed and believes that defendants named herein as DOES 1 through 10 and  
17 ROES 1 through 10 have, or may claim to have, some right, title, or interest in and  
18 to the property, the exact nature of which is unknown to Marchai and Marchai will  
19 seek leave to amend this complaint to allege their true names and capacities when  
20 and as ascertained, and will further ask leave to join said defendants in these  
21 proceedings.

22 7. On or about October 19, 2005, for valuable consideration, Cristela  
23 Perez made, executed, and delivered to CMG Mortgage, Inc. that certain  
24 InterestFirst Adjustable Rate Note dated October 19, 2005 evidencing a loan to  
25 Perez in the original principal amount of \$442,000.00.

26 8. To secure payment of the principal sum and interest provided in the  
27 note, as part of the same transaction, Perez executed and delivered to CMG  
28 Mortgage, as beneficiary, a Deed of Trust dated October 19, 2005. The Deed of Trust

1 was recorded in book number 20051109 as instrument number 0001385 in the  
2 Official Records of the Clark County Recorder's Office on November 9, 2005.

3 9. On November 5, 2007, Complete Association Management Company  
4 recorded on behalf of Wyeth Ranch a Notice of Delinquent Violation Lien as  
5 Document No. 20071105-0000341 in which Wyeth Ranch claimed a lien for unpaid  
6 violations in the amount of \$1,400.00.

7 10. Marchai is informed and believes that Perez failed to timely pay Wyeth  
8 Ranch association dues on January 1, April 1, or July 1, 2008.

9 11. On October 8, 2008, the Clark County Recorder recorded a Notice of  
10 Delinquent Assessment (Lien) as Document No. 200810080003311, which Alessi &  
11 Koenig executed as agent for Wyeth Ranch. According to the notice, as of September  
12 30, 2008, Perez owed Wyeth Ranch \$1,425.17.

13 12. On January 5, 2009, Alessi & Koenig, on behalf of Wyeth Ranch,  
14 recorded with the Clark County Recorder as Document No. 20090105-0002988 a  
15 Notice of Default and Election to Sell Under Homeowners Association Lien.  
16 According to the notice of default, as of December 17, 2008, Perez owed Wyeth  
17 Ranch \$3,096.46.

18 13. On January 14, 2010, Alessi & Koenig, on behalf of Wyeth Ranch,  
19 recorded with the Clark County Recorder as Document No. 201001140002589 a  
20 Notice of Trustee's Sale. According to the notice of sale, Perez owed Wyeth Ranch  
21 \$6,964.25 in unpaid assessments. The notice set a sale for February 17, 2010.

22 14. Marchai is informed and believes that between February 2010 and  
23 March 2011, Perez paid Wyeth Ranch \$2,005.00 in association dues.

24 15. On March 9, 2011, Alessi & Koenig, on behalf of Wyeth Ranch,  
25 recorded with the Clark County Recorder as Document No. 201103090001741 a  
26 Rescission of Notice Trustee's Sale, in which Wyeth Ranch rescinded the January  
27 14, 2010, notice of sale.  
28

1           16.    On March 29, 2011, Alessi & Koenig, on behalf of Wyeth Ranch,  
2 recorded with the Clark County Recorder as Document No. 201103290002937 a  
3 Notice of Trustee's Sale. According to the notice of sale, Perez owed Wyeth Ranch  
4 \$7,306.62 in unpaid assessments. The notice set a sale for May 8, 2011.

5           17.    Marchai is informed and believes that on August 4, 2011, Perez paid  
6 Wyeth Ranch another \$165.00.

7           18.    Marchai is informed and believes that on October 1, 2011, Perez  
8 defaulted under the terms of her loan from CMG Mortgage in that Perez failed to  
9 make the regular monthly installment payment on that date in the approximate  
10 amount of \$2,657.39, and all subsequent payments.

11           19.    On December 20, 2011, Alessi & Koenig, on behalf of Wyeth Ranch,  
12 recorded with the Clark County Recorder as Document No. 201112200001246 a  
13 Notice of Delinquent Assessment (Lien). According to the notice, Perez owed Wyeth  
14 Ranch \$9,296.56.

15           20.    On February 28, 2012, Alessi & Koenig, on behalf of Wyeth Ranch,  
16 recorded with the Clark County Recorder as Document No. 201202280000836 a  
17 Notice of Default and Election to Sell Under Homeowners Association Lien.  
18 According to the notice of default, Perez owed Wyeth Ranch \$10,625.06 in unpaid  
19 assessments.

20           21.    Marchai is informed and believes that between March and May 2012,  
21 Perez paid Wyeth Ranch another \$595.00.

22           22.    On June 5, 2012, a Corporate Assignment of Deed of Trust was  
23 recorded with the Clark County Recorder as Document 201206050003133 that  
24 evidences an assignment of the deed of trust from CMG Mortgage, Inc. to  
25 CitiMortgage, Inc.

26           23.    Marchai is informed and believes that on July 26, 2012, Perez made a  
27 \$165.00 payment to Wyeth Ranch.  
28

1           24.    On July 26, 2012, an Assignment of Mortgage was recorded with the  
2 Clark County Recorder as Document 201207260002017 that evidences an  
3 assignment of the deed of trust from CitiMortgage to U.S. Bank, N.A. as Trustee for  
4 the Stanwich Mortgage Loan Trust, Series 2012-6.

5           25.    On October 31, 2012, Alessi & Koenig, on behalf of Wyeth Ranch,  
6 recorded with the Clark County Recorder as Document No. 201210310000686 a  
7 Notice of Trustee's Sale. According to the notice of sale, Perez owed Wyeth Ranch  
8 \$11,656.07. The notice set a sale for November 28, 2012.

9           26.    Marchai is informed and believes that on November 13, 2012, Perez  
10 made a \$300.00 payment to Wyeth Ranch.

11           27.    On March 12, 2013, U.S. Bank, as trustee of the Stanwich Trust,  
12 assigned the deed of trust to Marchai.

13           28.    On July 31, 2013, Alessi & Koenig, on behalf of Wyeth Ranch, recorded  
14 with the Clark County Recorder as Document 201307310001002 another Notice of  
15 Trustee's Sale. According to the notice of sale, Perez owed Wyeth Ranch \$14,090.80.  
16 The notice set a sale for August 28, 2013.

17           29.    On August 12, 2013, an Assignment of Deed of Trust was recorded  
18 with the Clark County Recorder as Document No. 201308120002562 that evidences  
19 the assignment of the deed of trust from U.S. Bank, as trustee of the Stanwich  
20 Trust, to Marchai.

21           30.    On September 9, 2013, the Clark County Recorder recorded a Trustee's  
22 Deed Upon Sale as Document No. 201309090001816 that Alessi & Koenig executed.  
23 According to the trustee's deed, SFR acquired Alessi & Koenig's "right, title, and  
24 interest" in the property for \$21,000.00 at a sale conducted on August 28, 2013.

25           31.    Alessi & Koenig and Wyeth Ranch wrongfully foreclosed against the  
26 property in reliance upon NRS §§ 116.3116 *et seq.* (the "Statute").  
27  
28

1           32.    The purported foreclosure sale under the Statute did not extinguish  
2 Marchai's deed of trust, which continues to constitute a valid encumbrance against  
3 the property.

4           33.    Alessi & Koenig and Wyeth Ranch failed to give constitutionally  
5 adequate notice to Marchai of Wyeth Ranch's lien as required by the Supreme Court  
6 in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), given that the Statute  
7 on its face violated Marchai's rights to due process secured by the United States and  
8 Nevada Constitutions.

9           34.    Alessi & Koenig and Wyeth Ranch failed to give constitutionally  
10 adequate notice to Marchai of Wyeth Ranch's notice of default.

11           35.    Alessi & Koenig and Wyeth Ranch failed to give constitutionally  
12 adequate notice to Marchai of the notice of sale.

13           36.    Alessi & Koenig and Wyeth Ranch failed to identify any superpriority  
14 amount claimed by Wyeth Ranch and failed to describe the "deficiency in payment"  
15 required by NRS § 116.31162(1)(b)(1) in the notice of default.

16           37.    Alessi & Koenig and Wyeth Ranch failed to provide notice of any  
17 purported superpriority lien amount or the consequences for the failure to pay any  
18 purported superpriority lien amount.

19           38.    Alessi & Koenig and Wyeth Ranch failed to identify the amount of the  
20 alleged lien that was for late fees, interest, fines/violations, or collection fees/costs.

21           39.    Alessi & Koenig and Wyeth Ranch failed to identify if Wyeth Ranch  
22 intended to foreclose upon the superpriority portion of its lien, if any, or on the sub-  
23 priority portion of its lien.

24           40.    Alessi & Koenig and Wyeth Ranch failed to specify in any of the  
25 recorded documents that Wyeth Ranch's foreclosure would extinguish Marchai's  
26 interest in the property.

27           41.    Alessi & Koenig and Wyeth Ranch failed to market, sell, or auction the  
28 property for in a commercially reasonable manner.

1           42.     SFR purports to have purchased the property at the August 28, 2013,  
2 foreclosure sale for \$21,000.00.

3           43.     The property has an approximate fair market value well in excess of  
4 the \$21,000.00 purchase price.

5           44.     The sale and purchase of the property was unconscionable and  
6 commercially unreasonable.

7           45.     Neither Alessi & Koenig, nor Wyeth Ranch, nor the Statute gave fair  
8 notice to Marchai that the nonjudicial foreclosure of Wyeth Ranch's lien could  
9 extinguish Marchai's interest in the property as required by the Due Process  
10 clauses of both the United States Constitution and the Constitution of the State of  
11 Nevada.

12           46.     To date, the note remains unpaid, and no document has been recorded  
13 on the property expressly releasing Marchai's deed of trust.

14           47.     SFR had actual or record notice of Marchai's interest in the property.

15           48.     At the time of Wyeth Ranch's foreclosure, Perez had paid more than  
16 nine months of association dues following Wyeth Ranch's "institution of an action to  
17 enforce the lien," which satisfied any superpriority portion of Wyeth Ranch's lien.  
18 Thus, to the extent SFR acquired any interest in the property, it did so subject to  
19 Marchai's deed of trust.

20           49.     At the time of Wyeth Ranch's foreclosure, Wyeth Ranch's lien, or a  
21 portion thereof, including the superpriority portion, had expired. Thus, to the extent  
22 SFR acquired anything it acquired the property subject to Marchai's deed of trust.

23                               **First Claim for Relief**  
24                               **(Declaratory Relief Under Amendment V to the United States**  
25                               **Constitution—Takings Clause—Against SFR, Wyeth Ranch, and Alessi &**  
26                               **Koenig)**

26           50.     Marchai repeats and realleges each of the paragraphs set forth above.

27           51.     The purported foreclosure pursuant to the Statute effected a  
28 regulatory taking of Marchai's secured interest in the property without just

1 compensation, in violation of the Fifth Amendment to the United States  
2 Constitution.

3 52. An actual and justiciable controversy exists between Marchai and SFR,  
4 Wyeth Ranch, and Alessi & Koenig regarding the purported foreclosure sale and the  
5 rights associated with the foreclosure sale.

6 53. Without declaratory relief, an interpretation of the Statute and an  
7 interpretation of the constitutional validity of the Statute, Marchai's rights and  
8 secured interest in the property will be adversely affected.

9 54. Based upon the foregoing, Marchai requests an order declaring that  
10 the purported foreclosure sale under the Statute did not extinguish Marchai's deed  
11 of trust, which continues to be a valid encumbrance against the property.

12 55. Based upon the foregoing, Marchai requests an order declaring that  
13 the purported foreclosure sale be voided and set aside because the foreclosure  
14 pursuant to the Statute effected a regulatory taking of Marchai's secured interest in  
15 the Property without just compensation, in violation of the Fifth Amendment to the  
16 United States Constitution.

17 56. Marchai has been damaged by SFR, Wyeth Ranch, and Alessi &  
18 Koenig's conduct as specified herein in an amount to be proven at trial.

19 57. Marchai has been required to engage the services of an attorney to  
20 protect its interests in the property and is entitled to recover its reasonable  
21 attorney's fees and costs incurred in connection with this action.

22 **Second Claim for Relief**  
23 **(Declaratory Relief under the Due Process Clauses of the**  
24 **United States and Nevada Constitutions—Against SFR, Wyeth**  
25 **Ranch, and Alessi & Koenig)**

26 58. Marchai repeats and realleges each of the paragraphs set forth above.

27 59. The Statute on its face violates Marchai's constitutional rights, in  
28 particular those rights to due process secured by both the United States and  
Nevada Constitutions and is thus void and unenforceable.

1           60. Any purported notice provided was inadequate, insufficient, and in  
2 violation of Marchai's rights to due process as it failed to provide fair notice as  
3 required by the due process clauses of both the United States and Nevada  
4 Constitutions.

5           61. An actual and justiciable controversy exists between Marchai and SFR,  
6 Alessi & Koenig, and Wyeth Ranch regarding the purported foreclosure sale and the  
7 rights associated with the foreclosure sale.

8           62. Without declaratory relief, an interpretation of the Statute, and an  
9 interpretation of the constitutional validity of the Statute, Marchai's rights and  
10 secured interest in the property will be adversely affected.

11           63. Based upon the foregoing, Marchai requests an order declaring that  
12 the purported foreclosure sale under the Statute did not extinguish Marchai's deed  
13 of trust, which continues to be a valid encumbrance against the Property.

14           64. Based upon the foregoing, Marchai requests an order declaring that  
15 the purported foreclosure sale be voided and set aside because the Statute on its  
16 face violates Marchai's due process under both the United States and Nevada  
17 Constitutions.

18           65. Marchai has been damaged by SFR, Wyeth Ranch, and Alessi &  
19 Koenig's conduct as specified herein in an amount to be proven at trial.

20           66. Marchai has been required to engage the services of an attorney to  
21 protect its interests in the property and is entitled to recover its reasonable  
22 attorney's fees and costs incurred in connection with this action.

23                           **Third Claim for Relief**  
24           **(Wrongful Foreclosure—Against SFR, Wyeth Ranch, and Alessi & Koenig)**

25           67. Marchai repeats and realleges each of the paragraphs set forth above.

26           68. SFR wrongfully purported to purchase Marchai's property in violation  
27 of the Statute and common law.  
28



1           69.    The foreclosure sale was wrongful because the foreclosure itself was  
2 contrary to law, in that:

3               (a)    The Statute on its face violates Marchai's constitutional rights,  
4 in particular Marchai's rights to due process under both the Nevada and United  
5 States Constitutions.

6               (b)    The purported foreclosure pursuant to the Statute effected a  
7 regulatory taking of Marchai's secured interest in the property without just  
8 compensation in violation of the Fifth Amendment to the United States  
9 Constitution.

10              (c)    Any purported notice provided was also inadequate, insufficient,  
11 and in violation of Marchai's rights to due process under both the United States and  
12 Nevada Constitutions.

13              (d)    The lien, or a portion thereof, had expired by the time of the  
14 foreclosure.

15              (e)    Perez paid more than nine months of association dues following  
16 Wyeth Ranch's institution of an action to enforce its lien.

17           70.    SFR is not a bona fide purchaser of the Property.

18           71.    SFR's \$21,000.00 purchase price for the property was unconscionable.

19           72.    The sale and purchase of the property was not commercially  
20 reasonable.

21           73.    Based upon the foregoing, Marchai requests an order declaring that  
22 the purported foreclosure sale did not extinguish Marchai's deed of trust, which  
23 continues as a valid encumbrance against the property.

24           74.    Based upon the foregoing, Marchai requests an order declaring that  
25 the purported foreclosure sale be voided and set aside because SFR is not a bona  
26 fide purchaser of the property.

75. Based upon the foregoing, Marchai requests an order setting aside the purported foreclosure sale as void because SFR's \$21,000.00 purchase price for the property was not commercially reasonable.

76. Based upon the foregoing, Marchai requests an order declaring that the purported foreclosure sale be voided and set aside because SFR's \$21,000.00 purchase price for the property was unconscionable.

77. Marchai has been damaged by SFR, Wyeth Ranch, and Alessi & Koenig's conduct as specified herein in an amount to be proven at trial.

78. Marchai has been required to engage the services of an attorney to protect its interests in the property and is entitled to recover its reasonable attorney's fees and costs incurred in connection with this action.

**Fourth Claim for Relief**  
**(Violation of NRS § 116.1113 *et seq.*—Against Wyeth Ranch and Alessi & Koenig)**

79. Marchai repeats and realleges each of the paragraphs set forth above.

80. Wyeth Ranch and Alessi & Koenig wrongfully foreclosed upon the property in violation of the Statute.

81. Given the above-enumerated violations of the Statute, Marchai asserts that Wyeth Ranch's purported sale of the property be voided and set aside and requests any and all damages flowing from these violations.

**Fifth Claim for Relief**  
**(Intentional Interference with Contractual Relations against SFR, Wyeth Ranch, and Alessi & Koenig)**

82. Marchai repeats and realleges each of the paragraphs set forth above.

83. Marchai had a valid contract with Perez as evidenced by the note and deed of trust, which included as part of the benefit of the bargain a first priority secured interest in the property.

84. SFR, Wyeth Ranch, and Alessi & Koenig knew or should have known of the contract between Marchai and Perez.

1           85.    SFR, Wyeth Ranch, and Alessi & Koenig knowingly interfered with the  
2 contract between Marchai and Perez by failing to market, sell, or auction the  
3 property for a commercially reasonable or fair market value, thus evidencing intent  
4 to harm Marchai.

5           86.    SFR knowingly interfered with the contract between Marchai and  
6 Perez by wrongfully obtaining possession of the property for an unconscionable and  
7 commercially unreasonable amount, thus evidencing intent to harm Marchai.

8           87.    SFR knowingly interfered with the contract between Marchai and  
9 Perez by wrongfully obtaining possession of the property and attempting to  
10 extinguish Marchai's security interest in the Property.

11           88.    SFR, Wyeth Ranch, and Alessi & Koenig all lacked justification for  
12 these interferences, because of the many infirmities described within this amended  
13 complaint, including:

14               (a)    The Statute on its face violates Marchai's constitutional rights,  
15 in particular Marchai's rights to due process under both the Nevada and United  
16 States Constitutions.

17               (b)    The purported foreclosure pursuant to the Statute effected a  
18 regulatory taking of Marchai's secured interest in the Property without just  
19 compensation in violation of the Fifth Amendment to the United States  
20 Constitution.

21               (c)    Any purported notice provided was also inadequate, insufficient,  
22 and in violation of Marchai's rights to due process under both the United States and  
23 Nevada Constitutions.

24               (d)    The lien, or a portion thereof, had expired by the time of the  
25 foreclosure.

26               (e)    Perez paid more than nine months of association dues following  
27 Wyeth Ranch's institution of an action to enforce its lien.  
28

1           89.    Marchai has been damaged by SFR, Wyeth Ranch, and Alessi &  
2 Koenig's conduct as specified herein in an amount to be proven at trial.

3           90.    Marchai has been required to engage the services of an attorney to  
4 protect its interests in the property and is entitled to recover its reasonable  
5 attorney's fees and costs incurred in connection with this action.

6                                   **Sixth Claim for Relief**  
7                   **(Quiet Title—Against SFR, Wyeth Ranch, and Alessi & Koenig)**

8           91.    Marchai repeats and realleges each of the paragraphs set forth above.

9           92.    For all of the independent reasons cited above in Claims 2 through 6,  
10 Wyeth Ranch's sale did not extinguish Marchai's senior deed of trust.

11           93.    For all of the independent reasons cited above in Claims 2 through 6,  
12 Marchai requests an order declaring that the purported foreclosure sale did not  
13 extinguish Marchai's deed of trust, which continues as a valid encumbrance against  
14 the Property.

15           94.    For all of the independent reasons cited above in Claims 2 through 6,  
16 Marchai requests an order declaring that the purported foreclosure sale be voided  
17 and set aside because SFR is not a bona fide purchaser of the Property.

18           95.    For all of the independent reasons cited above in Claims 2 through 6,  
19 Marchai requests an order setting aside Wyeth Ranch's sale as void because SFR's  
20 payment of \$21,000.00 as a purchase price for the property was not commercially  
21 reasonable and the sale was not conducted in a commercially reasonable manner.

22           96.    For all of the independent reasons cited above in Claims 2 through 6,  
23 Marchai requests an order declaring that the purported foreclosure sale be voided  
24 and set aside because SFR's \$21,000.00 purchase price for the property was  
25 unconscionable.

26           97.    Marchai has been damaged by SFR, Wyeth Ranch, and Alessi &  
27 Koenig's conduct as specified herein in an amount to be proven at trial.  
28

1           98.    Marchai has been required to engage the services of an attorney to  
2 protect its interests in the property and is entitled to recover its reasonable  
3 attorney's fees and costs incurred in connection with this action.

4           99.    Accordingly, Marchai requests that title be quieted in its name and its  
5 deed of trust continue as a valid encumbrance against the Property.

6                               **PRAYER FOR RELIEF**

7           WHEREFORE, Marchai prays for relief as follows:

8           A.    For a declaration by the Court that Marchai holds a valid interest in  
9 the property under the note and deed of trust, and that SFR acquired the property  
10 subject to Marchai's interest;

11          B.    That title in the Property be quieted in Marchai;

12          C.    That Wyeth Ranch's purported foreclosure sale be declared void and  
13 set aside;

14          D.    For judgment in an amount proven at trial in excess of \$10,000.00;

15          E.    For an award of interest, costs, and attorneys' fees; and

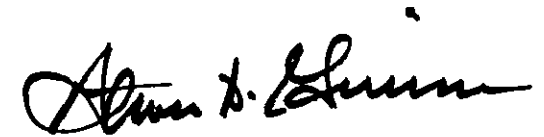
16          F.    For any further relief the Court deems just and proper.

17          DATED this 25th day of August 2016.

18                               DAVID J. MERRILL, P.C.

19  
20                               By:   
21                               DAVID J. MERRILL  
22                               Nevada Bar No. 6060  
23                               10161 Park Run Drive, Suite 150  
24                               Las Vegas, Nevada 89145  
25                               (702) 566-1935  
26                               Attorneys for MARCHAI, B.T.

# **TAB 24**



CLERK OF THE COURT

1 **IAFD**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 **MARCHAI, B.T., a Nevada business**  
14 **trust,**

15 **Plaintiff,**

16 **vs.**

17 **SFR INVESTMENTS POOL 1, LLC, a**  
18 **Nevada limited liability company;**  
19 **WYETH RANCH COMMUNITY**  
20 **ASSOCIATION, a Nevada non-profit**  
21 **corporation; ALESSI & KOENIG, LLC,**  
22 **a Nevada limited liability company;**  
23 **DOES 1 through 10, inclusive, and**  
24 **ROES 1 through 10, inclusive.**

25 **Defendants.**

A-16-742327-C

Case No.:  
Dept. No.

XXXI


26 **INITIAL APPEARANCE FEE DISCLOSURE**

27 Pursuant to NRS Chapter 19, as amended by Senate Bill 106, filing fees are  
28 submitted for parties appearing in the above-entitled action as indicated below:

1 Marchai, B.T.....\$270.00  
2 **TOTAL REMITTED .....**\$270.00

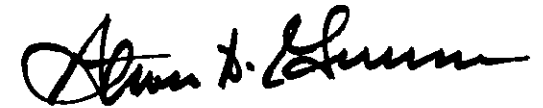
3 DATED this 25th day of August 2016.

4 DAVID J. MERRILL, P.C.

5  
6 By:   
7 DAVID J. MERRILL  
8 Nevada Bar No. 6060  
9 10161 Park Run Drive, Suite 150  
10 Las Vegas, Nevada 89145  
11 (702) 566-1935  
12 Attorneys for MARCHAI, B.T.  
13  
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# **TAB 25**



CLERK OF THE COURT

**AFFT**  
David J. Merrill, P.C.  
David J. Merrill, Esq  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145  
State Bar No.: 6060  
Attorney(s) for: Plaintiff(s)

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Case No.: A-16-742327-C

Dept. No.: XXXI

Date:

Time:

**Marchai, B.T., a Nevada business trust**

**vs**

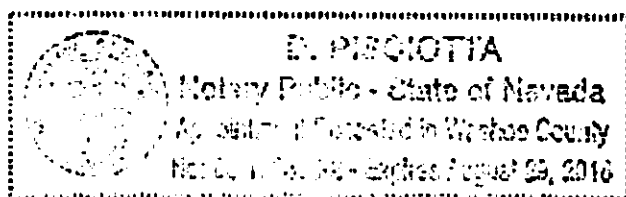
**Plaintiff(s)**

**SFR Investments Pool 1, a Nevada limited liability company; et al**

**Defendant(s)**

**AFFIDAVIT OF SERVICE**

I, Richard Janes, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the: Summons - Civil; Complaint; Initial Appearance Fee Disclosure; District Court Civil Cover Sheet on the 8th day of September, 2016 and served the same on the 12th day of September, 2016 at 3:13pm by serving the Defendant(s), SFR Investments Pool 1, a Nevada limited liability company by personally delivering and leaving a copy at Registered Agent: Paracorp Incorporated, 318 N. Carson St. #208, Carson City, NV, 89701 with Ashley Bougherbi, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

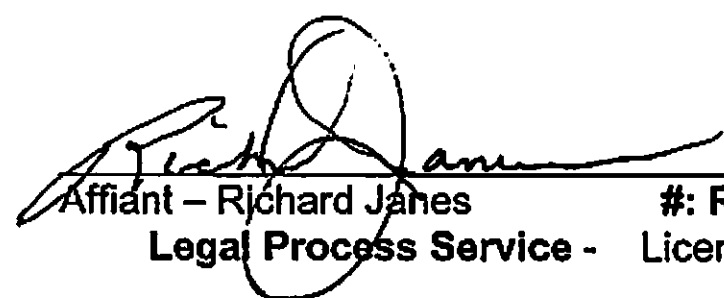


State of Nevada, County of Washoe

SUBSCRIBED AND SWORN to before me on this

13th day of September 2016

Notary Public D. Pisciotta



Affiant - Richard Janes  
Legal Process Service -

#: R-083121  
License # 604

WorkOrderNo 1606571



JA\_1119

SUMM  
DAVID J. MERRILL  
Nevada Bar No. 6060  
DAVID J. MERRILL, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone: (702) 566-1935  
Facsimile: (702) 993-8841  
E-mail: david@djmerrillpc.com  
Attorney for MARCHAI, B.T.

DISTRICT COURT  
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business  
trust,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company;  
WYETH RANCH COMMUNITY  
ASSOCIATION, a Nevada non-profit  
corporation; ALESSI & KOENIG, LLC,  
a Nevada limited liability company;  
DOES 1 through 10, inclusive, and  
ROES 1 through 10, inclusive.

Defendants.

Case No.: A-16-742327-C  
Dept. No. XXXI

SUMMONS - CIVIL

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST  
YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN  
20 DAYS. READ THE INFORMATION BELOW.**

**SFR Investments Pool 1, LLC**

**TO THE DEFENDANT(S):** A civil Complaint has been filed by the Plaintiff  
against you for the relief set forth in the Complaint.

- 1           1.     If you intend to defend this lawsuit, within 20 days after this  
2                 Summons is served on you, exclusive of the day of service, you must do  
3                 the following:  
4                 (a)     File with the Clerk of this Court, whose address is shown below,  
5                         a formal written response to the Complaint in accordance with  
6                         the rules of the Court, with the appropriate filing fee.  
7                 (b)     Serve a copy of your response upon the attorney whose name  
8                         and address is shown below.  
9           2.     Unless you respond, your default will be entered upon application of  
10                 the Plaintiff and failure to so respond will result in a judgment of  
11                 default against you for the relief demanded in the Complaint, which  
12                 could result in the taking of money or property or other relief  
13                 requested in the Complaint.  
14           3.     If you intend to seek the advice of an attorney in this matter, you  
15                 should do so promptly so that your response may be filed on time.  
16           4.     The State of Nevada, its political subdivisions, agencies, officers,  
17                 employees, board members, commission members and legislators each  
18                 have 45 days after service of the Summons within which to file an  
19                 Answer or other responsive pleading to the Counterclaim.

20 Submitted by:

STEVEN D. GRIERSON  
CLERK OF COURT

RUSH LAPRA

SEP 1 - 2016

21 By:

22   
23 DAVID J. MERRILL  
24 DAVID J. MERRILL, P.C.  
25 10161 Park Run Drive, Suite 150  
26 Las Vegas, Nevada 89145  
27 (702) 566-1935  
28 Attorney for Plaintiff

By:

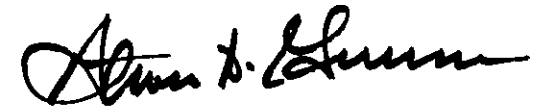
  
Deputy Clerk

Date

Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

NOTE: When service is by publication, add a brief statement of the  
object of the action. See Nevada Rules of Civil Procedure 4(b).

# **TAB 26**



CLERK OF THE COURT

**AFFT**  
David J. Merrill, P.C.  
David J. Merrill, Esq  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145  
State Bar No.: 6060  
Attorney(s) for: Plaintiff(s)

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

Case No.: A-16-742327-C

Dept. No.: XXXI

Date:

Time:

**Marchai, B.T., a Nevada business trust**

**vs**

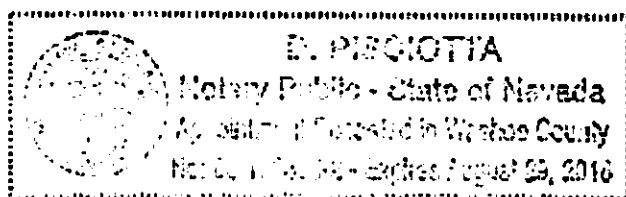
**Plaintiff(s)**

**SFR Investments Pool 1, a Nevada limited liability company; et al**

**Defendant(s)**

**AFFIDAVIT OF SERVICE**

I, Richard Janes, being duly sworn deposes and says: That at all times herein affiant was and is a citizen of the United States, over 18 years of age, licensed to serve civil process in the State of Nevada under license #604, and not a party to or interested in the proceeding in which this affidavit is made. The affiant received 1 copy(ies) of the: Summons - Civil; Complaint; Initial Appearance Fee Disclosure; District Court Civil Cover Sheet on the 8th day of September, 2016 and served the same on the 12th day of September, 2016 at 3:13pm by serving the Defendant(s), SFR Investments Pool 1, a Nevada limited liability company by personally delivering and leaving a copy at Registered Agent: Paracorp Incorporated, 318 N. Carson St. #208, Carson City, NV, 89701 with Ashley Bougherbi, Administrative Assistant pursuant to NRS 14.020 as a person of suitable age and discretion at the above address, which address is the address of the registered agent as shown on the current certificate of designation filed with the Secretary of State.

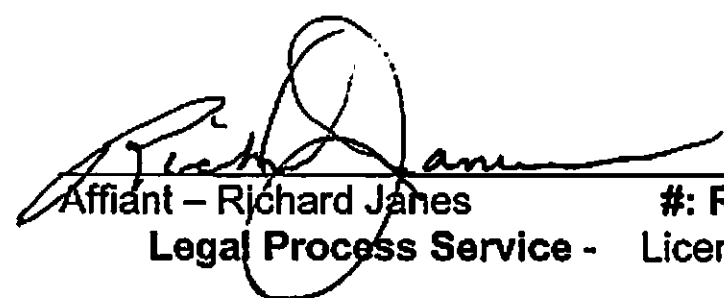


State of Nevada, County of Washoe

SUBSCRIBED AND SWORN to before me on this

13th day of September 2016

Notary Public D. Pisciotta



Affiant - Richard Janes  
Legal Process Service -

#: R-083121  
License # 604

WorkOrderNo 1606571



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SUMM  
DAVID J. MERRILL  
Nevada Bar No. 6060  
DAVID J. MERRILL, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone: (702) 566-1935  
Facsimile: (702) 993-8841  
E-mail: david@djmerrillpc.com  
Attorney for MARCHAI, B.T.

DISTRICT COURT  
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business  
trust,  
  
Plaintiff,  
  
vs.  
  
SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company;  
WYETH RANCH COMMUNITY  
ASSOCIATION, a Nevada non-profit  
corporation; ALESSI & KOENIG, LLC,  
a Nevada limited liability company;  
DOES 1 through 10, inclusive, and  
ROES 1 through 10, inclusive.  
  
Defendants.

Case No.: A-16-742327-C  
Dept. No. XXXI

SUMMONS - CIVIL

NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST  
YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN  
20 DAYS. READ THE INFORMATION BELOW.

SFR Investments Pool 1, LLC

TO THE DEFENDANT(S): A civil Complaint has been filed by the Plaintiff  
against you for the relief set forth in the Complaint.

CLERK OF THE COURT

SEP 1 - 2016

RECEIVED

- 1           1.     If you intend to defend this lawsuit, within 20 days after this  
2                 Summons is served on you, exclusive of the day of service, you must do  
3                 the following:  
4                 (a)     File with the Clerk of this Court, whose address is shown below,  
5                         a formal written response to the Complaint in accordance with  
6                         the rules of the Court, with the appropriate filing fee.  
7                 (b)     Serve a copy of your response upon the attorney whose name  
8                         and address is shown below.  
9           2.     Unless you respond, your default will be entered upon application of  
10                 the Plaintiff and failure to so respond will result in a judgment of  
11                 default against you for the relief demanded in the Complaint, which  
12                 could result in the taking of money or property or other relief  
13                 requested in the Complaint.  
14           3.     If you intend to seek the advice of an attorney in this matter, you  
15                 should do so promptly so that your response may be filed on time.  
16           4.     The State of Nevada, its political subdivisions, agencies, officers,  
17                 employees, board members, commission members and legislators each  
18                 have 45 days after service of the Summons within which to file an  
19                 Answer or other responsive pleading to the Counterclaim.

20 Submitted by:

STEVEN D. GRIERSON  
CLERK OF COURT

RUSH LAPRA

SEP 1 - 2016

21 By:

22   
23 DAVID J. MERRILL  
24 DAVID J. MERRILL, P.C.  
25 10161 Park Run Drive, Suite 150  
26 Las Vegas, Nevada 89145  
27 (702) 566-1935  
28 Attorney for Plaintiff

By:

  
Deputy Clerk

Date

Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

NOTE: When service is by publication, add a brief statement of the  
object of the action. See Nevada Rules of Civil Procedure 4(b).



# **TAB 27**

*Alan D. Green*  
CLERK OF THE COURT

Case No.: A-16-742327-C  
Dept. No.: XXXI  
Date:  
Time:

## AFFIDAVIT OF SERVICE

State of Nevada, County of Clark  
SUBSCRIBED AND SWORN to before me on this  
9th day of September 2016

  
Affiant - Leonard Jay Hirschhorn # R-070386

**Legal Process Service      License # 604**  
**WorkOrderNo 1606573**

SUMM  
DAVID J. MERRILL  
Nevada Bar No. 6060  
DAVID J. MERRILL, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone: (702) 566-1935  
Facsimile: (702) 993-8841  
E-mail: david@djmerrillpc.com  
Attorney for MARCHAI, B.T.

DISTRICT COURT  
CLARK COUNTY, NEVADA

MARCHAI, B.T., a Nevada business  
trust,

Plaintiff,

vs.

SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company;  
WYETH RANCH COMMUNITY  
ASSOCIATION, a Nevada non-profit  
corporation; ALESSI & KOENIG, LLC,  
a Nevada limited liability company;  
DOES 1 through 10, inclusive, and  
ROES 1 through 10, inclusive.

Defendants.

Case No.: A-16-742327-C  
Dept. No. XXXI

SUMMONS - CIVIL

**NOTICE! YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST  
YOU WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND WITHIN  
20 DAYS. READ THE INFORMATION BELOW.**

**Wyeth Ranch Community Association**

**TO THE DEFENDANT(S):** A civil Complaint has been filed by the Plaintiff  
against you for the relief set forth in the Complaint.


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1. If you intend to defend this lawsuit, within 20 days after this Summons is served on you, exclusive of the day of service, you must do the following:
  - (a) File with the Clerk of this Court, whose address is shown below, a formal written response to the Complaint in accordance with the rules of the Court, with the appropriate filing fee.
  - (b) Serve a copy of your response upon the attorney whose name and address is shown below.
2. Unless you respond, your default will be entered upon application of the Plaintiff and failure to so respond will result in a judgment of default against you for the relief demanded in the Complaint, which could result in the taking of money or property or other relief requested in the Complaint.
3. If you intend to seek the advice of an attorney in this matter, you should do so promptly so that your response may be filed on time.
4. The State of Nevada, its political subdivisions, agencies, officers, employees, board members, commission members and legislators each have 45 days after service of the Summons within which to file an Answer or other responsive pleading to the Counterclaim.

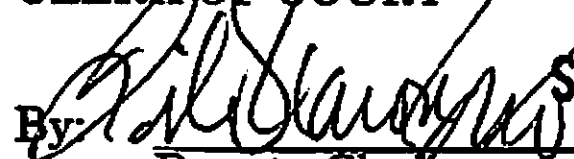
Submitted by:

STEVEN D. GRIERSON **IRISH LAPRA**  
CLERK OF COURT

By:

  
DAVID J. MERRILL  
DAVID J. MERRILL, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 566-1935

By:

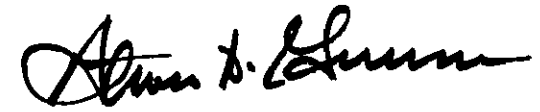
 **SEP 1 - 2016**  
Deputy Clerk Date

Attorney for Plaintiff

Regional Justice Center  
200 Lewis Avenue  
Las Vegas, Nevada 89155

**NOTE: When service is by publication, add a brief statement of the object of the action. See Nevada Rules of Civil Procedure 4(b).**

# **TAB 28**



CLERK OF THE COURT

1 **NEOJ**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for WELLS FARGO BANK, N.A.

11  
12  
13 **DISTRICT COURT**  
14  
15 **CLARK COUNTY, NEVADA**

16 **MARCHAI, B.T., a Nevada business**  
17 **trust,**

18 **Plaintiff,**

19 **vs.**

20 **CRISTELA PEREZ, an individual; et al.**

21 **Defendants.**

22 **AND ALL RELATED CLAIMS**

Case No.: A-13-689461-C

Dept. No. VII

Consolidated with: A-16-742327-C

23 **NOTICE OF ENTRY OF ORDER**

24 **TAKE NOTICE** that on the 13th day of December 2016, the Court entered an  
25 **Order Lifting Stay and Consolidating Cases**, a copy of which is attached hereto.

26 **DATED** this 13th day of December 2016.

27 **DAVID J. MERRILL, P.C.**

28 **By:**

  
29 **DAVID J. MERRILL**  
30 Nevada Bar No. 6060  
31 10161 Park Run Drive, Suite 150  
32 Las Vegas, Nevada 89145  
33 (702) 566-1935  
34 Attorneys for MARCHAI, B.T.

DAVID J. MERRILL, P.C.  
10161 PARK RUN DRIVE, SUITE 150  
LAS VEGAS, NEVADA 89145  
(702) 566-1935

DAVID J. MERRILL, P.C.  
10161 PARK RUN DRIVE, SUITE 150  
LAS VEGAS, NEVADA 89145  
(702) 566-1935

**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of December 2016, a copy of the foregoing Notice of Entry of Order was served electronically to the following through the Court's electronic service system:

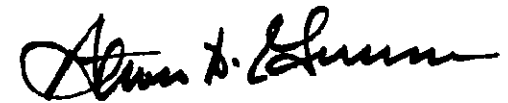
**Kim Gilbert Ebron**

Diana Cline Ebron	diana@kgelegal.com
E-Service for Kim Gilbert Ebron	eservice@hkimlaw.com
Michael L. Sturm	mike@kgelegal.com
Tomas Valerio	staff@kgelegal.com

**Lipson, Neilson, Cole, Seltzer & Garin, P.C.**

Brenda Correa	bcorrea@lipsonneilson.com
Kaleb Anderson	kanderson@lipsonneilson.com
Megan Hummel	mhummel@lipsonneilson.com

  
An employee of David J. Merrill, P.C.



CLERK OF THE COURT

1 **ORDR**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 **MARCHAI, B.T., a Nevada business**  
14 **trust,**

15 **Plaintiff,**

16 **vs.**

17 **CRISTELA PEREZ, an individual; et al.**

18 **Defendants.**

19 **AND ALL RELATED CLAIMS AND**  
20 **ACTIONS**

Case No.: A-13-689461-C

Dept. No. VII

Consolidated with: A-16-742327-C

21 **ORDER LIFTING STAY AND CONSOLIDATING CASES**

22 In accordance with the Court's September 30, 2016, Order Denying Motion,  
23 on December 1, 2016, the Court conducted a status check concerning the stay issued  
24 by the Court on September 30, 2016. David J. Merrill of David J. Merrill, P.C.  
25 appeared on behalf of Marchai, B.T. Jacqueline A. Gilbert of Kim Gilbert Ebron  
26 appeared on behalf of SFR Investments Pool 1, LLC. The Court having discussed  
27 the status of the case with counsel, as well as Marchai's filing of a separate case  
28 entitled *Marchai, B.T. v. SFR Investments Pool 1, LLC* (Case No. A-16-742327-C),  
being fully advised in the premises, and good causes appearing therefor:



1 IT IS HEREBY ORDERED that the stay issued in this action on September  
2 30, 2016 shall be and hereby is lifted;

3 IT IS FURTHER ORDERED that Case No. A-16-742327-C, entitled *Marchai,*  
4 *B.T. v. SFR Investments Pool 1, LLC*, which is currently pending before  
5 Department XXXI, shall be and hereby is consolidated with this action; and

6 IT IS FURTHER ORDERED that the parties shall appear for a status check  
7 on January 3, 2017 at 9:00 a.m. to discuss further proceedings in the case.

8 DATED this 9<sup>th</sup> day of December 2016.


9  
10   
11 HONORABLE LINDA MARIE BELL  
12 

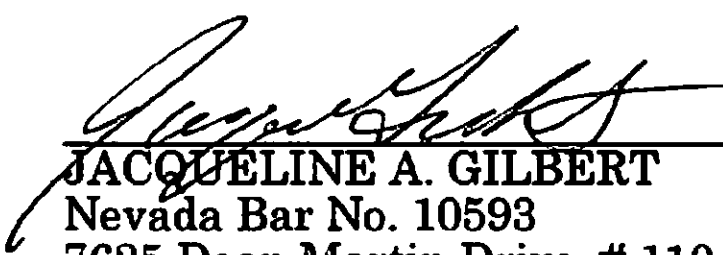
13 Submitted by:

14 DAVID J. MERRILL, P.C.

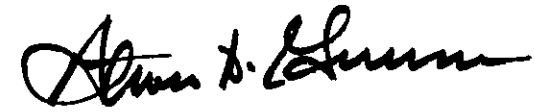
Approved as to form and content by:

KIM GILBERT EBRON

15  
16 By:   
17 DAVID J. MERRILL  
18 Nevada Bar No. 6060  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 566-1935  
19 Attorneys for MARCHAI, B.T.

20  
21 By:   
22 JACQUELINE A. GILBERT  
23 Nevada Bar No. 10593  
7625 Dean Martin Drive, # 110  
Las Vegas, Nevada 89139  
(702) 485-3300  
24 Attorneys for SFR INVESTMENTS  
25 POOL 1, LLC  
26  
27  
28

# **TAB 29**



CLERK OF THE COURT

1 **NEOJ**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

7  
8 **DISTRICT COURT**  
9  
10 **CLARK COUNTY, NEVADA**

11 **MARCHAI, B.T., a Nevada business**  
12 **trust,**

13 **Plaintiff,**

14 **vs.**

15 **SFR INVESTMENTS POOL 1, LLC, a**  
16 **Nevada limited liability company;**  
17 **WYETH RANCH COMMUNITY**  
18 **ASSOCIATION, a Nevada non-profit**  
19 **corporation; ALESSI & KOENIG, LLC,**  
20 **a Nevada limited liability company;**  
21 **DOES 1 through 10, inclusive, and**  
22 **ROES 1 through 10, inclusive.**

23 **Defendants.**

Case No.: A-16-742327-C  
Dept. No. XXXI


24  
25 **NOTICE OF ENTRY OF ORDER**

26 **TAKE NOTICE** that on the 13th day of December 2016, the Court entered an  
27 **Order Lifting Stay and Consolidating Cases**, a copy of which is attached hereto.

28 **DATED** this 13th day of December 2016.

**DAVID J. MERRILL, P.C.**

By:

  
DAVID J. MERRILL  
Nevada Bar No. 6060  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 566-1935  
Attorneys for MARCHAI, B.T.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 13th day of December 2016, I served a copy of the foregoing Notice of Entry of Order through the Court’s electronic filing and service system upon the following:

**Kim Gilbert Ebron**

Diana Cline Ebron	diana@kgelegal.com
E-Service for Kim Gilbert Ebron	eservice@kgelegal.com
Michael L. Sturm	mike@kgelegal.com
Tomas Valerio	staff@kgelegal.com

**Lipson, Neilson, Cole, Seltzer & Garin, P.C.**

Brenda Correa	bcorrea@lipsonneilson.com
Kaleb Anderson	kanderson@lipsonneilson.com
Megan Hummel	mhummel@lipsonneilson.com
Susana Nutt	snutt@lipsonneilson.com

  
An employee of David J. Merrill, P.C.



CLERK OF THE COURT

1 **ORDR**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 **MARCHAI, B.T., a Nevada business**  
14 **trust,**

15 **Plaintiff,**

16 **vs.**

17 **CRISTELA PEREZ, an individual; et al.**

18 **Defendants.**

19 **AND ALL RELATED CLAIMS AND**  
20 **ACTIONS**

Case No.: A-13-689461-C

Dept. No. VII

Consolidated with: A-16-742327-C

21 **ORDER LIFTING STAY AND CONSOLIDATING CASES**

22 In accordance with the Court's September 30, 2016, Order Denying Motion,  
23 on December 1, 2016, the Court conducted a status check concerning the stay issued  
24 by the Court on September 30, 2016. David J. Merrill of David J. Merrill, P.C.  
25 appeared on behalf of Marchai, B.T. Jacqueline A. Gilbert of Kim Gilbert Ebron  
26 appeared on behalf of SFR Investments Pool 1, LLC. The Court having discussed  
27 the status of the case with counsel, as well as Marchai's filing of a separate case  
28 entitled *Marchai, B.T. v. SFR Investments Pool 1, LLC* (Case No. A-16-742327-C),  
being fully advised in the premises, and good causes appearing therefor:

1 IT IS HEREBY ORDERED that the stay issued in this action on September  
2 30, 2016 shall be and hereby is lifted;

3 IT IS FURTHER ORDERED that Case No. A-16-742327-C, entitled *Marchai,*  
4 *B.T. v. SFR Investments Pool 1, LLC*, which is currently pending before  
5 Department XXXI, shall be and hereby is consolidated with this action; and

6 IT IS FURTHER ORDERED that the parties shall appear for a status check  
7 on January 3, 2017 at 9:00 a.m. to discuss further proceedings in the case.

8 DATED this 9<sup>th</sup> day of December 2016.


9  
10   
11 HONORABLE LINDA MARIE BELL  
12 

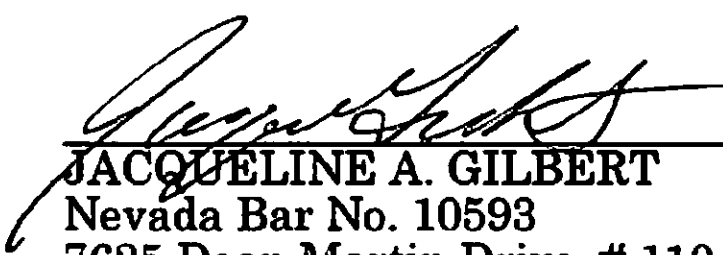
13 Submitted by:

14 DAVID J. MERRILL, P.C.

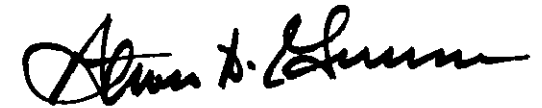
Approved as to form and content by:

KIM GILBERT EBRON

15  
16 By:   
17 DAVID J. MERRILL  
18 Nevada Bar No. 6060  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
(702) 566-1935  
19 Attorneys for MARCHAI, B.T.

20  
21 By:   
22 JACQUELINE A. GILBERT  
23 Nevada Bar No. 10593  
7625 Dean Martin Drive, # 110  
Las Vegas, Nevada 89139  
(702) 485-3300  
24 Attorneys for SFR INVESTMENTS  
25 POOL 1, LLC  
26  
27  
28

# **TAB 30**



CLERK OF THE COURT

1 **ORDR**  
2 **DAVID J. MERRILL**  
3 Nevada Bar No. 6060  
4 **DAVID J. MERRILL, P.C.**  
5 10161 Park Run Drive, Suite 150  
6 Las Vegas, Nevada 89145  
7 Telephone: (702) 566-1935  
8 Facsimile: (702) 993-8841  
9 E-mail: david@djmerrillpc.com  
10 Attorney for MARCHAI, B.T.

11 **DISTRICT COURT**  
12 **CLARK COUNTY, NEVADA**

13 MARCHAI, B.T., a Nevada business )  
14 trust, )  
15 )  
16 Plaintiff, )  
17 vs. )  
18 CRISTELA PEREZ, an individual; *et al.* )  
19 Defendants. )

Case No.: A-13-689461-C  
Dept. No. VII  
Consolidated with: A-16-742327-C

20 **AND ALL RELATED CLAIMS AND**  
21 **ACTIONS**

22 **ORDER LIFTING STAY AND CONSOLIDATING CASES**

23 In accordance with the Court's September 30, 2016, Order Denying Motion,  
24 on December 1, 2016, the Court conducted a status check concerning the stay issued  
25 by the Court on September 30, 2016. David J. Merrill of David J. Merrill, P.C.  
26 appeared on behalf of Marchai, B.T. Jacqueline A. Gilbert of Kim Gilbert Ebron  
27 appeared on behalf of SFR Investments Pool 1, LLC. The Court having discussed  
28 the status of the case with counsel, as well as Marchai's filing of a separate case  
entitled *Marchai, B.T. v. SFR Investments Pool 1, LLC* (Case No. A-16-742327-C),  
being fully advised in the premises, and good causes appearing therefor:



1 IT IS HEREBY ORDERED that the stay issued in this action on September  
2 30, 2016 shall be and hereby is lifted;

3 IT IS FURTHER ORDERED that Case No. A-16-742327-C, entitled *Marchai,*  
4 *B.T. v. SFR Investments Pool 1, LLC*, which is currently pending before  
5 Department XXXI, shall be and hereby is consolidated with this action; and


6 IT IS FURTHER ORDERED that the parties shall appear for a status check  
7 on January 3, 2017 at 9:00 a.m. to discuss further proceedings in the case.

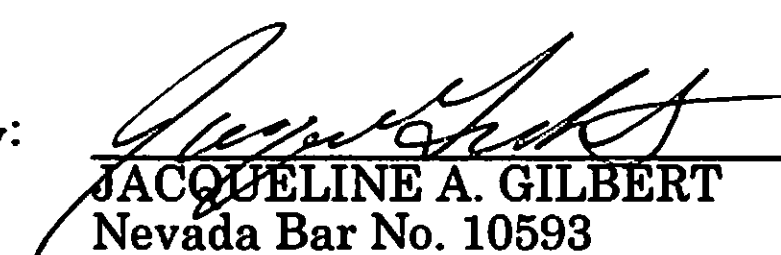
8 DATED this 9<sup>th</sup> day of December 2016.

9  
10   
11 HONORABLE LINDA MARIE BELL  
12 

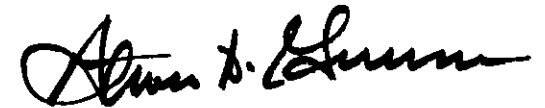
13 Submitted by:  
14 DAVID J. MERRILL, P.C.

Approved as to form and content by:  
KIM GILBERT EBRON

15  
16 By:   
17 DAVID J. MERRILL  
18 Nevada Bar No. 6060  
19 10161 Park Run Drive, Suite 150  
20 Las Vegas, Nevada 89145  
21 (702) 566-1935  
22 Attorneys for MARCHAI, B.T.

By:   
JACQUELINE A. GILBERT  
Nevada Bar No. 10593  
7625 Dean Martin Drive, # 110  
Las Vegas, Nevada 89139  
(702) 485-3300  
Attorneys for SFR INVESTMENTS  
POOL 1, LLC

# **TAB 31**



CLERK OF THE COURT

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.  
KALEB D. ANDERSON, ESQ.  
Nevada Bar No. 7582  
MEGAN H. HUMMEL, ESQ.  
Nevada Bar No. 12404  
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Las Vegas, Nevada 89144  
(702) 382-1500  
(702) 382-1512 - fax  
[kanderson@lipsonneilson.com](mailto:kanderson@lipsonneilson.com)  
[mhummel@lipsonneilson.com](mailto:mhummel@lipsonneilson.com)

*Attorneys for Defendant Wyeth Ranch Community Association*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

MARCHAI, B.T., a Nevada business trust,  
Plaintiff,

v.

CRISTELA PEREZ, an individual; *et al.*  
Defendants.

AND ALL RELATED CLAIMS

Case No.: A-13-689461-C

Dept. No.: VII

Consolidated with: A-16-742327-C

**DEFENDANT WYETH RANCH  
COMMUNITY ASSOCIATION'S  
ANSWER AND AFFIRMATIVE  
DEFENSES**

**DEFENDANT WYETH RANCH COMMUNITY ASSOCIATION'S ANSWER AND  
AFFIRMATIVE DEFENSES**

COMES NOW, WYETH RANCH COMMUNITY ASSOCIATION ("Defendant"), by  
and through its counsel of record at the law firm of LIPSON, NEILSON, COLE,  
SELTZER & GARIN P.C., and hereby answers Plaintiff MARCHAI, B.T.'s ("Plaintiff")  
Complaint as follows:

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**COMPLAINT**

1. Defendant, answering Paragraphs 1, is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

2. Defendant, answering paragraph 2, admits.

3. Defendant. Answering Paragraph 3, is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

4. Defendant, answering Paragraph 4, admits.

5. Defendant, answering Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30 is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

6. The allegations in Paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45 state and characterize legal conclusions to which no response is required. To the extent a response is required, Defendant denies each and every allegation set forth therein.

7. Defendant, answering Paragraphs 46, 47, 48, and 49, is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

**FIRST CLAIM FOR RELIEF**

**(Declaratory Relief Under Amendment V to the United States Constitution – Takings Clause – Against SFR, Wyeth Ranch, and Alessi & Koenig)**

8. Defendant, answering Paragraph 50, repeats and incorporates by reference its responses to the preceding Paragraphs as though fully set forth herein.

9. The allegations in Paragraphs 51, 52, 53, 54, and 55 state and characterize legal conclusions to which no response is required. To the extent a response is required, Defendant denies each and every allegation set forth therein.

///

1           10. Defendant, answering Paragraphs 56 and 57 is presently without sufficient  
2 information to form a belief as to the truth of the allegations and therefore denies the  
3 same.

4                                   **SECOND CLAIM FOR RELIEF**  
5           **(Declaratory Relief under the Due Process Clauses of the United States and**  
6           **Nevada Constitutions – Against SFR, Wyeth Ranch, and Alessi & Koenig)**

7           11. Defendant, answering Paragraph 58, repeats and incorporates by  
8 reference its responses to the preceding Paragraphs as though fully set forth herein.

9           12. The allegations in Paragraph 59, 60, 61, 62, 63, 64 state and characterize  
10 legal conclusions to which no response is required. To the extent a response is  
11 required, Defendant denies each and every allegation set forth therein.

12           13. Defendant, answering Paragraphs 65 and 66, is presently without  
13 sufficient information to form a belief as to the truth of the allegations and therefore  
14 denies the same.

15                                   **THIRD CLAIM FOR RELIEF**  
16           **(Wrongful Foreclosure – Against, SFR, Wyeth Ranch, and Alessi & Koenig)**

17           14. Defendant, answering Paragraph 67, repeats and incorporates by  
18 reference its responses to the preceding Paragraphs as though fully set forth herein.

19           15. The allegations in Paragraphs 68, 69, 70, 71, 72, 73, 74, 75, and 76, state  
20 and characterize legal conclusions to which no response is required. To the extent a  
21 response is required, Defendant denies each and every allegation set forth therein.

22           16. Defendant, answering Paragraphs 77 and 78, is presently without  
23 sufficient information to form a belief as to the truth of the allegations and therefore  
24 denies the same.

25                                   **FOURTH CLAIM FOR RELIEF**  
26           **(Violation of NRS 116.1113, et. seq. – Against Wyeth Ranch and Alessi & Koenig)**

27           17. Defendant, answering Paragraph 79, repeats and incorporates by  
28 reference its responses to the preceding Paragraphs as though fully set forth therein.

          18. Defendant, answering Paragraphs 80 and 81, denies each and every  
allegation contained therein.

**FIFTH CLAIM FOR RELIEF**  
**(Intentional Interference with Contractual Relations against SFR, Wyeth Ranch,  
and Alessi & Koenig)**

19. Defendant, answering Paragraph 82, repeats and incorporates by reference its responses to the preceding Paragraphs as though fully set forth therein.

20. Defendant, answering Paragraphs 83, 84, 85, 86, 87, and 88, denies each and every allegation contained therein.

21. Defendant, answering Paragraphs 89 and 90, is presently without sufficient information to form a belief as to the truth of the allegations and therefore denies the same.

**SIXTH CLAIM FOR RELIEF**  
**(Quiet Title – Against SFR, Wyeth Ranch, and Alessi & Koenig)**

22. Defendant, answering Paragraph 82, repeats and incorporates by reference its responses to the preceding Paragraphs as though fully set forth therein.

23. Defendant, answering Paragraphs 92, 93, 94, 95, 96, 97, 98, and 99, states as follows: this cause of action was dismissed by the court on January 24, 2017.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Defendant denies that by reason of act, omission, fault, conduct or liability on Defendant's part, whether negligent, careless, unlawful or whether as alleged or otherwise, Plaintiff was injured or damaged in any of the amounts alleged, or in any other manner whatsoever.

**SECOND AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the complaint, and each and every cause of action therein, fails to state facts sufficient to constitute a cause of action against Defendant.

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**THIRD AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the Complaint is barred by issue preclusion and/or claim preclusion (i.e. the Doctrine of Res Judicata).

**FOURTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that if Plaintiff suffered or sustained any loss, damage, or detriment, the same is directly and proximately caused and contributed to, in whole or in part, breach of warranty, breach of contract, or the acts, omissions, activities, recklessness, negligence, and/or intentional misconduct of Plaintiff, thereby completely or partially barring his recovery herein.

**FIFTH AFFIRMATIVE ACTION**

Defendant is informed and believes, and thereon alleges, that it is not legally responsible in any fashion with respect to the damages and injuries claimed by Plaintiff; however, if Defendant is subjected to any liability to Plaintiff, it will be due, in whole or in part, to the breach of warranty, breach of contract, omissions, activities, carelessness, recklessness, or negligence of others; wherefore any recovery obtained by Plaintiff against Defendant should be reduced in proportion to the respective negligence, fault, and legal responsibility of all other parties, persons, or entities who contributed to or caused any such injury or damage, in accordance with the laws of comparative negligence.

**SIXTH AFFIRMATIVE DEFENSE**

Defendant is informed and believed, and thereon alleges, that at the time of the incident alleged in Plaintiff's claims, Plaintiff knew of and fully understood the danger and risk incident to its undertaking, but despite such knowledge, freely and voluntarily assumed and exposed itself to all risk of harm and the consequent injuries or damages, if any, resulting therefrom.

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**SEVENTH AFFIRMATIVE DEFENSE**

Plaintiff is informed and believes, and thereon alleges, that the cross-claims, and each and every cause of action in the cross-claims, is barred by the applicable Statutes of Repose.

**EIGHTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that as to each alleged cause of action, Plaintiff has failed, refused, and neglected to take reasonable steps to mitigate his own alleged damages, if any, thus barring or diminishing Plaintiff's recovery.

**NINTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the crossclaims, and each and every cause of action contained therein, is barred by the applicable Statutes of Limitation.

**TENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff unreasonably delayed both the filing of the crossclaims, and notification of the alleged causes of action, and the basis for the causes of action alleged against Defendant, all of which has unduly and severely prejudiced Defendant in its defense of this action, thereby barring or diminishing Plaintiff's recovery under the Doctrine of Estoppel.

**ELEVENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff unreasonably delayed both the filing of the crossclaims and notification of the alleged cause of action, and the basis for the causes of action alleged against this answering Defendant, all of which has unduly and severely prejudiced Defendant, thereby barring or diminishing Plaintiff's under the Doctrine of Laches.

**TWELFTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff failed to join all necessary and indispensable parties to this lawsuit.

///



**THIRTEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the injuries and damages of which Plaintiff complaints were proximately caused by, or contributed to by, the acts of other Defendants, Cross-Defendants, Third-Party defendants, persons and/or other entities, and that said acts were an intervening and superseding cause of the injuries and damages, if any, of which the crossclaims complains, thus barring Plaintiff from recovering against Defendant.

**FOURTEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the crossclaims are barred by the Statute of Frauds.

**FIFTEENTH AFFIRMATIVE DEFENSE**

It has been necessary for this Defendant to retain the services of an attorney to defend this action, and this Defendant is entitled to a reasonable sum for attorney's fees and costs.

**SIXTEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that the claims of Plaintiff are reduced, modified, or barred by the Doctrine of Unclean Hands.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because Counterclaimant received payment.

**EIGHTEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because of changed circumstances.

**NINETEENTH AFFIRMATIVE DEFENSE**

Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because Plaintiff released its claims.

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///

Defendant is informed and believes, and thereon alleges, that Plaintiff's claims are reduced, modified, and/or barred because of the Parol Evidence Rule.

Defendant is informed and believes and thereon alleges that Plaintiff's performance was excused because of cardinal change.

Defendant is informed and believes that Plaintiff's first and second causes of action are barred by the Nevada Supreme Court's decision in Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, Case No. 68630.

Defendant is informed and believes and thereon alleges that Plaintiff failed to comply with the mediation requirements set forth in NRS Chapter 38.

Pursuant to the Nevada Rules of Civil Procedure, all affirmative defenses may not have been alleged herein insofar as sufficient facts were not available to this Defendant after reasonable inquiry, and therefore, Defendant reserves the right to amend this Answer to allege additional affirmative defenses, if subsequent investigation so warrants.

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Lipson, Neilson, Cole, Seltzer & Garin, P.C.  
9900 Covington Cross Drive, Suite 120  
Las Vegas, Nevada 89144  
(702) 382-1500 - fax (702) 382-1512

**PRAYER**

WHEREFORE, Defendant prays for judgment against Plaintiff as follows:

1. That Plaintiff takes nothing by way of this action;
2. For the costs of suit incurred herein;
3. For attorney's fees and costs; and
4. For such other relief as the Court deems just and proper.

DATED this 31<sup>st</sup> day of January, 2017.

LIPSON, NEILSON, COLE, SELTZER & GARIN, P.C.

By: /s/ Megan H. Hummel

KALEB D. ANDERSON, ESQ.  
Nevada Bar No. 7582  
MEGAN H. HUMMEL ESQ.  
Nevada Bar No. 12404  
9900 Covington Cross Drive, Suite 120  
Las Vegas, Nevada 89144

*Attorneys for Defendant  
Wyeth Ranch Community Association*

Lipson, Neilson, Cole, Seltzer & Garin, P.C.  
9900 Covington Cross Drive, Suite 120  
Las Vegas, Nevada 89144  
(702) 382-1500 - fax (702) 382-1512

**CERTIFICATE OF SERVICE**

I certify that on the 31<sup>st</sup> day of January, 2017, I electronically transmitted the foregoing **DEFENDANT WYETH RANCH COMMUNITY ASSOCIATION'S ANSWER AND AFFIRMATIVE DEFENSES** to the Clerk's Office using the Odyssey E-File & Serve system for filing and transmittal to the following Odyssey E-File & Serve registrants addressed to:

David J. Merrill, P.C.  
10161 Park Run Drive, Suite 150  
Las Vegas, NV 89145  
[david@djmerrillpc.com](mailto:david@djmerrillpc.com)

*Attorney for Plaintiff Marchai, B.T.*

Diana Cline Ebron, Esq.  
Jacqueline A. Gilbert, Esq.  
Karen L. Hanks, Esq.  
KIM GILBERT EBRON  
7625 Dean Martin Drive, Suite 110  
Las Vegas, NV 89139  
[diana@kgelegal.com](mailto:diana@kgelegal.com)  
[jackie@kgelegal.com](mailto:jackie@kgelegal.com)  
[karen@kgelegal.com](mailto:karen@kgelegal.com)

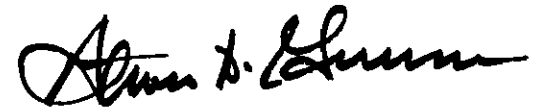
*Attorneys for SFR Investments Pool 1, LLC*

*/s/ Brenda Correa*

---

An employee of  
LIPSON, NEILSON, COLE, SELZTER & GARIN, P.C.

# **TAB 32**



CLERK OF THE COURT

ANSC  
DIANA CLINE EBRON, ESQ.  
Nevada Bar No. 10580  
E-mail: diana@kgelegal.com  
JACQUELINE A. GILBERT, ESQ.  
Nevada Bar No. 10593  
E-mail: jackie@kgelegal.com  
KAREN L. HANKS, ESQ.  
Nevada Bar No. 9578  
E-mail: karen@kgelegal.com  
KIM GILBERT EBRON  
*fka Howard Kim & Associates*  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
Telephone: (702) 485-3300  
Facsimile: (702) 485-3301  
*Attorneys for SFR Investments Pool 1, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MARCHAI B.T., a Bank Trust,

Plaintiff,

vs.

CRISTELA PEREZ, an individual; SFR  
INVESTMENTS POOL 1, LLC, a limited  
liability company; U.S. BANK NATIONAL  
ASSOCIATION, N.D., a national  
association; DOES I through X; and ROE  
CORPORATIONS I through 10, inclusive,

Defendants.

SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company,

Counterclaimant/Cross-Claimant,

vs.

MARCHAI B.T., a Bank Trust; U.S. BANK  
NATIONAL ASSOCIATION, N.D., a  
national association; CRISTELA PEREZ, an  
individual; and DOES I through X; and ROE  
CORPORATIONS I through 10, inclusive,

Counter-Defendant/Cross-Defendants.

Case No. A-13-689461-C

Dept. No. VII

Consolidated with: A-16-742327-C

**SFR INVESTMENTS POOL 1, LLC'S  
ANSWER TO COMPLAINT**

SFR INVESTMENTS POOL 1, LLC ("SFR") hereby answers MARCHAI B.T.'s

**KIM GILBERT EBRON**  
7625 DEAN MARTIN DRIVE, SUITE 110  
LAS VEGAS, NEVADA 89139  
(702) 485-3300 FAX (702) 485-3301

1 (“Marchai” or “Bank”) Complaint (Case No. A-16-742327-C)<sup>1</sup> as follows:

2 1. The allegations in paragraph 1 of the Complaint calls for a legal conclusion to which no  
3 response is required.

4 2. In answering paragraph 3 of the Complaint, SFR admits it is a Nevada limited liability  
5 company and is the title holder of the Property. The Trustee’s Deed Upon Sale referenced in  
6 paragraph 3 of the Complaint speaks for itself and SFR denies any allegations inconsistent with  
7 said document.

8 3. Answering paragraph 4 of the Complaint, SFR admits upon information and belief that,  
9 Wyeth Ranch Community Association (“Association” or “HOA”), is a Nevada non-profit  
10 corporation doing business in Clark County, Nevada.

11 4. Answering paragraph 5 of the Complaint, SFR admits upon information and belief that,  
12 Alessi & Koenig, LLC (“Alessi” or “HOA”), is a Nevada limited liability company doing business  
13 in Clark County, Nevada.

14 5. SFR is without knowledge or information sufficient to form a belief about the allegations  
15 in paragraph 6 in the Complaint and therefore denies said allegations.

16 6. The Note referenced in paragraph 7 of the Complaint speaks for itself, and SFR denies  
17 any allegations inconsistent with said document. To the extent paragraph 7 alleges that Cristela  
18 Perez (“Perez”) was the title owner of record of the Property at times prior to the Association  
19 foreclosure sale, SFR, upon information and belief, admits the allegations in paragraph 7.

20 7. The recorded Deed of Trust referenced in paragraph 8 of the Complaint speaks for itself,  
21 and SFR denies any allegations inconsistent with said document. SFR further admits upon  
22 information and belief, that a non-judicial publicly-held Association foreclosure auction sale  
23 occurred on August 28, 2013, at which time SFR was the highest bidder, purchasing the property  
24 for \$21,000.00. SFR further admits it now owns the property free and clear of the Bank’s purported  
25 deed of trust which was extinguished as a matter of law on August 28, 2013 as a result of the  
26 Association foreclosure sale.

27  
28 <sup>1</sup> SFR maintains its counterclaim and cross-claims in Case No. A-13-689461-C.

1       8. The recorded Notice of Delinquent Assessments Lien referenced in paragraph 9 of the  
2 Complaint speaks for itself, and SFR denies any allegations inconsistent with said document.

3       9. Upon information and belief, SFR admits the allegations in paragraph 10 of the Complaint.

4       10. The recorded Notice of Delinquent Assessments Lien referenced in paragraph 11 of the  
5 Complaint speaks for itself, and SFR denies any allegations inconsistent with said document.

6       11. The recorded Notice of Default referenced in paragraph 12 of the Complaint speaks for  
7 itself, and SFR denies any allegations inconsistent with said document.

8       12. The recorded Notice of Trustee's Sale referenced in paragraph 13 of the Complaint speaks  
9 for itself, and SFR denies any allegations inconsistent with said document.

10       13. SFR is without knowledge or information sufficient to form a belief about the allegations  
11 in paragraph 14 in the Complaint and therefore denies said allegations.

12       14. The recorded Notice of Trustee's Sale referenced in paragraph 15 of the Complaint speaks  
13 for itself, and SFR denies any allegations inconsistent with said document.

14       15. The recorded Notice of Trustee's Sale referenced in paragraph 16 of the Complaint speaks  
15 for itself, and SFR denies any allegations inconsistent with said document.

16       16. SFR is without knowledge or information sufficient to form a belief about the allegations  
17 in paragraph 17 in the Complaint and therefore denies said allegations.

18       17. SFR is without knowledge or information sufficient to form a belief about the allegations  
19 in paragraph 18 in the Complaint and therefore denies said allegations.

20       18. The recorded Notice of Delinquent Assessments Lien referenced in paragraph 19 of the  
21 Complaint speaks for itself, and SFR denies any allegations inconsistent with said document.

22       19. The recorded Notice of Default referenced in paragraph 20 of the Complaint speaks for  
23 itself, and SFR denies any allegations inconsistent with said document.

24       20. SFR is without knowledge or information sufficient to form a belief about the allegations  
25 in paragraph 21 in the Complaint and therefore denies said allegations.

26       21. The recorded Assignment referenced in paragraph 22 of the Complaint speaks for itself,  
27 and SFR denies any allegations inconsistent with said document. SFR further admits upon  
28 information and belief, that a non-judicial publicly-held Association foreclosure auction sale



1 occurred on August 28, 2013, at which time SFR was the highest bidder, purchasing the property  
2 for \$21,000.00. SFR further admits it now owns the property free and clear of the Bank's purported  
3 deed of trust which was extinguished as a matter of law on August 28, 2013 as a result of the  
4 Association foreclosure sale.

5 22. SFR is without knowledge or information sufficient to form a belief about the allegations  
6 in paragraph 23 in the Complaint and therefore denies said allegations.

7 23. The recorded Assignment referenced in paragraph 24 of the Complaint speaks for itself,  
8 and SFR denies any allegations inconsistent with said document. SFR further admits upon  
9 information and belief, that a non-judicial publicly-held Association foreclosure auction sale  
10 occurred on August 28, 2013, at which time SFR was the highest bidder, purchasing the property  
11 for \$21,000.00. SFR further admits it now owns the property free and clear of the Bank's purported  
12 deed of trust which was extinguished as a matter of law on August 28, 2013 as a result of the  
13 Association foreclosure sale.

14 24. The recorded Notice of Trustee's Sale referenced in paragraph 25 of the Complaint speaks  
15 for itself, and SFR denies any allegations inconsistent with said document.

16 25. SFR is without knowledge or information sufficient to form a belief about the allegations  
17 in paragraph 26 in the Complaint and therefore denies said allegations.

18 26. The recorded Assignment referenced in paragraph 27 of the Complaint speaks for itself,  
19 and SFR denies any allegations inconsistent with said document. SFR further admits upon  
20 information and belief, that a non-judicial publicly-held Association foreclosure auction sale  
21 occurred on August 28, 2013, at which time SFR was the highest bidder, purchasing the property  
22 for \$21,000.00. SFR further admits it now owns the property free and clear of the Bank's purported  
23 deed of trust which was extinguished as a matter of law on August 28, 2013 as a result of the  
24 Association foreclosure sale.

25 27. The recorded Notice of Trustee's Sale referenced in paragraph 28 of the Complaint speaks  
26 for itself, and SFR denies any allegations inconsistent with said document.

27 28. The recorded Assignment referenced in paragraph 29 of the Complaint speaks for itself,  
28 and SFR denies any allegations inconsistent with said document. SFR further admits upon

1 information and belief, that a non-judicial publicly-held Association foreclosure auction sale  
2 occurred on August 28, 2013, at which time SFR was the highest bidder, purchasing the property  
3 for \$21,000.00. SFR further admits it now owns the property free and clear of the Bank's purported  
4 deed of trust which was extinguished as a matter of law on August 28, 2013 as a result of the  
5 Association foreclosure sale.

6 29. The recorded Notice of Trustee's Sale referenced in paragraph 30 of the Complaint speaks  
7 for itself, and SFR denies any allegations inconsistent with said document.

8 30. The allegations in paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43 and 44 of  
9 the Complaint call for a legal conclusion to which no response is required. To the extent a  
10 response is required, SFR denies the allegations of paragraphs 31, 32, 33, 34, 35, 36, 37, 38, 39,  
11 40, 41, 42, 43 and 44. SFR specifically denies "the sale and purchase of the property was  
12 unconscionable and commercially unreasonable." Further, SFR specifically denies "the property  
13 has an approximate fair market value well in excess of the \$21,000.00 purchase price." The  
14 statutes referenced in paragraphs 31, 32, 33 and 36 speak for themselves and SFR denies any  
15 allegations inconsistent with said statutes.

16 31. The allegations in paragraphs 45, 46, 47, 48 and 49 of the Complaint call for a legal  
17 conclusion to which no response is required. To the extent a response is required, SFR denies the  
18 allegations of paragraphs 45, 46, 47, 48 and 49. SFR further admits upon information and belief,  
19 that a non-judicial publicly-held Association foreclosure auction sale occurred on August 28, 2013,  
20 at which time SFR was the highest bidder, purchasing the property for \$21,000.00. SFR further  
21 admits it now owns the property free and clear of the Bank's purported deed of trust which was  
22 extinguished as a matter of law on August 28, 2013 as a result of the Association foreclosure sale.

23 **FIRST CLAIM FOR RELIEF**

24 **(Declaratory Relief Under Amendment V to the United States Constitution—Takings  
25 Clause—Against SFR, Wyeth Ranch, and Alessi & Koenig)**

26 32. SFR repeats and realleges its answers to paragraphs 1 through 49 of the Complaint as  
27 though fully set forth herein.

28 33. The allegations in paragraphs 51, 52, 53, 54, 55 and 56 of the Complaint call for a legal  
conclusion to which no response is required. To the extent an answer is required, SFR denies the

allegations in paragraphs 51, 52, 53, 54, 55 and 56.

34. SFR denies the allegations contained in paragraph 57 of the Complaint.

**SECOND CLAIM FOR RELIEF**

**(Declaratory Relief Under the Due Process Clauses of the United States and Nevada Constitutions—Takings Clause—Against SFR, Wyeth Ranch, and Alessi & Koenig)**

35. SFR repeats and realleges its answers to paragraphs 1 through 57 of the Complaint as though fully set forth herein.

36. The allegations in paragraphs 59, 60, 61, 62, 63, 64 and 65 of the Complaint call for a legal conclusion to which no response is required. To the extent an answer is required, SFR denies the allegations in paragraphs 59, 60, 61, 62, 63, 64 and 65. The statutes referenced in paragraph 59, 60, 62, 63 and 64 of the Complaint speak for themselves and SFR denies any allegations inconsistent with said statutes.

37. SFR denies the allegations contained in paragraph 66 of the Complaint.

**THIRD CLAIM FOR RELIEF**

**(Wrongful Foreclosure—Against SFR, Wyeth Ranch, and Alessi & Koenig)**

38. SFR repeats and realleges its answers to paragraphs 1 through 66 of the Complaint as though fully set forth herein.

39. The allegations in paragraphs 69, 70, 71, 72, 73, 74, 75, 76 and 77 of the Complaint call for a legal conclusion to which no response is required. To the extent an answer is required, SFR denies the allegations in paragraphs 69, 70, 71, 72, 73, 74, 75, 76 and 77. SFR specifically denies “the purchase price was not commercially reasonable.” Further, SFR specifically denies that the “purchase price for the property was unconscionable.”

40. SFR denies the allegations contained in paragraph 78 of the Complaint.

**FOURTH CLAIM FOR RELIEF**

**(Violation of NRS§116.1113 *et seq.*--against SFR, Wyeth Ranch, and Alessi & Koenig)**

41. SFR repeats and realleges its answers to paragraphs 1 through 78 of the Complaint as though fully set forth herein.

42. The allegations in paragraphs 80 and 81 of the Complaint call for a legal conclusion to which no response is required. To the extent an answer is required, SFR denies the allegations in

1 paragraphs 80 and 81. The statutes referenced in paragraphs 80 and 81 speak for themselves and  
2 SFR denies any allegations inconsistent with said statutes.

3 **FIFTH CLAIM FOR RELIEF**  
4 **(Intentional Interference with Contractual Relations against SFR, Wyeth Ranch, and**  
5 **Alessi & Koenig)**

6 43. SFR repeats and realleges its answers to paragraphs 1 through 81 of the Complaint as  
7 though fully set forth herein.

8 44. The allegations in paragraphs 83, 84, 85, 86, 87, 88 and 89 of the Complaint call for a  
9 legal conclusion to which no response is required. To the extent an answer is required, SFR denies  
10 the allegations in paragraphs 83, 84, 85, 86, 87, 88 and 89.

11 45. SFR denies the allegations contained in paragraph 90 of the Complaint.

12 **SIXTH CLAIM FOR RELIEF**  
13 **(Quiet Title--against SFR, Wyeth Ranch, and Alessi & Koenig)**

14 46. SFR repeats and realleges its answers to paragraphs 1 through 90 of the Complaint as  
15 though fully set forth herein.

16 47. The allegations in paragraphs 92, 93, 94, 95, 96, 97, 98 and 99 of the Complaint call for  
17 a legal conclusion to which no response is required. To the extent an answer is required, SFR  
18 denies the allegations in paragraphs 92, 93, 94, 95, 96, 97, 98 and 99. SFR specifically denies  
19 "the purchase price was not commercially reasonable." Further, SFR specifically denies that the  
20 "purchase price for the property was unconscionable."

21 **AFFIRMATIVE DEFENSES**

22 1. The Bank fails to state a claim upon which relief may be granted.

23 2. The Bank is not entitled to relief from or against SFR, as the Bank has not sustained any  
24 loss, injury, or damage that resulted from any act, omission, or breach by SFR.

25 3. The occurrence referred to in the Counterclaim, and all injuries and damages, if any,  
26 resulting therefrom, were caused by the acts or omissions of the Bank.

27 4. The occurrence referred to in the Counterclaim, and all injuries and damages, if any,  
28 resulting therefrom, were caused by the acts or omissions of a third party or parties over whom  
SFR had no control.

1        5. SFR did not breach any statutory or common law duties allegedly owed to the Bank.

2        6. The Bank failed to mitigate its damages, if any.

3        7. The Bank's claims are barred because SFR complied with applicable statutes and with the  
4 requirements and regulations of the State of Nevada.

5        8. The Bank's claims are barred because the Association and its agents complied with  
6 applicable statutes and regulations.

7        9. The Bank's causes of action are barred in whole or in part by the applicable statutes of  
8 limitations or repose, or by the equitable doctrines of laches, waiver, estoppel, ratification and  
9 unclean hands.

10       10. The Bank is not entitled to equitable relief because it has an adequate remedy at law.

11       11. The Bank has no standing to enforce the first deed of trust and/or the underlying  
12 promissory note.

13       12. The Bank has no standing to enforce the statutes and regulations identified in the  
14 Counterclaim.

15       13. The first deed of trust and other subordinate interests in the Property were extinguished  
16 by the Association foreclosure sale held in accordance with NRS Chapter 116.

17       14. The Bank has no standing to challenge the constitutionality of NRS 116.

18       15. The Bank's claims are barred because the Association and its agents complied with the  
19 foreclosure noticing requirements outlined in the CC&Rs.

20       16. The Bank has no remedy against SFR because, pursuant to NRS 116.31166, SFR is  
21 entitled to rely on the recitals contained in the Association foreclosure deed that the sale was  
22 properly noticed and conducted.

23       17. The Bank has no remedy against SFR because SFR is a bona fide purchaser for value.

24       18. The Bank has no remedy against SFR because the amounts owed under the first deed of  
25 trust have been satisfied.

26       19. Pursuant to Nevada Rules of Civil Procedure 11, as amended, all possible affirmative  
27 defenses may not have been alleged herein insofar as sufficient facts were not available after  
28 reasonable inquiry at the time of filing this Answer. Therefore, SFR reserves the right to amend

this Answer to assert any affirmative defenses if subsequent investigation warrants.  
DATED February 6th, 2017.

**KIM GILBERT EBRON**  
  
*/s/ Diana Cline Ebron*  
DIANA CLINE EBRON, ESQ.  
Nevada Bar No. 10580  
JACQUELINE A. GILBERT, ESQ.  
Nevada Bar No. 10593  
KAREN L. HANKS, ESQ.  
Nevada Bar No. 9578  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
*Attorneys for SFR Investments Pool 1, LLC*

**CERTIFICATE OF SERVICE**

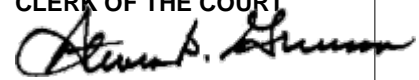
I HEREBY CERTIFY that on this 6th day of February 2017, pursuant to NRCP 5, I served  
via the Wiznet electronic filing system the foregoing **SFR INVESTMENTS POOL 1, LLC’S**  
**ANSWER TO COMPLAINT**, to the following parties:

Lipson, Neilson, Cole, Seltzer & Garin, P.C.		
Name	Email	Select
Brenda Correa	<a href="mailto:bcorrea@lipsonneilson.com">bcorrea@lipsonneilson.com</a>	<input checked="" type="checkbox"/>
Kaleb Anderson	<a href="mailto:kanderson@lipsonneilson.com">kanderson@lipsonneilson.com</a>	<input checked="" type="checkbox"/>
Megan Hummel	<a href="mailto:mhummel@lipsonneilson.com">mhummel@lipsonneilson.com</a>	<input checked="" type="checkbox"/>
Susana Nutt	<a href="mailto:snutt@lipsonneilson.com">snutt@lipsonneilson.com</a>	<input checked="" type="checkbox"/>

Select All Select None		
David J. Merrill, P.C.		
Name	Email	Select
David J. Merrill	<a href="mailto:david@dimerrillpc.com">david@dimerrillpc.com</a>	<input checked="" type="checkbox"/>

*/s/ Andrew M. David*  
An employee of KIM GILBERT EBRON

# **TAB 33**



**MSJD**

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Nevada Bar No. 10580  
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JACQUELINE A. GILBERT, ESQ.  
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Las Vegas, Nevada 89139  
Telephone: (702) 485-3300  
Facsimile: (702) 485-3301  
*Attorneys for SFR Investments Pool 1, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

MARCHAI B.T., a Bank Trust,  
  
Plaintiff,  
  
vs.

Case No. A-13-689461-C

Consolidated with: A-16-742327-C

CRISTELA PEREZ, an individual; SFR  
INVESTMENTS POOL 1, LLC, a limited  
liability company; U.S. BANK NATIONAL  
ASSOCIATION, N.D., a national association;  
DOES I through X; and ROE  
CORPORATIONS I through 10, inclusive,  
  
Defendants. \_\_\_\_\_

Dept. No. VII

**SFR INVESTMENTS POOL 1, LLC's  
MOTION FOR SUMMARY JUDGMENT**

SFR INVESTMENTS POOL 1, LLC, a  
Nevada limited liability company,  
  
Counterclaimant/Cross-Claimant,  
  
vs.

MARCHAI B.T., a Bank Trust; U.S. BANK  
NATIONAL ASSOCIATION, N.D., a national  
association; CRISTELA PEREZ, an individual;  
and DOES I through X; and ROE  
CORPORATIONS I through 10, inclusive,

Counter-Defendant/Cross-Defendants.

SFR Investments Pool 1, LLC ("SFR") hereby moves for summary judgment against  
MARCHAI B.T., a Nevada Business Trust ("Marchai" or the "Bank")<sup>1</sup>, pursuant to NRCP 56(c).

<sup>1</sup> Herein, "the Bank" refers to Marchai, B.T., a Nevada Business Trust and any predecessors or successors in interest to the First Deed of Trust, as well as any agents acting on behalf of these entities, including but



This Motion is based on the papers and pleadings on file herein, the following points and authorities, the Declaration of Diana Cline Ebron, ESQ. ("Ebron Decl."), attached as **Exhibit A**, the Declaration of Christopher Hardin ("Hardin Decl."), attached as **Exhibit B**, and such evidence and oral argument as may be presented at the time of the hearing on this matter.

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that on 22nd day of August, 2017, in Department VII of the above-entitled Court, at the hour of 9:00 a.m.~~p.m.~~, or as soon thereafter as counsel may be heard, the undersigned will bring SFR's Motion for Summary Judgment before this Court for hearing.

DATED July 21, 2017.

**KIM GILBERT EBRON**

/s/ Diana Cline Ebron  
DIANA CLINE EBRON, ESQ.  
Nevada Bar No. 10580  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
*Attorneys for SFR Investments Pool 1, LLC*

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

On September 18, 2014, the Nevada Supreme Court issued the SFR Decision, concluding that NRS 116.3116(2) gives associations a true super-priority lien, the non-judicial foreclosure of which extinguishes the title owner's interest and all junior liens, including a first deed of trust. SFR Investments Pool I, LLC v. U.S. Bank, N.A., 130 Nev. \_\_\_, \_\_\_, 334 P.3d 408, 419 (2014).

In this case, at the time of the Association foreclosure sale, the homeowner had not paid all amounts due and owing, and the lien still consisted of super-priority amounts. The Association followed all statutory procedures by mailing the notices, publishing the notice of sale, and posting the notice of sale. As demonstrated in the facts below, the Bank received notice of the sale and fully failed to protect its deed of trust. As a result, the sale extinguished the homeowner's interest

\_\_\_\_\_

not limited to servicers, trustees and nominee beneficiaries.

1 in the Property and the Bank's deed of trust.

2 In order to quiet title in its name, SFR, as the record title holder, need only produce its  
3 deed; the deed and the underlying sale are presumed valid under Nevada law. Breliant v. Preferred  
4 Equities Corp., 112 Nev. 663, 670, 918 P.2d 314, 319 (1996). Furthermore, the recitals in the deed  
5 are conclusive as to (1) default; (2) mailing of the notice of delinquent assessment; (3) recording  
6 of the notice of default and notice of sale; (4) elapsing of 90 days; and (5) giving notice of sale.

7 Here, SFR has produced the deed and is therefore entitled to summary judgment on its  
8 claims for quiet title and permanent injunction. Likewise, summary judgment in favor of SFR on  
9 the Bank's claims is warranted. All of the Bank's claims fail as a matter of law.

## 10 **II. PROCEDURAL HISTORY**

11 This case arises from Wyeth Ranch Community Association's (the "Association")  
12 foreclosure of real property commonly referred to as **7119 Wolf Rivers Avenue, Las Vegas,**  
13 **Nevada 89131; Parcel No. 125-15-811-013** (the "Property"). Specifically, on August 28, 2013,  
14 the Association held a public auction of the Property based on unpaid monthly assessments.  
15 Despite being mailed the notice of default and notices of sale, the Bank, the holder of the First  
16 Deed of Trust, did nothing to protect its interest in the Property. At the foreclosure sale, SFR was  
17 the highest bidder and purchased the Property for \$21,000.00.

18 On September 30, 2013, the Bank filed a Complaint in this action against SFR seeking  
19 Judicial Foreclosure of the Deed of Trust. SFR filed its answer and counterclaim against the Bank,  
20 as well as cross claims against Cristela Perez ("Borrower") and US Bank, National Association  
21 ("US Bank"). In its pleading, SFR raised two causes of action for declaratory relief/ quiet title and  
22 for injunctive relief.

23 On August 25, 2016, the Bank filed another complaint in the case of *Marchai, B.T. v. SFR*  
24 *Investments Pool*, Case No. A-16-742327-C. The Bank raised six causes of action for: 1)  
25 declaratory relief under the Takings Clause; 2) declaratory relief under the Due Process clauses of  
26 the Nevada and United States constitutions; 3) wrongful foreclosure; 4) violation of NRS  
27 116.1113; 5) intentional interference with a contract; and, 6) quiet title.  
28

The two cases were consolidated by order on September 30, 2016. SFR filed its answer on February 6, 2017. On February 13, 2014, Borrower and US Bank were defaulted.

### **III. STATEMENT OF UNDISPUTED FACTS**

The following contains facts undisputed by either party and is supported by documents disclosed by the parties, publicly recorded with the Clark County Recorder, produced by third-parties via subpoena or provided via deposition testimony:

DATE	FACTS
1991	Nevada adopted Uniform Common Interest Ownership Act as NRS 116, including NRS 116.3116(2).
On or about October 4, 2002	Association perfected and gave notice of its lien by recording its Declaration of Covenants, Conditions and Restrictions for Wyeth Ranch Community Association ("CC&Rs") <sup>2</sup>
July 21, 2004	Cristela Perez ("Borrower") obtained title to the Property through grant bargain sale deed recorded as Instrument No. 200407210003728. <sup>3</sup>
November 9, 2005	Deed of Trust in favor of Mortgage Electronic Registrations Systems, Inc. ("MERS") as the beneficiary, CMG Mortgage Inc. as the lender, and Fidelity National Title Agency of Nevada as the Trustee, recorded as Instrument No. 200511090001385. <sup>4</sup>
December 20, 2011	Association, through its agent Alessi and Koenig ("Alessi"), recorded notice of delinquent assessments ("NODA") as Instrument No. 201112200001246. <sup>5</sup>  Alessi mailed the NODA to the Borrower. <sup>6</sup>
February 28, 2012	After more than 30 days elapsed from the date of mailing NODA, Association recorded notice of default as Instrument No. 201202280000836. <sup>7</sup>  Within 10 days of recordation, the Notice of Default was thereafter mailed to all requisite parties, including the Bank's predecessor, MERS. <sup>8</sup> The Bank admits it received the Notice of Default. <sup>9</sup>
June 5, 2012	Corporate Assignment of Deed of Trust from MERS to CitiMortgage Inc., recorded as Instrument No. 201206050003133. <sup>10</sup>

<sup>2</sup> See excerpts from CC&Rs attached hereto as **Exhibit A-11**.

<sup>3</sup> See Grant Bargain Sale Deed, attached hereto as **Ex. A-1**.

<sup>4</sup> See First Deed of Trust, attached hereto as **Ex. A-2**.

<sup>5</sup> See Association Notice of Delinquent Assessments attached hereto as **Ex. A-3**.

<sup>6</sup> See Proof of Mailings attached hereto as **Ex. A-3**.

<sup>7</sup> See Association Notice of Default, attached hereto as **Ex. A-4**.

<sup>8</sup> See Proof of Mailings attached hereto. as **Ex A-4**

<sup>9</sup> See Bank's Responses to Interrogatories Nos. 3, 4 attached hereto as **Ex. A-4**.

<sup>10</sup> See Assignment First Deed of Trust, attached hereto as **Ex. A-5**.

DATE	FACTS
July 26, 2012	Assignment of Mortgage from Citimortgage, Inc. to U.S. Bank, National Association, as Trustee for Stanwich Mortgage Loan Trust, Series 2012-6 is recorded as Instrument No. 201207260001002. <sup>11</sup>
July 31, 2013	<p>After more than 90 days elapsed from the date of the mailing of the Notice of Default, the Association recorded a Notice of Trustee's Sale ("Notice of Sale") as Instrument No. 201307310001002.<sup>12</sup></p> <p>The Notice of Sale was mailed to all requisite parties, including the Bank.<sup>13</sup></p> <p>The Notice of Sale was posted on the Property in a conspicuous place.<sup>14</sup></p> <p>The Notice of Sale was thereafter posted at three public places within Clark County for 20 consecutive days.<sup>15</sup></p> <p>The Notice of Sale was published in the Nevada Legal News for three consecutive weeks.<sup>16</sup></p>
August 12, 2013	Assignment of Deed of Trust from U.S. Bank, National Association, as Trustee for Stanwich Mortgage Loan Trust, Series 2012-6 to Marchai B.T. (Bank") is recorded as Instrument No. 201308120002562. <sup>17</sup>
Before August 28, 2013	<p>No release of the super-priority lien was recorded.<sup>18</sup></p> <p>No lis pendens was recorded by the Bank.<sup>19</sup></p>
August 28, 2013	<p>Association foreclosure sale took place and SFR placed the highest bid.<sup>20</sup> SFR paid this amount.<sup>21</sup></p> <p>SFR's manager showed up at the publicly advertised sale, was the highest bidder at an auction with multiple bidders, and paid \$21,000.00 on behalf of SFR.<sup>22</sup></p> <p>There were multiple bidders in attendance at the sale.<sup>23</sup></p> <p>As recited in the Foreclosure Deed, the Association foreclosure sale</p>

<sup>11</sup> See Assignment First Deed of Trust, attached hereto as Ex. A-6.  
<sup>12</sup> See Association Notice of Foreclosure Sale, attached hereto as Ex. A-7.  
<sup>13</sup> See Proof of Mailings attached hereto as Ex. A-7.  
<sup>14</sup> See Proof of Posting and Publication attached hereto as Ex. A-8.  
<sup>15</sup> *Id.*  
<sup>16</sup> *Id.*  
<sup>17</sup> See Assignment First Deed of Trust, attached hereto as Ex. A-9.  
<sup>18</sup> See Ex. B, Hardin Decl., ¶18.  
<sup>19</sup> See *id.*, at ¶19.  
<sup>20</sup> See Association Foreclosure Deed, attached hereto as Ex. A-10, B-1.  
<sup>21</sup> See *id.*, at ¶12.  
<sup>22</sup> *Id.* See also Ex. B-2.  
<sup>23</sup> Ex. B, ¶ 15.

DATE	FACTS
	<p>complied with all requirements of law, including the mailing of copies of notices, the recording of the Notice of Default, and the posting and publication of copies of the Notice of Sale.</p> <p>SFR has no reason to doubt the recitals in the Foreclosure Deed.<sup>24</sup> If there were any issues with delinquency or noticing, none of these were communicated to SFR.<sup>25</sup></p> <p>Further, neither SFR, nor its agent, had any relationship with the Association besides owning property within the community.<sup>26</sup></p> <p>Similarly, neither SFR, nor its agent, had any relationship with Alessi, the Association's agent, beyond attending auctions, bidding, and occasionally purchasing properties at publically-held auctions conducted by Alessi, or having purchased some reverted properties through arm's-length negotiations.<sup>27</sup></p>
September 9, 2013	<p>Association foreclosure deed vesting title in SFR recorded as Instrument No. 201309090001816.<sup>28</sup> The recitals in the foreclosure deed state that the conveyance was made pursuant to Nevada Revised Statutes and Notice of Delinquent Assessment Lien; and further:</p> <p>Default occurred as set forth in a Notice of Default and Election to Sell, which was recorded on in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with.<sup>29</sup></p>

#### IV. LEGAL ARGUMENT

##### A. **Motion for Summary Judgment Standard.**

Summary judgment is appropriate "when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.'" Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Additionally, "[t]he purpose of summary judgment 'is to avoid a needless trial when an appropriate showing is made in advance that there is no genuine issue of fact to be

<sup>24</sup> Ex. B, at ¶ 13.

<sup>25</sup> Ex. B, at ¶ 14.

<sup>26</sup> Ex. B, at ¶ 16.

<sup>27</sup> Ex. B, at ¶ 17.

<sup>28</sup> See Association Foreclosure Deed, Ex.A-10.

<sup>29</sup> *Id.*

1 tried, and the movant is entitled to judgment as a matter of law.” McDonald v. D.P. Alexander  
2 & Las Vegas Boulevard, LLC, 121 Nev. 812, 815, 123 P.3d 748, 750 (2005) quoting Coray v.  
3 Home, 80 Nev. 39, 40-41, 389 P.2d 76, 77 (1964). Moreover, the non-moving party “must, by  
4 affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for  
5 trial or have summary judgment entered against [it].” Wood, 121 Nev. at 32, 121 P.3d at 1031.  
6 The non-moving party “is not entitled to build a case on the gossamer threads of whimsy,  
7 speculation, and conjecture.” Id. Rather, the non-moving party must demonstrate specific facts as  
8 opposed to general allegations and conclusions. LaMantia v. Redisi, 118 Nev. 27, 29, 38 P.3d  
9 877, 879 (2002); Wayment v. Holmes, 112 Nev. 232,237,912 P.2d 816, 819 (1996). Though  
10 inferences are to be drawn in favor of the non-moving party, an opponent to summary judgment,  
11 like MARCHAI, must show that it can produce evidence at trial to support its claim or defense.  
12 Van Cleave v. Kietz-Mill Minit Mart, 97 Nev. 414,417,633 P.2d 1220, 222 (1981).

13  
14 **B. SFR is Entitled to Summary Judgment on the competing claims for Quiet**  
15 **Title and Permanent Injunction**

16  
17 **1. Title Vested in SFR Without Equity or Right of Redemption.**

18 NRS 116.3166(3) states that “[t]he sale of a unit pursuant to NRS 116.31162, 116.31163  
19 and 116.31164 vests in the purchaser the title of the unit’s owner without equity or right of  
20 redemption.” According to the Nevada Supreme Court, sales without equity or right of redemption  
21 vest the purchaser with absolute title:

22 [T]he law authorizing the mortgagee to sell is, in our opinion, so thoroughly settled  
23 that it cannot now admit of a question. Such being the right of the mortgagee, it  
24 follows as a necessary consequence that the **purchaser from him obtains an**  
25 **absolute legal title as complete, perfect and indefeasible as can exist or be**  
26 **acquired by purchase; and a sale**, upon due notice to the mortgagor, whether at  
27 public or private sale, **forecloses all equity of redemption as completely as a**  
28 **decree of court.**

In re Grant, 303 B.R. 205, 209 (Bankr. D. Nev. 2003) (quoting Bryant v. Carson River Lumbering

Co., 3 Nev. 313, 317–18 (1867)) (emphasis added).

As the dissent in SFR correctly explained, “the owner, as well as the first security, will have no right to redeem the property under the majority's holding.” SFR Investments, 334 P.3d at 422 citing NRS 116.31166(3) and Bldg. Energetix Corp. v. EHE, LP, 129 Nev. \_\_\_, \_\_\_, 294 P.3d 1228, 1233 (Nev. 2013) (recognizing that there is no right to redeem after a Chapter 107 non-judicial foreclosure sale because a sale under that chapter ‘vests in the purchaser the title of the grantor and any successors in interest without equity or right of redemption’ (quoting NRS 107.080(5))). This is consistent with long-standing Nevada non-judicial foreclosure law that “[i]f the sale is properly, lawfully and fairly carried out, [the Bank] cannot unilaterally create a right of redemption in [itself].” Golden v. Tomiyasu, 79 Nev. 503, 518, 387 P.2d 989, 997 (1963). Here, because Nevada law does not allow the Bank or this Court to create a redemption period to save the Bank from its failure to preserve its interest, title must be quieted in favor of SFR.

**2. The Deed Recitals are Conclusive.**

Pursuant to NRS 116.31166(1), the recitals in the deed are conclusive as to (1) default; (2) mailing of the notice of delinquent assessment; (3) recording of the notice of default and notice of sale; (4) elapsing of 90 days; and (5) giving notice of sale. Thus, the Bank cannot offer any evidence to dispute these facts as per statute they are conclusive.

**3. The Foreclosure Deed and Sale are Presumed Valid.**

Under Nevada law, foreclosure sales and the resulting deeds are presumed valid. NRS 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.”) As a result, it is presumed that (1) the Association and Alessi obeyed the law; (2) the Property was conveyed to SFR; (3) the Association foreclosure sale was “fair and regular;” and (4) the Association foreclosure proceedings were conducted in the “ordinary course of business.” NRS 47.250(16)-(18).

Nevada law further provides that “[a] presumption not only fixes the burden of going

forward with evidence, but it also shifts the burden of proof.” Yeager v. Harrah's Club, Inc., 111 Nev. 830, 834, 897 P.2d 1093, 1095 (1995) (citing Vancheri v. GNLV Corp., 105 Nev. 417, 421, 777 P.2d 366, 368 (1989).) “These presumptions impose on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” Id. (citing NRS 47.180.). Having produced the deed, SFR has no further burden. Nevada law automatically presumes the deed and the sale are valid. Because of this, the Bank now bears the burden to overcome these presumptions. In other words, the Bank, and not SFR, bears the burden to prove that the Association foreclosure sale and the resulting foreclosure deed are not valid. The Bank cannot and has not met this burden.

There is not one shred of evidence in this case to overcome the presumptions in favor of SFR. With respect to the first presumption (NRS 47.250(16), there is no doubt that the Association/Alessi followed the law. Not only is this fact presumed, all evidence proves it to be true. Specifically, the undisputed facts show that Alessi did all of the following in accordance with NRS 116:

- Mailed a copy of the notice of delinquent assessment to the Cristela Perez (“Borrower”). The Notice stated the amount of assessment and other sums due, described the unit which the lien was imposed, and named the record owner of the unit.<sup>30</sup> NRS 116.31162(1)(a).
- Waited 30 days and then recorded a Notice of Default, which contained the same information as the notice of delinquent assessment and described the deficiency, stated the name and address of the person authorized to enforce the lien and contained in 14-point bold type: WARNING! IF YOU FAIL TO PAY THE AMOUNT SPECIFIED IN THIS NOTICE, YOU COULD LOSE YOUR HOME, EVEN IF THE AMOUNT IS IN DISPUTE.<sup>31</sup> NRS 116.31162(b).
- Mailed a copy of the Notice of Default by certified or registered mail to the Borrower.<sup>32</sup> NRS 116.3116(3)(b).
- Mailed a copy of the Notice of Default by regular mail to the Bank (any holder of a recorded security interest encumbering the unit).<sup>33</sup> NRS 116.31163.
- After expiration of 90 days, gave notice of time and place of sale by (1) mailing a

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<sup>30</sup> Ex. A-3

<sup>31</sup> Ex. A-4

<sup>32</sup> Ex. A-4.

<sup>33</sup> Ex. A-4.



copy to the Borrower via certified or registered mail; (2) mailing a copy to the Bank (holder of recorded security interest) via certified or registered mail; (3) mailing a copy to the Ombudsman via certified or registered mail (4) personally serve on unit owner or posting a copy on unit; (5) posting in three public places; (6) publishing three times, once each week, for three successive weeks in a newspaper; (6) recording a copy of the notice.<sup>34</sup> NRS 116.311635.

Regarding the second presumption (NRS 47.250(17)), there is no dispute that the property was conveyed to SFR. In accordance with NRS 116.31164(3)(a), Alessi, after receipt of payment from SFR, made, executed and delivered a deed to SFR.<sup>35</sup>

Finally, with regard to the third presumption (NRS 47.250(18)), there is no dispute that the Association sale was fair and regular and conducted in the ordinary course of business. In accordance with NRS 116.31164, the Association foreclosure was conducted in Clark County, the county where the Association is located, it was conducted by Alessi (the agent for the Association), at a public auction to the highest cash bidder, SFR.<sup>36</sup>

In light of this evidence, the Bank cannot possibly meet its burden to overcome the presumptions that (1) the Association and Alessi obeyed the law; (2) the Property was conveyed to SFR; (3) the Association foreclosure sale was “fair and regular;” and conducted in the “ordinary course of business.” As such, the first deed of trust was extinguished by the Association foreclosure sale, and SFR is entitled to summary judgment on its claim for quiet title and permanent injunction.

**C. All of the Bank’s Claims Against SFR Fail as a Matter of Law.**

The Bank alleges the additional following claims against SFR: 1) declaratory relief under the Takings Clause; 2) declaratory relief under the Due Process clauses of the Nevada and United States constitutions; 3) wrongful foreclosure; 4) violation of NRS 116.1113; and, 5) intentional interference with a contract. All of the claims fail as a matter of law, and therefore SFR is entitled to summary judgment in its favor.

**1. The Association Foreclosure Sale Does Not Constitute a Taking.**

As the Bank is all too well aware, the Nevada Supreme Court has already dispelled any contention that the Association foreclosure sale constitutes an unconstitutional taking. Saticoy

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<sup>34</sup> Ex. A-7 and A-8.

<sup>35</sup> A-7.

<sup>36</sup> Ex. A-10 and B-1.

1 Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage, a Division of Wells Fargo  
2 Bank, N.A., 133 Nev. \_\_\_\_, 388 P.3d 970 (2017). In Saticoy, the Court held that “the  
3 extinguishment of a subordinate deed of trust through an HOA’s nonjudicial foreclosure does not  
4 constitute a governmental taking.” Id. at 975.

5 Saticoy Bay is consistent with the manner in which the Legislature adopted the statute; it  
6 expressly stated that deeds of trust recorded before the statute took effect were exempt from the  
7 super-priority portion of the association’s lien, thereby avoiding what would arguably otherwise  
8 be a true taking. Because the foreclose sale did not constitute a taking, the Bank’s claim fails a  
9 matter of law.

## 10 **2. Due Process is Not Implicated.**

11 Any claim by the Bank that NRS 116 is facially unconstitutional is a non-starter. The  
12 Nevada Supreme Court has unequivocally shut this argument down by concluding that “an HOA  
13 acting pursuant to NRS 116.3116 *et seq.* cannot be deemed a state actor.” Saticoy, 388 P.3d at 973.  
14 The Court equally rejected any claim that the Legislature’s mere enactment of the statute  
15 constituted a deprivation because the state did not compel the Association to foreclose on its lien,  
16 and/or the state was not involved in the sale. Saticoy, at 973. As such, the Bank’s claim fails as a  
17 matter of law.

## 18 **3. SFR was Not the Foreclosing Party.**

19 Nevada law provides that “[a]n action for the tort of wrongful foreclosure will lie if the  
20 trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure  
21 occurred, no breach of condition or failure of performance existed on the mortgagor's or trustor's  
22 part which would have authorized the foreclosure or exercise of the power of sale.” Collins v.  
23 Union Federal Sav. & Loan Ass’n, 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). Here, SFR neither  
24 “exercised” the power of sale nor did it cause the foreclosure to occur; therefore the first element  
25 of this claim is not satisfied, and therefore the claim fails as a matter of law. While the inquiry  
26 stops there, the Bank also cannot establish the second element i.e. no breach. It is conclusively  
27 established that a default occurred on the part of the Borrower in paying her delinquent assessment.  
28 NRS 116.31166(1)(a). For these reasons, the Bank’s wrongful foreclosure claim against SFR fails

as a matter of law, and therefore, SFR is entitled to summary judgment.

**4. SFR Did Not Interfere with Any Contract.**

Under Nevada law, to prove a claim for intentional interference with a contract, a party must show: (1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage. J.J. Indus., LLC v. Bennett, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003). The Bennett Court elaborated on the intent element, and held that "because the action involves an intentional tort, the inquiry usually concerns the defendant's ultimate purpose or the objective that he or she is seeking to advance. Thus, mere knowledge of the contract is insufficient to establish that the defendant intended or designed to disrupt the plaintiff's contractual relationship; instead, the plaintiff must demonstrate that the defendant intended to induce the other party to breach the contract with the plaintiff. Accordingly, the plaintiff must inquire into the defendant's motive." Id. at 275, 1268.

In the present case, the Bank erroneously alleges that SFR interfered with the loan between it and the borrower. First, even assuming arguendo that the Bank could prove that SFR had knowledge of the loan between the Bank and the borrower, based merely on a recorded deed of trust, the Bank cannot prove that SFR intentionally interfered with this contract. Rather, SFR simply attended and bid at a publicly advertised Association foreclosure sale. Ex. B, ¶ 12. SFR had no involvement in the borrower's failure to pay Association assessments. Likewise, SFR had absolutely no involvement in the foreclosure process by the Association, other than attending and bidding at the sale. As such, there is no genuine issue of material fact as to any intentional conduct on the part of SFR.

Simply put, SFR had no hand in what transpired between the borrower and the Association, and between the borrower and the Bank. The borrower's failure to pay assessments, and the Association's exercise of its right to non-judicially foreclose to collect this debt had nothing to do with SFR. Because the Bank cannot show that SFR induced the borrower to default on her assessment obligations, the Bank's claim for intentional interference with a contract fails as a matter of law, and summary judgment in favor of SFR is warranted.

**CONCLUSION**

Based on the above, this Court should enter summary judgment against the Bank and in favor of SFR, stating that (1) title is quieted in SFR's name; (2) the first deed of trust was extinguished; and, (3) the Bank, and any agents, successors and assigns are permanently enjoined from interfering with SFR's possession and ownership of the Property.

DATED July 21, 2017.

**KIM GILBERT EBRON**

/s/ Diana Cline Ebron  
DIANA CLINE EBRON, ESQ.  
Nevada Bar No. 10580  
7625 Dean Martin Drive, Suite 110  
Las Vegas, Nevada 89139  
*Attorneys for SFR Investments Pool 1, LLC*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 21<sup>st</sup> day of July 2016, pursuant to NCRP 5(b), I served via the Eighth Judicial District Court electronic filing system, the foregoing **SFR INVESTMENTS POOL 1, LLC's MOTION FOR SUMMARY JUDGMENT**, to the following parties:

<a href="#">Select All</a> <a href="#">Select None</a>		
David J. Merrill P.C.		
Name	Email	Select
David J. Merrill	<a href="mailto:david@djmerrillpc.com">david@djmerrillpc.com</a>	<input checked="" type="checkbox"/>

*/s/ Jherna Shahani*

\_\_\_\_\_  
An employee of Kim Gilbert Ebron

# EXHIBIT A

**DECLARATION OF DIANA CLINE EBRON IN SUPPORT OF SFR INVESTMENTS  
POOL 1, LLC'S MOTION FOR SUMMARY JUDGMENT**

I, Diana Cline Ebron, Esq., declare as follows:

1. I am an attorney with Kim Gilbert Ebron, formerly Howard Kim & Associates, admitted to practice law in the State of Nevada.
2. I am counsel for SFR Investments Pool 1, LLC ("SFR") in this action.
3. I make this declaration in support of SFR's Motion for Summary Judgment.
4. I have personal knowledge of the facts set forth below based upon my review of the documents produced in this matter, except for those factual statements expressly made upon information and belief, and as to those facts, I believe them to be true, and I am competent to testify.
5. I am knowledgeable about how Kim Gilbert Ebron maintains its records associated with litigation, including litigation of **7119 Wolf Rivers Avenue, Las Vegas, Nevada 89131; Parcel No. 125-15-811-013** (the "Property").
6. Attached hereto as **Exhibit A-4 (in part)** is a true and correct copy of Marchai B.T.'s Responses to Requests for Interrogatories as served on Kim Gilbert Ebron pursuant to a Request for Interrogatories.
7. Attached hereto as **Exhibits A-1, A-2, A-3, A-4 (in part) A-5, A-6, A-7, A-8, A-9, and A-10** are true and correct copies of excerpts from documents received from Marchai B.T. as part of its Disclosures of Witnesses and Documents or documents produced in response to a Request for Production.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 21<sup>st</sup> day of July, 2017.

/s/ Diana Cline Ebron  
Diana Cline Ebron, Esq.

# EXHIBIT A-1





20040721-0003728

Fee \$17.00 RPTT: \$2,315.40  
07/21/2004 13:47:20 T20040084542  
Reg. LAWYERS TITLE OF NEVADA  
Frances Deane  
Clark County Recorder Page 4

Assessor's Parcel Number: 125-15-811-013  
Escrow Number: 04011017GR

Affix R. P. T. T. \$2,315.40  
Recording Requested by:  
Lawyers Title of Nevada, Inc.  
Please mail tax statements to:  
After Recording, mail to:  
Cristela Perez  
7119 Wolf Rivers Avenue  
Las Vegas, NV 89131

*The area to the right is provided for the recorder's office*

**GRANT, BARGAIN, SALE DEED**

For a valuable consideration, receipt of which is hereby acknowledged, PN II, Inc. a Nevada Corporation d/b/a Pulte Homes of Nevada do(es) hereby Grant, Bargain, Sell and Convey to

**CRISTELA PEREZ, A MARRIED WOMAN AS HER SOLE AND SEPARATE PROPERTY**

the following described real property situate in the City of Las Vegas  
County of Clark State of Nevada

**SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART  
HEREOF FOR THE COMPLETE LEGAL DESCRIPTION**

**SUBJECT TO:**

1. Taxes for the fiscal year 20 04-2005.
2. Rights of way, reservations, restrictions, easements and conditions of record.

**Together with all tenements, hereditaments and appurtenances  
thereunto belonging or appertaining, and the reversion and reversions,  
remainder and remainders, rents, issues profits thereof.**

Dated this 19th day of July, 2004.

PN II, Inc. a Nevada Corporation d/b/a Pulte Homes of Nevada

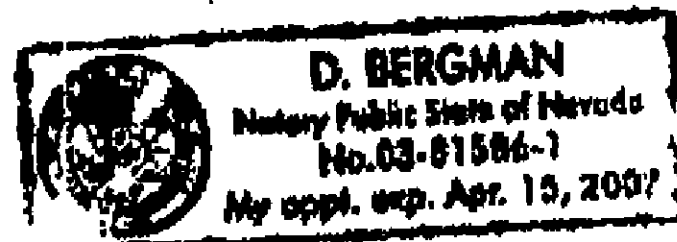
Roberta Leonard  
Roberta Leonard Lawful Agent

STATE OF NEVADA

COUNTY OF CLARK

On July 19, 2004 personally appeared  
before me, a Notary Public, Roberta Leonard Lawful Agent  
personally known (or proved) to me to be the person  
whose name is subscribed to the above instrument who  
acknowledged that she executed the instrument.

D. Bergman  
(NOTARY PUBLIC)



**EXHIBIT "A"**

**PARCEL 1:**

Lot Thirteen (13) in Block "A" of WYETH RANCH - UNIT 2, on file in Book 012 of Plats, Page 8, in the Office of the County Recorder of Clark County, Nevada.

**PARCEL II:**

A non-exclusive easement for ingress, egress, use and enjoyment of the Common lots as shown on the above map, and as set forth in the Declaration of Covenants, Conditions and Restrictions recorded October 4, 2002 in Book 20021004 as Document No. 01353, and as the same may be amended from time to time.

# STATE OF NEVADA DECLARATION OF VALUE FORM 10

## 1. Assessor Parcel Number(s)

a) 125-15-811-013

b)

c)

d)

## 2. Type of Property:

- a) ☐ Vacant Land  
c) ☐ Condo/Townhouse  
e) ☐ Apartment Building  
g) ☐ Agricultural  
i) ☐ Other

- b) ☒ Single Family Residence  
d) ☐ 2-4 Plex  
f) ☐ Commercial/Industrial  
h) ☐ Mobile Home

## FOR RECORDER'S OPTIONAL USE ONLY

Book: \_\_\_\_\_ Page: \_\_\_\_\_

Date of Recording: \_\_\_\_\_

Notes:

## 3. Total Value/Sales Price of Property

\$457,840.00

Deed in Lieu of Foreclosure Only (value of property)

\$0.00

Transfer Tax Value:

\$457,840.00

Real Property Transfer Tax Due

\$23,134.00 ✓

## 4. If Exemption Claimed:

a. Transfer Tax Exemption per NRS 375.090, Section \_\_\_\_\_

b. Explain Reason for Exemption: \_\_\_\_\_

## 5. Partial Interest: Percentage being transferred: \_\_\_\_\_ %

The undersigned declares and acknowledges, under penalty of perjury, pursuant to NRS 375.060 and NRS 375.110, that the information provided is correct to the best of their information and belief, and can be supported by documentation if called upon to substantiate the information provided herein. Furthermore, the parties agree that disallowance of any claimed exemption, or other determination of additional tax due, may result in a penalty of 10% of the tax due plus interest at 1% per month. Pursuant to NRS 375.030, the Buyer and Seller shall be jointly and severally liable for any additional amount owed.

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Capacity: Roberta Leonard, Lawful Agent for PN II, Inc.

Capacity: agent

## SELLER (GRANTOR) INFORMATION (REQUIRED)

Print Name: PN II, Inc., a Nevada Corp

Address: 1635 Village Center Cir. #250

City: Las Vegas

State: NV Zip: 89134

## BUYER (GRANTEE) INFORMATION (REQUIRED)

Print Name: Cristela Perez

Address: 7119 Wolf River

City: Las Vegas

State: NV Zip: 89131

## COMPANY/PERSON REQUESTING RECORDING (required if not seller or buyer)

Print Name: Lawyers Title of Nevada, Inc.

Address: 1645 Village Center Cir. #291

City: Las Vegas

State: NV

Zip: 89134

Escrow #: OR

Escrow #: Jane Grey/ Maria Rampa

AN ADDITIONAL RECORDING FEE OF \$1.00 WILL APPLY FOR EACH DECLARATION OF VALUE FORM PRESENTED TO CLARK COUNTY, EFFECTIVE JUNE 1, 2004.

3728

# EXHIBIT A-2

  
20051109-0001385

Assessor's Parcel Number: 125-15-811-013  
When recorded mail to:  
CMG MORTGAGE, INC.  
3160 CROW CANYON ROAD, SUITE 240  
SAN RAMON, CALIFORNIA 94583  
Loan No.: 32501493

Fee: \$38.00  
N/C Fee: \$0.00

11/09/2005 09:44:04  
T20050204478

Requestor:  
FIDELITY NATIONAL TITLE

Frances Deane KCP  
Clark County Recorder Pgs: 22

Mail Tax Statements to:  
CRISTELA PEREZ *mo*  
7119 WOLF RIVERS AVENUE  
LAS VEGAS, NEVADA 89131  
Prepared By:

Recording Requested By:

*629028-61* [Space Above This Line For Recording Data]  
**DEED OF TRUST**

MIN 1000724-0032501493-7  
MERS TELEPHONE: (888) 679-6377

#### DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated **October 19, 2005**, together with all Riders to this document.

(B) "Borrower" is **CRISTELA PEREZ, A MARRIED WOMAN, AS HER SOLE AND SEPARATE PROPERTY**. Borrower is the trustor under this Security Instrument.

(C) "Lender" is **CMG MORTGAGE, INC.**. Lender is a corporation organized and existing under the laws of the State of **CALIFORNIA**. Lender's address is **3160 CROW CANYON ROAD, SUITE 240, SAN RAMON, CALIFORNIA 94583**.

(D) "Trustee" is **FIDELITY NATIONAL TITLE AGENCY OF NEVADA**.

(E) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. **MERS is the beneficiary under this Security Instrument**. MERS is organized and existing under the laws of

NEVADA-Single Family-Fannie Mac/Freddie Mac **UNIFORM INSTRUMENT WITH MERS**  
Form 3029 1/01

Page 1 of 18

Initials: *CP*

uvcmertd



32501493



DEED

Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.

(F) **"Note"** means the promissory note signed by Borrower and dated **October 19, 2005**. The Note states that Borrower owes Lender **Four Hundred Forty Two Thousand And 00/100 Dollars** (U.S. \$ 442,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than **November 1, 2035**.

(G) **"Property"** means the property that is described below under the heading "Transfer of Rights in the Property."

(H) **"Loan"** means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(I) **"Riders"** means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

<input checked="" type="checkbox"/> Adjustable Rate Rider	<input type="checkbox"/> Condominium Rider	<input type="checkbox"/> Second Home Rider
<input type="checkbox"/> Balloon Rider	<input type="checkbox"/> Planned Unit Development Rider	<input type="checkbox"/> 1-4 Family Rider
<input type="checkbox"/> VA Rider	<input type="checkbox"/> Biweekly Payment Rider	<input type="checkbox"/> Other(s) [specify]

(J) **"Applicable Law"** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(K) **"Community Association Dues, Fees, and Assessments"** means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(L) **"Electronic Funds Transfer"** means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(M) **"Escrow Items"** means those items that are described in Section 3.

(N) **"Miscellaneous Proceeds"** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(O) **"Mortgage Insurance"** means insurance protecting Lender against the nonpayment of, or default on, the Loan.

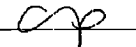
(P) **"Periodic Payment"** means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(Q) **"RESPA"** means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are

NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

Form 3029 1/01

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Initials: 

imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

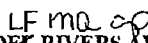
(R) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

#### TRANSFER OF RIGHTS IN THE PROPERTY

The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender's successors and assigns) and the successors and assigns of MERS. This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County [Type of Recording Jurisdiction] of CLARK [Name of Recording Jurisdiction]:

**LOT 13 IN BLOCK A OF WYETH RANCH- UNIT 2, AS SHOWN BY MAP THEREOF ON FILE IN BOOK 112 OF PLATS, PAGE 8 IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA. A NON- EXCLUSIVE EASEMENT FOR INGRESS, EGRESS, USE AND ENJOYMENT OF THE COMMON LOTS AS SHOWN ON THE ABOVE MAP AND AS SET FOURTH IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS RECORDED OCTOBER 4, 2002 IN BOOK 20021004 AS THE SAME MAY BE AMENDED FROM TIME TO TIME.**

Parcel ID Number: 125-15-811-013

LF MA   
7119 WOLF RIVERS AVENUE  
LAS VEGAS [City], Nevada 89131 [Zip Code] ("Property Address"):

which currently has the address of  
[Street]

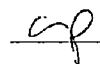
TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Security Instrument. All of the foregoing is referred to in this Security Instrument as the "Property." Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

BORROWER COVENANTS that Borrower is lawfully seised of the estate hereby conveyed and has the right to grant and convey the Property and that the Property is unencumbered, except for

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encumbrances of record. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

**1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges.** Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note and any prepayment charges and late charges due under the Note. Borrower shall also pay funds for Escrow Items pursuant to Section 3. Payments due under the Note and this Security Instrument shall be made in U.S. currency. However, if any check or other instrument received by Lender as payment under the Note or this Security Instrument is returned to Lender unpaid, Lender may require that any or all subsequent payments due under the Note and this Security Instrument be made in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity; or (d) Electronic Funds Transfer.

Payments are deemed received by Lender when received at the location designated in the Note or at such other location as may be designated by Lender in accordance with the notice provisions in Section 15. Lender may return any payment or partial payment if the payment or partial payments are insufficient to bring the Loan current. Lender may accept any payment or partial payment insufficient to bring the Loan current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but Lender is not obligated to apply such payments at the time such payments are accepted. If each Periodic Payment is applied as of its scheduled due date, then Lender need not pay interest on unapplied funds. Lender may hold such unapplied funds until Borrower makes payment to bring the Loan current. If Borrower does not do so within a reasonable period of time, Lender shall either apply such funds or return them to Borrower. If not applied earlier, such funds will be applied to the outstanding principal balance under the Note immediately prior to foreclosure. No offset or claim which Borrower might have now or in the future against Lender shall relieve Borrower from making payments due under the Note and this Security Instrument or performing the covenants and agreements secured by this Security Instrument.

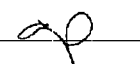
**2. Application of Payments or Proceeds.** Except as otherwise described in this Section 2, all payments accepted and applied by Lender shall be applied in the following order of priority: (a) interest due under the Note; (b) principal due under the Note; (c) amounts due under Section 3. Such payments shall be applied to each Periodic Payment in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this Security Instrument, and then to reduce the principal balance of the Note.

If Lender receives a payment from Borrower for a delinquent Periodic Payment which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one Periodic Payment is outstanding, Lender may apply any payment received from Borrower to the repayment of the Periodic Payments if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more Periodic Payments, such excess may be applied to any late charges

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due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the Note.

Any application of payments, insurance proceeds, or Miscellaneous Proceeds to principal due under the Note shall not extend or postpone the due date, or change the amount, of the Periodic Payments.

**3. Funds for Escrow Items.** Borrower shall pay to Lender on the day Periodic Payments are due under the Note, until the Note is paid in full, a sum (the "Funds") to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this Security Instrument as a lien or encumbrance on the Property; (b) leasehold payments or ground rents on the Property, if any; (c) premiums for any and all insurance required by Lender under Section 5; and (d) Mortgage Insurance premiums, if any, or any sums payable by Borrower to Lender in lieu of the payment of Mortgage Insurance premiums in accordance with the provisions of Section 10. These items are called "Escrow Items." At origination or at any time during the term of the Loan, Lender may require that Community Association Dues, Fees, and Assessments, if any, be escrowed by Borrower, and such dues, fees and assessments shall be an Escrow Item. Borrower shall promptly furnish to Lender all notices of amounts to be paid under this Section. Borrower shall pay Lender the Funds for Escrow Items unless Lender waives Borrower's obligation to pay the Funds for any or all Escrow Items. Lender may waive Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase "covenant and agreement" is used in Section 9. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 9 and pay such amount and Borrower shall then be obligated under Section 9 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

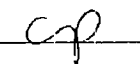
Lender may, at any time, collect and hold Funds in an amount (a) sufficient to permit Lender to apply the Funds at the time specified under RESPA, and (b) not to exceed the maximum amount a lender can require under RESPA. Lender shall estimate the amount of Funds due on the basis of current data and reasonable estimates of expenditures of future Escrow Items or otherwise in accordance with Applicable Law.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items no later than the time specified under RESPA. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Borrower and Lender can

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agree in writing, however, that interest shall be paid on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds as required by RESPA.

If there is a surplus of Funds held in escrow, as defined under RESPA, Lender shall account to Borrower for the excess funds in accordance with RESPA. If there is a shortage of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the shortage in accordance with RESPA, but in no more than 12 monthly payments. If there is a deficiency of Funds held in escrow, as defined under RESPA, Lender shall notify Borrower as required by RESPA, and Borrower shall pay to Lender the amount necessary to make up the deficiency in accordance with RESPA, but in no more than 12 monthly payments.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender.

**4. Charges; Liens.** Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any. To the extent that these items are Escrow Items, Borrower shall pay them in the manner provided in Section 3.

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the Property is subject to a lien which can attain priority over this Security Instrument, Lender may give Borrower a notice identifying the lien. Within 10 days of the date on which that notice is given, Borrower shall satisfy the lien or take one or more of the actions set forth above in this Section 4.

Lender may require Borrower to pay a one-time charge for a real estate tax verification and/or reporting service used by Lender in connection with this Loan.

**5. Property Insurance.** Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which Lender requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that Lender requires. What Lender requires pursuant to the preceding sentences can change during the term of the Loan. The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's right to disapprove Borrower's choice, which right shall not be exercised unreasonably. Lender may require Borrower to pay, in connection with this Loan, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time remappings or similar changes occur which reasonably might affect such determination or certification. Borrower shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by Borrower.

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If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover Lender, but might or might not protect Borrower, Borrower's equity in the Property, or the contents of the Property, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. Borrower acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that Borrower could have obtained. Any amounts disbursed by Lender under this Section 5 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgagee and/or as an additional loss payee. Lender shall have the right to hold the policies and renewal certificates. If Lender requires, Borrower shall promptly give to Lender all receipts of paid premiums and renewal notices. If Borrower obtains any form of insurance coverage, not otherwise required by Lender, for damage to, or destruction of, the Property, such policy shall include a standard mortgage clause and shall name Lender as mortgagee and/or as an additional loss payee.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 22 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Note or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds

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either to repair or restore the Property or to pay amounts unpaid under the Note or this Security Instrument, whether or not then due.

**6. Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

**7. Preservation, Maintenance and Protection of the Property; Inspections.** Borrower shall not destroy, damage or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing in the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property only if Lender has released proceeds for such purposes. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the Property, Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the Property. If it has reasonable cause, Lender may inspect the interior of the improvements on the Property. Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.

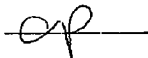
**8. Borrower's Loan Application.** Borrower shall be in default if, during the Loan application process, Borrower or any persons or entities acting at the direction of Borrower or with Borrower's knowledge or consent gave materially false, misleading, or inaccurate information or statements to Lender (or failed to provide Lender with material information) in connection with the Loan. Material representations include, but are not limited to, representations concerning Borrower's occupancy of the Property as Borrower's principal residence.

**9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument.** If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may

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take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

Any amounts disbursed by Lender under this Section 9 shall become additional debt of Borrower secured by this Security Instrument. These amounts shall bear interest at the Note rate from the date of disbursement and shall be payable, with such interest, upon notice from Lender to Borrower requesting payment.

If this Security Instrument is on a leasehold, Borrower shall comply with all the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold and the fee title shall not merge unless Lender agrees to the merger in writing.

**10. Mortgage Insurance.** If Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect. If, for any reason, the Mortgage Insurance coverage required by Lender ceases to be available from the mortgage insurer that previously provided such insurance and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to obtain coverage substantially equivalent to the Mortgage Insurance previously in effect, at a cost substantially equivalent to the cost to Borrower of the Mortgage Insurance previously in effect, from an alternate mortgage insurer selected by Lender. If substantially equivalent Mortgage Insurance coverage is not available, Borrower shall continue to pay to Lender the amount of the separately designated payments that were due when the insurance coverage ceased to be in effect. Lender will accept, use and retain these payments as a non-refundable loss reserve in lieu of Mortgage Insurance. Such loss reserve shall be non-refundable, notwithstanding the fact that the Loan is ultimately paid in full, and Lender shall not be required to pay Borrower any interest or earnings on such loss reserve. Lender can no longer require loss reserve payments if Mortgage Insurance coverage (in the amount and for the period that Lender requires) provided by an insurer selected by Lender again becomes available, is obtained, and Lender requires separately designated payments toward the premiums for Mortgage Insurance. If Lender required Mortgage Insurance as a condition of making the Loan and Borrower was required to make separately designated payments toward the premiums for Mortgage Insurance, Borrower shall pay the premiums required to maintain Mortgage Insurance in effect, or to provide a non-refundable loss reserve, until Lender's requirement for Mortgage Insurance ends in accordance with any written agreement between Borrower and Lender providing for such termination or until termination is required by Applicable Law. Nothing in this Section 10 affects Borrower's obligation to pay interest at the rate provided in the Note.

Mortgage Insurance reimburses Lender (or any entity that purchases the Note) for certain losses it may incur if Borrower does not repay the Loan as agreed. Borrower is not a party to the Mortgage Insurance.

Mortgage insurers evaluate their total risk on all such insurance in force from time to time, and may enter into agreements with other parties that share or modify their risk, or reduce losses. These agreements are on terms and conditions that are satisfactory to the mortgage insurer and the other party (or parties) to these agreements. These agreements may require the mortgage insurer to make payments using any source of funds that the mortgage insurer may have available (which may include funds obtained from Mortgage Insurance premiums).

As a result of these agreements, Lender, any purchaser of the Note, another insurer, any reinsurer, any other entity, or any affiliate of any of the foregoing, may receive (directly or indirectly)

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amounts that derive from (or might be characterized as) a portion of Borrower's payments for Mortgage Insurance, in exchange for sharing or modifying the mortgage insurer's risk, or reducing losses. If such agreement provides that an affiliate of Lender takes a share of the insurer's risk in exchange for a share of the premiums paid to the insurer, the arrangement is often termed "captive reinsurance." Further:

(a) Any such agreements will not affect the amounts that Borrower has agreed to pay for Mortgage Insurance, or any other terms of the Loan. Such agreements will not increase the amount Borrower will owe for Mortgage Insurance, and they will not entitle Borrower to any refund.

(b) Any such agreements will not affect the rights Borrower has - if any - with respect to the Mortgage Insurance under the Homeowners Protection Act of 1998 or any other law. These rights may include the right to receive certain disclosures, to request and obtain cancellation of the Mortgage Insurance, to have the Mortgage Insurance terminated automatically, and/or to receive a refund of any Mortgage Insurance premiums that were unearned at the time of such cancellation or termination.

**11. Assignment of Miscellaneous Proceeds; Forfeiture.** All Miscellaneous Proceeds are hereby assigned to and shall be paid to Lender.

If the Property is damaged, such Miscellaneous Proceeds shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such Miscellaneous Proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such Miscellaneous Proceeds, Lender shall not be required to pay Borrower any interest or earnings on such Miscellaneous Proceeds. If the restoration or repair is not economically feasible or Lender's security would be lessened, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such Miscellaneous Proceeds shall be applied in the order provided for in Section 2.

In the event of a total taking, destruction, or loss in value of the Property, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.


In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the Miscellaneous Proceeds multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the Property immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to Borrower.

In the event of a partial taking, destruction, or loss in value of the Property in which the fair market value of the Property immediately before the partial taking, destruction, or loss in value is less

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than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless Borrower and Lender otherwise agree in writing, the Miscellaneous Proceeds shall be applied to the sums secured by this Security Instrument whether or not the sums are then due.

If the Property is abandoned by Borrower, or if, after notice by Lender to Borrower that the Opposing Party (as defined in the next sentence) offers to make an award to settle a claim for damages, Borrower fails to respond to Lender within 30 days after the date the notice is given, Lender is authorized to collect and apply the Miscellaneous Proceeds either to restoration or repair of the Property or to the sums secured by this Security Instrument, whether or not then due. "Opposing Party" means the third party that owes Borrower Miscellaneous Proceeds or the party against whom Borrower has a right of action in regard to Miscellaneous Proceeds.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in Lender's judgment, could result in forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. Borrower can cure such a default and, if acceleration has occurred, reinstate as provided in Section 19, by causing the action or proceeding to be dismissed with a ruling that, in Lender's judgment, precludes forfeiture of the Property or other material impairment of Lender's interest in the Property or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of Lender's interest in the Property are hereby assigned and shall be paid to Lender.

All Miscellaneous Proceeds that are not applied to restoration or repair of the Property shall be applied in the order provided for in Section 2.

**12. Borrower Not Released; Forbearance By Lender Not a Waiver.** Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. Lender shall not be required to commence proceedings against any Successor in Interest of Borrower or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original Borrower or any Successors in Interest of Borrower. Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

**13. Joint and Several Liability; Co-signers; Successors and Assigns Bound.** Borrower covenants and agrees that Borrower's obligations and liability shall be joint and several. However, any Borrower who co-signs this Security Instrument but does not execute the Note (a "co-signer"): (a) is co-signing this Security Instrument only to mortgage, grant and convey the co-signer's interest in the Property under the terms of this Security Instrument; (b) is not personally obligated to pay the sums secured by this Security Instrument; and (c) agrees that Lender and any other Borrower can agree to extend, modify, forbear or make any accommodations with regard to the terms of this Security Instrument or the Note without the co-signer's consent.

Subject to the provisions of Section 18, any Successor in Interest of Borrower who assumes Borrower's obligations under this Security Instrument in writing, and is approved by Lender, shall obtain all of Borrower's rights and benefits under this Security Instrument. Borrower shall not be released from Borrower's obligations and liability under this Security Instrument unless Lender agrees

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to such release in writing. The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

**14. Loan Charges.** Lender may charge Borrower fees for services performed in connection with Borrower's default, for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument, including, but not limited to, attorneys' fees, property inspection and valuation fees. In regard to any other fees, the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

If the Loan is subject to a law which sets maximum loan charges, and that law is finally interpreted so that the interest or other loan charges collected or to be collected in connection with the Loan exceed the permitted limits, then: (a) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from Borrower which exceeded permitted limits will be refunded to Borrower. Lender may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to Borrower. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the Note). Borrower's acceptance of any such refund made by direct payment to Borrower will constitute a waiver of any right of action Borrower might have arising out of such overcharge.

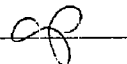
**15. Notices.** All notices given by Borrower or Lender in connection with this Security Instrument must be in writing. Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means. Notice to any one Borrower shall constitute notice to all Borrowers unless Applicable Law expressly requires otherwise. The notice address shall be the Property Address unless Borrower has designated a substitute notice address by notice to Lender. Borrower shall promptly notify Lender of Borrower's change of address. If Lender specifies a procedure for reporting Borrower's change of address, then Borrower shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to Lender shall be given by delivering it or by mailing it by first class mail to Lender's address stated herein unless Lender has designated another address by notice to Borrower. Any notice in connection with this Security Instrument shall not be deemed to have been given to Lender until actually received by Lender. If any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument.

**16. Governing Law; Severability; Rules of Construction.** This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall

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mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

**17. Borrower's Copy.** Borrower shall be given one copy of the Note and of this Security Instrument.

**18. Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

**19. Borrower's Right to Reinstate After Acceleration.** If Borrower meets certain conditions, Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument; (b) such other period as Applicable Law might specify for the termination of Borrower's right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that Borrower: (a) pays Lender all sums which then would be due under this Security Instrument and the Note as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting Lender's interest in the Property and rights under this Security Instrument; and (d) takes such action as Lender may reasonably require to assure that Lender's interest in the Property and rights under this Security Instrument, and Borrower's obligation to pay the sums secured by this Security Instrument, shall continue unchanged. Lender may require that Borrower pay such reinstatement sums and expenses in one or more of the following forms, as selected by Lender: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under Section 18.

**20. Sale of Note; Change of Loan Servicer; Notice of Grievance.** The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower. A sale might result in a change in the entity (known as the "Loan Servicer") that collects Periodic Payments due under the Note and this Security Instrument and performs other mortgage loan servicing obligations under the Note, this Security Instrument, and Applicable Law.

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There also might be one or more changes of the Loan Servicer unrelated to a sale of the Note. If there is a change of the Loan Servicer, Borrower will be given written notice of the change which will state the name and address of the new Loan Servicer, the address to which payments should be made and any other information RESPA requires in connection with a notice of transfer of servicing. If the Note is sold and thereafter the Loan is serviced by a Loan Servicer other than the purchaser of the Note, the mortgage loan servicing obligations to Borrower will remain with the Loan Servicer or be transferred to a successor Loan Servicer and are not assumed by the Note purchaser unless otherwise provided by the Note purchaser.

Neither Borrower nor Lender may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of Section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If Applicable Law provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to Borrower pursuant to Section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

**21. Hazardous Substances.** As used in this Section 21: (a) "Hazardous Substances" are those substances defined as toxic or hazardous substances, pollutants, or wastes by Environmental Law and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) "Environmental Law" means federal laws and laws of the jurisdiction where the Property is located that relate to health, safety or environmental protection; (c) "Environmental Cleanup" includes any response action, remedial action, or removal action, as defined in Environmental Law; and (d) an "Environmental Condition" means a condition that can cause, contribute to, or otherwise trigger an Environmental Cleanup.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any Hazardous Substances, or threaten to release any Hazardous Substances, on or in the Property. Borrower shall not do, nor allow anyone else to do, anything affecting the Property (a) that is in violation of any Environmental Law, (b) which creates an Environmental Condition, or (c) which, due to the presence, use, or release of a Hazardous Substance, creates a condition that adversely affects the value of the Property. The preceding two sentences shall not apply to the presence, use, or storage on the Property of small quantities of Hazardous Substances that are generally recognized to be appropriate to normal residential uses and to maintenance of the Property (including, but not limited to, hazardous substances in consumer products).

Borrower shall promptly give Lender written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the Property and any Hazardous Substance or Environmental Law of which Borrower has actual knowledge, (b) any Environmental Condition, including but not limited to, any spilling, leaking, discharge, release or threat of release of any Hazardous Substance, and (c) any condition caused by the presence, use or release of a Hazardous Substance which adversely affects the value of the Property. If Borrower learns, or is notified by any governmental or regulatory authority, or any private party,

NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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that any removal or other remediation of any Hazardous Substance affecting the Property is necessary, Borrower shall promptly take all necessary remedial actions in accordance with Environmental Law. Nothing herein shall create any obligation on Lender for an Environmental Cleanup.

NON-UNIFORM COVENANTS. Borrower and Lender further covenant and agree as follows:

**22. Acceleration; Remedies.** Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under Section 18 unless Applicable Law provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option, and without further demand, may invoke the power of sale, including the right to accelerate full payment of the Note, and any other remedies permitted by Applicable Law. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Section 22, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If Lender invokes the power of sale, Lender shall execute or cause Trustee to execute written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which any part of the Property is located. Lender shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.


Trustee shall deliver to the purchaser Trustee's deed conveying the Property without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

**23. Reconveyance.** Upon payment of all sums secured by this Security Instrument, Lender shall request Trustee to reconvey the Property and shall surrender this Security Instrument and all notes evidencing debt secured by this Security Instrument to Trustee. Trustee shall reconvey the Property without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. Lender may charge such person or persons a fee for reconveying the

NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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Property, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under Applicable Law.

**24. Substitute Trustee.** Lender at its option, may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by Applicable Law.

**25. Assumption Fee.** If there is an assumption of this loan, Lender may charge an assumption fee of U.S. \$ 4,420.00.

NEVADA-Single Family-Fannie Mac/Freddie Mac UNIFORM INSTRUMENT WITH MERS

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BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by Borrower and recorded with it.

Witnesses:

\_\_\_\_\_  
CRISTELA PEREZ (Seal)  
-Borrower

\_\_\_\_\_  
\_\_\_\_\_  
-Borrower (Seal)

\_\_\_\_\_  
\_\_\_\_\_  
-Borrower (Seal)

\_\_\_\_\_  
\_\_\_\_\_  
-Borrower (Seal)

NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS  
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STATE OF NEVADA

COUNTY OF Clark

This instrument was acknowledged before me on 10-20-05 by  
**CRISTELA PEREZ**

Mary Quackenbush  
My Commission Expires: 05-31-09



NEVADA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT WITH MERS  
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**FIXED/ADJUSTABLE RATE RIDER****(LIBOR One-Year Index (As Published In The Wall Street Journal)- Rate Caps)**

THIS FIXED/ADJUSTABLE RATE RIDER is made this **19th** day of **October, 2005**, and is incorporated into and shall be deemed to amend and supplement the Mortgage, Deed of Trust, or Security Deed (the "Security Instrument") of the same date given by the undersigned ("Borrower") to secure Borrower's Fixed/Adjustable Rate Note (the "Note") to **CMG MORTGAGE, INC.** ("Lender") of the same date and covering the property described in the Security Instrument and located at:

LF *mq* *co*  
**7119 WOOL RIVERS AVENUE, LAS VEGAS, NEVADA 89131**  
[Property Address]

**THE NOTE PROVIDES FOR A CHANGE IN BORROWER'S FIXED INTEREST RATE TO AN ADJUSTABLE INTEREST RATE. THE NOTE LIMITS THE AMOUNT BORROWER'S ADJUSTABLE INTEREST RATE CAN CHANGE AT ANY ONE TIME AND THE MAXIMUM RATE BORROWER MUST PAY.**

**ADDITIONAL COVENANTS.** In addition to the covenants and agreements made in the Security Instrument, Borrower and Lender further covenant and agree as follows:

**A. ADJUSTABLE RATE AND MONTHLY PAYMENT CHANGES**

The Note provides for an initial fixed interest rate of 5.000%. The Note also provides for a change in the initial fixed rate to an adjustable interest rate, as follows:

**4. ADJUSTABLE INTEREST RATE AND MONTHLY PAYMENT CHANGES**

**(A) Change Dates**

The initial fixed interest rate I will pay will change to an adjustable interest rate on the **FIRST** day of **November, 2010**, and the adjustable interest rate I will pay may change on that day every 12th month thereafter. The date on which my initial fixed interest rate changes to an adjustable interest rate, and each date on which my adjustable interest rate could change, is called a "Change Date."

**(B) The Index**

**MULTISTATE FIXED/ADJUSTABLE RATE RIDER - WSJ One-Year LIBOR - Single Family - Fannie Mae Uniform Instrument**  
Form 3187 6/01

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Initials: *co*

usc3187



32501493



RIDER



Beginning with the first Change Date, my adjustable interest rate will be based on an Index. The "Index" is the average of interbank offered rates for one-year U.S. dollar-denominated deposits in the London market ("LIBOR"), as published in *The Wall Street Journal*. The most recent Index figure available as of the date 45 days before each Change Date is called the "Current Index." If the Index is no longer available, the Note Holder will choose a new index that is based upon comparable information. The Note Holder will give me notice of this choice.

**(C) Calculation of Changes** Before each Change Date, the Note Holder will calculate my new interest rate by adding **Two and One-Fourth** percentage points (2.250%) to the Current Index. The Note Holder will then round the result of this addition to the nearest one-eighth of one percentage point (0.125%). Subject to the limits stated in Section 4(D) below, this rounded amount will be my new interest rate until the next Change Date. The Note Holder will then determine the amount of the monthly payment that would be sufficient to repay the unpaid principal that I am expected to owe at the Change Date in full on the Maturity Date at my new interest rate in substantially equal payments. The result of this calculation will be the new amount of my monthly payment.

**(D) Limits on Interest Rate Changes**

The interest rate I am required to pay at the first Change Date will not be greater than 10.000% or less than 2.250%. Thereafter, my adjustable interest rate will never be increased or decreased on any single Change Date by more than two percentage points from the rate of interest I have been paying for the preceding 12 months. My interest rate will never be greater than 10.000%.

**(E) Effective Date of Changes**

My new interest rate will become effective on each Change Date. I will pay the amount of my new monthly payment beginning on the first monthly payment date after the Change Date until the amount of my monthly payment changes again.

**(F) Notice of Changes** The Note Holder will deliver or mail to me a notice of any changes in my initial fixed interest rate to an adjustable interest rate and of any changes in my adjustable interest rate before the effective date of any change. The notice will include the amount of my monthly payment, any information required by law to be given to me and also the title and telephone number of a person who will answer any question I may have regarding the notice.

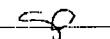
**B. TRANSFER OF THE PROPERTY OR A BENEFICIAL INTEREST IN BORROWER**

1. Until Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument shall read as follows:

**Transfer of the Property or a Beneficial Interest in Borrower.** As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a

MULTISTATE FIXED/ADJUSTABLE RATE RIDER - WSJ One-Year LIBOR - Single Family - Fannie Mae Uniform Instrument Form 3187 6/01

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bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law.

If Lender exercises this option, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.


2. When Borrower's initial fixed interest rate changes to an adjustable interest rate under the terms stated in Section A above, Uniform Covenant 18 of the Security Instrument described in Section B1 above shall then cease to be in effect, and the provisions of Uniform Covenant 18 of the Security Instrument shall be amended to read as follows:

Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 18, "Interest in the Property" means any legal or beneficial interest in the Property, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by Borrower at a future date to a purchaser.

If all or any part of the Property or any Interest in the Property is sold or transferred (or if Borrower is not a natural person and a beneficial interest in Borrower is sold or transferred) without Lender's prior written consent, Lender may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by Lender if such exercise is prohibited by Applicable Law. Lender also shall not exercise this option if: (a) Borrower causes to be submitted to Lender information required by Lender to evaluate the intended transferee as if a new loan were being made to the transferee; and (b) Lender reasonably determines that Lender's security will not be impaired by the loan assumption and that the risk of a breach of any covenant or agreement in this Security Instrument is acceptable to Lender.

MULTISTATE FIXED/ADJUSTABLE RATE RIDER - WSJ One-Year LIBOR - Single Family - Fannie Mae Uniform Instrument Form 3187 6/01

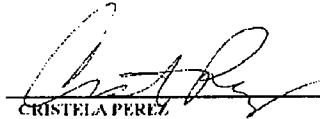
(Page 3 of 4)

Initials: 

To the extent permitted by Applicable Law, Lender may charge a reasonable fee as a condition to Lender's consent to the loan assumption. Lender also may require the transferee to sign an assumption agreement that is acceptable to Lender and that obligates the transferee to keep all the promises and agreements made in the Note and in this Security Instrument. Borrower will continue to be obligated under the Note and this Security Instrument unless Lender releases Borrower in writing.

If Lender exercises the option to require immediate payment in full, Lender shall give Borrower notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 15 within which Borrower must pay all sums secured by this Security Instrument. If Borrower fails to pay these sums prior to the expiration of this period, Lender may invoke any remedies permitted by this Security Instrument without further notice or demand on Borrower.

BY SIGNING BELOW, Borrower accepts and agrees to the terms and covenants contained in this Fixed/Adjustable Rate Rider.

 (Seal)  
CRISTELA PEREZ -Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

\_\_\_\_ (Seal)  
-Borrower

MULTISTATE FIXED/ADJUSTABLE RATE RIDER - WSJ One-Year LIBOR - Single Family Family Mae Uniform  
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# EXHIBIT A-3

Inst #: 201112200001246  
Fees: \$17.00  
N/C Fee: \$0.00  
12/20/2011 09:12:32 AM  
Receipt #: 1012628  
Requestor:  
ALESSI & KOENIG LLC (JUNES  
Recorded By: MJM Pgs: 1  
DEBBIE CONWAY  
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC  
9500 W. Flamingo Rd., Suite 205  
Las Vegas, Nevada 89147  
Phone: (702) 222-4033

A.P.N. 125-15-811-013

Trustee Sale # WR-7119-A

**NOTICE OF DELINQUENT ASSESSMENT (LIEN)**

In accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the official records of **Clark County, Nevada, Wyeth Ranch Community Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **7119 Wolf Rivers Ave , Las Vegas, NV 89131** and more particularly legally described as: **Lot 13 Block A Book 112 Page 8** in the County of **Clark**.

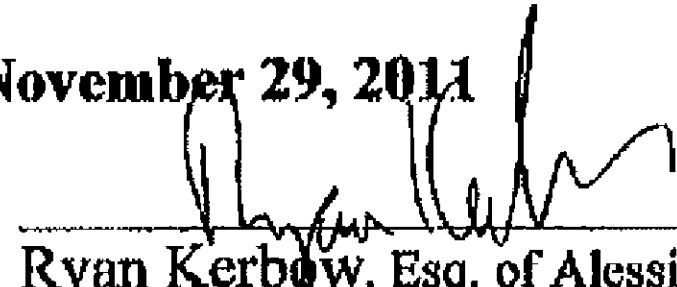
The owner(s) of record as reflected on the public record as of today's date is (are): **Cristela Perez**

The mailing address(es) is: **P.O. Box 750158, Las Vegas, NV 89136**

The total amount due through today's date is: **\$9,296.56**. Of this total amount **\$9,559.06** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **\$450.00** represent collection costs. Note: Additional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice.

Date: **November 29, 2011**

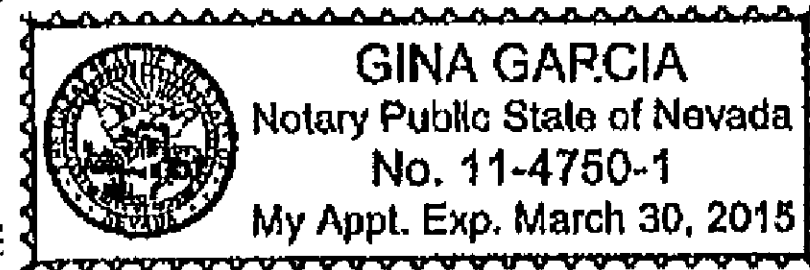
By:

  
Ryan Kerbow, Esq. of Alessi & Koenig, LLC on behalf of **Wyeth Ranch Community Association**

State of Nevada  
County of Clark

SUBSCRIBED and SWORN before me **November 29, 2011**

(Seal)



(Signature)

  
NOTARY PUBLIC

A&K000203

MBT0538

DAVID ALESSI\*  
THOMAS BAYARD\*  
ROBERT KOENIG\*\*  
RYAN KERNOW\*\*\*\*  
HUONG LAM\*\*\*  
\* Admitted to the California Bar  
\*\* Admitted to the California, Nevada  
and Colorado Bar  
\*\*\* Admitted to the Nevada Bar  
\*\*\*\* Admitted to the Nevada and California Bar

**ALESSI  
&  
KOENIG**  
*A Multi-Jurisdictional Law Firm*

9500 West Flamingo Road, Suite 205  
Las Vegas, Nevada 89147  
Telephone: 702-222-4033  
Facsimile: 702-222-4043  
[www.alessikoenig.com](http://www.alessikoenig.com)

**ADDITIONAL OFFICES**

AGOURA HILLS, CA  
PHONE: 818-735-9600

RENO NV  
PHONE: 775-626-2323

&  
DIAMOND BAR CA  
PHONE: 909-843-6590

November 29, 2011

**LIEN LETTER**  
**VIA REGULAR AND CERTIFIED MAIL**

Cristela Perez  
7119 Wolf Rivers Ave  
Las Vegas, NV 89131

**Re: Wyeth Ranch Community Association/7119 Wolf Rivers Ave/HO #11632**

Dear Cristela Perez:

Our office has been retained by Wyeth Ranch Community Association to collect the past due assessment balance on your account. Please find the enclosed Notice of Delinquent Assessment (Lien), signed and dated on behalf of Wyeth Ranch Community Association on November 29, 2011. The total amount due as of the date of this letter is \$9,296.56. To verify the total of unpaid charges please contact Alessi & Koenig, LLC. Please submit payment to our Nevada mailing address listed above. Payment must be in the form of a cashier's check or money order and made payable to Alessi & Koenig. Cash will not be accepted.

Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our office will assume the debt is valid. If you notify our office in writing within the thirty-day period that you dispute the debt, or any portion thereof, we will obtain verification of the debt and a copy of such verification will be mailed to you. Upon receipt of your written request within the thirty-day period, we will provide you with the name and address of the origin. Please note the law does not require our office to wait until the next step in the collection process. If, however, you request the original creditor within the thirty-day period that begins of the original creditor within the thirty-day period that begins requires us to suspend efforts to collect the debt until we mail advised that you have the right to inspect the association records.

In the event Alessi & Koenig, LLC does not receive costs of \$9,296.56, a Notice of Default will be recorded in the additional fees and costs. If you have any questions regarding please contact my legal assistant, Naomi Eden, at (702) 222- you could lose ownership of your property.

Sincerely,  
  
ALESSI & KOENIG

U.S. Postal Service <sup>TM</sup>	
<b>CERTIFIED MAIL<sup>TM</sup> RECEIPT</b>	
(Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at <a href="http://www.usps.com">www.usps.com</a>	
<b>OFFICIAL USE</b>	
Postage	Postmark Here
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Post	
Sent To	CRISTELA PEREZ
Street, Apt. or PO Box	7119 WOLF RIVERS AVE
City, State, Zip	LAS VEGAS, NV 89131

PS Form 3800, August 2005 See Reverse for Instructions

Please be advised that Alessi & Koenig, LLC is a debt collector that is attempting to collect a debt and any information obtained will be used for that purpose.

A&K000200

MBT0535

JA\_1211

DAVID ALESSI\*  
 THOMAS BAYARD\*  
 ROBERT KOENIG\*\*  
 RYAN KERBOW\*\*\*\*  
 HUONG LAM\*\*\*  
 \* Admitted to the California Bar  
 \*\* Admitted to the California, Nevada  
 and Colorado Bar  
 \*\*\* Admitted to the Nevada Bar  
 \*\*\*\* Admitted to the Nevada and California Bar

**ALESSI & KOENIG**  
*A Multi-Jurisdictional Law Firm*  
 9500 West Flamingo Road, Suite 205  
 Las Vegas, Nevada 89147  
 Telephone: 702-222-4033  
 Facsimile: 702-222-4043  
[www.alessikoenig.com](http://www.alessikoenig.com)

**ADDITIONAL OFFICES**

AGOURA HILLS, CA  
 PHONE: 818-735-9600

RENO NV  
 PHONE: 775-626-2323

&  
 DIAMOND BAR CA  
 PHONE: 909-843-6590

November 29, 2011

**LIEN LETTER**  
**VIA REGULAR AND CERTIFIED MAIL**

Cristela Perez  
 P.O. Box 750158  
 Las Vegas, NV 89136

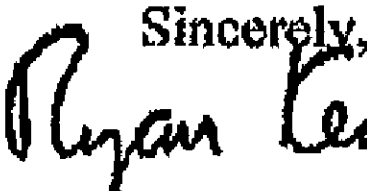
**Re: Wyeth Ranch Community Association/7119 Wolf Rivers Ave/HO #11632**

Dear Cristela Perez:

Our office has been retained by **Wyeth Ranch Community Association** to collect the past due assessment balance on your account. Please find the enclosed Notice of Delinquent Assessment (Lien), signed and dated on behalf of **Wyeth Ranch Community Association** on November 29, 2011. The total amount due as of the date of this letter is **\$9,296.56**. To verify the total of unpaid charges please contact **Alessi & Koenig, LLC**. Please submit payment to our Nevada mailing address listed above. Payment must be in the form of a cashier's check or money order and made payable to **Alessi & Koenig**. Cash will not be accepted.

Unless you, within thirty days after receipt of this notice, dispute the validity of this debt, or any portion thereof, our office will assume the debt is valid. If you notify our office in writing within the thirty-day period that you dispute the debt, or any portion thereof, we will obtain verification of the debt and a copy of such verification will be mailed to you. Upon receipt of your written request within the thirty-day period, we will provide you with the name and address of the original creditor. Please note the law does not require our office to wait until the end of the thirty-day period to take the next step in the collection process. If, however, you request a copy of the original creditor within the thirty-day period that begins on the date of this letter, we will require us to suspend efforts to collect the debt until we mail you a copy of the original creditor. If you are advised that you have the right to inspect the association records, please do so within the thirty-day period.

In the event **Alessi & Koenig, LLC** does not receive payment of **\$9,296.56**, a Notice of Default will be recorded in the public records. If you have any questions regarding this letter, please contact my legal assistant, Naomi Eden, at (702) 222-4043. If you do not pay this debt, you could lose ownership of your property.

Sincerely,  
  
**ALESSI & KOENIG**

Please be advised that **Alessi & Koenig, LLC** is a debt collector the information obtained will be used for that purpose.

U.S. Postal Service<sup>TM</sup>  
**CERTIFIED MAIL<sup>®</sup> RECEIPT**  
 (Domestic Mail Only; No Insurance Coverage Provided)  
 For delivery information visit our website at [www.usps.com](http://www.usps.com)  
**OFFICIAL USE**  
 Postage  
 Certified Fee  
 Return Receipt Fee (Endorsement Required)  
 Restricted Delivery Fee (Endorsement Required)  
 Total Fee  
 Sent to: **CRISTELA PEREZ**  
 Street, Apt. or P.O. Box: **PO BOX 750158**  
 City, State: **LAS VEGAS, NV 89136**  
 PS Form 3800, August 2008 See Reverse for Instructions

A&K000201

MBT0536

When recorded return to:

**ALESSI & KOENIG, LLC**  
**9500 W. Flamingo Rd., Suite 205**  
**Las Vegas, Nevada 89147**  
**Phone: (702) 222-4033**

**A.P.N. 125-15-811-013**

**Trustee Sale # WR-7119-A**

**NOTICE OF DELINQUENT ASSESSMENT (LIEN)**

In accordance with Nevada Revised Statutes and the Association's Declaration of Covenants, Conditions and Restrictions (CC&Rs) of the official records of **Clark** County, Nevada, **Wyeth Ranch Community Association** has a lien on the following legally described property.

The property against which the lien is imposed is commonly referred to as **7119 Wolf Rivers Ave , Las Vegas, NV 89131** and more particularly legally described as: **Lot 13 Block A Book 112 Page 8** in the County of **Clark**.

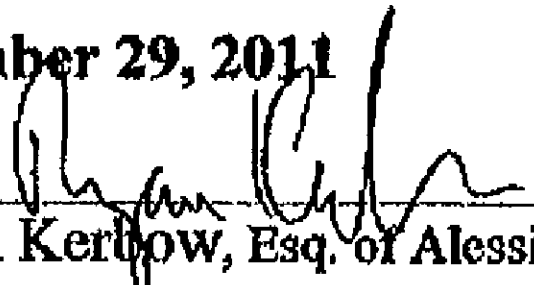
The owner(s) of record as reflected on the public record as of today's date is (are): **Cristela Perez**

The mailing address(es) is: **P.O. Box 750158, Las Vegas, NV 89136**

The total amount due through today's date is: **\$9,296.56**. Of this total amount **\$9,559.06** represent Collection and/or Attorney fees, assessments, interest, late fees and service charges. **\$450.00** represent collection costs. Note: Additional monies shall accrue under this claim at the rate of the claimant's regular monthly or special assessments, plus permissible late charges, costs of collection and interest, accruing subsequent to the date of this notice.

Date: **November 29, 2011**

By:

  
**Ryan Kertow, Esq. of Alessi & Koenig, LLC on behalf of Wyeth Ranch Community Association**

State of Nevada  
County of Clark

SUBSCRIBED and SWORN before me November 29, 2011

(Seal)

(Signature)

\_\_\_\_\_  
NOTARY PUBLIC

A&K000202

MBT0537

JA\_1213



Inst #: 201112200001246  
Fees: \$17.00  
N/C Fee: \$0.00  
12/20/2011 09:12:32 AM  
Receipt #: 1012628  
Requestor:  
ALESSI & KOENIG LLC (JUNES  
Recorded By: MJM Pgs: 1  
DEBBIE CONWAY  
CLARK COUNTY RECORDER

When recorded return to:

ALESSI & KOENIG, LLC  
9500 W. Flamingo Rd., Suite 205  
Las Vegas, Nevada 89147  
Phone: (702) 222-4033

A.P.N. 125-15-811-013

Trustee Sale # WR-7119-A

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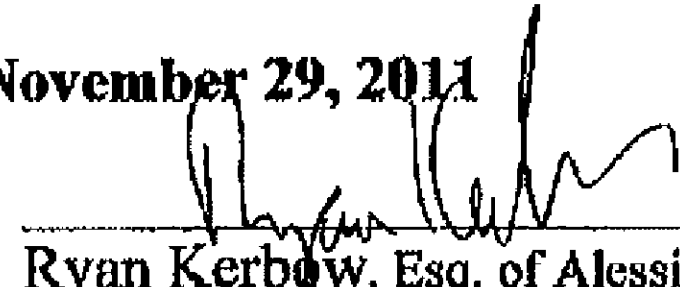
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Date: **November 29, 2011**

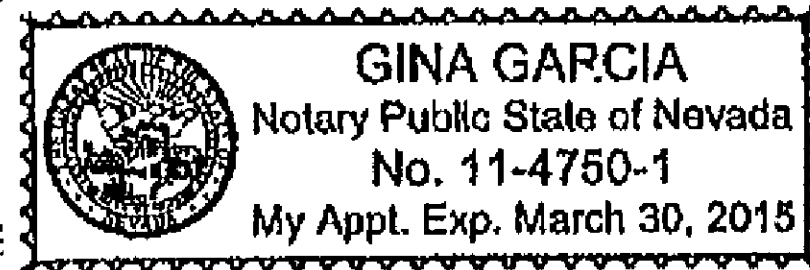
By:

  
Ryan Kerbow, Esq. of Alessi & Koenig, LLC on behalf of **Wyeth Ranch Community Association**

State of Nevada  
County of Clark

SUBSCRIBED and SWORN before me **November 29, 2011**

(Seal)



(Signature)

  
NOTARY PUBLIC

A&K000203

MBT0538

# EXHIBIT A-4