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8
9 SUPREME COURT
10 STATE OF NEVADA

11
12 7510 PERLA DEL MAR AVE TRUST,

CASE NO.: 75603

13 Appellant,

14 vs.

15 BANK OF AMERICA, N.A.,

16 Respondent.

17
18 **JOINT APPENDIX 2**
19

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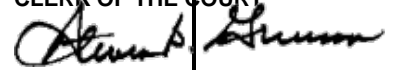
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1 CASE NO. A-13-686277-C

2 DEPT. NO. 30

3 DOCKET U

4 DISTRICT COURT

5 CLARK COUNTY, NEVADA

6 * * * * *

7
8 7510 PERLA DEL MAR AVE TRUST,)
9 Plaintiff/)
10 Counterdefendant.)

11 vs.)

Case No. A686277-C

12 BANK OF AMERICA, N.A.; NORTH)
13 AMERICAN TITLE COMPANY,)
14 MOUNTAIN'S EDGE MASTER)
15 ASSOCIATION; and DOMINIC J.)
16 NOLAN,)
17 Defendants/)
18 Counter-Claimants.)

19 REPORTER'S TRANSCRIPTION OF PROCEEDINGS

20 BEFORE THE HONORABLE JERRY A. WIESE, II

21 DEPARTMENT XXX

22 DATED MONDAY, FEBRUARY 12, 2018

23 -and-

24 TUESDAY, FEBRUARY 13, 2018

25 TRANSCRIBED BY: KIMBERLY A. FARKAS, NV CCR No. 741

1 APPEARANCES:

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3 For the Plaintiff/Counterdefendant:

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10 For the Defendant/Counter-Claimant:

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16 For the Homeowners Association:

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1 **LAS VEGAS, NEVADA, MONDAY, FEBRUARY 12, 2018;**

2 **10:30 A.M.**

3
4 **P R O C E E D I N G S**

5 *** * * * ***

6 THE COURT: Let's go on the record.

7 This is Case A686277, 7510 Perla Del Mar Ave Trust
8 versus Bank of America, et al. and counterclaim.

9 You guys want to state your appearances
10 for the record?

11 MR. BOHN: Michael Bohn, with
12 Eddie Haddad, for Plaintiff 7510 Perla Del Mar Ave
13 Trust.

14 MR. BRENNER: And Darren Brenner for
15 Bank of America. With me is Karen Whelan.

16 THE COURT: Good morning, everybody.

17 MR. BRENNER: Good morning.

18 MR. BOHN: Good morning.

19 THE COURT: You guys want to do opening
20 statements?

21 MR. BRENNER: I think a good place to
22 start, Judge, might be that over the weekend we
23 have stipulated facts.

24 THE COURT: Okay. That would be great.

25 MR. BRENNER: Can we file these in open

1 court and submit them to you?

2 THE COURT: Can you do that? I don't
3 think you can do it on a civil case. I think you
4 still have to e-file it.

5 MR. BOHN: You just stamp it.

6 THE COURT: Used to.

7 MR. BOHN: No more.

8 MR. BRENNER: Why don't we do this: I'm
9 going to hand the signed copy to Ms. Whelan, and
10 I'm going to give Your Honor an unsigned copy.
11 And we'll get the signed copy filed with the
12 court.

13 THE COURT: That's fine. That would be
14 great.

15 MR. BOHN: Do you want to read them into
16 the record?

17 THE COURT: If it's being filed, once
18 they e-file it, it's part of the record. As long
19 as the parties agree, we'll just agree to make
20 that an exhibit in the trial or part of the
21 record, and the Court can consider it as if it had
22 been stipulated in open court. Fair enough?

23 MR. BOHN: Fair enough.

24 MR. BRENNER: I think that's fair
25 enough.

1 Your Honor, my opening will be this: It
2 will be a thumbnail sketch of the stipulated
3 facts. There were two associations, a master and
4 a sub -- I'm sorry. I'm stealing your thunder.

5 MR. BOHN: I have a 60-second opening,
6 Your Honor. Just like the last case, only
7 different. In this one, there are two HOAs, a
8 master and a sub. Inquiry letters were sent to
9 both of them. The subassociation was the one that
10 conducted the foreclosure. There was no payment
11 made to the subassociation that conducted the
12 foreclosure. There was a payment made to the
13 master association, but that doesn't affect the
14 lien of the subassociation.

15 And it's our position at close of trial
16 you should grant judgment to my client that the
17 deed of trust has been extinguished by means of
18 the HOA foreclosure sale.

19 THE COURT: Okay. That was 60 seconds
20 or less. That was good.

21 MR. BOHN: I'm a man of my word
22 sometimes.

23 MR. BRENNER: Your Honor will see, based
24 on the stipulated facts -- I think the stipulated
25 facts probably -- they're arguably everything

1 material, probably at least 85 percent.

2 As Counsel said, there was a master.
3 The master responded with a ledger. Bank of
4 America responded by giving a check to the master
5 association. The subassociation is the one that
6 foreclosed, as Counsel, I believe, indicated.

7 Bank of America did not pay because NAS
8 refused to give a response. I think we're going
9 to go over some other issues here, but I think
10 since our last trial, maybe it did come out at the
11 time of our last trial -- maybe it didn't come out
12 of our last trial, but the Court has now issued
13 the Shadow Canyon decision -- let me back up.

14 It's our position that the offer to pay
15 was a sufficient tender under Nevada law. We'll
16 go over the Ebert case and the Cladianos case.
17 And we believe that the only factual inquiry is
18 whether or not the bank was ready, willing, and
19 able to pay if it had been accepted. And we think
20 we're going to easily be able to show that.

21 But, secondarily, even if the Court
22 finds that's not sufficient, we now have the Shady
23 Canyon [sic]. You know, in the similar
24 progression of changing things as we go -- I'm
25 sorry. Shadow Canyon.

1 Shadow Canyon redefines the commercial
2 reasonableness test. It says when you have great
3 price disparity, only slight unfairness is
4 required. So it's effectively a burden shift on
5 the evidence. The greater the price disparity,
6 the less evidence that's required.

7 And then the last thing I'll say,
8 because I know it was an issue that was raised in
9 the last trial, Shadow Canyon is -- it makes clear
10 that the price that you're looking at is the price
11 of the auction versus the fair market value, not
12 versus other HOA comparable sales. We're not
13 saying, gee, was this a fair price at a
14 foreclosure auction. You look at what if it
15 wasn't a foreclosure auction. That was factor one
16 under Shadow Canyon. And when you get great price
17 disparity, you only need slight evidence of
18 unfairness. And, again, we think the evidence
19 will show that at trial.

20 THE COURT: Awesome. Mr. Bohn.

21 MR. BOHN: With the Court's permission,
22 I'll call my first and only witness, Your Honor.

23 THE COURT: Come on up, Mr. Haddad.
24 Remain standing and raise your right hand.

25 **THE CLERK: You do solemnly swear the**

1 testimony you're about to give in this action
2 shall be the truth, the whole truth, and nothing
3 but the truth, so help you God.

4 THE WITNESS: I do.

5 THE CLERK: Please be seated, and please
6 state and spell your last name for the record.

7 THE WITNESS: Eddie Haddad, E-D-D-I-E,
8 H-A-D-D-A-D.

9 THE COURT: Thanks.

10 DIRECT EXAMINATION OF EDDIE HADDAD

11 BY MR. BOHN:

12 Q. Mr. Haddad, before court this morning,
13 you were telling me you're experiencing some pain
14 with your shoulder; correct?

15 A. I am, yes.

16 Q. Are you under any kind of pain
17 medication?

18 A. Just Tylenol. That's about it.

19 Q. Nothing that would affect your ability
20 to understand the question and answer
21 appropriately?

22 A. No.

23 Q. Okay. Let's proceed, then.

24 What do you do for a living?

25 A. I'm a real estate broker for over 20

1 years now.

2 Q. And what did you do before you were in
3 real estate?

4 A. I was a student at UNLV.

5 Q. And what did you study at UNLV?

6 A. Business marketing.

7 Q. Do you have a real estate brokerage?

8 A. Yes.

9 Q. And what's the name of that company?

10 A. Great Bridge Properties. Sole
11 proprietorship.

12 Q. You're also the manager of Resources
13 Group, LLC; is that correct?

14 A. Yes.

15 Q. And what is Resources Group?

16 A. Real estate management company.

17 Q. And is that what you -- is that the
18 entity that you use to manage your various real
19 estate acquisitions?

20 A. Yes, it is.

21 Q. Okay. And Resources Group is the
22 trustee for a number of trusts, including the
23 7510 Perla Del Mar Ave Trust, which is the
24 plaintiff in this case; is that correct?

25 A. Yes, it is.

1 Q. So you're the de facto trustee of the
2 Perla Del Mar Trust; correct?

3 A. Yes, that's correct.

4 Q. All right. Now, the 7510 Perla Del Mar
5 Ave Trust is the owner of the property located at
6 7510 Perla Del Mar Avenue in Las Vegas, Nevada; is
7 that correct?

8 A. Correct.

9 Q. And that was purchased at HOA
10 foreclosure sale; is that correct?

11 A. Yes, it was.

12 MR. BOHN: Do we have an exhibit book
13 for the witness? Probably not.

14 THE COURT: I think what he's got up
15 here is from a different trial.

16 MR. BOHN: Oh. Then probably can't use
17 that.

18 THE COURT: Do you have exhibits for me,
19 too, or not?

20 MR. BRENNER: We should.

21 THE COURT: You wanted three copies,
22 Judge?

23 THE CLERK: One copy is the witness
24 copy. That's my copy. The witness copy is my
25 copy.

1 MR. BRENNER: We have an extra copy.

2 THE CLERK: I don't need it.

3 THE COURT: That's fine.

4 MR. BOHN: Well, Your Honor, all the
5 exhibits in the two binders have been stipulated
6 to be admitted by both parties.

7 Correct, Counsel?

8 MR. BRENNER: Correct. So stipulated.

9 (Whereupon, the stipulated exhibits
10 were admitted into evidence.)

11 THE COURT: All the exhibits are
12 admitted. Great. That makes it easy.

13 BY MR. BOHN:

14 Q. Mr. Haddad, do you have Exhibit 10 in
15 front of you?

16 A. Yes, I do.

17 Q. And that's a foreclosure deed?

18 A. Correct.

19 Q. What was the date of the foreclosure
20 sale, and how much did you buy this property for?

21 A. The highest bid at the sale was \$14,600,
22 and the sale date was February 1st, 2013.

23 Q. Did you personally attend this auction?

24 A. Yes, most likely, I would have.

25 Q. Okay. How long have you been purchasing

1 property at foreclosure sales?

2 A. NRS 116 and NRS 107 combined, for over
3 10, 12-plus years. NRS 116 sales, for over five
4 years now.

5 Q. And you also go to sheriff's sales and
6 property tax sales conducted by the county?

7 A. Yes. Clark County Treasurer's auction
8 and sheriff's sales as well, conducted mainly by
9 banks.

10 Q. And how often do you attend -- or how
11 often do you attend these foreclosure sales?

12 A. There are sales five days a week, 52
13 weeks a year, subtracting the holidays, of course.

14 Q. So you literally attend hundreds of
15 foreclosure sales; correct?

16 A. That is correct.

17 Q. And you have literally bid at hundreds
18 of sales; correct?

19 A. Yes. That's my courthouse.

20 Q. And do you have any estimate as to how
21 many properties, 107s and 116s, you've acquired at
22 foreclosure sales over the years?

23 A. It's been in the hundreds.

24 Q. Okay. From all this, do you consider
25 yourself to be an experienced buyer?

1 A. I would say so, yes.

2 Q. Okay. Now, do you have any specific
3 recollection about this particular sale or your
4 research on this one?

5 A. February 1st, 2013. That's going to be
6 very difficult. No, I would not.

7 Q. Okay. Do you have a practice of
8 research that you conduct or that you do before a
9 foreclosure sale?

10 A. Yes, all the time.

11 Q. Is it the same for all of them?

12 A. I would say so, yes.

13 Q. Was it the same back in 2013?

14 A. Sorry. I was just going to say, a
15 little bit more on the NRS 116 sales than the 107
16 sales. But, yes, it would be the same for -- in
17 2013 as well.

18 Q. Okay. And what kind of research do you
19 do before attending an HOA foreclosure sale?

20 A. So besides looking at the Nevada Legal
21 News, I will also consult the Clark County
22 Recorder's website, Clark County Assessor's
23 website as well.

24 Q. And what kind of information are you
25 looking for when you look at these websites?

1 A. Anything of record. Well, first of all,
2 the sale date and time. Anything of record. I
3 take notice of, you know, if there was a judgment,
4 if there was a notice of default recorded, notice
5 of sale, kind of confirm all the NOD, NOS
6 information.

7 I would look if there was any, you know,
8 lis pendens that were recorded against property.
9 Anything of record. And the assessor's office, I
10 look for the property characteristics, like the
11 square footage, year built, if there's a garage,
12 if there's a swimming pool, what type of roof it
13 has on it.

14 Q. Okay. Before an HOA sale, is there
15 anything in particular you would be looking for
16 that gets your attention before the sale?

17 A. So, yeah, if a sale was going to be
18 conducted pursuant to NRS 116, I would look for
19 any type of deeds of trust that are recorded on a
20 property, and if there's any notice of default or
21 notice of sales associated with those deeds of
22 trust.

23 Q. And back in 2013, why would that concern
24 you?

25 A. Because purchasing an NRS 116

1 potentially carries the weight of added cost and
2 added time associated with additional litigation.

3 Q. Okay. Do you do your own research, or
4 do you have anybody researching, helping you?

5 A. I do my own research.

6 Q. And how did you learn of the date and
7 time of foreclosure sales?

8 A. Nevada Legal News. They have the sales
9 calendar that they publish.

10 Q. Now, there isn't any recorded
11 information for yourself or anyone else to find
12 regarding whether notices were actually mailed or
13 who they're mailed to; correct?

14 A. No. No, there's no -- in fact, when I
15 have tried that in the past by calling either
16 trustees or calling banks -- let's say, for
17 example -- I'll give you an example. If I bought
18 a second mortgage deed of trust, I would call the
19 first mortgage deed of truth to verify information
20 because I'd be buying the second subject to the
21 first.

22 If I call a bank, the bank would flash
23 FDCPA, Fair Debt Collection Practices Act, in
24 front of my face. When I've called trustees to
25 inquire about whether banks have either, you know,

1 paid, you know, super priority or if there's
2 anything that I need to know about, similarly,
3 they flash FDCPA, and they say that, you know,
4 you're not a party to this transaction. All
5 pertinent announcements will be made at the time
6 of sale.

7 MR. BRENNER: Move to strike as
8 nonresponsive. It was a "yes" or "no" question.

9 MR. BOHN: I can ask the same question.
10 There's no jury here.

11 MR. BRENNER: I'd prefer he did, so I
12 can preserve my record on objections.

13 MR. BOHN: He hasn't ruled yet.

14 THE COURT: Hold on a second. I think
15 the question was how did you learn the date and
16 time of the foreclosure sales.

17 MR. BOHN: I did ask him is there any
18 recorded information to show you or other bidders
19 if notices were mailed or notices -- or who they
20 were mailed to.

21 THE COURT: I'm not going to strike it.
22 I think it's responsive. Overruled.

23 MR. BOHN: Thank you.

24 Q. In your review back in 2013, did you
25 ever come across any recording information by any

1 bank attempting to notify the world of an attempt
2 at a tender of an HOA lien?

3 A. No. Not in '13. I would say the
4 earliest that we had those, if you would call them
5 notices of payment of super priority, probably the
6 earliest would have been, like, after the SFR
7 decision came out.

8 Q. And that was September 2014?

9 A. Yes, correct.

10 Q. Do you rely on foreclosure agents to
11 properly conduct the foreclosure sale?

12 A. 1,000 percent. We rely on foreclosure
13 agents -- whether they're bank foreclosure agents
14 or whether they're HOA foreclosure agents, they're
15 supposed to check PACER system, you know, to make
16 sure that the borrower didn't file bankruptcy
17 before the sale. They're supposed to comply with
18 the laws under NRS 107 or NRS 116.

19 I don't have any other way of reliance
20 except for relying on the trustee to have done
21 their job.

22 Q. Thank you.

23 Do you or anyone associated with
24 Resources Group have any affiliation with the HOA
25 board or foreclosure agent in this case?

1 A. No, none whatsoever.

2 Q. Have you ever obtained any information
3 from the HOA foreclosure agents in this or any
4 other sale?

5 A. No, not before the sale.

6 Q. Okay. Do you ever obtain any non-public
7 information from the foreclosure agent for the
8 HOA?

9 A. I do not.

10 Q. Do you ever obtain copies of any of the
11 recorded documents you see on the recorder's
12 website?

13 A. Sorry. Do I ever obtain any?

14 Q. Yes.

15 A. I have the ability to, yes. Clark
16 County Recorder's office, all that information is
17 available, absolutely free, through Fidelity
18 National Title and other customer service
19 departments of major title companies. They can
20 make that information available at any time.

21 Q. Do you retain copies of any of your
22 research?

23 A. No, not if it's publicly obtainable.

24 Q. Okay. As a general rule, can you tell
25 the Court the kind of condition of the properties

1 you have after you purchase at the foreclosure
2 sale?

3 A. I would say 99.9999 percent of the time
4 the property is in need of dire -- is in dire need
5 of rehab due to either -- just, you know, over the
6 years, maintenance that has not been undertaken,
7 and rehab.

8 If somebody is losing their property in
9 either an HOA sale or bank foreclosure sale,
10 they're not going to spend money fixing up that
11 property. All the way to just pure malicious
12 damage, where they're pouring concrete down the
13 pipes, tearing out electric wire. There's also a
14 lot of vandalism, copper theft, you know,
15 vagrants, squatters. It's very difficult to tell
16 the condition of the property just from driving
17 the outside of the property.

18 Another big risk inherent with
19 foreclosure sales is eviction. Unlawful
20 detainers. As you know, you've been handling some
21 unlawful detainer situations that have been taking
22 three or four years, and there's no rents.
23 There's no income produced. There's just
24 expenses.

25 You know, they're fighting the trustee

1 they're foreclosed on, whether it's the bank or
2 the HOA. So those are inherent risks that are
3 taken when acquiring a property at a foreclosure
4 sales.

5 Q. And are those risks the same or similar
6 if you're buying a 116 sale as opposed to 107
7 sale?

8 A. So far I would say everything that I
9 just talked about would be inherent in both sales,
10 NRS 116 and/or NRS 107.

11 Now, I will tell you this: That people
12 are more upset when their homes are sold by their
13 neighbors. And you probably know of several
14 instances where we've had the foreclosed-upon
15 homeowner put signs, "This neighborhood sucks,"
16 "These people are communists," and they fight
17 tooth and nail. And they put -- they send us
18 photos of bullets and they graffiti the -- you
19 know, "die."

20 You know, it's very -- for whatever
21 reason, it's even more of a problem when
22 homeowners association or, you know, community of
23 their neighbors are foreclosing on these
24 homeowners than just that phantom bank out there,
25 you know, in some other city.

1 Q. Do you feel as if you're taking a risk
2 when you purchase a property at a foreclosure
3 sale?

4 A. Yes. More -- more risk as to property
5 condition on NRS 116 sales than NRS 107 sales.

6 Q. In your experience, is there a
7 difference between purchasing property in an HOA
8 sale under Chapter 116 or a trust deed foreclosure
9 under Chapter 107?

10 A. So besides more property damage risk,
11 there is the time and cost of litigating with
12 potential suitors, such as first deeds of trust.

13 Q. Have you been able to obtain title
14 insurance on any property purchased at a 116 HOA
15 foreclosure sale?

16 A. I believe you have settled several of
17 these cases with some various banks recently,
18 thank God, that, you know, we're starting to get
19 some settlement offers.

20 Other than that, the title company has
21 been clear. No title insurance unless a court
22 orders, you know, quiet title action, I guess. Is
23 that what they call it? And it's affirmed by
24 Nevada Supreme Court.

25 Q. In the last year or so, we have gotten a

1 few of those affirmed; correct?

2 A. Yes.

3 Q. But just to clarify the record, at a 116
4 sale, the title company won't give you title
5 insurance until you get the quiet title order;
6 correct?

7 A. That is correct.

8 Q. Where the 107 sale, there's no issue
9 regarding the quiet title?

10 A. Very rarely. Like .1 percent, maybe, or
11 1 percent, you know, end up in litigation of some
12 sort.

13 Q. With your real estate brokerage, is
14 there one title company you use more than the
15 others?

16 A. Fidelity National Title. But they're
17 not the only ones.

18 Q. Okay. Have you attempted to get title
19 insurance without a quiet title action from any
20 title company other than Fidelity Title?

21 A. Through my lawyer and myself, our
22 efforts combined, yes, we've probably been through
23 all of the title companies.

24 Q. And what is their response when you
25 attempt to get title insurance without a quiet

1 title?

2 A. It's the same as Fidelity's. Go out and
3 get an order from a court that's upheld by Nevada
4 Supreme Court.

5 Q. And do you consider the time in
6 litigation of a 116 quiet title when determining
7 how much to bid at a 116 sale?

8 A. Yes. I don't think it was clear at that
9 time of how long or how costly it would be, but it
10 was definitely considered.

11 Q. Okay.

12 A. And, you know, it had to be factored. I
13 mean, even an NRS 107 sale that's occupied, if it
14 was prevalent that the property was occupied, that
15 would cause me to bid lower than an NRS 107 sale
16 that was vacant, just because of an unlawful
17 detainer action that has to be taken. And we've
18 had several of those that have lasted years and
19 years.

20 So the litigation could come about from
21 a prior owner or it can come about from a bank.
22 So there's always that risk of litigation. But
23 there's that added risk of additional litigation
24 when an NRS 116 property is acquired.

25 Q. If you can't get title insurance, you

1 can't sell them; correct?

2 A. That is correct.

3 Q. And if you can't sell them, what do you
4 do with them?

5 A. Well, I mean, I guess the property can
6 be sold, but without title insurance. But who, in
7 their right mind, would buy a property without
8 title insurance.

9 Q. Have you sold any property acquired in a
10 116 sale without title insurance?

11 A. No, not at all.

12 Q. If you can't sell them, what do you do
13 with them?

14 A. I have no other choice but to lease
15 them.

16 Q. And before you lease them, you have to
17 clean them up, make them habitable and presentable
18 for someone who would want to pay money to live in
19 there?

20 A. Hundred percent of the time.

21 Q. Do you have any contact with the HOA
22 after the sale?

23 A. Yes. Casually, normally, usually, to
24 bring the HOA balance current and to keep it
25 current. My policy is every six months, they get

1 six months' worth of payments in advance to
2 mitigate damage -- any future collection efforts
3 by the HOA.

4 Q. Do you have any idea how many lawsuits
5 that you, through your various entities, are
6 involved with?

7 A. There are hundreds, unfortunately.

8 Q. When you first started buying HOA
9 properties, before the SFR decision came out, did
10 you find it was common for -- banks who would
11 attempt to start their own foreclosures on
12 properties acquired at HOA foreclosure sale?

13 A. Yes, that is correct. That was shortly
14 after or shortly before the SFR decision came out.

15 Q. And when they attempted to file
16 foreclosures, what did you have to do in response?

17 A. I had no choice but to file a TRO or an
18 injunction to stop the sale. I think in Shadow
19 Wood [sic], that's what the Supreme Court said.
20 You know, got to file a TRO, an injunction, or pay
21 first and then argue later. So I was not taking a
22 chance.

23 Q. Okay. Do you pay property taxes on
24 these properties?

25 A. Yes. Once a quarter, I'll check the

1 county treasurer's office website, and if there's
2 a balance, a tax balance that's owed, then it's
3 automatically paid.

4 Q. Do you ever find that there's a balance
5 that's already been paid?

6 A. Yes. Quite often the banks, through
7 their mortgage and insurance departments, they
8 kept paying the property taxes. So on the day
9 that it's due, if there's no tax balance that's
10 due, then there's nothing to pay.

11 MR. BOHN: Thank you, sir.

12 I have no further questions of this
13 witness.

14 THE COURT: Cross?

15 MR. BRENNER: Your Honor, I'd like to
16 publish -- I'd like to publish Mr. Haddad's
17 deposition transcript.

18 THE COURT: That's fine.

19 MR. BRENNER: Can we get the TV going?

20 THE COURT: You have to turn the TV on.

21 MR. BRENNER: And I'm going to need that
22 transcript.

23 May I approach?

24 THE COURT: You may.

25 MR. BRENNER: Looks like the TV got on.

1 We may have to do this the old-fashioned way.
2 It's just not turning on. Play around with it
3 later.

4 CROSS-EXAMINATION OF EDDIE HADDAD
5 BY MR. BRENNER:

6 Q. Mr. Haddad, do I understand your
7 testimony correctly, that you're saying the
8 prospects of litigation and the inability to get
9 title insurance were factors that you used in
10 determining how much to bid on a property?

11 A. No. I bid the next highest bid. So how
12 can you say that those factors affected me?

13 Q. So they had no -- the fact that you may
14 have had to file a suit -- did you believe you
15 were going to have to file suit?

16 A. No. No guarantees. I mean, it would be
17 crazy for a bank to argue that -- you know, that
18 they don't have to follow the law. NRS 116 has
19 been around since 1991 far as the --

20 Q. Hold on. Hold on. Simple "yes" or "no"
21 questions.

22 Let me ask it a bit differently.

23 Did you think that there was a
24 reasonable probability that you would have to file
25 litigation at the time you were purchasing these

1 properties?

2 A. Reasonable probability, yes.

3 Q. And did you factor that reasonable
4 probability into the price that you would bid at
5 auction?

6 A. No, sir.

7 Q. Did you factor the possibility of
8 litigation costs and fees into what you would bid
9 at a property?

10 A. I mean, are you asking me about the
11 maximum bid, or are you asking me about why I bid
12 as low as I bid? I bid as low as I bid because
13 that was the next available bid to make.

14 Q. I'm trying to clarify what your
15 testimony was earlier. All right.

16 And so just going back to the question,
17 did you factor in the reasonable possibility of
18 litigation costs and fees into what you would bid
19 on a property?

20 A. You're asking me about this particular
21 property or in general?

22 Q. If you remember this -- do you remember
23 this particular property?

24 A. I don't.

25 Q. So then let's talk about in general, and

1 why don't we talk about in 2013, at the time of
2 this sale.

3 A. So I guess the best way to answer that
4 would be, yes, it would factor into the maximum
5 that I would be able to pay on a property, but not
6 the minimum. I mean, the minimum is the minimum.
7 That's -- you know, whatever the next available
8 bid to bid is what I would have bid, you know.

9 Would it factor into the maximum? Yes.
10 Do I have that maximum out for you? I don't.

11 Q. And was -- again, you testified earlier
12 about the inability to procure title insurance
13 after purchasing these properties. That was your
14 testimony; correct?

15 A. Yes.

16 Q. And did that also factor into the
17 maximum that you would bid on these properties in
18 2013?

19 A. Let me put it to you this way: Right
20 around that time, I paid \$1,200,000 for an HOA
21 sale. Okay. I hope that tells you how confident
22 I was at the time that, you know, NRS 116 will be
23 followed to the tee.

24 Q. I'm not going to lie to you. It
25 doesn't.

1 The question is -- because you testified
2 about title insurance, and I want to make sure we
3 understand what the role was of the inability to
4 get title insurance. I want to just ask you that.

5 What in your mind was the role in 2013
6 of the inability to get title insurance when
7 purchasing these properties?

8 A. That it would take some time, but that
9 Nevada law will prevail. You know, and then my
10 job was to factor the time and the costs of
11 litigating into my maximum bid amount. Those
12 would have been additional inherent risks that,
13 you know, would not be required to factor in for
14 under the NRS 107 sales scheme.

15 Q. Did you have an understanding as to why
16 the title insurers would not give you title
17 insurance?

18 A. I would say so, yes.

19 Q. What was that understanding?

20 A. That understanding was that it hadn't
21 been decided yet by the Nevada Supreme Court.
22 That was the -- that was the explanation that was
23 given to me by the title -- by the title insurers.

24 Q. "It" being whether the sale extinguished
25 the first deed of trust?

1 A. That is correct.

2 Q. And does that -- you mentioned that
3 you've been able to get insurance in some matters
4 that have resolved either by settlement or final
5 judgment; is that correct?

6 A. Yes, correct.

7 Q. So safe to say that the title insurance
8 issue continues through today?

9 A. Yes. I would say it's finally starting
10 to get unwound, but it still remains an issue
11 today. Correct. I mean, here we are.

12 Q. So let me ask you this very directly.
13 Was the inability to get title insurance
14 a factor that went into the maximum bid you would
15 put on a property in 2013?

16 A. The maximum bid, yes. But we haven't
17 even come to the maximum bid here.

18 Q. I want to go over -- you've got your
19 deposition transcript in front of you.

20 MR. BRENNER: Judge, I don't know that
21 you need an extra copy.

22 THE COURT: Go ahead.

23 BY MR. BRENNER:

24 Q. I'm going to ask you if you recall
25 giving a deposition in this case. You're probably

1 going to tell me "no."

2 So instead I'm going to ask you, any
3 reason to believe you did not give a deposition in
4 this case?

5 A. No, I don't have any reason to believe
6 that.

7 Q. In all these depositions, you come in
8 and you're asked to give the same oath to answer
9 questions truthfully?

10 A. Yes. I wish they'd combine them
11 somewhere, somehow.

12 Q. And you do, in fact, answer all
13 questions truthfully?

14 A. To the best of my knowledge, yes.

15 Q. All right. If you could read along with
16 me on page 11, starting at line 5.

17 A. Okay.

18 Q. It says, quote:

19 "What factors do you use in determining
20 how much to bid on a property?

21 "Answer: "That's trade secrets. I'm
22 not going to discuss trade secrets."

23 A. Correct.

24 Q. Why is that trade secrets?

25 A. The maximum I'm going to bid on an

1 NRS 116 is a trade secret. All processes, all
2 methodology of how I derive at a maximum bid, I
3 felt like I'm not going to discuss. You could be
4 representing one of my competitors, and, you know,
5 don't want necessarily that information to get
6 out.

7 Q. But you have testified today that
8 litigation expense and title insurance were
9 factors?

10 A. As a general matter, yes, it is -- they
11 are definitely factors as to the maximum bid.
12 But, again, we haven't reached the maximum bid for
13 the sale that was held here.

14 Q. So there's other factors that you don't
15 believe you should have to testify about because
16 they're privileged?

17 A. I've testified that the costs and the
18 time of litigation is a factor.

19 Q. Any other factors?

20 A. Well, we talked about the factors that
21 are inherent in NRS 107 sales. Those are added on
22 top of it as well.

23 Q. Okay. What about the fact that there's
24 a deed of trust recorded against the property?

25 A. That would play into costs and time of

1 litigation.

2 Q. So the fact that there was a deed of
3 trust would factor into the maximum amount you
4 were willing to bid on a property?

5 A. It most definitely will. Now, to what
6 effect, that's what I was talking to you about
7 here, when I was mentioning trade secret.

8 Q. All right. Let's just -- I kind of dove
9 right in to where your counsel left off, but let's
10 take a step back for a minute.

11 You said you've been in the real estate
12 industry for 20 years. Have you been a broker
13 that entire time?

14 A. Yes.

15 Q. And there's required continuing legal
16 education, I believe, every year or two. I take
17 it you've complied with that every year?

18 A. Yes. Every two years.

19 Q. You've taken the exam and you passed the
20 exam?

21 A. Yes. Initially, I've taken the exam,
22 correct.

23 Q. You're the manager of multiple series
24 LLCs that own properties purchased at HOA sales?

25 A. Yes.

1 Q. You manage the trust assets for each one
2 of the related trusts?

3 A. Yes.

4 Q. That includes the trust at issue in this
5 case?

6 A. Correct.

7 Q. And the LLCs and trusts are parties to
8 hundreds of litigations in Nevada; is that fair?

9 A. Yes.

10 Q. And you said you've attended hundreds of
11 HOA sales?

12 A. Five days a week, 52 weeks a year.

13 Q. And I know you mentioned 107 sales.

14 Are there other types of foreclosure
15 sales where you purchase properties?

16 A. The 107 and 116 sales kind of go
17 together. And there's Clark County Treasurer's
18 sales couple times a year. Sheriff's sales quite
19 occasionally as well.

20 Q. And you talked a little bit about your
21 process for researching.

22 You would read the announcements in
23 Nevada Legal News; correct?

24 A. Yes.

25 Q. And you were aware that those

1 announcements always said the sale was without
2 warranty, expressed or implied?

3 A. Well, that's what they said. That
4 doesn't mean that that's -- you know, I mean, so
5 does NRS 107. Your clients, when they foreclose
6 on a property, they also say the same thing.

7 Q. Yeah. But I'm just asking what you
8 read.

9 You read that the sale was without
10 warranty, expressed or implied, in the publication
11 announcements in Nevada Legal News; correct?

12 A. That's what I've seen as standard
13 language, yes.

14 Q. Okay. And you said you've reviewed the
15 Clark County Assessor's website; correct?

16 A. Yes. Not always accurate, but ...

17 Q. You can see -- when you review that
18 website, you can see tax assessed value and you
19 can see other amounts that people have paid to
20 purchase title on that property; correct?

21 A. I've seen the values in this town go up
22 and down. So tax assessed values is not reliable.

23 Q. Okay. How about the fact you can see
24 what other people have paid for the purchase of
25 title to properties?

1 A. Again, irrelevant because it's not
2 something that can be relied upon.

3 Q. Irrelevant to you?

4 A. Yes, it would be irrelevant to me.

5 Q. All right. If I can get you to look at
6 Exhibit D. I'm sorry. Exhibit 3.

7 A. Back to the big book?

8 Q. Yep, the big one. Whenever you're
9 there.

10 A. Yes, I'm there.

11 Q. My understanding is you would not, as a
12 general practice, have gone and pulled a copy of
13 this deed of trust prior to bidding?

14 A. That's not correct at all.

15 Q. So as a general practice, you would have
16 pulled a copy of this deed of trust?

17 A. Yes. I potentially could have requested
18 a copy from customer service department.

19 Q. That was your standard practice?

20 A. Yeah. I mean, I would say so.

21 Q. No reason to believe that standard
22 practice wasn't followed here?

23 A. I mean, no reason to believe that
24 standard practice was not followed here.

25 Q. If I can get you to look at -- why don't

1 you look at the second page of the deed of trust.
2 It's BANA/Nolan-11.

3 Two things I want you to note. So you
4 see under Section F, it says, "Note means the
5 promissory note signed by the borrower and dated
6 December 9th, 2010. The note states the borrower
7 owes the lender \$164,032 and 00/100."

8 Do you see that?

9 A. Yes.

10 Q. So you would have seen that when you
11 pulled a copy of this document, consistent with
12 your procedure for doing so?

13 A. Sure.

14 Q. And then you see that it goes on to say,
15 "Borrower has promised to pay this debt in
16 regular, periodic payments, and to pay the debt in
17 full not later than January 1, 2041."

18 You would have seen that as well?

19 A. Yes.

20 Q. So you would have known that at the time
21 of the sale, there was approximately 28 years
22 before the maturity date on this loan?

23 A. Okay. That's fine. I've never seen a
24 deed of trust fulfilling -- you know, fulfill all
25 their obligations, but I'm sure they're out there.

1 Q. And then if you can look at the next
2 page, under 12, you see where there's a box
3 checked under "Riders," and you see the "planned
4 unit development" rider is checked?

5 A. Yes.

6 Q. What is a planned unit development
7 rider?

8 A. That is a rider that goes at the end of
9 the deed of trust that we used against your firm
10 and your bank in the SFR motion. And when you --
11 when the banks were arguing that, "Oh, well, no,
12 we don't have to pay the super priority," we said,
13 "Well, wait a second. Your planned unit
14 development rider says yes, you do."

15 So it's funny now that the banks are
16 actually trying to use this against us. But how
17 can I help you?

18 Q. I understand.

19 So you understand the planned unit
20 development rider gives the bank the right to pay?

21 A. The right, yeah. The obligation.

22 Q. And if I can get you to just look at
23 this planned unit development rider. It starts on
24 page 30.

25 And it says -- I'm going to look on the

1 first page. You see that we've got our property
2 address, 7510 Perla Del Mar Avenue. And you see
3 below that it says, "The property includes, but is
4 not limited to, a parcel of land improved with a
5 dwelling, together with other such parcels in
6 certain common areas and facilities as described
7 in the covenants, conditions and restrictions
8 filed on record that affect the property."

9 And then below that it says, "The
10 property is part of a planned unit development
11 known as Mandolin."

12 Do you see all that?

13 A. Yes.

14 Q. And if you look on the next page, 31,
15 under "PUD Covenants," Part A, it says, "Borrower
16 shall perform" -- first sentence under PUD
17 obligations is: "Borrower shall perform all
18 obligations under the PUD's constituent
19 documents."

20 And then the last sentence says,
21 "Borrower shall promptly pay when due all dues and
22 assessments imposed pursuant to the constituent
23 documents."

24 Do you see where I read from?

25 A. Yes.

1 Q. Okay. And if you go on the last page,
2 which is BANA 32, it says, "Remedies." And it
3 says, "If borrower does not pay PUD dues and
4 assessments when due, the lender may pay them."

5 Did I read that correctly?

6 A. Yes.

7 Q. When were you first aware of the
8 existence of a PUD rider as a common document in a
9 deed of trust for properties that are in an HOA
10 community?

11 A. I can't recall. Maybe 1980s.

12 Q. Safe to say that at the time you
13 purchased these properties at the sale, you were
14 aware of the planned unit development rider?

15 A. Yes.

16 Q. So you were aware that the bank at least
17 had the right to pay, if not the obligation to
18 pay, the lien?

19 A. Correct.

20 Q. I'm going to ask you a very simple "yes"
21 or "no" question or "correct" or "incorrect."

22 You did not ask NAS whether there was a
23 payment or offer of payment as to the
24 super-priority portion of the lien; correct?

25 A. I have asked in the past, yes.

1 Q. For this property, you did not ask NAS
2 whether there was an offer to pay or an attempt to
3 pay the super-priority portion of the lien?

4 A. I could have. I don't recall when it
5 was. I asked them until I was blue in the face,
6 and then I stopped asking thereafter. Since NAS
7 was one of the larger trustees, I must have asked
8 them more than the other trustees, but FD CPA.

9 Q. So when you asked them, who would you
10 ask and how would you do it?

11 A. The trustee's sale officer.

12 Q. So you would ask the auctioneer?

13 A. Yes.

14 Q. And you know that wasn't an employee of
15 NAS?

16 A. Sure. At times, yes, it was. And I
17 would call the office at times and also inquire as
18 well.

19 Q. All right. And I understand it's your
20 testimony that you did not save any records
21 related to the research that you did?

22 A. No. That's why I don't know if -- on
23 this particular instance if I asked or if it was
24 another one.

25 Q. You certainly don't have any

1 documentation showing that you asked that question
2 for this property?

3 A. No. But I know that there's
4 documentation out there for the FDCPA, because I
5 know that's what they were telling the banks.

6 Q. I'm not asking you about that. I'm not
7 asking you to -- we might get to that. All right.
8 We might get to what your understanding was. But
9 right now I'm just asking you the simple "yes or
10 no" questions.

11 Did you ask the HOA?

12 A. Yes. I believe even my attorney has
13 asked the HOAs in the past as well.

14 Q. Did you ask the specific HOA in this
15 case -- I want to be able to pronounce it right --
16 Mandolin HOA, whether or not there was a payment
17 or an offer to pay the super-priority portion of
18 the lien?

19 A. I don't recall.

20 Q. And you certainly don't have any
21 documentation stating that you asked this
22 particular HOA whether there was an offer or
23 payment on the super-priority portion?

24 A. I don't have any documentation.

25 Q. Did you ask the homeowner of this

1 particular property?

2 A. I did not make any contact with the
3 homeowner.

4 Q. Did you ask the record beneficiary
5 whether it had made any attempt to pay or a
6 payment of the super-priority portion of the lien?

7 A. I have in the past, yes.

8 Q. Did you ask in this particular property?

9 A. I don't recall.

10 Q. And you certainly don't have any
11 documentation setting forth that you asked;
12 correct?

13 A. Correct. But we can call right now and
14 see what kind of answer they give us if you'd
15 like. We have the 800 number.

16 Q. And you didn't ask anyone -- so you know
17 how to call them and ask if you wanted to?

18 A. Oh, yeah. Absolutely.

19 Q. You didn't ask anyone whether payment
20 had been -- you didn't ask anyone at all whether
21 payment had been offered or made by the holder of
22 the first deed of trust, at least that you can
23 remember, in relation to this property?

24 A. Yes. Yes, I have in the past.

25 Q. This property?

1 A. I don't recollect.

2 Q. Did you ask NAS, the HOA, or anyone, for
3 that matter, whether the HOA was intending to
4 foreclose on a super priority?

5 A. I have asked in the past as well, yes.

6 Q. How about this property?

7 A. I don't recall this particular property.
8 The answer that I always get, and it's very
9 routine, five days a week, 52 weeks a year, all
10 pertinent announcements shall be made at the time
11 of sale.

12 Q. Did you ask the HOA, the property
13 management company, or the community management
14 company, NAS, or anybody, whether the delinquency
15 being foreclosed on included assessments from
16 prior to the date of the notice of delinquent
17 assessment?

18 A. I don't recall.

19 Q. Is that a question you would normally
20 ask?

21 A. Yes, I would have asked -- I would have
22 asked in the past all of the trustees.

23 Q. And would you document that?

24 A. I don't have any documentation to that
25 effect.

1 Q. Would you have documented it at the
2 time?

3 A. If I would have asked the trustees, they
4 would have told me that all sales would be made at
5 the time of sale. If I would have asked at the
6 sale, I would have been told to be quiet, do not
7 disrupt the sale. All -- excuse me, all pertinent
8 announcements shall be made at the time of sale.

9 Q. Okay. Let me just go back to my
10 question.

11 Would you have documented it if you had
12 asked? Would you have documented that you asked
13 and documented the answer you were given?

14 A. No, I don't have any documentation.

15 Q. Now, you said you were told by the
16 trustees or the auctioneers to be quiet and do not
17 disrupt?

18 A. Well, yes, if anybody gets out of
19 line -- they have a list of properties that
20 they've got to go through. If they're selling 20,
21 30 properties, they've got to get going. You
22 know, if anybody tries to disrupt the auction,
23 please don't disrupt the auction. All
24 announcements shall be made. Listen for all
25 announcements.

1 Q. It's not like an old movie with a
2 wedding, where they say, "speak now or forever
3 hold your peace"? They don't give you that
4 opportunity?

5 A. I've never heard that before, so, no.

6 Q. So you can't -- so just to make sure
7 that we've drawn the whole picture since I gave
8 that bad analogy.

9 There's not an opportunity within the
10 auction for you to ask a question or disrupt, to
11 use the word you said the trustee would use?

12 A. No. I would listen attentively to all
13 announcements, and I would look at the county
14 recorder's office. In effect, that would be --
15 the proof is in the pudding. If anything was
16 recorded prior to the sale, it would have been
17 recorded and/or made at the time of sale.

18 Q. At the time that you purchased this
19 property, let's just say in 2013, you understood
20 that only a portion of the lien had the
21 super-priority status?

22 A. Yes.

23 Q. So you knew the sale could be on the
24 super priority, it could be on the sub priority,
25 or it could be on some combination of both?

1 A. No. It's either -- all sales start out
2 as full, with all -- the entire balance, unless
3 you subtract out the amount known as the super
4 priority. Then the only thing remaining to sell
5 would be the junior portion.

6 Q. Well, you've certainly seen
7 circumstances where notices fluctuate because the
8 homeowner's making payments along the way; right?

9 A. No. A homeowner -- a second mortgage
10 deed of trust is not allowed to pay instead of the
11 first mortgage. The first mortgage has to pay,
12 and it's got to be explicit. It's got to be
13 expressly stated that the payment is to be applied
14 in such a manner.

15 Q. I'm sorry. I know that was my question,
16 but I want to follow up.

17 What do you mean that it has to be
18 expressly stated that the payment has to be
19 applied in such a manner?

20 A. If Ocwen is the recorded deed of trust
21 holder, and Bank of America just all of a sudden
22 sends a check, who is Bank of America? They're
23 not of record. And if they just send a payment,
24 how is that to be applied?

25 Well, accounting methods, generally

1 accepted accounting principles, GAAP, says you
2 must apply the payments towards the earlier
3 balance first. You can't just arbitrarily apply
4 it to whatever payment that you want to apply it.

5 And nobody has the right to pay -- the
6 second mortgage holder cannot just pay super
7 priority. Has to pay the full amount.

8 Q. And so the Ocwen, assuming that it's the
9 first deed of trust beneficiary, has to say,
10 "Apply this payment to a certain place"? Is that
11 your understanding?

12 A. Yeah, absolutely.

13 Q. So being like -- if they were trying to
14 pay the super priority, they would say, "Here's a
15 check for X amount to pay the super priority"?

16 A. Yeah. You have to pay it on the -- you
17 know, all payments must be applied to the earlier
18 balance first; otherwise, the HOA loses their
19 right to collect under the statute of limitations.

20 Q. And you understood that a homeowner
21 could make payments against their delinquent
22 account. It just doesn't have to be a bank;
23 correct?

24 A. I don't know. That's between them and
25 the HOA if they have a payment plan. But

1 certainly they cannot pay instead of the bank --
2 instead of the first deed of trust holder. How
3 would that be relied upon?

4 Q. And you were aware -- we talked about
5 the affidavit of publication. You were aware that
6 the notice of sale and the foreclosure deed had
7 the "without warranty" language?

8 A. This is my valet ticket here at the
9 Golden Nugget. It has that "We're not responsible
10 for your car if anything happens to it." But we
11 all know they have insurance for that.

12 Q. Well, we're not suing them today. You
13 didn't bring them into court, so that will be a
14 dispute for another day.

15 I'm going to assume that your answer was
16 a yes, that you were aware?

17 A. Yes, I've seen that language, correct.

18 Q. I know that you've acted as a broker.
19 And I might highlight my lack of understanding of
20 the industry, but a broker is distinguishable from
21 an agent; correct?

22 A. Yes. Pretty much so, yes.

23 Q. Can you explain the distinction?

24 A. Manager.

25 Q. The broker is the manager. The agents

1 are the ones who go out and list and sell
2 properties?

3 A. Correct.

4 Q. Have you ever acted as an agent before
5 or only as a broker?

6 A. In my past, yes, I have.

7 Q. So you have listed properties. You've
8 represented buyers at properties; is that correct?

9 A. I have.

10 Q. And when you're doing those types of
11 transactions, would you agree with me that there's
12 inspections and due diligence periods, escrow
13 agents, title companies, title insurance company?
14 They're all part of the due diligence involved in
15 the process?

16 A. Whether I'm on the buyer's side or
17 whether I'm on the seller's side, I would
18 recommend any buyer go out and get an inspection.

19 Q. And none of those things that I
20 mentioned are attendant to an HOA foreclosure sale
21 such as the one in this case; correct?

22 A. Look, if I was looking for the grandest
23 product, I would go to a name brand store and get
24 it. But if I was looking to get a bargain, I
25 would go to Pic "N" Save or -- you know, I'd get a

1 dented can of soup or one that's missing a tag,
2 and I would expect to save money on that, right.

3 Q. I think I know the answer.

4 Is that a "yes"?

5 A. I'm sorry. If we can repeat the
6 question.

7 Q. The question is all of the things that
8 we went over that would be attendant, like in the
9 sales that you did as an agent, the inspections,
10 the due diligence, the contracts, the escrow
11 agents, the title insurance, the title reports,
12 those types of things, are not reflected in a sale
13 such as the one we had here?

14 A. Even sales pursuant to NRS 107 and 116,
15 if you were to put 100 warranties on a continuum,
16 there are certain warranties that we can depend on
17 because those are warranties as to compliance
18 issues. The trustees are supposed to follow
19 procedure. Anyone who is to be protected is to
20 follow procedure.

21 For example, a borrower can't come after
22 the sale and say, "Oh, no, I never intended for
23 this property to go to sale."

24 Hey, I don't know what you,
25 Mr. Borrower, and your bank, you know, conspired

1 behind the scenes or whether you have some kind of
2 disputes, but those certainly were not made
3 available to us. And if Nevada wants to be ready
4 for the next real estate bubble, and we don't want
5 to look like Sao Pao, Brazil, and we want to
6 recycle properties and make these communities look
7 beautiful, we have to give the third-party bidders
8 every opportunity to recycle these properties,
9 because that's exactly what we're -- what reliance
10 do we have if we go to sale and, you know, we
11 can't rely on the sales process.

12 Q. Did you hire --

13 A. Only -- I'm sorry -- only low bids would
14 be received at these auctions.

15 Q. Did you hire a property inspector to
16 inspect the Perla Avenue property prior to bidding
17 on it?

18 A. So under these sales, it's not possible
19 to go into the properties and to hire an
20 inspector.

21 Q. Did you use an escrow agent to hold
22 funds before paying for the bid price at the
23 property?

24 A. No.

25 Q. And you already said you did not -- you

1 were unable to get title insurance; correct?

2 A. Correct.

3 Q. Do I gather that you didn't even attempt
4 to get title insurance prior to purchasing this
5 property?

6 A. That is correct.

7 Q. At any time have you attempted to get
8 title insurance for this property?

9 A. No. I don't know if my attorney has. I
10 have not.

11 Q. And you talked about leasing out
12 properties that you're unable to get title
13 insurance for. That applies to this property?

14 A. Yes.

15 Q. Do you know what you leased this
16 property for?

17 A. I don't have that property record on me.

18 Q. Do you know if there's a tenant in it
19 right now?

20 A. I don't have that record on me. But
21 most likely, yes, unless there's a move-out.

22 Q. And you wouldn't know the name of the
23 tenant, I take it?

24 A. That's correct. I don't have that on
25 me.

1 Q. You wouldn't know how much rental income
2 you've received on this property?

3 A. I don't have that information on me.

4 Q. All right. You mentioned banks quite
5 often pay property taxes. Do you know if the bank
6 paid the property taxes in relation to this
7 property?

8 A. I don't have that information on me.
9 All that information can be made available if my
10 attorney says to do so. But, you know, after
11 paying back all of the repairs and maintenance,
12 all the attorney fees, all the taxes, all the
13 insurance, after paying the repairs, the
14 maintenance, water heaters, appliances, move-out,
15 squatters, I mean, it's not a profitable business.

16 Q. And if I ask you if you had record of
17 any of that occurring in this case, squatters,
18 maintenance, damage repair, anything like that, do
19 you have any knowledge of any of that actually
20 occurring in relation to this property?

21 A. I don't have that information on me.

22 Q. All right. You said 99 percent of the
23 time the properties are in dire need of rehab.
24 That was your testimony; correct?

25 A. I think I said 99.9 percent.

1 Q. And you don't have any information on
2 what, if any, rehab was required for this
3 property; is that correct?

4 A. No. But that information could be made
5 available.

6 MR. BRENNER: No further questions.

7 THE COURT: Mr. Bohn?

8 MR. BOHN: Thank you, Your Honor.

9 Redirect.

10 REDIRECT EXAMINATION OF EDDIE HADDAD

11 BY MR. BOHN:

12 Q. Counsel was asking you -- well, you
13 testified that it's not realistically possible to
14 inspect the property prior to foreclosure sale;
15 correct?

16 A. That is correct.

17 Q. And there is no escrow involved with a
18 foreclosure sale; correct?

19 A. No. The auctioneer requests to show
20 proof of funds, and they expect to get paid with
21 cashier checks at the time of sale.

22 Q. And there's also no due diligence period
23 to inspect the property or research the title at a
24 foreclosure sale; is that correct?

25 A. Outside of a 90-day notice of default

1 period and a 20-day notice of sale period, there
2 is no other due diligence period.

3 Q. And are all these factors that you
4 consider when determining how much to bid at a
5 foreclosure sale?

6 A. Yes.

7 MR. BOHN: I have no other questions.

8 MR. BRENNER: Nothing.

9 THE COURT: Thank you, sir. You can
10 step down.

11 THE WITNESS: Sorry for my lengthy
12 responses.

13 THE COURT: Mr. Bohn.

14 MR. BOHN: Your Honor, the plaintiff
15 would rest his case based on the testimony,
16 stipulated facts, and the admitted exhibits.

17 MR. BRENNER: I'm going to make a 52(c)
18 motion. Plaintiff has the -- it's plaintiff's
19 burden to establish that vis-a-vis the testimony.
20 It doesn't. In addition, the tender satisfied per
21 the stipulated facts. In addition, equities weigh
22 in my client's favor. That's all I'm going to
23 say.

24 And I would stipulate and agree to
25 deferral of that motion until after the close of

1 all the evidence.

2 THE COURT: Okay.

3 MR. BOHN: You want me to argue now or
4 at the conclusion of the case?

5 THE COURT: Argue at the end.

6 MR. BOHN: Thank you.

7 THE COURT: Who do you want to put on?

8 MR. BRENNER: Ms. Moses is waiting
9 outside.

10 Your Honor, I think what we're going to
11 try to do is get her done before lunch, if
12 possible. She's got childcare issues in the
13 afternoon. We've got three witnesses in the
14 afternoon, and then I think we wanted to return --
15 I think both of us were hoping we could return
16 tomorrow to finish closings, even if there is
17 extra time, just to gather thoughts.

18 THE COURT: That's fine.

19 MR. BOHN: That's correct. Yes.

20 THE COURT: Ms. Moses. That's who we're
21 looking for?

22 (Discussion off the record.)

23 THE COURT: Good morning, ma'am. Once
24 you get there, please remain standing, raise your
25 right hand and be sworn.

1 **THE CLERK:** You do solemnly swear the
2 testimony you're about to give in this action
3 shall be the truth, the whole truth, and nothing
4 but the truth, so help you God.

5 THE WITNESS: I do.

6 MS. WHELAN: Please be seated and state
7 and spell your first and last name for the record.

8 THE WITNESS: Susan Moses. S-U-S-A-N,
9 M-O-S-E-S.

10 THE COURT: Go ahead, Counsel.

11 DIRECT EXAMINATION OF SUSAN MOSES

12 BY MR. BRENNER:

13 Q. Ms. Moses, who is your current employer?

14 A. Nevada Association Services.

15 Q. What is your role with NAS?

16 A. I'm their custodian of records and
17 paralegal.

18 Q. And you also testify at depositions and
19 trials as a corporate representative for NAS; is
20 that correct?

21 A. I do.

22 Q. How long have you been at NAS?

23 A. Since June of 2009.

24 Q. And you're here in response to a
25 subpoena issued to NAS; is that correct?

1 A. Correct.

2 Q. About how many times have you testified
3 for NAS at deposition or trial?

4 A. At deposition, almost 600. And at
5 trial, maybe 16 or 17.

6 Q. Who is Chris Yergensen?

7 A. He is a former employee at NAS.

8 Q. Former in-house counsel?

9 A. Correct.

10 Q. Now, I understand that there was a
11 time -- well, let me back up.

12 Mr. Yergensen only recently left, within
13 the last few months; is that right?

14 A. September.

15 Q. Prior to Mr. Yergensen leaving, the two
16 of you would share duties for testimony at trial
17 or deposition; is that correct?

18 A. Correct.

19 Q. And am I correct that generally you
20 would testify about what happened in a collection
21 file, and Mr. Yergensen would testify about
22 policies and procedures?

23 A. Correct.

24 Q. Now, do I understand correctly that
25 there's been somewhat of a hole left at NAS

1 regarding who can testify about the policies and
2 procedures since Mr. Yergensen left?

3 A. Correct.

4 Q. Do I understand, because we've done this
5 a million times, that you would say that you've
6 done what you can to familiarize yourself with
7 policies and procedures, but you would still have
8 to defer to Mr. Yergensen as having superior
9 knowledge?

10 A. Correct.

11 Q. So as we've done many times in the past,
12 if I ask you a question and you believe it is
13 outside of your knowledge and that you would have
14 to defer it to Mr. Yergensen, as you know, he's a
15 witness later today, please let me know.

16 A. Okay.

17 MR. BRENNER: And, your Honor, what I
18 plan to do with this witness, just to give a
19 preview, is to ask that the witness not be excused
20 for all purposes until we have Mr. Yergensen
21 testify to make sure he can actually fill in those
22 blanks for NAS.

23 THE COURT: That's fine.

24 BY MR. BRENNER:

25 Q. Can you explain the general process for

1 how a referral of a delinquent account from an HOA
2 works.

3 A. Usually the HOA would send us a referral
4 by either fax or email. Most often it would be a
5 updated accounting ledger from the HOA or the
6 management company. Sometimes a delinquent
7 referral form would come with that also.

8 Q. And once the referral happens, NAS
9 handles all aspects of the nonjudicial foreclosure
10 and collections; is that correct?

11 A. Correct.

12 Q. NAS would prepare the notices, for
13 example?

14 A. Correct.

15 Q. NAS would handle the correspondence with
16 the homeowner or third parties regarding payments
17 on the delinquency?

18 A. Correct.

19 Q. And it would -- NAS would specifically
20 deal with the -- with a lienholder who wanted to
21 pay against the delinquency?

22 A. Correct.

23 Q. And if I can get you to look at the
24 exhibit binder in front of you. Exhibit Tab 37 is
25 the stipulated collection file.

1 A. 37? I'm sorry. 37, do you mean?

2 Q. Yes, I'm sorry. Exhibit Tab 37.

3 A. Okay.

4 Q. Is there something I'm still doing
5 wrong?

6 THE COURT: Is it on?

7 MR. BRENNER: It's on. I've got an
8 orange light here. Let me hit it again. There we
9 go.

10 THE COURT: Is there a button that says
11 "computer?" Made it work.

12 BY MR. BRENNER:

13 Q. All right. If I can get you to look on
14 the third page, which is 255, it says, "A consent
15 and authorization."

16 Is that a general consent to be able to
17 do collection in the communities as opposed to a
18 consent to do collections on a specific property?

19 A. Yes. This would be HOA-wide.

20 Q. All right. So if trying to figure out
21 when this particular delinquent file was referred,
22 what would we look at to figure that out?

23 A. If you look at the next page,
24 BANA/Nolan-256, that is an updated accounting
25 ledger from the HOA. In the bottom right-hand

1 corner, there's a receipt stamp. It looks like
2 November. I can't read the actual date.

3 Q. November 2011?

4 A. November 2011.

5 Q. And can I get you to look at page 260.

6 A. Okay.

7 Q. What is that?

8 A. This is the demand letter that would
9 have been sent to the homeowner.

10 Q. And why is it sent to the homeowner?

11 A. It's sent to the homeowner to make them
12 aware that they are past due.

13 Q. And what percentage of the time would
14 you estimate that the homeowner responds to this
15 letter?

16 A. I don't know about a percentage, but not
17 very often.

18 Q. Fair enough.

19 Do you see anything in the file that
20 indicates this homeowner was responsive to this
21 letter?

22 A. I'm looking at the status report on 448,
23 and it doesn't show that there was a response from
24 the homeowner. And I didn't see anything in the
25 file.

1 Q. Now, just so we're clear, the status
2 report is where you would record events that occur
3 on the file, such as a homeowner writing in or
4 homeowner calling in?

5 A. Correct.

6 Q. It could record other things, like
7 foreclosure activity by first deed of trust?

8 A. It would record any activities on the
9 account.

10 Q. Okay. Fair enough.

11 And I'm going to ask you the same set of
12 questions with relation to page 270, which is a
13 January 2017, 2012 letter.

14 A. Okay.

15 Q. What is this?

16 A. This is a cover letter that would
17 accompany the notice of delinquent assessment lien
18 on 271.

19 Q. Okay. And why is it sent?

20 A. This would alert the homeowner that a
21 notice of delinquent assessment lien was recorded
22 against the property.

23 Q. And did the homeowner respond to this
24 letter based on your review of the file?

25 A. Once again, I'm looking at the status

1 report on BANA/Nolan-448, and there's no response
2 from the homeowner stating that they -- that there
3 is any correspondence from the homeowner regarding
4 the notice of delinquent assessment lien.

5 Q. And, again, that's routine, that when
6 someone is not paying their HOA dues, they're also
7 not responding to you?

8 A. Yeah, most often.

9 Q. If I can get you to look at Exhibit
10 Tab 4.

11 A. Okay.

12 Q. Do you recognize that, and what is it?

13 A. This is the recorded copy of the notice
14 of delinquent assessment lien recorded January 4,
15 2012.

16 Q. This is one of three recorded documents
17 NAS would record prior to completing a nonjudicial
18 foreclosure; is that correct?

19 A. Correct.

20 Q. And am I also correct that this document
21 would not be supplied to a holder of a first deed
22 of trust?

23 A. It's only sent to the homeowner.

24 Q. The second notice is a notice of default
25 and election to sell; correct?

1 A. Correct.

2 Q. And the third notice would be a notice
3 of trustee's sale?

4 A. Correct.

5 Q. And the notice of default and election
6 to sell and the notice of trustee's sale you do
7 provide to the holder of the first deed of trust
8 as a matter of policy, at least?

9 A. To anyone with a recorded interest in
10 the property.

11 Q. All right. And with every additional
12 notice, there's additional costs and fees; is that
13 correct?

14 A. Correct.

15 Q. So when you have a nonresponsive
16 homeowner who isn't paying or contacting you to
17 work out a payment plan, we're always going to
18 see, as the notices progress, the balance get
19 higher and higher?

20 A. Most often.

21 Q. All right. And you're aware that the
22 notice of delinquent assessment lien says it's in
23 accordance with Nevada Revised Statutes and the
24 Association's declarations of covenants,
25 conditions, and restrictions?

1 A. Correct.

2 Q. As I understand it, NAS did not at any
3 time read the CC&Rs or take steps to ensure
4 compliance with them; is that correct?

5 A. We do not read the CC&Rs. We rely upon
6 the HOA to give us accurate information that they
7 have complied with the CC&Rs.

8 Q. And if the HOA -- so if the HOA doesn't
9 say you need to do this in order to comply with
10 the CC&Rs, NAS isn't independently going to do
11 anything?

12 A. Correct. We would not read the CC&Rs.

13 Q. And that's because you consider it the
14 HOA's job to do so?

15 A. I believe in our consent and
16 authorization, it says we rely upon the HOA to
17 abide by whatever they're supposed to abide by.

18 Q. So now looking at the delinquent
19 assessment lien, it says, the total amount due as
20 of today's date is 987.44.

21 Do you see that?

22 A. I do.

23 Q. And then it breaks out the late fees,
24 collection fees, and interest in the amount of
25 684.34. Do you see that?

1 A. 648.34?

2 Q. If I said it wrong, I apologize. You
3 said it right.

4 A. Yes.

5 Q. Am I correct that you can't simply
6 figure out the amount of assessments that are due
7 by subtracting the second number from the first?

8 A. Correct.

9 Q. And you would agree with me that
10 nothing, looking at the face of this document,
11 would tell you what day the delinquency started?

12 A. Correct.

13 Q. Nothing would tell you the amount of the
14 monthly assessments?

15 A. Correct.

16 Q. Nothing would tell you the number of
17 months in arrears?

18 A. Correct.

19 Q. And there's no statement in this
20 document that the sale -- or that the lien is
21 pursuant to a super priority?

22 A. There's nothing in the document that
23 discusses super priority.

24 Q. All right. Let's take a look at
25 Exhibit 7.

1 A. Okay.

2 Q. That's not the right exhibit. Hold on.
3 That's somebody else's handwriting.

4 Let's take a look at Exhibit 6.

5 A. Okay.

6 Q. All right. Do you recognize this and
7 what is it?

8 A. This is a recorded copy of the notice of
9 default recorded February 27, 2012.

10 Q. And it is among the recorded documents
11 that the HOA authorized NAS to record in relation
12 to this property?

13 A. Correct.

14 Q. And as we mentioned a moment ago, it's
15 the second recorded notice in the nonjudicial
16 foreclosure process; correct?

17 A. It is.

18 Q. And this sets forth a lump sum of
19 \$1,992.87; is that correct?

20 A. Yes.

21 Q. And as we went over a moment ago,
22 there's no super-priority language in here or any
23 method of extrapolating the number of months in
24 arrears and the amount of monthly assessments;
25 correct?

1 A. Correct.

2 Q. Also doesn't tell us the date the
3 delinquency began; correct?

4 A. Correct.

5 Q. And if you look on the second page --
6 and I highlighted it. Although it's super small
7 print, I'm sure you can see it on yours. This
8 states that "The sale is based on a breach of the
9 obligation for which the covenants, conditions,
10 restrictions recorded on July 6, 2006" -- it gives
11 the instrument number, and then it says, "has
12 occurred."

13 Do you understand what breach of
14 obligation there is that gave rise to this?

15 A. I believe it's the breach in the
16 homeowner not paying their HOA dues.

17 Q. All right. And then it goes on to
18 say -- well, let me just ask you this question.

19 You said that NAS never reviews the
20 CC&Rs; correct?

21 A. Correct.

22 Q. All right. So you wouldn't have
23 separately reviewed the CC&Rs prior to issuing the
24 notice of default because you never review them?

25 A. We would not.

1 Q. All right. So this is among the
2 documents you sent to the recorded beneficiary of
3 the deed of trust; correct?

4 A. This is one of the documents that we
5 would have sent to everyone with a recorded
6 interest in the property.

7 Q. And to be clear, you didn't send a
8 redacted form where you would take out the amount
9 of the lien or change any information; correct?

10 A. Not that I'm aware of.

11 Q. You would send the exact same copy that
12 got recorded to the holder of first deed of trust?

13 A. I believe so.

14 Q. And this notes -- I'll put it up so you
15 can see where I highlighted to make it easy to
16 find.

17 This says, "Upon your request, this
18 office will mail you a written itemization of the
19 entire amount you must pay."

20 Do you see that?

21 A. Yes.

22 Q. All right. If I can get you -- we're
23 going to come back to the notice of default, but
24 if I can get you to look at Exhibit Tab 37, page
25 267.

1 A. I'm sorry. 267?

2 Q. Yeah, 267.

3 A. Okay.

4 Q. Is this the written itemization that
5 would be provided if requested?

6 A. Can you move it up so I can see the very
7 bottom?

8 Q. Yeah.

9 A. So since time had lapsed, it probably
10 would not be this particular ledger, but it would
11 look like this, with the breakdown of the amounts
12 due at the time.

13 Q. Understood. Understood. And that's
14 really what I was getting at.

15 So I think you answered the question,
16 but just to be clear, it would come in this form.
17 The numbers might be different depending upon what
18 time it was requested?

19 A. Correct.

20 Q. And when you -- by the way, as the
21 custodian of records, you're also responsible for
22 gathering and producing all of the documents that
23 are produced in these cases?

24 A. I am.

25 Q. And you don't require a protective order

1 in order to produce them? You just produce the
2 documents; correct?

3 A. I'm sorry. Can you repeat.

4 Q. You don't require a protective order
5 governing the confidentiality of documents to
6 produce them; correct?

7 A. We just require a subpoena duces tecum
8 so I can produce the documents.

9 Q. Okay. Understood.

10 Now, we can look at this -- well, since
11 we're on here -- I'm going to go back to the
12 notice of default, but we see on this there's a
13 balance forward, and then it says, in parentheses,
14 "5.9."

15 Can you explain what that means. I can
16 make it easy. In other words, is that reflecting
17 a credit of \$5.90?

18 A. It does.

19 Q. So at the time this was referred, there
20 was a credit of -- how does that work? At the
21 time this was referred, there was a credit of
22 \$5.90?

23 A. Okay. Let me explain. So if you look
24 at BANA/Nolan-256, that's an updated accounting
25 ledger that came from the HOA or the management

1 company.

2 We started the account -- if you look on
3 this particular ledger, there's a line in the
4 middle of the page, and it says there's a credit
5 amount of \$5.90. So our balance forward would be
6 a credit of \$5.90.

7 Then NAS would take the rest of the
8 information past that, and we would put that into
9 our ledger so that we could calculate what was
10 owed to the HOA and then add any fees and costs.

11 Q. If we look at 256, it looks like there
12 were five months' worth of assessments in arrears
13 at the time of the referral?

14 A. It looks like it.

15 Q. And the same thing that's indicated on
16 267, the ledger we're looking at; correct?

17 A. Correct.

18 Q. All right. And it would also be true at
19 the time that the notice of lien was recorded,
20 they were five months in arrears?

21 A. I believe so.

22 Q. All right. Five months in arrears, less
23 the \$5.90?

24 A. Correct.

25 Q. All right. If we look back at the

1 notice of default -- let me put this document away
2 before I lose it.

3 Nothing in the notice of default
4 reflects the \$295 or, I guess to be fair, \$289.90
5 if we back out the 5.90?

6 A. We're on Exhibit 6; correct?

7 Q. Yes.

8 A. I'm sorry. Can you ask your question
9 again.

10 Q. Sure.

11 The amount of -- whether we use 289.9 or
12 295, neither of those numbers are set forth in the
13 notice of default as the amount of the outstanding
14 assessment, correct, at the time of the notice of
15 lien?

16 A. Correct.

17 Q. And in addition to the statement saying,
18 "Upon your request, this office will mail you a
19 written itemization of the entire amount you must
20 pay," here at the bottom it also says, "To find
21 out about the amount you must pay or arrange for
22 payments to stop the foreclosure or if the
23 property is in foreclosure for any other reason,
24 contact Nevada Association Services."

25 Do you see that?

1 A. Yes.

2 Q. And that is, in fact, the address for
3 Nevada Association Services; correct?

4 A. Correct.

5 Q. And the phone number as well?

6 A. Yes.

7 Q. And that was the expectation -- I
8 believe you already testified to that, but that
9 was the expectation that anyone who had questions
10 about the amount that must be paid was to contact
11 NAS?

12 A. Correct.

13 Q. Recognizing that this might be -- the
14 next area might be an area where you've got to
15 defer some to Mr. Yergensen, I'm still going to
16 see how far we can get. I'm going to ask you to
17 turn to Exhibit Tab 32.

18 A. Okay.

19 Q. Are you familiar -- this is the --

20 MR. BRENNER: Judge, it's a stipulated
21 fact. I don't have the stipulated facts right in
22 front of me, but the stipulation is basically that
23 this letter was, in fact, sent to NAS.

24 Q. Are you familiar with this type of
25 letter?

1 A. Yes.

2 Q. Typical letter that NAS would receive
3 from Miles Bauer in the 2012 timeframe?

4 A. It's one of them.

5 Q. Do you know when NAS started receiving
6 letters such as this from Miles Bauer?

7 A. I don't know exactly when.

8 Q. All right. Did NAS -- let me just take
9 a look at the letter with you.

10 This says, "This letter is in response
11 to your notice of default with regard to the HOA
12 assessments purportedly owed on the above
13 described real property. This firm represents the
14 interest of MERS as nominee for Bank of America
15 N.A., a successor by merger to BSE Home Loan
16 Servicing, LP, with regard to these issues -- BANA
17 is the beneficiary/servicer of the first deed of
18 trust loan secured by the property."

19 First of all, did I read that correctly?

20 A. Yes.

21 Q. Second of all, is it correct that NAS
22 understood that Miles Bauer was representing the
23 interest of the holder of the first deed of trust?

24 A. That they were representing Bank of
25 America?

1 Q. Yes. As the servicer or beneficiary of
2 the first deed of trust.

3 A. I believe so.

4 Q. In an effort to skip reading the rest of
5 the paragraphs, although you've got the letter
6 there and we can reference it if necessary, NAS
7 understood that Miles Bauer's position was, on
8 behalf of Bank of America, that the super priority
9 was a maximum of nine months of assessments and
10 could not include any costs and fees?

11 A. That's a question that Mr. Yergensen
12 would have to answer.

13 Q. All right. And let me -- I'm going to
14 have you read -- or I'm going to read with you one
15 portion of the letter. That's this middle, big
16 paragraph. It says, "Based on Section 2B, a
17 portion of your HOA lien is arguably senior to
18 BANA's first deed of trust."

19 A. We're on 113?

20 Q. Yes. The second page, yes.

21 A. I'm sorry. Where is that?

22 Q. Right here. If you look at the screen.

23 A. Okay. I'm sorry. Go ahead.

24 Q. "Based on Section 2B, a portion of your
25 HOA lien is arguably senior to BANA's first deed

1 of trust, specifically the nine months of
2 assessments for common expenses incurred before
3 the date of your notice of delinquent assessments
4 dated February 23rd, 2012."

5 We've agreed that that amount was 289.9;
6 correct?

7 A. Okay.

8 Q. No reason to dispute that; right?

9 A. No.

10 MR. BRENNER: It's a stipulated fact,
11 Your Honor, that NAS did not respond to this
12 letter.

13 Q. Ms. Moses, do you have an understanding
14 as to why NAS did not respond to this letter?

15 A. This is a letter that's in NAS's file.

16 Q. It's a stipulated fact that NAS didn't
17 respond.

18 Do you have an understanding as to why
19 NAS would not have responded?

20 A. So my question is is it in the file?
21 Because I need to know if it's in the file. I can
22 sit here and look through the file, or you can
23 tell me.

24 Q. Not to my knowledge it's not. It's not
25 in the file.

1 A. Okay. So if it's not in the file, then
2 I would say that NAS may not have received the
3 letter.

4 Q. Okay. Let's just go back to -- it's a
5 stipulated fact in this case that NAS received
6 this letter. So I want you to assume that.

7 Do you have an understanding as to why
8 NAS didn't respond to this letter?

9 A. Okay. So I'm looking -- if I can look
10 through the file and see if it's in there. You
11 just said that NAS doesn't have it in its file.

12 Q. So let me ask you this question: Do you
13 have an understanding as to NAS's policies and
14 procedures in 2013 as to why it would not have
15 responded to this letter?

16 A. We didn't receive it.

17 Q. Okay. Did NAS have a policy and
18 procedure in March of 2013 regarding whether or
19 not it would substantively respond to this letter
20 if it was received, as has been established in
21 this case by the stipulated facts?

22 A. Okay. So we do -- when we do receive
23 this type of letter for the notice of default, we
24 have in the past, and I've seen it in the files,
25 where we would send an email explaining that

1 without a homeowner's authorization, we would not
2 be able to provide information to a third party if
3 we received the letter.

4 Q. Was there a time when NAS would respond
5 to these letters without requiring an
6 authorization from the homeowner?

7 A. I don't know the exact date. I believe
8 it was sometime maybe in 2014.

9 Q. Okay. How about prior to that? How
10 about prior to 2012, was there a time period?

11 A. I don't know the exact time period.

12 Q. These are questions you would expect
13 Mr. Yergensen to know?

14 A. Correct.

15 Q. Would it be fair to say, just in case
16 Mr. Yergensen doesn't come, because I haven't
17 heard anything from him, but he's under subpoena.

18 A. Okay.

19 Q. Is it fair to say that there was a time
20 period when NAS would respond without
21 authorization and then it stopped and then it
22 started again?

23 A. Yes.

24 Q. And when it would provide a response to
25 Miles Bauer, it would look like the ledger we

1 looked at on page 267?

2 A. If they provided a homeowner's
3 authorization, we would have provided -- first of
4 all, we would have required them to go to our
5 online system so that could request a payoff, a
6 formal payoff, and then NAS would have responded
7 to the formal payoff.

8 Q. Well, the online system wasn't until
9 2014; correct?

10 A. No. We had our online system before
11 then.

12 Q. Let me just ask you this: True or
13 false, prior to 2012, would the response from NAS
14 have looked like the ledger at page 267?

15 A. Well, it would have been probably three
16 pages long. There would have been a ledger.
17 There would have been a breakdown of the amounts.
18 And there was a cover email that would also go
19 with that.

20 Q. Okay. And the breakdown of the amounts
21 would do things like list the 295 figure?

22 A. Okay.

23 Q. Or 289.10 if we subtract the 5.9?

24 A. Correct.

25 Q. And when that happened, Miles Bauer

1 would typically -- when I say "when that
2 happened," when NAS provided that breakdown, Miles
3 Bauer would issue a check; correct?

4 A. They would send a check.

5 Q. And what was NAS's practice as far as
6 how it would handle that check?

7 A. Most often, the check was not -- the
8 check came with conditions, as well as not being
9 for the amount due, as it said, to cure the
10 deficiency. So NAS would refuse the check.

11 Q. And that was the policy and practice of
12 NAS, to refuse the check?

13 A. If there were conditions and if it was
14 not to pay the amount in full, yes.

15 Q. And when you say "to pay the amount in
16 full," you mean if -- if Miles Bauer issued a
17 check and it was for less than the total balance
18 owed?

19 A. Well, because they were saying to cure
20 the HOA deficiency. So if they were trying to
21 cure the deficiency, you would expect that the
22 check would come in the total amount due.

23 Q. Any evidence in your file that NAS told
24 the HOA about receipt of a letter from Miles Bauer
25 requesting payoff information?

1 A. I can look through the file if you would
2 like.

3 Q. Well, let me say this: I didn't see any
4 information in there. Do you have any reason to
5 believe that that information would be in here?
6 And if so, where would you look?

7 A. Well, I'd just look through the file
8 around the March 16, 2012 date of the letter and
9 look to see if the letter was in the file.

10 Q. Okay. And if the letter is not in the
11 file -- I'm sorry.

12 What would the correspondence look like
13 to the HOA?

14 A. It would probably be in email format.

15 Q. Was it NAS's practice in 2012 to forward
16 letters such as this to the HOA for instruction?

17 A. I don't know if it was a policy to do,
18 without looking through the file. And if we
19 didn't receive the letter, then it's hard to say
20 whether or not it would have gone to the HOA.

21 I know that there were discussions about
22 these types of letters with the HOAs and with the
23 management companies. And it was more kind of in
24 a bulk -- these are the types of letters we're
25 getting. This is what we're going to do. So may

1 not be specific to this HOA with this type of
2 letter, but that HOAs were informed.

3 Q. But I think you said -- as far as
4 whether there was a policy, you said you didn't
5 know?

6 A. I didn't know if there was a specific
7 policy about having to send the letters, these
8 type of letters, on, if it was received.

9 Q. So that would be a question for
10 Mr. Yergensen?

11 A. Yes.

12 Q. If we can just go back to the notice of
13 default briefly.

14 A. In Exhibit 6?

15 Q. Yes.

16 A. Okay.

17 Q. When you provided the notice of
18 default -- well, first of all, do you agree with
19 me there's nothing in here that says, at least on
20 the face of this document, that in order to
21 release information to lienholders, the lienholder
22 must obtain an authorization?

23 A. I don't think there's language in there
24 that's like that.

25 Q. And you didn't send, like, a cover

1 letter or any separate correspondence when you
2 served the notice of default that explained that;
3 correct?

4 A. Correct.

5 Q. Could I get you to look at Exhibit Tab
6 34, please.

7 A. Okay.

8 Q. Now, this is the supplemental
9 declaration of covenants, conditions, and
10 restrictions for Mandolin.

11 NAS would not have reviewed these; is
12 that correct?

13 A. Correct.

14 Q. If I can still get you to take a look at
15 page 158 of this. And I'm going to ask you a
16 question about -- it says -- it's the portion I've
17 highlighted down here. It says, "Any payments
18 received by the association in the discharge of a
19 unit owner's obligations may be applied to the
20 oldest balance due subject to any limitations in
21 the act."

22 Did -- even though I know you didn't
23 read this, is that still the same procedure NAS
24 applied when it received payments?

25 A. When NAS receives payments, we apply

1 them to the total balance due.

2 Q. So you don't apply it to the oldest
3 balance?

4 A. We're not required to apply it to the
5 oldest balance. We're required to apply it to the
6 total balance. We're trying to collect on the
7 entirety of the lien. The HOA may have different
8 requirements when they receive a payment that NAS
9 has received or if they receive something from the
10 homeowner. But NAS is collecting on the entire
11 lien; therefore, we would apply the total amount
12 to the balance, the total balance, due.

13 Q. So you would not follow the CC&R?

14 A. We don't follow the CC&Rs, but we're not
15 supposed to apply it to certain things. That
16 would be the HOA having to do that.

17 MR. BRENNER: Judge, I've got a ways to
18 go.

19 THE COURT: You want to break now?

20 MR. BRENNER: We can. Let me tell you,
21 I've got about three more pages for this witness,
22 and I'm sure Mickey will have some questions. So
23 we can do one of two things. If you wanted to go
24 on, I could try to be done shortly, or we can
25 break now.

1 THE COURT: Let's take a break. Come
2 back at 1:00.

3 MR. BRENNER: What time do you have to
4 be done for your --

5 THE WITNESS: Just if I could leave by
6 2:15, 2:30 at the absolute latest.

7 THE COURT: Come back at 1:00. Thanks,
8 guys. Off the record.

9 (Whereupon, a luncheon recess was
10 taken.)

11 THE COURT: We're back on the record.

12 Ma'am, just be reminded you're still
13 under oath.

14 THE WITNESS: Thank you, Your Honor.

15 THE COURT: Go ahead, Counsel.

16 BY MR. BRENNER:

17 Q. Can I get you to look at Exhibit Tab 34.
18 It's the CC&Rs we previously looked at. I'm going
19 to ask you to look at page 203.

20 A. Okay.

21 Q. All right. Just go over a couple of
22 these. I'm going to start with 6.2.1.

23 "Introduction. This Section 6.2
24 establishes certain standards and covenants which
25 are for the benefit of the holders, insurers, and

1 guarantors of certain security interests. This
2 Section 6.2 is supplemental to, not a substitution
3 for, any other provisions of the governing
4 documents, but in the case of conflict, this
5 Section 6.2 shall control."

6 And then I'm going to go down to 6.23
7 and read that.

8 "Notice of actions. The association
9 shall give prompt written notice to each eligible
10 mortgagee and eligible insurer of" -- and if we
11 look at B, it says, "any delinquency in the
12 payment of common expense assessments owed by a
13 unit owner which remains uncured for a period of
14 60 days and whose unit is subject to a first
15 security interest held, insured, or guaranteed by
16 that eligible mortgagee or eligible insurer as
17 applicable."

18 And then another I want to show you, and
19 then I'm going to have a question.

20 Why don't I stop there, then I'll ask
21 the questions separately.

22 What, if anything, does NAS do as part
23 of its role to facilitate application of the
24 provision I just read regarding notice of actions?

25 A. That would be for the HOA to be

1 responsible for.

2 Q. So NAS does nothing independent?

3 A. Not that I'm aware of.

4 Q. So, for example -- well, let me just go
5 on to the next one.

6 Section 6.2.6. "Inspection of books.
7 The association must maintain current copies of
8 the declaration, bylaws, rules, the association's
9 articles of incorporation, books, records, and
10 financial statements of the association. The
11 association shall permit any eligible mortgagee or
12 eligible insurer or other first mortgagee of units
13 to inspect the books and records of the
14 association during normal business hours."

15 If I asked you the same question, would
16 your answer be the same?

17 A. I'm sorry. What's your question?

18 Q. What, if anything, does NAS do to
19 facilitate application of that provision?

20 A. Can I see it? Because you took it away
21 awfully fast.

22 Q. Oh, sorry. Sure.

23 A. I don't know what page we're on.

24 Q. Sure. It's 206.

25 A. 206.

1 Q. Same exhibit.

2 A. Okay. So 6.2.6, I believe, is for the
3 HOA.

4 Q. Okay. All right. And before, as part
5 of the policy of requiring authorization before
6 releasing information to the beneficiary of a
7 first deed of trust, since NAS doesn't review the
8 CC&Rs, is it also safe to assume that you don't
9 review the CC&Rs to see if there's a provision
10 authorizing release of information to the holder
11 of a first deed of trust?

12 A. We would rely on the HOA to review the
13 CC&Rs and know what's expected of them.

14 Q. And you don't know whether or not there
15 was a policy of forwarding requests for
16 information from Miles Bauer to the HOA; correct?

17 A. I'm sorry?

18 Q. You don't know whether there was a
19 policy to forward requests for information, like
20 the Miles Bauer letter we saw, to the HOA?

21 A. I don't know.

22 Q. All right. If I could ask you to take a
23 look at Exhibit Tab 37 again. And we're going to
24 look at page 323.

25 A. 323?

1 Q. Yes.

2 A. Okay.

3 Q. Let's look at 323 and 324.

4 What are these documents? Looks like
5 323 is a letter, and then 324 is authorization to
6 publish.

7 A. So 322, 323, and 324 would be sent as an
8 email to either the HOA or the management company.
9 It would have been sent regarding signing the
10 authorization to publish to allow NAS to move
11 forward with the recording of the notice of sale.

12 Q. Okay. So there's one email, which is
13 322, with 323 and 324 attached; is that correct?

14 A. Correct.

15 Q. All right. And is this also the form in
16 which you would have -- well, strike that.

17 Would you agree with me that as part of
18 this request for authorization, there's no request
19 for authorization to release information to Miles
20 Bauer?

21 A. I don't see anything like that.

22 Q. Okay. And do you know whether or not --
23 going back to the Miles Bauer letter, do you know
24 whether or not it would have been NAS's policy to
25 reach out to Mr. Nolan to see if he would

1 authorize NAS to release information?

2 A. He's the homeowner?

3 Q. Yes.

4 A. I don't think that there was a policy
5 that NAS would reach out. We required the third
6 party seeking the information to reach out to the
7 homeowner.

8 Q. So NAS would have required Miles Bauer
9 or Bank of America to reach out to the homeowner?

10 A. Correct.

11 Q. If I can get you to take a look at
12 Exhibit Tab 9.

13 This is the notice of foreclosure sale;
14 correct?

15 A. Correct.

16 Q. Do you agree with me -- and I'm
17 looking -- you can see where I've highlighted
18 here, although I don't expect you to be able to
19 read it off the screen. Just so you know where
20 I've highlighted.

21 Do you agree with me that the notice
22 says that the sale is going to be conducted under
23 the power of sale pursuant to those terms of those
24 certain covenants, conditions, and restrictions
25 recorded on July 6, 2006?

1 A. Yes.

2 Q. Okay. And this also notes that the sale
3 will be made without covenant or warrant, express
4 or implied, regarding, without limited to, title,
5 possession, or encumbrances or obligations to
6 satisfy any secured or unsecured liens?

7 A. Yes.

8 Q. And then it says the total amount due is
9 \$3,954.62; correct?

10 A. Correct.

11 Q. Similar to the questions I asked you
12 before, there's no breakdown of how that amount is
13 calculated on the face of this document; is that
14 correct?

15 A. Correct.

16 Q. And there's no information from which
17 the super-priority portion of the lien can be
18 extrapolated from the face of the document?

19 A. There's nothing on the document that
20 discusses super priority.

21 Q. And it doesn't say the date the
22 delinquency started or the number of months in
23 arrears or the amount of the monthly assessment;
24 correct?

25 A. Correct.

1 Q. And then if we can go back to Exhibit
2 Tab 37.

3 A. Okay.

4 Q. Page 363.

5 A. Okay.

6 Q. I'm going to ask you about the email at
7 the bottom. It's a policy question, so you'll
8 have to let me know if this is you or
9 Mr. Yergensen, but this email that says -- well,
10 let me read it, and then I'll ask the questions.

11 It says, "We have discovered that more
12 properties are now being sold at the foreclosure
13 auction to third-party investors. When this
14 happens, all parties get paid, including the HOA;
15 therefore, it is suggested that the HOA allow NAS
16 to take the property to foreclosure sale. If
17 there are any third-party investors interested in
18 buying the property, it will be sold to such
19 interested parties. If there are no third-party
20 investors at the sale and the HOA wants to give
21 further consideration to other possible sale
22 outcomes or options, NAS can then have the
23 foreclosure sale postponed to a later date.

24 "Again, it is the recommendation of NAS
25 to proceed with the sale in anticipation of a

1 third-party investor buying the property. Please
2 let me know how to proceed with each HOA sale
3 email I send you each week."

4 Was it NAS's policy to send the email
5 with this verbiage in every -- in relation to
6 every non-judicial foreclosure sale around this
7 time?

8 A. Around this time, yes.

9 Q. Okay. All right. And when we talk
10 about -- where it says when this happens, all
11 parties get paid, including the HOA, what parties
12 is NAS referring to?

13 A. NAS and the HOA.

14 Q. And that's it; right?

15 A. Correct.

16 Q. Not referring to the beneficiary of a
17 first deed of trust getting paid; correct?

18 A. Just NAS and the HOA.

19 Q. Okay. And you're essentially seeking
20 input and permission from the HOA about whether it
21 wants to go forward with the sale; is that
22 correct?

23 A. Correct.

24 Q. And in this particular instance, the HOA
25 asks for the sale to be postponed?

1 A. Correct.

2 Q. And you would agree with me that there's
3 nothing in this email advising the HOA about a
4 letter from Miles Bauer asking for super-priority
5 payoff?

6 A. There's nothing in this particular email
7 that discusses Miles Bauer.

8 Q. Okay. If I could get you to look at
9 pages 336. My questions are going to be about 336
10 to 337, what these documents illustrate and
11 whether they illustrate that the homeowner entered
12 into a payment plan.

13 A. I'm sorry. 336 to 338?

14 Q. I'm sorry. 336 to 376.

15 A. Okay. And what's your question?

16 Q. Do these documents reflect that the
17 homeowner made a payment of \$250 and entered into
18 a payment plan?

19 MR. BOHN: What page are you looking at?

20 MR. BRENNER: I was giving her 336 to
21 376.

22 Q. Okay. Take your time to go through it.
23 We can go through these one by one.

24 A. Okay. Say it again. Because you said
25 336.

1 Q. Let's just do this: Let's start with --
2 I probably said it wrong. Let's go to 366.

3 A. 366.

4 Q. I'm trying to do some cut-to-the-chase,
5 and in the process I think I'm creating confusion.

6 A. I understand. No problem. I just want
7 to make sure I'm looking at the right thing.

8 Q. Do you agree with me that 366 and 367
9 reflect that the homeowner made a payment of \$250
10 in December of 2012?

11 A. There is a \$250 payment. There's a
12 money order on 366, and NAS's receipt for that
13 payment on 367.

14 Q. All right. And if we look at 368, this
15 shows how it was disbursed, the \$250?

16 A. Correct.

17 Q. And you would agree with me it wasn't
18 all applied to the oldest balance of the
19 delinquency?

20 A. Well, you can't tell how it was applied
21 by looking at 368. It shows that NAS sent \$180 to
22 the HOA and that \$35 went to the title company and
23 \$35 went to the posting company.

24 If you look at NAS's updated accounting
25 ledger that would correspond with that payment,

1 you would be able to see that NAS applied it to
2 the running balance.

3 Q. We talked about that 295 or 289 figure
4 when the account initially came over. That would
5 not include North American Title Company fees or
6 priority posting and publishing fees; correct?

7 A. It's just whatever is on this
8 disbursements requisition.

9 Q. What would the North American Title
10 Company and priority publishing fees be for?

11 A. North American Title Company is the
12 title company that NAS used, so it would be for
13 recording documents. It would be for either a
14 title report or a TSG. I haven't looked through
15 the file to see which one we requested. Anything
16 that would be from the title company. The
17 priority posting and publishing is for posting and
18 publishing the notice of sale.

19 Q. All stuff that happens after the file is
20 referred to NAS?

21 A. Correct.

22 Q. All right. And if you look at page 375
23 and 376, and I guess 377 is the end of a signature
24 block on an email, but do these reflect that the
25 homeowner entered into a payment plan with the

1 homeowner association?

2 A. 375 is the request for a payment plan
3 from the homeowner, and 376 is the approval from
4 the management company for the HOA.

5 Q. I've got some questions for you about
6 the email from Carly Jared to Cindy Manning.

7 And Carly Jared was an NAS employee; is
8 that correct?

9 A. Correct.

10 Q. And the email says, "The above homeowner
11 is requesting a 12-month payment plan. The
12 balance as of November was \$3,954.62, but he did
13 just bring in a \$250 good faith payment. Please
14 advise if approved."

15 What is a \$250 good faith payment?

16 A. We require that the homeowner, I
17 guess -- I've heard it also called a "deposit."
18 So they're making a payment. When they request a
19 payment plan, they have to provide a payment with
20 the payment plan.

21 Q. And then the homeowner has -- it's a
22 12-month payment plan. Is that something the
23 homeowner requests, or is it NAS that says, "Your
24 payment plan would be 12 months"?

25 A. If you look at 375, towards the -- it

1 looks like it's the third sentence --

2 Q. I see.

3 A. -- the fourth sentence, "I recently
4 returned to work, and I am requesting to set up a
5 12-month payment plan."

6 Q. All right. And when you set up the
7 payment plan, does it also include the assessments
8 you anticipate would occur -- would be incurred
9 over the 12 months, or is it just prior balance?

10 A. I believe that they do include the
11 current assessments just so that the homeowner
12 doesn't have to make two separate payments, that
13 they're only making one payment per month.

14 Q. And it's standard that approval from the
15 HOA will be sought in this form, like an email?

16 A. Correct.

17 Q. Okay. If I could get you to look at
18 page 389.

19 A. Okay.

20 Q. Do you recognize this document?

21 A. This is the affidavit of publication.

22 Q. And I'm going to -- I've highlighted
23 this portion, which I know you can't read on the
24 screen, but I'll read it. It says, "The sale will
25 be made without covenant or warranty, expressed or

1 implied, regarding, but not limited to, title or
2 possession or encumbrances or obligations to
3 satisfy any secured or unsecured liens."

4 Did I read that correctly?

5 A. Yes.

6 Q. And this is what actually would get
7 published in Nevada Legal News?

8 A. Correct.

9 Q. All right. And if we could turn to
10 Exhibit Tab 10. What is Exhibit Tab 10?

11 A. Exhibit 10 is a copy of the recorded
12 foreclosure deed.

13 Q. All right. And if -- you can see where
14 I highlighted. It says that the deed is without
15 warranty, expressed or implied; is that correct?

16 A. Correct.

17 Q. And there's language referencing the
18 CC&Rs, where it states, "This covenant is made
19 pursuant to the powers conferred upon the agent by
20 Nevada or by statutes, the Mandolin governing
21 document CC&Rs, and that certain notice of
22 delinquent assessment lien described herein."

23 Did I read that correctly?

24 A. Yes.

25 Q. And I'm assuming if I ask you the same

1 question I did before, it's not going to be any
2 different, but I'll ask it anyway.

3 What, if anything, did NAS do to make
4 sure that its sale was pursuant to the CC&Rs at
5 this stage?

6 A. Nothing.

7 MR. BRENNER: No further questions at
8 this time.

9 THE COURT: Mr. Bohn.

10 MR. BOHN: Thank you, Your Honor.

11 CROSS-EXAMINATION OF SUSAN MOSES

12 BY MR. BOHN:

13 Q. Ms. Moses, my name is Michael Bohn. I'm
14 the attorney for plaintiff Perla Del Mar Trust and
15 Eddie Haddad.

16 At any time did -- does your file
17 reflect any correspondence from Bank of America or
18 their attorneys advising you that under the terms
19 of the CC&Rs, they're entitled to see the books
20 and records of the homeowner?

21 A. So I'm looking at NAS's phone notes on
22 BANA/Nolan-438.

23 Q. Which one? What page number?

24 A. At BANA/Nolan-438. Those are NAS's
25 phone notes. And I don't see any correspondence

1 from Bank of America for Miles Bauer. And on the
2 status report, BANA/Nolan-448, I didn't see
3 anything documented in there either.

4 Q. Is there anything in either of these two
5 documents which indicate that you received any
6 correspondence whatsoever from Miles Bauer or from
7 Bank of America or anyone else on behalf of Bank
8 of America?

9 A. There is not.

10 MR. BRENNER: Relevance. Stipulated
11 fact.

12 THE COURT: I'll allow it. Overruled.
13 BY MR. BOHN:

14 Q. Did you review this file before you came
15 in to testify today?

16 A. I did not.

17 Q. Okay. You had the opportunity to review
18 this file since you've been on the stand; correct?

19 A. Correct.

20 Q. And you haven't seen any correspondence
21 from Miles Bauer or Bank of America?

22 A. Not in the document --

23 MR. BRENNER: Relevance.

24 THE COURT: I think it's relevant.
25 Overruled.

1 MR. BOHN: Thank you.

2 BY MR. BOHN:

3 Q. Does your file reflect if any additional
4 payments were received from Mr. Nolan other than
5 that \$250?

6 A. I'm looking at BANA/Nolan-410. That's
7 NAS's updated accounting ledger for the date of
8 the sale. And if you look at the bottom portion
9 of this ledger, the only payment that we show
10 would be the \$250 payment from the homeowner for
11 the deposit for the payment plan. There were no
12 additional payments made.

13 Q. And if there was a payment plan
14 established, would that paperwork be handled by
15 NAS or by the HOA?

16 A. NAS.

17 Q. Is there a payment plan in this file?

18 A. On BANA/Nolan-381 is a copy of the
19 payment plan for the homeowner.

20 MR. BOHN: Thank you. I have no further
21 questions.

22 THE COURT: Any more?

23 MR. BRENNER: I will. One second.

24 REDIRECT EXAMINATION OF SUSAN MOSES

25

1 BY MR. BRENNER:

2 Q. Do I understand correctly that if you
3 received correspondence by mail, it was your
4 policy and procedure to place that correspondence
5 in the file?

6 A. Correct.

7 Q. You've testified, I think you said, in
8 600 different depositions. I'm assuming some
9 subset of that was with my firm, in Bank of
10 America cases, where it was alleged to have sent a
11 letter like the kind we saw in Exhibit 52; is that
12 fair?

13 A. Yes.

14 Q. And it's frequent that there's an
15 allegation by Bank of America that it sent the
16 letter, and then when you come to testify and look
17 at your file, you don't see the letter in your
18 file; is that fair?

19 A. Correct.

20 MR. BRENNER: Your Honor, for the
21 record, Stipulated Fact 17 is Bank of America --
22 BANA, through its counsel, Miles Bauer, sent the
23 letter dated March 16, 2002, to Mandolin Phase 3,
24 care of NAS, regarding payment of the
25 super-priority lien, the terms of which speak for

1 themselves and include a request for
2 identification of a super-priority portion
3 measured at a maximum of nine months of unpaid
4 assessments and offering to pay that amount upon
5 proof of same. And that cites to Joint Exhibit
6 32.

7 And then Stipulated Fact 18 is NAS
8 received Miles Bauer's letter but did not respond
9 based on its claim that doing so would violate the
10 FDCPA.

11 BY MR. BRENNER:

12 Q. Ms. Moses, if you do not have a copy of
13 this letter in your file, then it's safe to say
14 NAS breached its own policy by failing to put a
15 copy of the letter in its file?

16 A. I'm sorry. I'm not sure I understand
17 your question.

18 Q. Well, NAS's policy was to put a copy of
19 Exhibit 32 in the file; correct?

20 A. Correct. I don't see a copy of it in
21 the file.

22 Q. All right. And then going back to your
23 testimony about the payment plan and about 381, in
24 particular --

25 A. Okay.

1 Q. -- this is the payment plan you were
2 referring to?

3 A. Correct.

4 Q. This isn't signed. How would it have
5 been delivered to Mr. Nolan?

6 A. Probably by mail.

7 Q. And do you have anything in your file
8 that would indicate that one way or the other?

9 A. To indicate what?

10 Q. That it was delivered by mail.

11 A. It would have been sent by email. I
12 don't have any proof that it was received, if
13 that's what you're asking.

14 Q. Okay. And your testimony that it was
15 delivered by mail, you're basing that on practices
16 and procedures?

17 A. Correct.

18 Q. There's nothing in the file that would
19 specifically say that the practice and procedure
20 was followed in this case?

21 A. If you look at BANA/Nolan-448, which is
22 NAS's updated status report, there's an entry on
23 December 17, 2012 that says, "Payment plan
24 executed." The amount due is \$453. 1/3/2013
25 through 11/3/2013, with balance due 12/3/2013.

1 And since there was no response from the
2 homeowner, NAS sent the breach letter on
3 BANA/Nolan-382 explaining that the homeowner had
4 breached his payment plan.

5 And I don't have any correspondence or
6 notations in the status report saying that the
7 homeowner responded after the payment plan was
8 sent to him or the breach letter.

9 Q. What does it mean, "Payment plan
10 executed on 12/17/2012 per the status report"?

11 A. That the payment plan was sent to the
12 homeowner, and we're waiting for a response from
13 the homeowner.

14 Q. So "executed" doesn't mean signed?

15 A. No.

16 Q. And there's no follow-up call to the
17 homeowner to ask if they received a copy and
18 intended to return the payment plan?

19 A. There's nothing in the file on the phone
20 notes on BANA/Nolan-438 that the homeowner called
21 NAS regarding the payment plan or the breach
22 letter.

23 Q. I'm sorry. 438?

24 A. Yes. The phone notes.

25 Q. So this -- per the status report, the

1 payment plan document was sent on 12/17?

2 A. Yes.

3 Q. And there's no phone call to -- to
4 Mr. Nolan or other communication, after sending
5 the payment plan, about the payment plan itself?

6 A. Well, we sent a breach letter, and
7 there's no response from the breach letter either.

8 Q. Okay. And the payment plan as
9 structured, that would have gotten the delinquency
10 paid in full within 12 months?

11 A. I didn't look at it. The balance due
12 would have been 12/3/2013, so whatever was due
13 that date would have been -- there would have been
14 a balance.

15 Q. And that would have included NAS's
16 costs?

17 A. Yes.

18 Q. Okay. If you're in communication with
19 Mr. Nolan now, why not send Mr. Nolan a request
20 for authorization to release information to Miles
21 Bauer?

22 A. I don't know.

23 MR. BRENNER: No further questions.

24 THE COURT: Any more?

25

1 RECROSS-EXAMINATION OF SUSAN MOSES

2 BY MR. BOHN:

3 Q. Do you consider it to be NAS's
4 obligation to request the homeowner to provide
5 authorization for third persons to get
6 information, or is that the obligation of the
7 third person, such as Bank of America, to request
8 that authorization and provide it to you?

9 A. We -- our policy is that the third party
10 needs to provide the authorization to NAS to be
11 able to release information.

12 MR. BOHN: Thank you. No further
13 questions.

14 REDIRECT EXAMINATION OF SUSAN MOSES

15 BY MR. BRENNER:

16 Q. Your concern is NAS's own FDCPA
17 exposure; correct?

18 A. About what?

19 Q. About producing information to Miles
20 Bauer.

21 A. I'm sorry?

22 Q. Miles Bauer didn't say it was concerned
23 about violating the FDCPA in its letter, did it?

24 A. I don't believe so.

25 MR. BRENNER: No further questions.

1 MR. BOHN: Your Honor, I have no further
2 questions. But before you excuse the witness, I
3 haven't done this before, but I would orally move
4 to be relieved from Stipulated Fact Number 18,
5 which states, "NAS received Miles Bauer's letter
6 but did not respond based on its claim that doing
7 so would violate the FDCPA."

8 I've done a number of these trials.
9 I've seen a lot of these cases and a lot of the
10 letters. Sometimes they were ignored. But the
11 witness's testimony is that it doesn't appear to
12 have -- I know the statute and the case law is
13 that a letter sent is presumed to be received, and
14 that's what I agreed to this particular
15 stipulation on.

16 But it's this witness's testimony that
17 the letter is not in the file; therefore, she
18 believes it was not received. And in relieving
19 from 18, I'm not saying it was or wasn't received,
20 but the Court should consider the testimony of the
21 witness rather than the stipulated fact.

22 MR. BRENNER: Trying to hold back the
23 editorial on it. It's a stipulated fact, Judge,
24 and incredibly prejudicial to come here and change
25 it. The entire trial strategy is based around it.

1 I know for a fact Mr. Yergensen would come in here
2 and say -- because I've got his testimony saying
3 it -- that NAS routinely breached its own
4 procedure in failing to put these letters in the
5 file.

6 We wouldn't have called the witnesses in
7 this order. We wouldn't have asked the same
8 questions. We would have used different evidence.
9 We would have done things differently if this
10 wasn't a stipulated fact. I didn't have to
11 because it is a stipulated fact. It's that
12 simple.

13 THE COURT: So are you asking me to
14 reserve ruling on it until we have Mr. Yergensen's
15 testimony?

16 MR. BRENNER: No. I'm asking you to
17 absolutely deny it. Halfway through trial, after
18 we've set our strategy in motion based on reliance
19 on a stipulated fact, to try to pull the rug out
20 from under us, where it is a stipulated fact, is
21 ridiculously prejudicial. I would say it would
22 result in a mistrial.

23 MR. BOHN: It wouldn't be a mistrial --
24 my turn?

25 THE COURT: Sure.

1 MR. BOHN: All right. It wouldn't be a
2 mistrial. I don't see a jury sitting over here.
3 And it's not that extremely prejudicial.

4 There still is the presumption that it
5 was received, and I acknowledge that. And it
6 goes -- either way you slice it, it goes to one of
7 our claims or defenses that they didn't receive a
8 response.

9 Why didn't they do anything? Why didn't
10 they call? Why didn't they send us a follow-up
11 letter? Anything. That's from the Shadow
12 factors. Is their actions are inactions in
13 attempting to stop the sale. All I'm saying is
14 from the live testimony -- the live testimony
15 differs from the stipulated fact. You should
16 consider the live testimony.

17 You may decide to ignore it and go with
18 the stipulated facts. I'm just asking you to
19 go -- relieve us of the stipulated fact and
20 consider the live testimony.

21 MR. BRENNER: If I may put one more
22 thing on the record. This is one amongst many
23 things I would have done differently if we didn't
24 have that stipulated fact. I would have showed up
25 with a binder with about half a dozen trial

1 transcripts where it's admitted that despite it
2 being the practice, it routinely was a practice
3 that was ignored. I would have impeached the
4 witness with it.

5 But guess what, it didn't matter. I
6 didn't need to do that research, bill my client
7 for the time, or deal with that at all because it
8 was a stipulated fact in this case.

9 THE COURT: Okay. We'll let you go now.
10 Thank you.

11 (Witness excused)

12 THE COURT: You did stipulate to it.
13 Testimony is different. I don't know if there's a
14 good answer.

15 MR. BRENNER: If you're entertaining it,
16 Your Honor, then I would need to go -- we would
17 need to pause trial, and I would need to go
18 back -- I don't even have the materials here, the
19 tools here, to build the case, the full case, for
20 delivery. I haven't prepped on it because it was
21 stipulated.

22 I would need you to stop the trial now,
23 let me go back and retool things, and let me
24 prepare a case for delivery, if that's what we're
25 doing.

1 THE COURT: Even if I relieve you of the
2 stipulated fact, there's still a presumption that
3 letters sent are received. So the presumption is
4 that it was received, and for some reason it's
5 just not in the file.

6 How does that change anything?

7 MR. BRENNER: I don't know that it does.
8 But I would put on my full case about delivery if
9 that had been a contested fact. I would put on my
10 case. I would have that record, and it would be
11 presented.

12 To come here and say we are going to
13 erase a stipulated fact that the parties agreed to
14 beforehand, how could that not be prejudicial?
15 And we're truncating a trial when I have -- an SFR
16 trial is four or five days. We're truncating it
17 down to a day and a half. There's a reason. We
18 don't put the same evidence on.

19 THE COURT: I haven't even looked at the
20 stipulated fact until you guys referenced it in
21 the testimony. So are there other stipulated
22 facts that relate to that issue?

23 MR. BOHN: 17 and 18 are the only two.

24 THE COURT: 17 is not in dispute, is it?

25 MR. BOHN: No.

1 THE COURT: 17 is that the letter was
2 sent.

3 MR. BOHN: Correct.

4 THE COURT: You have a copy of the
5 letter. You actually referenced it. It's
6 Exhibit 32; correct?

7 MR. BOHN: Correct.

8 THE COURT: So the only issue is whether
9 or not the letter was received.

10 MR. BOHN: Correct.

11 THE COURT: So 17 we're not going to
12 have to deal with. 18, I'm just going to -- how
13 about we do this: I'm just going to presume that
14 the letter was received and not put in the file.

15 MR. BOHN: If that's your finding,
16 that's fine.

17 THE COURT: Whether it's a stipulated
18 fact or not, a letter sent is presumed received.
19 She said she didn't see it in the file, but that
20 doesn't mean that it wasn't received and not put
21 in the file. I'm just going to presume that she
22 got it.

23 MR. BOHN: Thank you.

24 THE COURT: What else? Do you have
25 another witness?

1 MR. BRENNER: Yep. Mr. Jung should be
2 here.

3 THE COURT: Good afternoon, sir. Step
4 all the way up on the witness stand. Once you get
5 there, remain standing, raise your right hand to
6 be sworn.

7 **THE CLERK: You do solemnly swear the**
8 **testimony you're about to give in this action**
9 **shall be the truth, the whole truth, and nothing**
10 **but the truth, so help you God.**

11 THE WITNESS: **Yes, I do.**

12 THE CLERK: Please be seated and please
13 state and spell your first and last name for the
14 record.

15 THE WITNESS: My first name is Rock,
16 R-O-C-K. Last name is Jung, J-U-N-G.

17 THE COURT: Thank you.

18 DIRECT EXAMINATION OF ROCK JUNG

19 BY MR. BRENNER:

20 Q. Good afternoon, Mr. Jung. What is your
21 present occupation?

22 A. I am an attorney.

23 Q. Nevada licensed?

24 A. Yes, sir.

25 Q. And how long have you been a

1 Nevada-licensed attorney?

2 A. Since 2008.

3 Q. Where are you currently employed?

4 A. I'm currently employed with the law firm
5 Wright, Finlay & Zak.

6 Q. And where were you employed in 2012?

7 A. 2012, I would have been employed with
8 the law firm Miles, Bauer, Bergstrom & Winters.

9 Q. And what were your dates of employment
10 with Miles Bauer?

11 A. Approximately October 2009 through March
12 2014.

13 Q. And was Bank of America one of your
14 clients during that period?

15 A. Yes, they were.

16 Q. What type of work did Miles Bauer
17 perform for Bank of America in relation to HOA
18 sales while you were at Miles Bauer?

19 A. In relation to HOA sales, generally, we
20 would seek to contact the HOA or its HOA sales
21 trustee to obtain information to allow us to
22 tender and satisfy any super-priority lien
23 obligations that might have existed in order to
24 protect the bank's first deed of trust lien
25 interest.

1 Q. And when you performed those services,
2 did you charge for them?

3 A. I did. We did, yes.

4 Q. And can you estimate for me. During the
5 period of time that you worked at Miles Bauer, the
6 number of times Bank of America hired Miles Bauer
7 to determine and pay super-priority liens?

8 A. Wow. During the four and a half years I
9 was there, I'd say several thousands. Good faith
10 estimate, probably about 6,000 or so.

11 Q. And can you walk me through the steps of
12 typically what would happen after you got one of
13 those referrals, what you would do next from
14 there.

15 A. Sure. After receiving a referral, we
16 would generally review the documents that came
17 with the referral, see who recorded the HOA notice
18 in question, and based on the information
19 contained in the notice, contact the HOA trustee
20 to request the information to satisfy any
21 super-priority lien obligations that might have
22 existed. And then it depends whether or not -- or
23 depended whether or not we received any
24 information back to allow us to do so.

25 Q. Okay. And would you reach out by way of

1 letter?

2 A. Yes. Correct.

3 Q. Okay. All right. And when you received
4 information back -- if you received information
5 back from the -- you would send these letters to
6 trustees, I take it, rather than the HOA?

7 A. Correct. Generally the entity that
8 recorded the notice in question and whose contact
9 information would have been contained in that
10 notice.

11 Q. Okay. And if the trustee responded by
12 providing -- let me back up.

13 What type of information were you
14 looking for specifically?

15 A. Specifically, we were looking for the
16 HOA common assessment amount to allow us to
17 calculate a super-priority amount.

18 Q. And what is the typical practice as to
19 how that information was provided to Miles Bauer?

20 A. Generally, it would be provided in a
21 payoff ledger form, which would have a breakdown
22 of fees, including assessments.

23 Q. Okay. Once you received that ledger,
24 what would be the next step?

25 A. The next step, assuming if we did

1 receive a ledger, we would calculate -- the
2 super-priority amount generally would be nine
3 months of common assessments.

4 Q. Were there also times where you made a
5 voluntary payment of additional amounts?

6 A. Yes.

7 Q. And that would be to cover some costs
8 and fees?

9 A. Correct. Reasonable fees and costs as
10 it pertains to a first deed of trust lienholder.

11 Q. And how would you get the money to pay
12 the super priority and whatever other portion?

13 A. My recollection is we would recommend
14 the amount we felt would satisfy any
15 super-priority lien obligations to the client, and
16 they would wire that amount.

17 Q. And then after the amount was wired,
18 what happened next?

19 A. We would then convert the wired amount
20 into a check and then hand deliver that check to
21 the HOA trustee in question.

22 Q. And would that check come with a cover
23 letter?

24 A. Yes, it would.

25 Q. What was the gist of the cover letter?

1 A. The gist of the cover letter was to
2 explain, one, what property it was pertaining to;
3 and, two, to remind them of our prior
4 correspondence, where we were requesting
5 information to allow us to satisfy any
6 super-priority lien obligations; and, three, the
7 check amount and how we came about calculating
8 that amount.

9 Q. All right. Who is NAS?

10 A. NAS is the -- stands for Nevada
11 Association Services. And from what I know,
12 they're a very large collection agent or HOA sales
13 trustee for a lot of HOAs in Nevada.

14 Q. Of those 6,000 retentions that you
15 testified about, are you able to estimate what
16 percentage of those might relate to NAS?

17 A. That's a good question. I could say --
18 first of all, I can say they're probably easily
19 the single most common HOA trustee I saw out of
20 those approximate 6,000 or so files. Number two,
21 if I were to make an estimate, maybe a third would
22 be NAS.

23 Q. All right. So hundreds, if not
24 thousands?

25 A. Correct.

1 Q. All right. And through those efforts,
2 did you become familiar with NAS's practices for
3 handling your attempts to request information and
4 ultimately issue a check?

5 A. I did. And I remember it changed over
6 the years of my employment with Miles Bauer.

7 Q. Can you describe what you mean.

8 A. Well, initially, what I recall, when we
9 first started sending these requests for payoff
10 information to satisfy any super-priority lien
11 obligations in late 2009, NAS would send us a
12 payoff ledger pertaining to the requested property
13 in question.

14 But I want to say in sometime 2012, NAS
15 changed that policy to no longer providing any
16 information in response to our request, citing
17 concerns of violating the FDCPA absent borrower's
18 written authorization and a payment of \$150 for
19 that information.

20 Q. So prior to 2012, they didn't -- NAS --
21 your understanding of NAS's practices was it
22 didn't require a \$150 payment or the
23 authorization?

24 A. Or the borrower's written authorization,
25 that's correct.

1 Q. Okay. At some point in time, did NAS
2 again change its procedures?

3 A. Yes, that's what I recall.

4 Q. Okay. Do you recall when they changed
5 their procedures again?

6 A. I don't. Maybe -- maybe late 2013-2014.
7 I might have left already, Miles Bauer, by that
8 time.

9 Q. So what would you do -- once NAS said,
10 "We won't give you information without the
11 homeowner or borrower authorization," what would
12 your next step in the process with NAS be?

13 A. The next step would be to look at our
14 database because, as I testified earlier, NAS had
15 previously provided us with payoff ledgers. So we
16 had a significant amount of past payoff ledgers
17 that were in reference to dozens, perhaps -- I
18 want to say dozens of different HOAs. So we would
19 look to see if we already had a past payoff ledger
20 on file pertaining to that same HOA in question.

21 Q. Okay. Can I get you to look at the big
22 exhibit binder in front of you. It's already
23 open. Look at Exhibit Tab 22.

24 A. Okay.

25 MR. BRENNER: Your Honor, for the

1 record, stipulated -- assuming it's still a
2 stipulated fact, Stipulated Fact 19 is BANA,
3 through its counsel, Miles Bauer, sent a letter
4 dated September 20, 2012 to the master
5 association, care of Silver State, offering to pay
6 the sum of nine months of common assessment
7 predating Mr. Nolan's default, requesting proof of
8 that amount, requesting information regarding the
9 master association sale, referring to Joint
10 Exhibit 22.

11 BY MR. BRENNER:

12 Q. Mr. Jung, can I get you to look at that
13 exhibit, Joint Exhibit 22.

14 A. Yes. Okay. I'm looking at it now.

15 Q. Do you recognize this document?

16 A. I do.

17 Q. That's your signature on the second
18 page; correct?

19 A. Correct.

20 Q. This is for the property located at
21 7510 Perla Del Mar Avenue; is that correct?

22 A. That's correct.

23 Q. And it was sent to Mountain's Edge
24 Master Association, care of Silver State Trustee
25 Services?

1 A. Correct.

2 Q. Okay. And this was that initial inquiry
3 letter asking for information about the super
4 priority?

5 A. Correct.

6 Q. And I want to focus your attention on
7 page 2, which is BANA 88. And there is the
8 paragraph that says, "Based on Section 2B" -- I'm
9 assuming you've seen it a million times, but I'll
10 slow down. Make sure everyone else can get there.
11 Put it up here, too.

12 It says, "Based on Section 2B, a portion
13 of your HOA lien is arguably senior to BANA's
14 first deed of trust, specifically the nine months
15 of assessments for common expenses incurred before
16 the date of your notice of the delinquent
17 assessment dated August 9, 2012."

18 And then I'm going to read the last
19 sentence. It says, "That amount, whatever it is,
20 is the amount BANA should be required to
21 rightfully pay to fully discharge its obligations
22 to the HOA per NRS 116.3102, and my client hereby
23 offers to pay that sum upon presentation of
24 adequate proof of the same by the HOA."

25 What were you looking for as far as

1 adequate proof?

2 A. Basically, an official account statement
3 or payoff ledger on the HOA trustees' letterhead
4 or some kind of documentation that would show it
5 came from the HOA trustee itself.

6 Q. And can I get you to turn to Exhibit Tab
7 23.

8 A. Okay.

9 MR. BRENNER: Your Honor, for the
10 record, Stipulated Fact 20, the master association
11 provided a statement of account showing the total
12 amount Mr. Nolan owed to the master association
13 through September 20, 2012, in response to Miles
14 Bauer's letter.

15 BY MR. BRENNER:

16 Q. Mr. Jung, looking at Exhibit Tab 23, is
17 this the type of proof that you were looking for?

18 A. Yes, that's correct.

19 Q. All right. And is this similar to the
20 information, even if not exactly in form, in
21 substance to what NAS would provide prior to its
22 FDCPA policy?

23 A. Correct, yes.

24 Q. All right. And was it your procedure
25 to -- when NAS provided that ledger, was it your

1 procedure to accept that ledger as proof that you
2 were looking for, as referenced in your letter?

3 A. That's correct.

4 Q. After you received this ledger, if I
5 understand correctly, your next step in the
6 process would have been to calculate an amount and
7 issue payment?

8 A. Correct. It would be to calculate the
9 amount and let the client know what our calculated
10 amount was.

11 Q. So let's take a look at Exhibit Tab 24,
12 if we can.

13 MR. BRENNER: Your Honor, it's also
14 stipulated that -- Stipulated Fact 22, Miles
15 Bauer, on BANA's behalf, delivered a check for
16 \$932 -- I'm sorry, delivered a \$932.83 check to
17 the master association, care of Silver State, on
18 or about October 12, 2012. This included 225 --
19 there's a typo -- 225, nine months' worth of
20 assessments, plus a voluntary payment of certain
21 collection costs and fees.

22 BY MR. BRENNER:

23 Q. Mr. Jung, what is Exhibit Tab 24 in your
24 words?

25 A. Exhibit 24 is what I call a cover letter

1 for the check that accompanied -- a cover letter
2 that accompanied the check that was meant to pay
3 off or satisfy any super-priority lien
4 obligations.

5 Q. And it's your signature on that letter;
6 is that correct?

7 A. Correct.

8 Q. And is a copy of the check at Exhibit
9 Tab 25 that would have gone with that letter?

10 A. Correct.

11 Q. How you would you deliver the check?

12 A. We would deliver the check via a runner.
13 I believe it was Legal Wings that did it for us.

14 Q. Do you understand correctly from your
15 testimony that the initial letter requesting
16 information would go by mail, and then if you had
17 the information to calculate an amount for a
18 check, the check would be delivered by runner?

19 A. Correct.

20 Q. And then if you look -- I'm going to ask
21 you how you calculated the \$932.83 amount. And if
22 necessary, to refresh your recollection, I would
23 point you to page 93 of Exhibit 24.

24 A. Well, at this time we were paying nine
25 months' worth of assessments plus reasonable fees

1 and costs. So it appears out of that \$932.83, I
2 believe \$225 was pertaining to an equivalent of
3 nine months' worth of assessments.

4 I think the HOA assessments for this HOA
5 was assessed on a quarterly basis as opposed to
6 monthly. So perhaps it was \$75 a quarter times 3
7 would give us the equivalent of nine months, or
8 \$225. The remainder of the balance would have
9 been what we estimated to be reasonable fees and
10 costs.

11 Q. And that would be based on the
12 information Silver State provided?

13 A. Correct.

14 Q. All right. And so, in essence, the
15 payment was for approximately four times what the
16 nine months' worth of delinquent assessments were?

17 A. Correct.

18 Q. And this was your typical procedure --
19 what we just viewed, with the initial letter, the
20 response, the check, this tracks your typical
21 procedure in dealing with these files; is that
22 correct?

23 A. That is correct.

24 Q. All right. If I can get you to look at
25 Exhibit Tab 30.

1 A. Okay.

2 Q. What is Exhibit Tab 30?

3 A. Exhibit Tab 30 is what I like to call
4 the initial letter to the homeowner. And so this
5 was just a letter that we wrote to the homeowner
6 of record -- homeowner of record of the deed of
7 trust, letting him know who we were, and that we
8 had received a copy of a notice of default by the
9 HOA or its trustee, and to let him know that he
10 needs to bring the HOA account current, or we
11 would have to advance funds to bring it current.

12 Q. And can I get you to look back now at
13 Exhibit Tab 28.

14 A. And, I'm sorry, just to step back for a
15 moment. We would have to advance funds to satisfy
16 any super-priority lien obligations, but that
17 doesn't mean we were satisfying any balance owed
18 by the homeowner.

19 Q. Understood.

20 Could I get you to look back at Exhibit
21 Tab 28, please.

22 A. Okay.

23 Q. And what is Exhibit Tab 28?

24 A. Exhibit Tab 28, it's a copy of a
25 screenshot of ProLaw, which was the case

1 management system that I used while at Miles,
2 Bauer, Bergstrom & Winters.

3 Q. If you had -- and do you agree with me,
4 this has the very notes about the activities that
5 are occurring on this file in chronological order?

6 A. Yes, I do.

7 Q. And it was your policy, practice, and
8 procedure to record the events in the form that
9 you have here in Exhibit 28?

10 A. That's correct.

11 Q. And if you had received a response from
12 the homeowner in response to Exhibit 30, your
13 September 10, 2012 letter, would that have been
14 reflected in ProLaw?

15 A. Yes, it would have.

16 Q. And what does a lack of a notation
17 regarding a response from the homeowner tell you?

18 A. It tells me that the homeowner never
19 responded to that letter we sent him.

20 Q. Was it always your practice to send that
21 letter to the homeowner?

22 A. Yes, it was.

23 Q. And was it normal that the homeowner
24 would not respond to that letter?

25 A. Yes. Meaning more 'often than not, I

1 would not receive a response from the homeowner.

2 Q. I'm going to ask you to turn to Exhibit
3 Tab 32.

4 MR. BRENNER: Your Honor, we've spoken
5 about the stipulated facts related to this one, so
6 I won't read those again.

7 Q. Mr. Jung, is this a letter you drafted?

8 A. Yes, I would have drafted this, with
9 approval from my managing attorney.

10 Q. And is that your signature?

11 A. Yes, it is.

12 Q. And what's the purpose of this letter?

13 A. The purpose of this letter is similar to
14 the other initial letter we looked at. And this
15 one is to the HOA trustee, Nevada Association
16 Services, and appears to be the same property. So
17 that leads me to believe there must have been two
18 HOAs, like a master and sub, and NAS is one of the
19 trustees for one of the two.

20 So, once again, we're just introducing
21 who we are, who we represent. And in response to
22 an NOD that was recorded by NAS, we would like
23 information to allow us to satisfy any
24 super-priority lien obligations.

25 Q. I know you're not going to remember with

1 precision, but focusing on March of 2012, could
2 you estimate for me how many letters like this you
3 had sent to NAS, be it in the hundreds or the
4 thousands or whatever number you would use?

5 A. By March? That was approximately my
6 halfway point of employment with Miles Bauer, give
7 or take. I'd say it would have been close to a
8 thousand.

9 Q. And, again, it was your practice, if you
10 had the information either from a current ledger
11 provided NAS or prior ledger, then to issue a
12 check to NAS?

13 A. Correct.

14 Q. And I apologize if we already covered
15 this. What was your understanding of what NAS
16 would do with that check that you issued?

17 A. Oh, they would always reject it unless
18 it was for the full amount.

19 Q. Were there times when you ever paid the
20 full amount?

21 A. There were a handful of times, yes.

22 Q. And were those circumstances you were
23 representing the first or the second or something
24 else?

25 A. The second, a junior deed of trust.

1 Q. Okay. What would happen, in your
2 experience, when you paid NAS the full amount on
3 behalf of a second?

4 A. Well, funny enough, a few times they
5 would just reject that and send it back just out
6 of reflex, out of habit. And we would have to
7 resend it and tell the runner specifically to tell
8 the receptionist, "No, no, this is for the full
9 amount that was stated on your NAS payoff ledger,
10 not just nine months or not just nine months and
11 fees and costs, so don't throw it away or don't
12 give it back to us, because you're going to want
13 it."

14 Q. All right. I just probably -- I'm just
15 going to ask the question.

16 Why did you need information from NAS in
17 this particular instance?

18 A. Why? We wanted to satisfy the
19 super-priority lien obligations. And based on the
20 notice of default that NAS recorded, we don't know
21 what the monthly assessment amount is or what the
22 super-priority amount is or any information to
23 allow us to calculate a super-priority amount.

24 Q. All right. And I believe you said that
25 your understanding as to why NAS wouldn't provide

1 the information was FDCPA?

2 A. That's what I recall NAS citing to,
3 their fear of possibly violating the Fair Debt
4 Collection Practices Act.

5 Q. Did they tell -- was that message given
6 to you globally, or would you get an individual
7 response in relation to each individual letter?

8 A. I believe it was globally. And then
9 they just stopped responding, period, even though
10 they were continuing to reject the check attempts.

11 Q. And in this particular file, is there
12 any reason why this would have differed from your
13 normal procedure of checking to see if you had a
14 prior ledger from when NAS was responding?

15 A. No. We would have -- if they weren't
16 providing a payoff ledger at this time of the
17 letter, March 16, 2012, we would have
18 automatically looked at the database, I like to
19 call it, archives and just see if we have a past
20 payoff ledger regarding this same HOA.

21 MR. BRENNER: No further questions.

22 THE COURT: Mr. Bohn.

23 MR. BOHN: Thank you, Your Honor.

24 CROSS-EXAMINATION OF ROCK JUNG

25

1 BY MR. BOHN:

2 Q. Good afternoon, Mr. Jung. Can I call
3 you Rock? I know you.

4 A. That's fine. No problem.

5 Q. All right. What was the next step that
6 you, at the Miles Bauer law firm, or Bank of
7 America would do once a check was rejected?

8 A. We would then do what I call monitor the
9 file, see if it did go to sale, or if it was
10 postponed. And that would be it.

11 Q. How you would you monitor the file?

12 A. Basically, looking at the recorder's
13 website, see if there was a sale or a subsequent
14 trustee's deed upon sale recorded.

15 Q. Did you have access to the Nevada Legal
16 News calendar and website?

17 A. I believe so, yes.

18 Q. Would you check that?

19 A. I personally wouldn't. I believe my
20 legal assistant would.

21 Q. Okay. So your office would monitor, and
22 you would know when a property was set for sale.
23 You would also know if a property was postponed;
24 correct?

25 A. Correct.

1 Q. Okay. Other than just watching it, did
2 your firm take any steps to pay the full lien
3 amount?

4 A. No.

5 Q. Did your firm take any steps to try to
6 get an arbitration to dispute the lien amount?

7 A. No.

8 Q. Did your firm attempt to get a
9 restraining order to determine what the proper
10 amount was?

11 A. No.

12 Q. Did your firm record any notices to let
13 the public know that there was a dispute as to the
14 amount?

15 A. No.

16 Q. I just asked you what you would do if a
17 check was rejected.

18 What would your firm do if your initial
19 inquiry letter sent by mail was not responded to
20 whatsoever?

21 MR. BRENNER: Asked and answered.

22 MR. BOHN: I believe my first question
23 was what would he do if the check was rejected. I
24 want the same line of questioning for if the
25 letter -- you didn't get a response to your letter

1 of inquiry.

2 MR. BRENNER: Relevance.

3 THE COURT: I'm going to allow it.

4 MR. BOHN: Thank you.

5 THE WITNESS: If we didn't receive a
6 letter response to our first letter, I believe
7 that's when we would look at our database or
8 archives to see if we had a payoff ledger from NAS
9 from the past, when they were providing payoff
10 ledgers, and whether or not it was a payoff ledger
11 for the same HOA as the HOA where we were now not
12 getting a response to our first letter.

13 BY MR. BOHN:

14 Q. Okay. And from this -- if you did not
15 have that information in the database, what was
16 your next step, if anything?

17 A. Our next step was to just consider it as
18 a rejected tender attempt, because we've done
19 everything we can. We reached out to NAS. They
20 stonewalled us. We looked in our archives to see
21 if we had past payoff ledgers when they weren't
22 stonewalling us. And if we didn't, then we had to
23 just treat it as a rejected file.

24 Q. And if there was no check sent, would
25 that be an indication in your mind that you didn't

1 have any archived information regarding this
2 particular HOA?

3 A. Correct.

4 Q. Okay. And would the answer still be the
5 same, you wouldn't file for arbitration, go for a
6 TRO, pay the full lien amount, or record any
7 documents disputing the lien amount; is that
8 correct?

9 A. That's correct.

10 Q. In any of the time that NAS or any other
11 collection agent would refuse to provide
12 information based on the FDCPA, would you provide
13 them with a copy of the deed of trust and plant
14 the parts of the deed of trust that gave you the
15 right to pay off the lien?

16 A. No.

17 Q. Would you ever research the CC&Rs to see
18 if the CC&Rs gave the bank any rights to review
19 the financial records?

20 MR. BRENNER: Privileged, Your Honor.
21 What Bank of America's counsel did in furtherance
22 of its retention is a privileged matter. He can
23 certainly ask if he told them about the CC&Rs.

24 MR. BOHN: Counsel specifically pointed
25 out the CC&Rs to Susan Moses and the sections of

1 the CC&Rs that gave the bank the right to this
2 information. My only question is did he ever
3 provide that -- did he review the CC&Rs to see if
4 there's such information provided to NAS.

5 MR. BRENNER: Asking counsel about any
6 of their mental impressions -- the original
7 question was research. But asking counsel about
8 any mental impressions they did in formulating
9 their strategy is clearly privileged.

10 This witness has only spoken about
11 facts, what he did, and what policies and
12 procedures were. Asking if you ever did this in
13 relation to formulating your course of work for
14 Bank of America, that's privileged.

15 MR. BOHN: Well, asking him if he ever
16 filed a lien or sent another letter or filed an
17 injunction would be the same thing.

18 MR. BRENNER: That is not. That's
19 factual. That's something that factually actually
20 happened.

21 THE COURT: The way I understood
22 Mr. Bohn's question was did he ever do the
23 research and send something to NAS. He's not
24 asking about whether he conveyed anything or sent
25 something to the bank.

1 MR. BRENNER: It's the first part of
2 the -- well, that would be attorney/client
3 privilege; right? It's no different than saying,
4 "Did you ever research" -- pick any genre of
5 litigation. "Did you ever research whether future
6 damages are recoverable under this type of
7 situation?"

8 If he wants to ask what was communicated
9 with NAS, that is fact. But the attorney's mental
10 impressions, including what they research --

11 THE COURT: The question, "Would you
12 ever research the CC&Rs to see if the CC&Rs gave
13 the bank any rights to review financial records,"
14 that arguably is a work product privilege, so I'll
15 sustain it on that.

16 He then said, "My question is did he
17 ever review the CC&Rs to see if there's such
18 information provided to NAS?"

19 MR. BOHN: Let me rephrase it.

20 THE COURT: You better rephrase it. I
21 mean, if it's work product, it is privileged.

22 BY MR. BOHN:

23 Q. Did you ever send to NAS a copy of the
24 CC&Rs or section of the CC&Rs that may have
25 permitted the bank, your client, to see the

1 financial records of the borrower or the
2 association?

3 A. Not to my recollection.

4 MR. BOHN: I have no further questions.

5 THE COURT: Any more?

6 MR. BRENNER: Briefly.

7 REDIRECT EXAMINATION OF ROCK JUNG

8 BY MR. BRENNER:

9 Q. Of the 6,000 or so referrals or HOA
10 super-priority matters that you were involved in,
11 do you have an estimate as to how many times the
12 HOA both provided information and accepted a
13 check?

14 A. Are we talking -- which HOA are we
15 talking about?

16 Q. Any HOA.

17 A. Both provided information and accepted
18 the check? Well, off the top of my head, there
19 were a few HOA trustees that would accept --
20 provide and accept, such as Hampton & Hampton. I
21 believe ACS, starting in 2013, and Alessi &
22 Koenig, also starting in 2013, would start
23 accepting checks for nine months' worth of
24 assessments.

25 But NAS, I don't ever recall them

1 accepting checks -- providing and accepting checks
2 unless it was for the full amount, like on a
3 junior deed of trust, as to which I testified
4 earlier.

5 Q. Of the ones that would accept, do you
6 think that that was more or less than half of the
7 6,000?

8 A. Much less than half.

9 Q. Okay. And you said you charged for the
10 services that you provided?

11 A. That's correct.

12 Q. And it's your testimony that you did not
13 file whatever percentage that is -- whether it's
14 5,000, or whatever, you didn't file 5,000 lawsuits
15 to enjoin foreclosure sales; is that safe to say?

16 A. Right. It was definitely closer to
17 6,000. We did not file 6,000 separate lawsuits.

18 Q. And you would have had to charge for
19 your services in relation to each of those; is
20 that fair to say?

21 A. Yes, absolutely.

22 Q. Same if you had filed for arbitration,
23 you would have charged for your services; is that
24 correct?

25 A. That is correct.

1 MR. BRENNER: No further questions.

2 MR. BOHN: No other questions.

3 THE COURT: Thank you, sir.

4 THE WITNESS: Thank you, Your Honor.

5 MR. BRENNER: The \$24,000 question, if
6 Mr. Yergensen is here.

7 THE COURT: Let's go see.

8 MS. OCHOA: Good morning, Your Honor.
9 Angela Ochoa on behalf of the homeowners
10 association.

11 THE COURT: You want to sit in? That's
12 fine.

13 Sir, come all the way up on the witness
14 stand. Once you get there, please remain standing
15 and raise your hand to be sworn.

16 **THE CLERK: You do solemnly swear the**
17 **testimony you're about to give in this action**
18 **shall be the truth, the whole truth, and nothing**
19 **but the truth, so help you God.**

20 THE WITNESS: **Yes.**

21 THE CLERK: Please be seated and please
22 state and spell your first and last name for the
23 record.

24 THE WITNESS: David Litt, L-I-T-T, III.

25 DIRECT EXAMINATION OF DAVID LITT

1 BY MR. BRENNER:

2 Q. Mr. Litt, famous last words, but I think
3 this is going to be brief.

4 What is your role with the Mandolin HOA?

5 A. I am their current community manager.

6 Q. And you understand that you're here in
7 response to the subpoena issued to the HOA itself?

8 A. Correct, yes.

9 Q. And how long have you been the community
10 manager for the Mandolin HOA?

11 A. Three years now.

12 Q. Do you know offhand how many homes are
13 in the community?

14 A. 179.

15 Q. And do you know who the current
16 collection company is that the community uses?

17 A. The current collection company is the
18 Clarkson Law Group.

19 Q. Have you ever testified before at trial?

20 A. No. No, sir.

21 Q. So in front of you, you've got an
22 exhibit binder. I'm going to ask you some
23 questions about documents that are within that
24 binder. You may not have seen these documents
25 before, and it may not matter for the purpose of

1 the questions.

2 A. Okay.

3 Q. But I'm going to ask you to first turn
4 to Exhibit Tab 24. I'm going to put it up on the
5 screen, too, which you might be able to use as a
6 reference for what I'm looking at. But trying to
7 read from the screen is probably going to be
8 impossible.

9 MR. BOHN: Which exhibit number?

10 MR. BRENNER: Exhibit Tab 4.

11 BY MR. BRENNER:

12 Q. Do you see at the top it says, "Notice
13 of Delinquent Assessment Lien"?

14 A. Yes.

15 Q. Do you have an understanding as to what
16 a delinquent assessment lien is?

17 A. That is -- yes. That should be monthly
18 assessments that are due to the association from a
19 homeowner.

20 And the homeowner fails to pay them, and
21 then you send them to collections; is that fair?

22 A. Yes. After a certain amount of time,
23 yes.

24 Q. And do you see that this is dated -- at
25 least the recorder's date, which is what I'm going

1 to go by here, small print, but it says 1/4/2012.

2 Do you see that?

3 A. Yes, that's correct.

4 Q. And do you see here at the bottom, where
5 says -- where it's signed by Shea Watkins of
6 Nevada Association Services, Inc.?

7 A. Yes.

8 Q. Was NAS acting as the HOA's collection
9 agent in January of 2012?

10 A. Yes.

11 Q. And was NAS authorized to record this
12 document?

13 A. I would not --

14 Q. I can withdraw the question and ask it
15 differently.

16 Any reason to believe NAS was not
17 authorized to record this document?

18 A. No.

19 Q. Oh, one other question.

20 Do you see where it says, "In
21 accordance" -- at the top, again, it's super small
22 print, but it says, "In accordance with Nevada
23 Revised Statute and the association's declaration
24 of covenants, conditions, and restrictions (CC&Rs)
25 recorded on July 6, 2006 as Instrument No.

1 000347BK" -- I'm not going to read all of that in.

2 It goes on to say the Mandolin has a
3 lien on the following legally described property.

4 Did -- let me go on to Exhibit Tab 6, if
5 I can.

6 Exhibit Tab 6 is a document known as a
7 Notice of Default and Election to Sell Under
8 Homeowners Association Lien. I'm going to ask you
9 to turn to the second page, and you'll see where
10 I've highlighted certain language referencing the
11 CC&Rs, including the language that says, "Hereby
12 declares a breach of the obligation for which the
13 covenants, conditions, and restrictions" -- again,
14 with all the recording information -- "has
15 occurred."

16 And then below that it says, "That by
17 reason thereof, the association has deposited with
18 said agents such documents as the covenants,
19 conditions, and restrictions and documents
20 evidencing the obligations secured thereby."

21 Did you see where I was referring to?

22 A. Yes.

23 Q. And do that with one more, Exhibit
24 Tab 9.

25 Exhibit Tab 9 is a notice of foreclosure

1 sale. Again, you'll see where I've highlighted
2 certain information. It says notice is given.
3 And then the portion I've highlighted says, "Under
4 the power of sale pursuant to those certain
5 covenants, conditions, and restrictions."

6 Here is my question for you: Did the
7 HOA expect NAS to abide by the CC&Rs that were
8 quoted in the notices that we just went over?

9 A. Yes.

10 Q. Did the association consider the task of
11 ensuring compliance with the CC&Rs its own or
12 NAS's?

13 A. This would be NAS's. They were the
14 professionals, and we leave them to do their
15 professional job.

16 Q. And that's why you hired the experts, if
17 you will?

18 A. Correct.

19 Q. Okay. If I can get you to look at page
20 34 -- I'm sorry, Exhibit Tab 34. And this is the
21 Supplemental Declaration of Covenants, Conditions,
22 and Restrictions for Mandolin.

23 Do you see that?

24 A. Yes.

25 Q. And I'm going to ask you to look on

1 page -- I'm going to confuse you because the CC&Rs
2 have page numbers, and we put our own Bates stamp
3 at the bottom. I'm going to go with the Bates
4 stamp at the bottom that's BANA/Nolan-203. And
5 I'm going to just read the portion that I've
6 highlighted, which you're going to see skips over
7 A because it's not relevant.

8 Section 6.2.3, "Notice of actions. The
9 association shall give prompt written notice to
10 each eligible mortgagee and eligible insurer
11 of" -- then going down to B -- "any delinquency in
12 the payment of common expense assessments owed by
13 a unit owner which remains uncured for a period of
14 60 days and whose unit is subject to a first
15 security interest held, insured, or guaranteed by
16 that eligible mortgagee or eligible insurer as
17 applicable."

18 My question for you, sir, is are you
19 aware of any reason NAS would have to refuse to
20 apply that provision?

21 A. No.

22 Q. And if I can get you to look, similarly,
23 at BANA 206.

24 Section 6.2.6, "Inspection of books.
25 The association must maintain current copies of

1 the declaration, bylaws, rules, and the
2 association's articles of incorporation, books,
3 records, and financial statements of the
4 association."

5 Let me just stop right there.

6 What type of information is in the
7 books, records, and financial statements of the
8 association? Well, let me ask you a more
9 pinpointed question.

10 A. Okay.

11 Q. So would delinquency information be
12 contained -- a specific homeowner's delinquency
13 information be something that's maintained in the
14 books and records of the association?

15 A. To a point. We would have their account
16 ledgers up to the point that the account went to
17 collections.

18 Q. All right. And this goes on to say,
19 "The association shall permit any eligible
20 mortgagee or eligible insurer or other first
21 mortgagee of units to inspect the books and
22 records of the association during normal business
23 hours."

24 Are you aware of any reason NAS would
25 have to refuse to honor this provision?

1 MR. BOHN: Objection. Relevance.

2 THE COURT: I'm going to allow it. I
3 understand where he's going.

4 THE WITNESS: No.

5 BY MR. BRENNER:

6 Q. If I can get you to look to page -- sir,
7 you are aware that there was an HOA foreclosure in
8 this case --

9 A. Yes.

10 Q. -- correct?

11 A. Yes.

12 Q. All right. I'm going to read to you
13 Section 6.3.11.

14 "Security interest. Any breach or
15 amendment of this declaration shall not affect or
16 impair the lien or charge of any security interest
17 made in good faith and for value on any unit
18 provided, however, that any subsequent unit owner
19 of such property shall be bound hereby whether
20 such unit owner's title was acquired by
21 foreclosure in a trustee's sale or otherwise."

22 My question for you, if you know, did
23 the HOA consider it a violation of the CC&Rs to
24 fail to pay assessments?

25 MR. BOHN: Objection. Calls for a legal

1 conclusion and relevance.

2 MR. BRENNER: I'm asking if he knows
3 what the HOA considered.

4 THE COURT: I'm going to allow it.

5 THE WITNESS: Could you repeat that.

6 BY MR. BRENNER:

7 Q. Sure.

8 Did the HOA consider a failure to pay
9 assessments a violation of the CC&Rs? If you
10 know.

11 A. I would say, yes.

12 Q. Does the HOA retain a file regarding the
13 foreclosure on Mr. Nolan's property -- and I can
14 give you the address -- at 7510 Perla Del Mar
15 Avenue?

16 A. Yes. Well, there's a homeowner file for
17 the property, yes.

18 Q. And have you seen that file?

19 A. Yes.

20 Q. If I can get you to turn to Exhibit Tab
21 32. This is a two-page letter, BANA/Nolan-112
22 through 113.

23 Let me ask you this: If NAS provided
24 the HOA a copy of this letter, would it have been
25 the HOA's procedure to place it in its files?

1 A. If -- repeat that. I'm sorry.

2 Q. Sure.

3 If NAS -- it's a stipulated fact that
4 this letter was sent to NAS and received by NAS.

5 If NAS had received this letter and then
6 sent it to the HOA, would it have been the HOA's
7 procedure to put this letter in its files?

8 MS. OCHOA: Objection. Form.

9 MR. BRENNER: She's not a party.

10 MS. OCHOA: I think we're going to have
11 a misunderstanding as to the time period at issue.

12 MR. BRENNER: Fair enough.

13 THE COURT: I understand that you're
14 here to help him, but I don't know that you get to
15 object when you're not a party to the case.

16 MR. BRENNER: Let me back up and ask
17 this, Your Honor. Fair point.

18 BY MR. BRENNER:

19 Q. Is it the HOA's procedure, when it
20 receives information about a property that's in
21 collections, to place that information in its
22 files?

23 A. Honestly, I do not know. When an
24 account is in collections, typically, the only
25 thing we're monitoring are payments being made.

1 So once a file goes to collections, we typically
2 don't have any contact with the owner or anything
3 like that. Everyone is directed to go through
4 NAS. So any type of correspondence, if we were to
5 receive it, would come from NAS.

6 Q. That's what I'm asking. If you received
7 correspondence from NAS. And I understand what
8 you're saying.

9 A. Yeah.

10 Q. Originated by a third party, but sent to
11 NAS, and then NAS sends it to the HOA. Would it
12 have been HOA's practice to place that in the
13 file?

14 A. If we received a letter, yes.

15 Q. And did you see a copy of this letter in
16 the file?

17 A. I honestly don't recall.

18 Q. Have you ever seen a letter that looked
19 like this before?

20 A. Actually, I haven't. I have not.

21 Q. So based on your review, fair to say you
22 didn't see anything suggesting that NAS asked the
23 HOA for input on how to respond to this letter at
24 Exhibit 32?

25 A. No.

1 MR. BRENNER: No further questions.

2 THE COURT: Cross?

3 MR. BOHN: I have no questions, Your
4 Honor.

5 MR. BRENNER: You're excused. That's
6 your job.

7 THE WITNESS: Oh, well, thank you.

8 MS. OCHOA: Thank you, Your Honor.

9 THE COURT: What is the guy's name we're
10 waiting for?

11 MR. BRENNER: Mr. Yergensen.

12 Why don't we take five. I can go
13 through my notes and fine tune things.

14 THE COURT: That's fine. Go ahead and
15 take a break. Off the record.

16 (Whereupon, a recess was taken.)

17 THE COURT: Come on in, sir. We're
18 going to have you step all the way up on the
19 witness stand. Once you get there, please remain
20 standing and raise your right hand.

21 **THE CLERK: You do solemnly swear the**
22 **testimony you're about to give in this action**
23 **shall be the truth, the whole truth, and nothing**
24 **but the truth, so help you God.**

25 **THE WITNESS: I do.**

1 THE CLERK: Please be seated and state
2 and spell your first and last name for the record.

3 THE WITNESS: I'm Chris Yergensen.
4 C-H-R-I-S. My last name, Y-E-R-G-E-N-S-E-N.

5 THE COURT: Thank you, sir.

6 DIRECT EXAMINATION OF CHRIS YERGENSEN
7 BY MR. BRENNER:

8 Q. Mr. Yergensen, I understand that up
9 until about September, you were in-house corporate
10 counsel for NAS; is that accurate?

11 A. Yes.

12 Q. And you started in 2013?

13 A. 2013.

14 Q. And, let's see, what were your duties as
15 corporate counsel?

16 A. I evaluated all legal issues relating to
17 the company.

18 Q. And in relation to providing testimony
19 on behalf of NAS, you've testified hundreds of
20 times; is that correct?

21 A. Yes, correct.

22 Q. And what was the typical division of
23 labor between you and Ms. Moses?

24 A. Ms. Moses was a paralegal. She really
25 dealt with the file, specifics of the file,

1 paperwork.

2 Q. And you would testify about matters of
3 policies and procedures?

4 A. That is correct.

5 Q. All right. And how did you become
6 familiar with NAS's policies and procedures to
7 testify?

8 A. Well, prior to my employment, I worked
9 for Red Rock Financial Services, which is also a
10 collection agency that collects for homeowners
11 associations as well.

12 Most collection agencies that devote
13 their business to collecting for homeowners
14 associations, their policies are very similar. I
15 also -- when I started with NAS, I just became
16 familiar with the policies that they had prior to
17 my employment.

18 Q. Are you familiar with NAS's policies and
19 procedures from between 2010 and 2014 with respect
20 to collections in nonjudicial foreclosures?

21 A. I am.

22 Q. Same question with respect to the
23 handling of recorded notices.

24 A. Yes.

25 Q. Same question with respect to the

1 procedures for accepting payments on delinquent
2 accounts.

3 A. Yes.

4 Q. Same question with respect to accepting
5 payments from holders of a first deed of trust.

6 A. Yes.

7 Q. And same question with respect to
8 handling requests for information about and
9 payments toward the super-priority portion of a
10 lien.

11 A. Yes.

12 Q. And are you familiar with the law firm
13 of Miles Bauer?

14 A. Yes.

15 Q. And how are you familiar?

16 A. I became familiar with them in 2010,
17 when they first notified me of their legal
18 position with respect to some of the questions you
19 just asked me.

20 Q. I'm going to ask you a couple -- how
21 many times have we done this now? 10? 15?

22 A. Too many times.

23 Q. You know what I'm going to ask you. And
24 I'm going to go back to the 2009-2010 timeframe in
25 minute. But this is a copy of the letter from

1 Miles Bauer to NAS at Exhibit Tab 32.

2 Do you recognize this letter?

3 A. Yes.

4 Q. And how would you describe this letter?

5 A. Typically, Miles Bauer would send two
6 letters in their legal work for the financial
7 institutions. The first letter was typically a
8 letter outlining what their position of what they
9 believed the super priority was and then asking
10 for certain information.

11 Q. And what was your understanding of the
12 information they were seeking?

13 A. They were just looking for information
14 with regard to how to -- financial information, so
15 that they could calculate under their legal
16 position what the super-priority amount was.

17 Q. Was it your understanding that Miles
18 Bauer would typically accept a ledger as that
19 information?

20 A. Correct. And NAS prior, to about 2012,
21 would supply a simple accounting ledger that it
22 would have supplied to the homeowner. And in that
23 accounting ledger, it had information that they
24 needed.

25 Q. And let me put that up real quick. Give

1 me one second.

2 So this is Exhibit Tab 37, page 267.
3 You can probably look up on the screen. You're
4 welcome to turn to it too. But my question is
5 going to be is this a typical form of the ledger
6 that Miles Bauer would be provided prior to 2012?

7 A. That is NAS's ledger. So NAS, acting on
8 behalf of the association, would get an accounting
9 ledger from the HOA, combine it with its fees and
10 costs into one ledger. So typically NAS would
11 give that -- sometimes NAS would just simply give
12 the ledger that came from the association.

13 Q. All right. And you said those requests
14 from Miles Bauer started coming in around 2010?

15 A. Yes. January.

16 Q. Safe to say that by 2012, NAS would have
17 seen hundreds of letters like the one at Exhibit
18 Tab 32 on the screen?

19 A. Yeah. My personal communication with
20 Miles Bauer, there was -- yeah, there were many
21 communications, yes.

22 Q. And it was NAS's policy to put any
23 correspondence received by mail in the file; is
24 that correct?

25 A. NAS's file was any letter that came to

1 its office would be -- usually there was a stamp
2 received with the date on it, and it was filed in
3 that particular collection file.

4 Q. And we've had you now at trial multiple
5 times where you've seen that policy was not
6 followed?

7 A. Absolutely. There were hundreds of
8 thousands of letters received yearly.
9 Occasionally some letters didn't make it into the
10 file, got into the wrong file. So, yes, you're
11 correct.

12 Q. And so essentially, the policy existed,
13 but due to human error or some issue, it wasn't
14 followed?

15 A. And typically with the Miles Bauer
16 letters, and as I have testified before, because
17 of the routine nature, I just think that, to some
18 degree, some of the employees at NAS got a little
19 bit lazy.

20 I mean, it was the same form letter
21 every time. So you see occasionally that letter
22 didn't make it particularly to the collection file
23 because it just fell on deaf ears by 2014 for
24 sure.

25 Q. And even by 2012, you had gone through

1 the same song and dance a million times, where you
2 got the letter, even if you provided the
3 information or Miles Bauer got it, and you got a
4 check and it was going to be with the letter, that
5 you would reject; correct?

6 A. Yeah. There was always a two-part
7 process with Miles Bauer. One was an
8 informational letter, and then the second letter
9 was usually a letter accompanied with a check.

10 Q. In 2012, was it the policy and procedure
11 to have somebody read the letter, like read it
12 from top to bottom, or was it more like a glance,
13 and it's the same letter, so it gets the same
14 treatment?

15 A. Well, in 2012 -- so late 2011, NAS, as
16 well as most of the collection agencies in
17 southern Nevada, made it clear to Miles Bauer that
18 they would not be responding to that information
19 request unless Miles Bauer produced written
20 consent of the homeowner.

21 So you see letters by mid-2012, 2013,
22 you see those letters fell on deaf ears more
23 because Miles Bauer knew that they were not going
24 to receive a response because of that policy.

25 Q. Just to be clear of the "theys" that

1 we're talking about, Miles Bauer wasn't going to
2 receive a response from NAS because it was aware
3 of NAS's policy.

4 Is that your understanding?

5 A. That is correct, um-hum.

6 Q. All right. Safe to say that when these
7 homeowners are in default, they often weren't
8 responding to NAS either; correct?

9 A. Yeah. Most of them -- well, you want my
10 opinion? Most of them were investors. If you
11 look at -- most of the houses where -- nobody
12 lived there. Yeah. If the homeowner was not
13 paying the association dues very -- it was highly
14 likely that the homeowner was not going to respond
15 to any letters that NAS sent to that homeowner,
16 yes.

17 Q. Did NAS have any reason to believe that
18 the homeowner would be more responsive to Miles
19 Bauer?

20 A. I have no -- I don't know.

21 Q. Fair enough.

22 And NAS did not review the CC&Rs to see
23 if the CC&Rs contained the homeowner's
24 authorization to release information; correct?

25 A. No, NAS did not review the CC&Rs.

1 Q. NAS considered that the obligation of
2 the homeowners association?

3 A. Correct. NAS is not a law firm. Other
4 than myself, I'm not so sure any employee would
5 have understood the first page of the CC&Rs. So,
6 you know, generally speaking, the CC&Rs was
7 something that NAS relied upon the homeowners
8 association and its general counsel to give advice
9 with respect to any legalities of the CC&Rs.

10 Q. And when NAS received a letter like
11 this, it did not have -- a letter like this being
12 Exhibit Tab 32, it did not have a policy whereby
13 it would forward a copy of the letter to the HOA;
14 correct?

15 A. By that time, no.

16 Q. And it didn't have a policy where it
17 would ask the HOA for input on the decision not to
18 provide information in response to the letter?

19 A. Correct. The letter came to NAS only,
20 at least as far as I know. It's usually addressed
21 to NAS.

22 Q. And I guess it sums up all questions to
23 just ask this: NAS would not have provided the
24 letter to the homeowners association?

25 A. NAS did not have a policy to forward

1 that letter to the homeowners association.

2 Q. And if it did, we would expect to see
3 evidence of that in the file?

4 A. That is correct.

5 Q. You understood that Miles Bauer was
6 attempting to pay the super-priority portion of
7 the lien, whatever that may be?

8 A. In this letter? I think there is some
9 reference to that, that they would like to pay it
10 off. Give us some information so that we can
11 calculate it. I think there's something like that
12 in the last --

13 Q. Yeah. And if we look at the second
14 page, I think what you're referencing -- and you
15 tell me if this is correct -- the last sentence of
16 the middle paragraph that says, "That amount,
17 whatever it is, is the amount BANA should be
18 required to rightfully pay to fully discharge its
19 obligations to the HOA per NRS 116.102, and my
20 client hereby offers to pay that sum upon adequate
21 presentation of proof of the same by the HOA."

22 Is that what you're referring to?

23 A. Yes. Right.

24 All right. And just to be clear, NAS
25 would not have responded to this letter at this

1 point in time without an authorization from the
2 homeowner?

3 A. Yeah. Miles Bauer was -- well, that is
4 correct. That is correct.

5 Q. All right. And are you familiar with
6 the statement in the letter that says, "Please let
7 me know what the status of any HOA lien or
8 foreclosure sale is, if any"?

9 A. I think that's in the letter, yeah.

10 Q. And NAS didn't respond -- as a matter of
11 procedure, it wouldn't respond to that either;
12 correct?

13 A. No. But it would send the notice of
14 sale to whatever financial institution.

15 Q. What percentage of properties -- if you
16 know, what percentage of properties did NAS start
17 the nonjudicial foreclosure process and then
18 actually take it to sale?

19 A. I think it was in 2014, I gave a speech
20 to the Realtors Association. I had that data. It
21 was roughly 10 to 15 percent.

22 Q. So 85 percent of the properties would
23 not go to sale for one reason or another; it would
24 get paid off or the HOA would change its mind?

25 A. Usually the first nasty letter that a

1 homeowner got from a collection agency spurred on
2 a payment in full, and then the percentages went
3 down. But 10 to 15 percent ultimately made its
4 way to -- and, obviously, that was in 2014, when I
5 had those statistics. It could have gone up
6 higher. But -- but at one point, I mean,
7 30 percent of homeowners were in default in most
8 homeowners associations. It's crazy.

9 Q. All right. And NAS knew that if it did
10 provide information to Miles Bauer, that Miles
11 Bauer would turn around and send a check?

12 A. The practice of Miles Bauer was the
13 first letter and then the second letter, yes. And
14 the second letter had a check, yes.

15 Q. And when the letter with the check came,
16 it was the receptionist who reviewed the letter
17 and the check and rejected it? Is that accurate?

18 A. Well, I mean, I'll tell you what the
19 policy was, and you can ask it more specifically
20 about Miles Bauer.

21 Q. Fair enough.

22 A. But the policy at NAS is when a partial
23 payment would come in on an account -- and
24 typically the checks from Miles Bauer were not
25 payments in full of the entire HOA lien, they were

1 attempting to pay a portion of the lien, so it was
2 considered to be a partial payment.

3 The policy with respect to accepting
4 partial payments was the partial payment would be
5 accepted and applied to the account if there was
6 no conditions placed upon the acceptance of that
7 payment. If there was a condition placed upon
8 that partial payment that was agreed upon, like
9 the condition, whatever it was, then it would also
10 be accepted and applied.

11 If the condition placed upon the
12 acceptance of that partial payment was not agreed
13 upon, then the payment would be rejected and sent
14 back.

15 Q. And it would be the receptionist who was
16 making that determination?

17 A. In the Miles Bauer case, because they
18 were form letters, yes, that was usually the case.

19 Q. NAS did have collection staff that would
20 actually work on the files, pursue the debts,
21 record the notices; correct?

22 A. Correct. NAS's business practice was a
23 compartmentalized. So one employee handled
24 notices of default. So they all kind of had a
25 expertise in that particular area of the

1 collections process.

2 Q. And the receptionist wasn't, generally
3 speaking, part of the collection staff?

4 A. Well, she was an employee.

5 Q. But she didn't, on a typical day-to-day
6 basis, handle collections? She answered phones
7 and what have you?

8 A. Yeah. Her expertise was answering
9 phones.

10 Q. And obviously, she wasn't an attorney;
11 correct?

12 A. That is correct.

13 Q. All right. And NAS had her reviewing
14 correspondence from an attorney's office and
15 determining whether the payment should be
16 accepted; correct?

17 A. Yeah. Like I said, she probably saw the
18 same form letter thousands of times.

19 Q. Would it surprise you to learn that
20 Mr. Jung testified moments before you took the
21 stand that there were instances where he tendered
22 the full amount of the lien on behalf of a second
23 deed of trust and that those were rejected?

24 A. I've actually -- I wouldn't be surprised
25 if some of them got rejected, but I'd can say to

1 the counter to that that some of them were
2 accepted, yeah.

3 Q. Now, if I understand correctly, that
4 prior to 2014 -- let me just back up so everyone
5 knows the page I'm on.

6 2010 to sometime late 2011 or early
7 2012, NAS would provide ledgers in response;
8 correct?

9 A. Correct.

10 Q. And then NAS stopped for approximately
11 two years, until 2014; correct?

12 A. It was July of 2013.

13 Q. July of 2013.

14 And then in July of 2013, NAS started
15 providing responses to Miles Bauer again; is that
16 correct?

17 A. That is correct.

18 Q. All right. And in the 2012 timeframe,
19 the basis for refusing to provide was the Federal
20 Fair Debt Collection Practices Act; correct?

21 A. Close. It's the Federal Debt -- no, the
22 Federal Debt Collection Practices Act. FDCPA.

23 Q. Fair enough. Fair enough. Point is
24 it's federal; right?

25 A. That's right.

1 Q. You know where I'm going.

2 A. It's not "Fair," that's for sure, but
3 it's "Federal."

4 Q. And when you changed your practice in
5 2014, did you base it on a change in federal law?

6 A. No. We based the business decision on a
7 change in state law.

8 Q. So a business decision to follow federal
9 law was changed based on a change in state law?

10 A. Yes.

11 Q. Okay. And with that change in state
12 law, did it authorize NAS to collect \$150 per
13 payoff provided?

14 A. Correct. The law was fairly clear of
15 what we could provide to a first trust deed holder
16 for a payment of \$150.

17 Q. And prior to 2011 or 2012 when you would
18 provide information to Miles Bauer, it was not
19 charged for its services; correct? I'm sorry.
20 Bad question.

21 NAS did not charge Miles Bauer for
22 giving the ledger?

23 A. It depended on what Miles Bauer was
24 requesting. If it was requesting a formal demand
25 payoff in which Miles Bauer could rely upon it for

1 a period of time, that that amount was going to be
2 accurate, NAS would charge \$150. If it was just
3 simply pulling off of our accounting screen the
4 ledger and faxing it to them or emailing it to
5 them, then we provided that service for free.

6 Q. And it was almost always that you
7 provided the ledger in response to Miles Bauer in
8 that 2010 to 2012 timeframe; correct?

9 A. Out of a courtesy, because we loved Bank
10 of America at the time, we simply just printed out
11 the accounting ledger and sent it to them.

12 Q. So as of 2012 when you initiated the
13 FDCPA procedure, you had already received hundreds
14 of inquiries, provided hundreds of free ledgers,
15 been delivered hundreds of checks, all of which
16 were rejected by a receptionist?

17 A. Not all.

18 Q. A good portion.

19 A. There's no such thing as "all" and
20 "never."

21 Q. Okay. The point is you weren't going
22 paid up to 2012; correct?

23 A. To provide a ledger?

24 Q. Yes.

25 A. Well, once again, we were getting paid.

1 A substantial portion of our business was charging
2 \$150 for demand payoff. I don't mean to split
3 hairs here, but when NAS provided a service, which
4 we called a payoff demand, that demand basically
5 put down on a piece of paper the amount that was
6 due so that somebody could rely upon it for a
7 certain period of time.

8 Because assessments are reoccurring.
9 Charges are reoccurring, and what NAS would do
10 would be stop the collection process for that
11 timeframe to allow somebody like a title company
12 or a bank, or even a homeowner, to make that
13 certain payment and have assurance that that lien
14 was going to be released.

15 Now, if we just printed out a simple
16 accounting ledger, thrown it off the computer, no,
17 we did not charge for that service. But we did
18 charge for demand payoffs. And Miles Bauer, even
19 though occasionally they would request accounting
20 ledgers, there were times when Miles Bauer
21 actually wanted a payoff demand, and in that case
22 we would charge \$150.

23 Q. And when you got the letter like the one
24 with the language that we had, you understood they
25 were just looking for a ledger?

1 A. That's correct.

2 Q. And in 2014, when you changed -- when
3 NAS changed its procedures based on state law, it
4 understood that there were business risks in
5 changing a procedure based on federal law because
6 of a change in state law?

7 A. Correct. It's not the first time
8 business people have gone against my legal advice,
9 yes.

10 Q. And, in fact, it was NAS's position, if
11 you will, its procedure, to treat the super
12 priority as nine months plus all costs and fees;
13 correct?

14 A. Yeah. NAS's position -- well, I guess
15 we need to talk about timeframe.

16 Q. 2012.

17 A. Yeah, NAS's position was in accordance
18 to what Judge Glass had ruled in 2006, and that
19 was that super priority consisted of nine months
20 of the assessment, nine late fees, nine months of
21 interest, all the costs of collecting, and a
22 transfer fee.

23 Q. Basically, everything NAS incurred in
24 order to do the collection would have been
25 included?

1 A. All the cost of collecting, yeah.

2 Q. And NAS knew that that decision was an
3 unpublished nonbinding opinion from a District
4 Court judge; right?

5 A. And NAS was in active litigation in an
6 attempt to confirm that decision in other courts
7 as well as Nevada Supreme Court.

8 Q. So NAS knew that it was taking a legal
9 position that could ultimately be incorrect?

10 A. To some degree, NAS was not taking that
11 position other than the fact that we were arguing
12 it. It was our clients taking that position.

13 Q. NAS -- here's what I'm getting at: NAS
14 understood that the super priority could -- might
15 be only nine months, no costs or fees?

16 A. Absolutely. Absolutely. We knew that
17 risk. Still think the Nevada Supreme Court got it
18 wrong.

19 Q. NAS would not attempt to get
20 authorization from the homeowner, correct, in
21 order to disclose information to Miles Bauer?

22 A. No. NAS informed the third party,
23 whoever that third party was, attempting to get
24 information that they needed to get the consent of
25 the homeowner.

1 Q. Did NAS believe that the FDCPA failed to
2 provide any response whatsoever -- and I'll be
3 specific, for example -- just to state the amount
4 of the monthly assessment?

5 MR. BOHN: Are we limiting this to the
6 time period of the case?

7 MR. BRENNER: 2012 is fine.

8 THE WITNESS: So in 2012, NAS was
9 getting, you know, claims that it was violating
10 the FDCPA, and the claims were all over the place,
11 including the scope of what was disclosed.

12 Unfortunately, the FDCPA uses the term
13 "nature of the debt." So NAS took a very cautious
14 approach in disclosing anything related to the
15 nature of the debt. So, most likely, NAS's policy
16 would be not to disclose the monthly fee. Yeah,
17 probably -- it probably would not have done so to
18 a third party unless there was written consent.

19 BY MR. BRENNER:

20 Q. Was there any specific reason that NAS
21 didn't ask the HOA to disclose that?

22 A. I don't know. No. No, the requests
23 were coming directly to NAS. I don't know if the
24 requests went to the HOA or not.

25 Q. So if we look at this, there is a

1 breakdown on the notice of delinquent assessment
2 of the lien for what amount the total amount is
3 and what portion is attributable to late fees,
4 collection costs, and interest.

5 Is this notice consistent with NAS's
6 procedures at the time?

7 A. Yes.

8 Q. And you would agree with me that this is
9 disclosing information about the nature of the
10 debt in a publicly recorded document?

11 A. Absolutely.

12 Q. And this document is not something that
13 would have been served on Bank of America;
14 correct?

15 A. That is the notice of -- what is that
16 again?

17 Q. The notice of delinquent assessment
18 lien.

19 A. That is correct. It wasn't until the
20 notice of default and the notice of sale that NAS
21 sent out those notices to security interest
22 holders in a property.

23 Q. If we look at Exhibit 6, which is the
24 notice of default, it says -- and there's this
25 first statement, "Upon your request, this office

1 will mail you a written itemization of the entire
2 amount you must pay."

3 And the other statement I've highlighted
4 says, "To find out about the amount you must pay
5 or arrange for payment to stop the foreclosure or
6 if your property is in foreclosure for any other
7 reason, contact," and then do you see where NAS's
8 information is provided?

9 A. Correct.

10 Q. Would you agree with me that the notice
11 of default would -- that you provided to Bank of
12 America would have directed Bank of America to NAS
13 pursuant to those provisions?

14 A. Well, the document has our contact
15 information on it. Absolutely.

16 Q. Would you agree with me there's nothing
17 in the notice of default that tells Bank of
18 America, If you want this information, you need to
19 provide us with an authorization, specifically
20 talking about the notice of default?

21 A. So Bank of America was supplied a copy
22 of the notice of default. It was not written to
23 Bank of America. So, I mean, when we're talking
24 about you, the "you" in that document is talking
25 about the homeowner.

1 Q. Was any information -- as a matter of
2 procedure, would any information, like the amount
3 of the lien, be redacted from the notice of
4 default?

5 A. No. It's all a recorded document.

6 Q. Is the information that's transferred to
7 Bank of America as a matter of procedure, would it
8 come with a cover letter explaining anything
9 specific to Bank of America?

10 A. No. It was just -- a copy of the notice
11 of default was sent directly to Bank of America
12 or -- assuming -- we're assuming they were a
13 security interest holder in the property.

14 Q. But be it the notice of lien, the notice
15 of default, or the notice of sale, it was NAS's
16 procedure to record -- to publicly record a notice
17 that included the entire amount of the debt owed
18 by the homeowner at that point in time?

19 A. Yes.

20 Q. And Exhibit Tab 37. This is Exhibit Tab
21 37, Document 363. This is the email that says,
22 "We have discovered that more properties are now
23 being sold at the foreclosure auction of
24 third-party investors. When this happens, all
25 parties get paid, including the HOA."

1 I understand correctly that "all
2 parties" means the HOA, NAS, and maybe vendors
3 like Nevada Legal News; is that correct?

4 A. All parties involved in attempting to
5 collect the HOA's lien.

6 Q. And NAS, at this point in time, was
7 actively encouraging the HOAs to go to sale; is
8 that fair?

9 A. Does it use the word "encourage" in
10 there? It's certainly suggesting to.

11 Q. How did NAS get paid for its services?

12 A. When NAS collected cash, it usually got
13 paid.

14 Q. And how would it typically -- just in
15 practice, what typically happened? How would it
16 typically recover? Let me back up. Assuming the
17 homeowner paying off.

18 A. Correct. And that was the majority of
19 them. Like I said, the first letter usually
20 spurred on the homeowner to pay.

21 Q. And then taking properties to sale; is
22 that correct?

23 A. That would be -- another method would be
24 when the funds came in through the foreclosure
25 sale, yes.

1 Q. And I think -- correct me if I'm wrong.
2 I think you've testified before that those two
3 methods comprised of 99 percent of the ways that
4 NAS would be compensated?

5 A. That's typical, yes. The other way
6 would be -- which is a small minority -- is the
7 homeowners association would actually dip into its
8 pocket and pay our costs and fees.

9 Q. Got you.

10 And NAS understood at this point in
11 time, in 2012, that Miles Bauer either wouldn't
12 pay any of the costs or would only pay a portion
13 of the costs?

14 A. Well, yeah. The stance by Miles Bauer
15 was to pay no costs. But occasionally -- I have
16 seen occasional letters where they thought, we'll
17 pay a couple hundred bucks or whatsoever. They'd
18 throw in some number. I never could figure out
19 what the difference was. But 90 percent of the
20 time it was no costs.

21 Q. Okay. So I take it, then, you're not
22 aware that there was a master association in this
23 case that got a payment from Miles Bauer that
24 included reasonable costs and fees?

25 A. I'm not familiar with this case.

1 Q. And when you're at this stage where
2 you're sending this email, the assumption is the
3 homeowner is not paying. And so you've got a
4 default to that secondary way of recovery through
5 the foreclosure sale?

6 A. So the intent of this email -- there was
7 a lot of homeowners associations, like I said,
8 that they didn't want to have to pay the
9 collection costs. That was something they didn't
10 want to do. So they would -- there was a lot of
11 collection actions that were just sitting dormant.
12 They either didn't want to move forward. They
13 didn't want to foreclose on their neighbor. For
14 whatsoever reason.

15 So this email was an attempt to say,
16 "Hey, we've been in collections now for a couple
17 of years, three or four years. You know,
18 properties are being sold. It's a good method for
19 you to go forward, and you'll get paid."

20 Q. And specifically being sold to
21 third-party investors who were buying at these
22 sales?

23 A. Typically the HOAs didn't want to have
24 that property to revert back to them.

25 Q. And would you agree with me, you're

1 seeking input from the HOA regarding what it wants
2 to do based on the advice and information being
3 provided in that email?

4 A. Correct. NAS would never foreclose on a
5 property unless it had written consent of the
6 homeowners association.

7 Q. Why not tell the HOA at this point in
8 time that Miles Bauer had requested information to
9 pay off the super priority?

10 A. I don't know.

11 Q. No reason that you know of?

12 A. No reason that I know of.

13 Q. Certainly, nothing would have prohibited
14 that information from being supplied? You're not
15 claiming the FDCPA prohibited you from providing
16 that information to the homeowners association?

17 A. No. That's not true.

18 Q. And you agree with me, nothing in that
19 email expressed concern for the homeowner or the
20 holder of the first deed of trust?

21 A. You're going to have to ask that
22 question again.

23 Q. You weren't expressing any concern in
24 that email that we just went over for the HOA for
25 the homeowner or the first deed of trust; correct?

1 MR. BOHN: Objection. Email didn't come
2 from him. It came from Misty Blanchard.

3 THE WITNESS: The email speaks for
4 itself. I don't think the word "concern" is in
5 there, nor do I think that the word "homeowner" is
6 in there, nor do I think any bank is in there.

7 THE COURT: So I didn't rule on the
8 objection, but I think he covered it.

9 THE WITNESS: I'm sorry, Your Honor.

10 THE COURT: It's okay.

11 THE WITNESS: I jumped the gun there.

12 BY MR. BRENNER:

13 Q. That's a standard email; right? That
14 email probably would have been sent out hundreds
15 and hundreds of times; right?

16 A. It was sent out in a specific time
17 period right around 2013-14, when a lot of the
18 dormant type of collection actions were just
19 sitting there. And each month the homeowners
20 association was not getting paid.

21 And NAS had performed a substantial
22 amount of work, and the email speaks for itself.
23 It was suggesting that maybe the HOA reconsider
24 and take the next step and move forward to the
25 foreclosure.

1 Q. What I'm getting at is sending out that
2 email was part of a policy and procedure of NAS at
3 that particular point in time?

4 A. Yeah, absolutely. Yes. It was a form
5 email, and it's in every trial that I'm with you.

6 Q. And you're knowledgeable about the
7 policy and procedure that surrounded that form
8 email; correct?

9 A. Yes.

10 MR. BRENNER: A moment of indulgence,
11 Judge. I want to go through and make sure I
12 covered everything that Ms. Moses said she could
13 not.

14 No further questions.

15 THE COURT: Mr. Bohn.

16 MR. BOHN: Thank you.

17 CROSS-EXAMINATION OF CHRIS YERGENSEN

18 BY MR. BOHN:

19 Q. Mr. Yergensen, there are a lot of dates
20 being thrown around. Forgive my asking the
21 question twice.

22 When did you start at NAS?

23 A. In October of 2013.

24 Q. And before that, you were at Red Rock
25 Financial Services; correct?

1 A. Yes, sir.

2 Q. And they provided similar services to
3 the services provided by NAS; correct?

4 A. Yes.

5 Q. All right. In your experience, do you
6 know when the HOAs first started actually
7 conducting foreclosures on their liens?

8 A. Well, the Korbelt case was in 2006, so --

9 Q. Okay.

10 A. But, really, the HOA foreclosure --
11 well, the real estate market fell off the edge of
12 the earth here in southern Nevada in 2009,
13 essentially. The delinquency rate shot up from an
14 average of about 6 to 7 percent on a Nevada basis
15 to -- I mean, condominiums were up to the 40
16 percentile at one point. It shot up to about
17 25 percent within a matter of a couple of years
18 from 2009 to 2011.

19 Homeowners associations were strapped
20 for cash at that point when they had 25 percent of
21 their homeowners not making the payments, so it
22 was a pretty tough time.

23 So to answer your question, 2009, 2010
24 is when it really kind of popped up.

25 Q. So that's when they started happening

1 more frequently?

2 A. Yes. Um-hum.

3 Q. Okay.

4 A. I mean, if you look at statistics, they
5 kept going up until about 2014. Now they've gone
6 back down.

7 Q. Do you know how many -- well, you were
8 with Red Rock for all of 2012; correct?

9 A. Correct.

10 Q. Do you know how many foreclosures Red
11 Rock did in 2012?

12 MR. BRENNER: Objection. Scope. It's a
13 subpoena to NAS. I'll just rest on that. Object
14 to scope.

15 MR. BOHN: We've gone beyond the scope
16 frequently. We didn't put it on the record. It
17 is beyond the scope, but there's no jury here.
18 And the point I'm trying to get to is they're
19 going to make a point about the prices, and I have
20 to get into how the associations didn't really
21 know what they were doing when they were -- it was
22 uncharted territory at the very beginning.

23 And a lot of properties, it's my
24 understanding, weren't selling or selling for very
25 little, and HOAs were afraid to sell, and that's

1 what I'm trying to establish through his
2 testimony.

3 MR. BRENNER: I think it's irrelevant.

4 THE COURT: It may be. Don't take a
5 long time with it, though I'll let you have a
6 little bit of rope.

7 BY MR. BOHN:

8 Q. Do you know how many they foreclosed on
9 in 2012?

10 A. I do not know the exact number, but it's
11 certainly -- like I said, if you look at
12 statistics, it was going up to about 2014. So
13 there would have been less in 2012 than there was
14 in '13. There would have been more in '12 than
15 there was in '11. There would have been more in
16 '11 than there was in 10.

17 Q. Okay. Rock Jung testified earlier that
18 he probably had sent -- or his Miles Bauer firm
19 probably sent 6,000 of these tender letters,
20 almost a third of them -- to NAS. Would that
21 number surprise you?

22 A. I think at one point, NAS -- we did
23 market studies on how many HOAs we collected for,
24 and that's probably accurate. NAS at one time had
25 about a 30, 35 percent market share, so that's

1 probably accurate.

2 Q. Okay. Did NAS ever do any study to show
3 any fluctuation in the prices being paid at the
4 foreclosure sales?

5 A. No, but I -- no study, but we -- I mean,
6 it was certainly not -- I mean, we had kind of an
7 idea. I mean -- you know, I mean, originally,
8 yeah, prices were very low in 2010-2011. And also
9 investor activity started picking up in 2012-2013.

10 Typically, early on, it was common to
11 have three or four investors. By 2013-2014, there
12 were some 20, 25 investors. You know, the word
13 spread that somebody is making money or something
14 like that, you know. Their competition kind of
15 creeped into the market. When you have more
16 bidders at an auction, obviously, the prices are
17 going to go up. And that's essentially what
18 happened.

19 Q. Did you or -- was -- are you aware of an
20 increase in the prices that were being paid after
21 the real estate division came out with their
22 opinion letter in December of 2013, I believe?

23 MR. BRENNER: Scope. Relevance.

24 MR. BOHN: Same line of questions.

25 THE COURT: I'm going to let him talk

1 about that a little bit. Go ahead.

2 THE WITNESS: When the real estate
3 division came out, I think the values might have
4 gone down a little bit. I think people were
5 concerned that the state of Nevada was going to
6 jump on the bank's side, which essentially they
7 did. I will tell you, though, Mr. Bohn, the day
8 after the Nevada Supreme Court came out with --
9 BY MR. BOHN:

10 Q. SFR decision?

11 A. -- the SFR decision, prices went through
12 the roof. We took in -- people were paying almost
13 90 percent of value at the HOA foreclosure sale.
14 I think the SFR decision came out on a Thursday.
15 We had something like 10 properties, and almost
16 \$6 million came into our office. Everybody
17 thought it was a slam dunk at that point. Nobody
18 realized that the litigation was going to
19 continue.

20 But I will tell you that Friday was a
21 madhouse, the day after the SFR decision came out.

22 But with respect to the real estate
23 division opinion letter, I think there was some
24 concern on the investors' part that there might be
25 more of litigation, but I don't think the prices

1 might have gone down.

2 But once again, just by the shear
3 volume, it started going back up again. And like
4 I said, once the SFR decision came out, the
5 investors -- it was a frenzy.

6 BY MR. BOHN:

7 Q. You testified about a case that Judge
8 Glass made a ruling on in 2006; correct?

9 A. Yes.

10 Q. There's also -- I never get the initials
11 right -- the CCICH?

12 A. Yeah. The Common Interest Community for
13 Common Hotels, or something like that.

14 Q. They issued an opinion letter in 2010
15 also?

16 A. Correct. It was in -- the state of
17 Nevada internally was having issue -- was just
18 like the court system. Nobody could say which was
19 which. So there was ambiguity of how the
20 super-priority amount was going to be calculated
21 even within the state of Nevada, despite the fact
22 that the real estate division came out on one
23 side, the Common Interest Community Commission
24 came out on the other side.

25 Q. And that opinion was that the

1 super-priority lien consists of nine months plus
2 some costs; correct?

3 A. That is correct.

4 Q. And did you, as counsel for Red Rock and
5 later for NAS, rely on that opinion in formulating
6 your decision as to what the super-priority lien
7 consisted of?

8 A. Yes. In all of the briefs, you know, we
9 would refer to that opinion, as well as other
10 opinions, as well as the Connecticut Supreme Court
11 decision, as well as -- yeah, other -- I mean, I
12 think by -- leading all the way up finally to the
13 Icon Holdings case that didn't come out until
14 2016, almost every court in this district was
15 dealing with the super-priority issue.

16 MR. BOHN: Okay. Thank you. I have no
17 further questions.

18 THE COURT: Any more?

19 MR. BRENNER: We'll let him go, go back
20 to his day job.

21 THE COURT: Thank you, sir.

22 THE WITNESS: Thanks, guys.

23 THE COURT: Do you have more,
24 Mr. Brenner?

25 MR. BRENNER: I've got one more. I can

1 call up Ms. Woodbridge for Bank of America.

2 THE COURT: Okay. Once you get all the
3 way up there, remain standing, raise your right
4 hand.

5 THE CLERK: You do solemnly swear the
6 testimony you're about to give in this action
7 shall be the truth, the whole truth, and nothing
8 but the truth, so help you God.

9 THE WITNESS: I do.

10 THE CLERK: Please be seated, and please
11 state and spell your first and last name for the
12 record.

13 THE WITNESS: Jessica Woodbridge,
14 J-E-S-S-I-C-A, W-O-O-D-B-R-I-D-G-E.

15 DIRECT EXAMINATION OF JESSICA WOODBRIDGE
16 BY MR. BRENNER:

17 Q. Okay. Ms. Woodbridge, who is your
18 employer?

19 A. Bank of America N.A.

20 Q. What is your title?

21 A. I am an assistant vice president and
22 consumer resolution associate.

23 Q. Can you describe your job duties,
24 please.

25 A. I manage a portfolio of loans, mortgage

1 loans that have some litigation on them. I work
2 primarily by reviewing business records with our
3 in-house and outside counsel in resolving the
4 litigation. I also am available to testify in
5 trials, depositions, and mediations on behalf of
6 the bank.

7 Q. How many times have you testified at
8 trial or deposition?

9 A. I have been doing this job since
10 September of 2012 and have testified consistently
11 throughout that time period. So I haven't kept
12 track, but it would be in the hundreds.

13 Q. What do you typically do to prepare to
14 testify?

15 A. I would -- typically, I meet with
16 counsel. I would review the documents produced in
17 the case, and then I would compare them or look in
18 the books and records, the databases of Bank of
19 America.

20 Q. And is that what you did in order to
21 prepare for your testimony today?

22 A. Yes.

23 Q. Are you familiar with Bank of America's
24 practices for handling HOA super-priority liens
25 between the years 2010 and 2013?

1 A. Yes.

2 Q. And how did you become familiar?

3 A. I have seen the policies and procedures
4 for the bank.

5 Q. All right. How many HOA cases have you
6 provided deposition testimony in or trial
7 testimony in that involved facts related to an
8 attempt to pay the super priority, an estimate,
9 please?

10 A. Again, I've lost track, but, I mean, it
11 would have to be 30, 40, 50 times, maybe.

12 Q. All right. Come back to that in a
13 minute.

14 If I can get you to look at Exhibit 3,
15 please, which is the deed of trust.

16 I'm not going to have any piercing
17 questions for you about it. Just take a look at
18 the first page.

19 A. Okay.

20 Q. Have you seen this document before?

21 A. I have.

22 Q. Have you seen it in Bank of America's
23 business records?

24 A. Yes.

25 Q. And why does Bank of America maintain a

1 copy of this document in its business records?

2 A. We were the servicer for the loan for a
3 period of time.

4 Q. What role, if any, did Bank of America
5 have in originating the loan?

6 A. So the original lender is KBA Mortgage,
7 LLC, and as I understand it, they are an affiliate
8 of Bank of America. I believe Bank of America
9 N.A. and this KBA Mortgage, LLC are under the same
10 corporate umbrella of Bank of America Corporation.

11 Q. Okay. So, in essence, a Bank of America
12 entity originated this loan?

13 A. Yes.

14 Q. Do you recall the dates of servicing?

15 A. I do.

16 Q. And what were those?

17 A. It would have been from the origination,
18 which I believe was in December of 2010, until
19 June 3rd of 2013.

20 Q. So it continued to service this loan for
21 several months after the HOA's foreclosure sale?

22 A. Yes.

23 Q. Can you describe for me what it means,
24 "to service a loan"?

25 A. The servicer -- the loan servicer is

1 the -- sort of handles the day-to-day activities
2 of the loan. We're the customer service entity.
3 We're who the customer would send payments to,
4 which we would then forward on to an investor.
5 And we would perform all sorts of activities
6 necessary for the loan up to and including
7 collection activities.

8 Q. Actually, I got rid of that exhibit and
9 I wasn't quite done.

10 Do you know what a "planned unit
11 development rider" is?

12 A. Yes.

13 Q. What is it?

14 A. It is a rider attached to a deed of
15 trust, and it would just indicate for when
16 properties are in a planned unit.

17 Q. Was Bank of America aware that this
18 property was in the -- never remember the name --
19 the Mandolin common interest community at the time
20 the loan was originated?

21 A. Yes.

22 Q. And how do you know that?

23 A. I know it because the planned unit
24 development rider states the owner of the planned
25 unit development as Mandolin.

1 Q. And if I can get you to look at
2 Exhibit 34, which is the CC&Rs. And my question
3 is going to be about a CC&Rs provision on page
4 206. No, it's not. On 208.

5 I'm going to specifically ask you about
6 Section 6.3.1, which says -- I've read it several
7 times -- "Security interest. Any breach or
8 amendment of this declaration shall not affect or
9 impair the lien or charge of any security interest
10 made in good faith for value of any unit," and so
11 on.

12 Did Bank of America rely on the
13 existence of this provision in issuing this loan?

14 A. Yes.

15 Q. And how do you know that?

16 A. I could see from the -- in our title
17 policy that this provision is stated. In
18 addition, as I understand it, this is a VA loan,
19 and it would not have been possible for -- or our
20 understanding is we could not have originated a VA
21 loan in a planned unit development if there
22 were -- if the lien would have been superior to
23 our lien, to the VA's lien.

24 Q. Bear with me one second. Could I get
25 you to look at Exhibit Tab 39.

1 MR. BRENNER: Judge, I would -- do you
2 have any objection to sealing 39 and 40?

3 MR. BOHN: I was going to say -- no, no
4 objection.

5 MR. BRENNER: Judge, we're going to
6 seal -- if it's okay with the Court, seal 39 and
7 40. 39 has -- I'll ask the witness to explain
8 what it is, but it has certain loan debt numbers.
9 And 40 is the note.

10 THE COURT: Let her talk about it and
11 then explain to me why it meets the requirement
12 for sealing.

13 MR. BRENNER: Sure.

14 Q. Do you have an understanding as to what
15 the exhibit at Exhibit Tab 39 is?

16 A. Yes.

17 Q. And what is it?

18 A. This is a payoff demand statement from
19 Bank of America regarding this property.

20 MR. BRENNER: Your Honor, I would just
21 ask that it be sealed under Graham-Leach-Bliley.
22 So there is a judicial act exception under
23 Graham-Leach-Bliley which governs financial
24 institutions which accept this type of thing. But
25 you still have some courts that, even where the

1 exception is applied, they still order that there
2 should be appropriate protections taken because
3 they're not a party to this case.

4 I think it's my job as the attorney for
5 Bank of America to ask that it be sealed, but I
6 would note that there is a judicial exception as
7 well.

8 MR. BOHN: I have no objection, Your
9 Honor.

10 THE COURT: You're not objecting to it?
11 I'll seal them. 39 and 40?

12 MR. BRENNER: Yes. And if you had
13 denied it, I think I would have done my job by
14 raising it.

15 Q. All right. I'm sorry, 39 is the amount
16 Mr. Nolan owed as of December 28, 2017; is that
17 correct?

18 A. No. It's -- the payoff demand statement
19 is -- states that it's -- the statement date is
20 12/28/2017, but it appears it's only good through
21 5/20/2013.

22 Q. I understand.

23 So there would have been additional
24 amounts incurred after that time?

25 A. Yes.

1 Q. And then if I can get you to look at
2 Exhibit Tab 40, what is that?

3 A. This is a copy of the notes for this
4 subject property.

5 Q. And it says at the top, "This loan is
6 not assumable without the approval of the
7 Department of Veterans Affairs or its authorized
8 agent"?

9 A. Yes.

10 Q. Is that one of the pieces of information
11 that tell you this was a VA loan?

12 A. Yes.

13 Q. All right. And let's shift gears a
14 little bit to tender or payment of the
15 super-priority portion of the lien.

16 You're familiar with Bank of America's
17 practices for handling HOA liens going back to
18 2010; correct?

19 A. Yes.

20 Q. Okay. And can you walk us through what
21 that procedure was.

22 A. Sure. So when a notice of default or a
23 notice of sale came into the bank, it would be
24 routed to my department -- what was then called
25 MRT. It's now called CRT. And a case would be

1 opened. And counsel would be retained -- most
2 likely it was going to be the Miles Bauer law
3 firm -- to identify the amounts -- and we would
4 retain them to identify the amount of the super
5 lien priority amount and to tender that on our
6 behalf.

7 Q. All right. And did you have an
8 understanding -- did the bank, I should say, have
9 an understanding of how Miles Bauer would go about
10 doing that?

11 A. Yes. We would have expected them to
12 have to reach out to an entity, most likely, the
13 collection trustee, because the document itself
14 did not contain information stating what the super
15 lien priority amount was going to be.

16 Q. The document itself being the notice of
17 default or the notice of sale?

18 A. Yes.

19 Q. And if Miles Bauer was able to obtain
20 information from the HOA trustee, without diving
21 into any privileged information, do I understand
22 correctly that between the bank and Miles Bauer, a
23 decision would be made on how much to pay?

24 A. Yes.

25 Q. And what was the procedure from there?

1 Would Miles Bauer loan the bank money? Would the
2 bank front the money? How you would it work?

3 A. So once we had the information or
4 determined that amount, we would request to -- we
5 would make a request for the funds to be wired to
6 Miles Bauer, and, you know, information would be
7 added. It would be deducted under the fees due
8 section of the homeowner's account.

9 Q. And you would expect Miles Bauer to take
10 that wire to pay the super priority?

11 A. Yes.

12 Q. All right. Do your records reflect that
13 that procedure was followed in relation to the
14 7510 Perla Del Mar property?

15 A. I see -- yes.

16 Q. Okay. Did you see information regarding
17 a tender to the master association through Silver
18 State?

19 A. Yes.

20 Q. And what did you see happen in relation
21 to that?

22 A. So I can see -- I saw the letter go out,
23 the ledger come back, and then I can see in our
24 files there was a note about payment -- a note
25 added to our system of record about the payment

1 and the fees due. It was notated that there was
2 an HOA fee paid.

3 Q. All right. And is it your understanding
4 that Miles Bauer was retained and reached out to
5 the subassociation, Mandolin, through NAS?

6 A. Yes.

7 Q. All right. And what's your
8 understanding of what happened with that?

9 A. I understand that NAS did not return or
10 provide a payoff ledger and said no super lien
11 priority amount could be determined.

12 Q. If NAS had provided a ledger, would Bank
13 of America have followed its procedures of wiring
14 funds to Miles Bauer to pay the super-priority
15 portion of the lien?

16 A. Yes.

17 MR. BRENNER: No further questions.

18 THE COURT: Mr. Bohn?

19 CROSS-EXAMINATION OF JESSICA WOODBRIDGE

20 BY MR. BOHN:

21 Q. In 2012, was it Bank of America's
22 policies and procedures to not take any further
23 action in regards to the lien other than monitor
24 the foreclosure after a payment was rejected?

25 A. I am not sure. I know we would just

1 follow the advice of counsel.

2 Q. Are you an attorney?

3 A. I have gone to law school and am
4 licensed, yes.

5 Q. Where are you licensed?

6 A. I am licensed in Indiana, Washington,
7 D.C., and Texas.

8 Q. Are you testifying today as an attorney
9 or as an employee of Bank of America?

10 MR. BRENNER: I think that's a question
11 for me. And she's not testifying as an attorney.

12 BY MR. BOHN:

13 Q. But you do agree that in this case,
14 after the letter was sent to the Mandolin, there
15 was no further activity on the part of Bank of
16 America as to the association lien recorded by the
17 Mandolin; is that correct?

18 A. I could not -- I did not see in our
19 files that any further action was taken.

20 Q. Okay. There was no follow-up letter
21 sent; correct?

22 A. Not that I could see, no.

23 Q. There was no check for the full amount
24 of the lien tendered?

25 A. Not that I could see in my records, no.

1 Q. There was no request for an arbitration
2 as to the lien amount; is that correct?

3 A. That's correct.

4 Q. There was no lawsuit filed to try to get
5 an injunction or TRO to stop the sale and
6 determine the proper amount of the lien; is that
7 correct?

8 MR. BRENNER: Scope. Calls for
9 speculation.

10 THE COURT: Overruled. Just asking if
11 that happened.

12 THE WITNESS: Not that I could see in
13 our files, no.

14 BY MR. BOHN:

15 Q. And there was nothing recorded to put
16 potential purchasers on notice of an attempt or
17 dispute regarding the super-priority lien; is that
18 correct?

19 A. I mean, other than the deed of trust
20 itself being recorded with the conditions in there
21 about the other rider and our ability to pay, no.

22 Q. Okay. And the ability to pay, that's
23 part of the common law, isn't it? It doesn't have
24 to be in the PUD rider. It's common law that a
25 junior lienholder can pay off senior liens to

1 protect their priority; isn't that correct?

2 MR. BRENNER: Calls for a legal
3 conclusion. And it stipulates -- with the
4 witness, it calls for a legal conclusion.

5 THE COURT: I think it does. It's
6 sustained, but it sounds like he stipulated to it.

7 MR. BOHN: All right. I have no other
8 questions.

9 THE COURT: Anything else?

10 MR. BRENNER: Nope.

11 THE COURT: Okay. You can step down.

12 (Witness excused)

13 MR. BOHN: Are we done with witnesses?

14 THE COURT: That's it for today?

15 MR. BRENNER: We rest.

16 THE COURT: Any rebuttals?

17 MR. BOHN: No rebuttal, Your Honor.

18 THE COURT: You want to wait until
19 tomorrow to do your closings?

20 MR. BOHN: Preferably, yes.

21 THE COURT: That's fine.

22 Can I suggest that you guys submit some
23 proposed findings of fact and conclusions of law
24 to me.

25 MR. BOHN: By tomorrow?

1 THE COURT: Put it in Word format so I
2 can cut and paste.

3 MR. BOHN: We will. okay.

4 THE COURT: I don't care if you do it by
5 tomorrow, but the sooner the better, before I
6 forget everything I've heard.

7 MR. BOHN: I might forget it myself.

8 MR. BRENNER: Yep. What time do you
9 want us here tomorrow?

10 THE COURT: I've got a calendar, but
11 it's a short calendar. Let's just say
12 10:00 o'clock.

13 MR. BOHN: Can we do 10:30? I've got a
14 summary judgment motion in Department 19.

15 THE COURT: That's fine. 10:30.

16 MR. BRENNER: I'm going to try to be
17 brief, but it's typically, like, 45 minutes. Is
18 an hour and a half for lunch going to work?

19 MR. BOHN: Mine is about the same time,
20 same amount of time.

21 MR. BRENNER: I meant before lunch.

22 THE COURT: 10:30, and you each take and
23 hour an half -- or each take 45 minutes. That's
24 an hour and a half and takes us straight up to 12.

25 MR. BOHN: There's one housekeeping

1 matter.

2 THE COURT: We don't need to do this on
3 the record; right?

4 MR. BOHN: Yeah. The housekeeping
5 matter.

6 MR. BRENNER: We're going to sub -- you
7 want to sub or just add -- long story short,
8 however we do it, Nationstar has become the deed
9 of trust beneficiary since -- I think since the
10 case was filed. But we're going to stipulate that
11 we can either substitute Nationstar in --

12 MR. BOHN: Or add them as a party.

13 MR. BRENNER: -- or just agree that --
14 add them as a party and agree that whatsoever
15 ruling is entered is binding on Nationstar. Maybe
16 that makes the most sense.

17 MR. BOHN: That's fine with me.

18 THE COURT: One of you represents
19 Nationstar?

20 MR. BRENNER: I do, yeah.

21 THE COURT: Okay. That's fine. Based
22 on what you just put on the record, I think that's
23 sufficient; right?

24 MR. BRENNER: I think so.

25 MR. BOHN: Yes.

1 MR. BRENNER: And we'll make it part of
2 any proposed findings.

3 Judge, in the interest of trying to
4 truncate things and not drone on about things
5 you've heard a thousand times, are there any
6 specific areas you want closing to focus on over
7 others?

8 THE COURT: No. It's the same case.

9 MR. BRENNER: Okay.

10 THE COURT: You guys have made the same
11 arguments over and over. I've heard the same
12 arguments over and over. Just do what you've got
13 to do to preserve the record.

14 MR. BRENNER: Okay. Fair enough.

15 MR. BOHN: Thank you, Your Honor.

16 MR. BRENNER: Oh, sorry. One more
17 housekeeping thing. The trial brief we gave you
18 has got bad dates. Use the dates in the
19 stipulated fact. There were a couple dates that
20 were mistaken. So, thank you.

21 THE COURT: All right. Thanks, guys.
22 Off the record.

23 (Proceedings adjourned at 3:46 p.m.)

24 * * * * *

25

1 **LAS VEGAS, NEVADA, MONDAY, FEBRUARY 12, 2018;**

2 **11:00 A.M.**

3
4 **P R O C E E D I N G S**

5 *** * * * ***

6 THE COURT: Let's go back on the record.
7 You guys have already closed both your cases, so
8 we're just doing closing arguments; right?

9 MR. BOHN: Yes.

10 THE COURT: Mr. Bohn, the time is yours.

11 MR. BOHN: I forgot the fancy clicky
12 thing.

13 MR. BRENNER: You want to use mine?

14 MR. BOHN: No. I'll do it like the
15 cavemen did and hit my laptop with my finger.

16 THE COURT: That's fine.

17 MR. BOHN: I like Judge Gebhardt a lot.
18 I liked him as a JP, and I liked him on the bench.
19 I like you, too, but it's like I was explaining
20 super-priority lien foreclosure law to him for the
21 very first time. I appreciate that you've done a
22 number of these, and you understand the concepts
23 quite well.

24 THE COURT: I do.

25 MR. BOHN: And to try to change this

1 from my last couple. This litigation, I got to
2 say, the bank attorneys, not just the Akerman
3 firm, but especially the Akerman firm, all of
4 them, it's been a nice little group. We're very
5 civil with each other, courtesy exceptions granted
6 all the time. I felt a little bit bad yesterday
7 trying to move to set aside that stipulated fact
8 because we did agree to it. The evidence came out
9 exactly the way Darren said, but you've got to do
10 what your client says.

11 But the other side have been practicing
12 law the way they're supposed to. I have other
13 cases that aren't HOA foreclosures, some PI, some
14 contract business conflicts and such, and it's
15 dog-eat-dog cutthroat out there. I appreciate
16 what the other side has done for me in this and
17 other cases.

18 THE COURT: I appreciate the
19 professionalism from both sides as well.

20 MR. BOHN: In this case, Your Honor,
21 we've asserted the claims for quiet title,
22 declaratory relief, and permanent injunction.

23 Quick timeline on this case. The
24 December 8th, 2011 pre-lien letter mailed. This
25 is all in the stipulated facts. A month later,

1 the notice of lien is recorded by Mandolin and
2 mailed to the former owner. A month later the
3 master association records its lien on
4 February 2nd, 2017.

5 February 27, 2012 Mandolin records its
6 notice of default and election to sell, which was
7 mailed to Bank of America. August 14th, master
8 association records its notice of default and
9 election to sell. On March 16, 2012, Miles Bauer
10 sends its inquiry letter. No response is received
11 and no further action is taken.

12 Several months later, the Mandolin
13 records its notice of foreclosure sale, and it's
14 mailed to Bank of America. Notice does contain
15 the statutory bold-typed warnings. And on
16 February 1st, the foreclosure sale was conducted
17 and the property acquired by my client, the Perla
18 Del Mar Trust.

19 In contrast, the timeline on Shadow Wood
20 was the notice of sale was dated January 18th,
21 2012. It was recorded nine days later, on January
22 27th. The sale date was set for February 22nd.
23 And three days -- four days later, the check for
24 less than the amount of the sale was sent and
25 rejected. They had a much shorter timeframe in

1 which with to deal than we can in this case.

2 The Shadow Wood Court set forth four
3 factors to be considered by the Court: The price
4 paid; the presence of fraud, oppression or
5 unfairness; the failure of the complaining party
6 to act to protect its interest prior to the
7 sale -- I like to call that the laches argument or
8 the unavailability of equitable relief argument --
9 as well as the interests of the bonafide
10 purchaser.

11 The principles of law and equity,
12 including the law of real property by statute,
13 applies to NRS Chapter 116. I'd like to talk
14 about the principles of equity.

15 Equitable relief is not available
16 because the defendant had notice of the sale and
17 failed to protect its interests before the sale.
18 There's no dispute that BANA received a notice of
19 default. It's evidenced by the correspondence
20 between Miles Bauer and NAS.

21 One of the last quotes from Shadow Wood
22 is where the complaining party has access to all
23 the facts surrounding the questioned transaction
24 and merely makes a mistake as to the legal
25 consequences of his act, equity should not

1 normally interfere, especially where the rights of
2 third parties might be prejudiced thereby.

3 Nevada law presumes that a person
4 intends the ordinary consequence of that person's
5 voluntary act. Defendants took no action to
6 protect their interest in the property. That
7 could be construed to consent to the sale and
8 extinguishment.

9 Equity requires the bank to act before
10 the sale. If Your Honor would affect the title of
11 the purchaser, it would be awarding poor business
12 choices and poor business behavior and penalizing
13 the purchaser at the HOA foreclosure sale.

14 The Shadow Canyon case, of course,
15 said -- that recently came out said that the
16 presumptions are in favor of the purchaser and the
17 title holder of the property, and the burden of
18 proof is on the party seeking to set the sale
19 aside.

20 And here there was really no tender in
21 the case. They got the letter. It was ignored.
22 The bank, even though it had an army of attorneys
23 at disposal, didn't do anything that SFR or Shadow
24 Wood said they should do.

25 The second principle of equity is

1 equitable relief is not available where the
2 defendant has an adequate remedy of law.

3 You have two grounds to deny equitable
4 relief. You look at the caption of the case here.
5 Not only is there a battle between Perla Del Mar
6 Trust and Bank of America or now BONY, Bank of New
7 York Mellon --

8 MR. BRENNER: Nationstar.

9 MR. BOHN: Nationstar, one of those
10 banks, but there are counterclaims and
11 cross-claims in the case against NAS and the
12 Mandolin.

13 They are seeking money damages from
14 these parties. If they have money damage remedy,
15 then they're not entitled to equitable relief.
16 And the Shadow Wood and Shadow Canyon case say
17 very clearly setting aside the sale is done on
18 equitable principles. The fact as to whether or
19 not the judgment is collectible is irrelevant. If
20 you have the remedy at law, you're not entitled to
21 an equitable remedy.

22 If there is a defect in the foreclosure
23 sale, the defendant has a remedy at law against
24 the HOA and the foreclosure agent precluding
25 equitable relief. And the restatement section,

1 8.3, that the banks like to quote from notes that
2 the remedy is not available based on gross
3 inadequacy of price alone, and the Shadow case,
4 again, confirms that.

5 Moving from Factor 3, the availability
6 of equitable remedy, to Factor 4, the bonafide
7 purchaser.

8 This is one everyone seems to get tough,
9 but it's a relatively simple concept. You've
10 heard the -- or read the statutory definition
11 before. I like to quote from the treatise by
12 Professor Freyermuth which was cited in the Shadow
13 Wood case. They take a different tact on bonafide
14 purchasers at foreclosure sales.

15 Because normally if you have a voluntary
16 transfer, it's a voluntary transfer, where both
17 parties have intent as to what to do.

18 With a statutory foreclosure sale, like
19 we have under Chapter 116, there is no intent.
20 And the matters that are of record with a strong
21 lien like an HOA lien are extinguished.

22 So bonafide purchaser in foreclosure
23 context, according to these professors, say that
24 you're a bonafide purchaser if you have -- if
25 there are defects, which we're contending there

1 are not. But they have no actual knowledge of the
2 defects, they're on notice from recorded
3 instruments of the defects, and the defects are
4 such that a person attending the sale and
5 exercised reasonable care would be unaware of the
6 defects.

7 The only possible defect here would be
8 the fact that the NAS ignored their letter, which
9 both attorneys testified yesterday happened a lot
10 because there were so many of them going back and
11 forth. Bank of America, for whatever reason, was
12 attempting to make their own paper trail and
13 record.

14 Consistent with that, Shadow Wood talks
15 about bonafide purchaser and says when the
16 association sale complies with the statutory
17 foreclosure rules, as evidenced by the recorded
18 notices, such as the case here, without any facts
19 to the contrary, the purchaser would only have
20 notice that the former owner has the ability to
21 raise an equitably based post-sale challenge, the
22 basis of which is unknown to the purchaser.

23 I'm going to pause there and note that a
24 lot of the banks and some of the judges are
25 saying, well, Eddie Haddad knew he was going to

1 get involved in litigation. He's not a bonafide
2 purchaser. This quote says otherwise.

3 The purchaser or former owner, or
4 whoever, always has the equitable right to bring
5 an action. You can't deprive bonafide purchaser
6 status just because there may be a lawsuit coming,
7 and even if he anticipates a lawsuit.

8 The Court goes on to point out that NYCB
9 points to no other evidence indicating that
10 Gogo Way had notice before it purchased the
11 property, constructive or inquiry, as to their
12 intents to pay the lien and prevent the sale or
13 that Gogo Way knew or should have known that
14 Shadow Wood claimed more than its owners actually
15 owed, especially where the record prevents us from
16 determining whether that is true.

17 And similar situation here. They're
18 going to complain that there was an attempt at a
19 tender, and sending a letter itself constitutes
20 tender -- which we're going to dispute -- and that
21 because of that, their lien is protected.

22 There was no evidence my client knew of
23 any such dispute or any attempt. And because of
24 such, he should be found to be a bonafide
25 purchaser.

1 The burden is on the defendant to show
2 that the plaintiff is not a bonafide purchaser.
3 That's from the Shadow Canyon case. Equitable
4 relief will not be granted to the possible
5 detriment of innocent third parties. That's from
6 Shadow Wood.

7 I'd like to cite Miller & Starr, as the
8 Nevada Supreme Court has a number of times. And
9 this cite -- I took the pages here.

10 It says the proof of the bonafide
11 purchaser is simple. You just have to testify you
12 paid money and didn't have notice, and the burden
13 shifts to the other side to show that you did have
14 notice. And then they comment that as a practical
15 matter, it really makes little difference because
16 it's so easy to prove one way or another.

17 Shadow Wood addresses six standards for
18 a bonafide purchaser. A bonafide purchaser is
19 without notice of prior equity and without inquiry
20 notice. It's not affected -- the title of the
21 bonafide purchaser is not affected by any manner
22 in which he has no notice. And this is both
23 statutorily and in case law.

24 Bonafide purchaser must pay the valuable
25 consideration, not adequate consideration. So the

1 "they didn't pay enough" argument doesn't work
2 anymore, especially after the Shadow Canyon case.

3 The fact that the purchase price may be
4 low is not sufficient to put the purchaser on
5 notice of any alleged defects. And, again, Shadow
6 Canyon supports that also.

7 I discussed this already, the fact that
8 the court retains equitable power to void the sale
9 does not deprive purchaser of bonafide purchaser
10 status.

11 And the time to determine the status of
12 bonafide purchaser is at the time of the sale.

13 The Court notes in Shadow Wood that we
14 had no notice before we purchased the property of
15 the attempts to pay. The older case law, Bailey
16 versus Butner, Moore versus De Bernardi, says that
17 the time to determine is when he hands over his
18 money. That's the operating moment. Anything he
19 knows of beforehand he's charged with. What
20 happens after he hands over his money doesn't
21 count. It's at the time the money changes hands.
22 At foreclosure sales, the money changes hands at
23 the time of the sale.

24 Case that just came in a couple weeks
25 ago, the very purpose of the recording statutes is

1 to impart notice to bonafide purchasers.
2 Defendants' answers to interrogatories provide no
3 basis to show that plaintiff is not a bonafide
4 purchaser. Their answer to interrogatories are an
5 exhibit to the -- one of the exhibits. I'm going
6 to go through their answers sans the objections.

7 First reason they gave was there was no
8 notice that the super-priority portion of the lien
9 was being foreclosed upon or how the bank could
10 protect its interest.

11 MR. BRENNER: Your Honor, I've to object
12 that our objections are still our objections, and
13 they need to be ruled on before this can be
14 admissible. And I understand that you're probably
15 going to say "overruled," and I'm fine with that.
16 But I wanted to put that on record.

17 THE COURT: Well, since I haven't looked
18 at the objections or the questions yet. If I look
19 at them as part of my decision, then if I sustain
20 the objection, I won't consider it.

21 MR. BRENNER: Very good. The objection
22 specifically would be that it's -- and this is per
23 case law that just came out two months ago, it
24 appeased plaintiff's burden. So asking another
25 party information that plaintiff has that it's

1 plaintiff's burden to make is not proper.

2 MR. BOHN: Case law says it's their
3 burden. You can read the case and decide for
4 yourself.

5 THE COURT: Okay. Thanks, guys.

6 MR. BOHN: This is from the old one.
7 It's not supposed to be US Bank. It's whichever
8 bank we're suing here.

9 No notice that the super-priority
10 portion of the lien was being foreclosed upon or
11 how the bank could protect its interest.

12 In SFR, the Supreme Court said nothing
13 appears to have stopped the bank from determining
14 the precise super-priority amount in advance of
15 the sale or paying the entire amount and
16 requesting a refund of the balance.

17 The Court also notes in there that
18 because the lien goes to more than just the bank,
19 it goes to the former owner, you don't have to set
20 forth the precise super-priority amount.

21 Mind you, in 2015, the legislature
22 changed the statute that had said -- that allowed
23 the HOAs to charge some costs and had to set forth
24 the super-priority amount and the amount of costs
25 that were being claimed. But with the statutes as

1 it applied at the time of this sale is the only
2 SFR sale. The Supreme Court said, once you're on
3 notice, you have an obligation, and due process is
4 not offended by this type of notice.

5 Reason 2, sale's not commercially
6 reasonable. That was an issue that was up in the
7 air or raised by the banks after Shadow
8 Wood/Shadow Canyon put this one to bed. The Court
9 said HOA foreclosure sales of real property are
10 ill-suited for evaluation under Article 9's
11 reasonableness standard.

12 I'd like to cite the case of Schwartz
13 versus Adams, where the Court found that the
14 notices sent were insufficient to comply with due
15 process. The Court said since the sales were
16 conducted so as to deny the owners of the property
17 due process of law, ideal remedy would be to
18 return the property to the former owner pending
19 constitutionally sufficient proceedings.
20 Unfortunately, this can no longer be done without
21 injury to innocent parties or bonafide purchasers
22 of the property.

23 So even in the case where there's
24 constitutionally insufficient notice given to the
25 owner of the property, the Supreme Court still

1 protected the bonafide purchaser.

2 And under Shadow Wood again, the party
3 who has property rights that may be affected has
4 the duty to take action before the sale, citing
5 Footnote 7, which I'm sure you've read many times
6 before.

7 How could the bank have protected
8 itself? And I asked both the B of A
9 representative as well as Rock Jung. They could
10 have paid the entire lien and sued for a refund.
11 They could have stashed an escrow account to avoid
12 having to use its own funds.

13 MR. BRENNER: I'm going to object, Your
14 Honor. That's not the testimony that Mr. Jung
15 proffered, and I wouldn't have allowed him to
16 opine on issues of what the bank could have done.

17 THE COURT: I don't remember that coming
18 up with him.

19 MR. BOHN: I did ask, Did you record
20 anything? Did you submit the CC&Rs and say, hey,
21 we're entitled to this information? Was the
22 entire lien paid? Did you file any action to get
23 an injunction to determine the amount of the lien
24 and what should be paid? None of this was done.

25 And the Supreme Court gave six things to

1 be done to protect interests before the sale: Pay
2 the lien, sue for refund, establish an escrow
3 account, bid at the sale, get an injunction,
4 record lis pendens, request an arbitration.

5 Had they done any of these steps, had
6 they been proactive whatsoever, other than just
7 sending a letter, they would have preserved its
8 right to equitable relief.

9 The sale is presumed valid and the
10 burden of proof is on the bank. That's the Shadow
11 Canyon case.

12 Stipulated facts and exhibits evidence a
13 valid sale. The pre-lien letter was sent in the
14 mail. The notice of default and election to sell
15 was recorded and mailed, including to Bank of
16 America. The notice of sale is recorded, it's
17 mailed. The notice was posted on the property in
18 three locations within the county, and it was
19 published in Nevada Legal News.

20 And the foreclosure deed has recitals
21 that are conclusive absent grounds for equitable
22 relief, and they haven't shown grounds for
23 equitable relief. So the recitals in the deed are
24 conclusive.

25 Going to the Shadow Wood factors again,

1 fraud, oppression, or unfairness as reinforced by
2 the Shadow Canyon case, you have to show a grossly
3 inadequate price and fraud, oppression, or
4 unfairness that accounts for and brought about the
5 grossly inadequate price. Again, the answers to
6 interrogatories do not set forth fraud,
7 oppression, or unfairness.

8 Contention 1, there was no notice the
9 HOA was foreclosing on a super-priority
10 foreclosure or advised the bank how it could
11 protect its interest or told what the
12 super-priority amount was is not grounds for
13 fraud, oppression, or unfairness because, again,
14 SFR. You get notice. You have to find out what
15 it is and take action.

16 Shadow Wood provides if you make a
17 mistake as to your legal consequences, equity will
18 not assist. And Bank of America -- the Court has
19 to keep in mind, Bank of America is not an old
20 widow living on a pension. It's a very
21 sophisticated entity, with lobbyists in every
22 state and a team of attorneys assisting it, in
23 this case Miles Bauer.

24 Contention 2 in their answers to
25 interrogatories, the sale was not commercially

1 reasonable based on the gross inadequacy of price.
2 The gross inadequacy standard was rejected in the
3 Shadow Canyon, Shadow Wood, and Golden versus
4 Tomiyasu.

5 Final Shadow Wood factor is the price
6 paid. Both counsel obtained expert witnesses in
7 this case to give you valuations of what the
8 property was worth. It's all irrelevant unless
9 they can show fraud, oppression, or unfairness.
10 And if they haven't shown it, you don't have to
11 look at the price.

12 There wasn't even a tender. There was
13 no tender made. There was a letter sent.
14 Additionally, in the answers to interrogatories,
15 attempted tender was not even listed as one of the
16 grounds for fraud, oppression, or unfairness.

17 Counsel is going to talk about an older
18 Nevada case that happened not long after World War
19 II. It doesn't talk about payment in regards to a
20 tender. It talks about tender and performance. I
21 know the facts. I don't know the name. I'm sure
22 Darren will raise it. He's mentioned it
23 yesterday.

24 But that case, the guy wanted to build a
25 motel and retained a contractor. And they started

1 to build it, but during World War II, with the
2 shortage of materials and manpower, they put a
3 stop to it. Sometime later, they restarted it.
4 The contractor got started again, and the owner
5 put a stop to it again.

6 After the war, people were looking for
7 things to do. The owner decided to move forward
8 with the project on his own. The contractor said,
9 "I'm here, let me get going so I can fulfill the
10 contract and make my money."

11 The owner said, "We're going to do it
12 without you."

13 The Supreme Court in that instance said
14 tender of performance is all that is required.
15 That is a performance contract. That is not a
16 contract involving money.

17 The restatement talks about what a
18 tender is in regards to a real property lien, and
19 it said that the money -- payment has to be made
20 by cash or cash equivalent, i.e., cashier check.
21 Not only that, if it's rejected, it has to be kept
22 good. The reason being, it's simple contract.

23 If you're going to offer to pay a debt,
24 you're allowed to say, "How much do I owe?" If
25 you disagree with it, you can say, "Let's make an

1 offer and compromise." If that offer is rejected,
2 just like with a contract, as a matter of law, the
3 offer is withdrawn. To keep the tender good, you
4 have to advise them after it's rejected.

5 This is an open offer to make a contract
6 here, and the money is here and it's available
7 anytime you want it. You can still accept it.

8 And the concept of kept good has been
9 embraced by the Nevada Supreme Court in a lot of
10 very old cases, one of them even from the 20th
11 century. It's just something that doesn't come up
12 with.

13 I'd like to point out it's always been
14 contemplated by the UCIOA, as shown to the comment
15 to Section 3116 of the 2014 JEB version of the
16 UCIOA. They said, "Equitable balance was premised
17 on the assumption that an association took action
18 to enforce its lien. When the unit owner failed
19 to cure its assessment default, the first mortgage
20 lender would promptly institute foreclosure
21 proceedings and pay the unpaid assessments, up to
22 six months' worth, to the association to satisfy
23 the association's lien."

24 It goes on to say it is also expected
25 that the bank would turn around and start their

1 own foreclosure. Get the property in the hands of
2 a homeowner who wants to live there and is willing
3 to pay the amounts due to the HOA so the HOA can
4 have the income it needs to provide the services
5 that it's supposed to.

6 Didn't happen here. Frequently, the
7 banks will point out, "Well, we have the PUD rider
8 which gives us the right to pay, and that should
9 have put them on notice of something that was
10 done."

11 In Shadow Wood, the Court found the mere
12 fact that the party retains the ability to bring
13 an equitable action after a foreclosure sale does
14 not impart constructive notice to the purchaser
15 that there may be an adverse claim to title.

16 Similarly, the mere fact that the bank
17 could have paid or could have made a tender should
18 not be held to be enough to put the purchaser on
19 notice. And even if there was notice, how is he
20 supposed to research? How is he supposed to find
21 out? It's just not practical.

22 And, by the way, the restatement of the
23 common law says that any junior lienholder always
24 has the right to cure any default on the property
25 so as to protect its interest. So the fact

1 there's a PUD rider or a planned unit development
2 rider or a condo rider, or whatever it was in this
3 particular case, is just consistent with the
4 common law, and it's consistent with the
5 restatement. So the fact that these legal rights
6 existed aren't enough to put someone on notice of
7 an attempt at a tender.

8 The bank is seeking equity. It must do
9 equity. The bank should be denied equitable
10 relief because it failed to do equity. It failed
11 to put anyone on notice of its claims and failed
12 to take any other steps to protect its interests.

13 The restatement, Section 6.4, which is
14 the tender and payment section, notes that -- they
15 say if the full amount of tender is paid, great.
16 As to the owner or the borrower and the bank,
17 interest has to stop at that point. But here
18 payment wasn't even made.

19 They note that the rule extinguishing a
20 mortgage when a tender is directed has only
21 limited modern significance. The reason is that
22 the mortgages are virtually always recorded, and
23 the payer derives little benefit from the
24 theoretical extinction of the mortgage if it is,
25 in fact, still present and apparently undischarged

1 in the publish records, meaning, got to put third
2 persons on notice.

3 The recording statutes are a basic part
4 of real property law as stated in 116.1108. A
5 conveyance is anything that basically affects any
6 title to the property.

7 Recording of a conveyance is notice to
8 third parties. 111.325 provides that an
9 unrecorded conveyance is void as against a
10 bonafide purchaser. If the bank is going to take
11 the position, and they are, that merely sending
12 the letter was sufficient tender to protect their
13 lien or protect their lien interests and that the
14 super-priority lien thereby was extinguished, an
15 extinguishment is a discharge which is a
16 conveyance, which has to be recorded to put third
17 persons on notice. And if you don't record that
18 conveyance, how is someone going to know.

19 The restatement will say because it is
20 paid by someone other than the persons primarily
21 responsible, the owner of the property, the bank
22 pays it, they're a third party, it's not a
23 discharge of the lien. It actually assigns the
24 lien, and the terms of the bank's deed of trust,
25 as I said before, allows that. Anything that they

1 pay they get to add to the debt secured by the
2 deed of trust and the amount owed on the note, and
3 they can foreclose on that because that's a breach
4 of their deed of trust. So if it's a discharge or
5 an assignment, it's still a conveyance and has to
6 be recorded.

7 106.260 provides that any discharge or
8 assignment of the lien may be recorded. And,
9 again, the very purpose of recording statutes is
10 to impart notice to subsequent purchaser.

11 I'm coming to the end here.

12 This is one thing they always throw out:
13 Oh, the deed is always without warranty or
14 representation. Well, the only warranties you get
15 with any deeds are found in 111.170. The
16 construction of words "grant, bargain, and sell"
17 in conveyances. And the only warranties you get
18 with those are, "I haven't given a deed to anybody
19 else before I give this one to you, and I haven't
20 encumbered the property before I gave this deed to
21 you." That's all the warranties are.

22 Mr. Haddad was on the stand saying,
23 "Well, my Golden Nugget ticket says things," but
24 they are still -- the HOA, the foreclosing party,
25 is still required to follow the law. And when

1 they hand out that deed with a conclusive
2 recitals, he's entitled to rely on it. So even
3 though it doesn't have the statutory warranties,
4 there are still implied warranties that come with
5 it, i.e., that the sale was conducted validly.
6 And, in fact, there's a presumption the sale was
7 conducted pursuant to the law, and that is noted
8 in the Shadow Canyon case.

9 We request judgment free and clear of
10 the claims of Bank of America, Nationstar, whoever
11 the current holder is, that we get free and clear
12 of their claims. And we request a permanent
13 injunction precluding US Bank or its successors
14 from asserting any claim in the property by way of
15 the extinguished deed of trust.

16 There's probably more to say. You've
17 heard it all before, though, I'm sure. I'll be
18 happy to rest. Thank you.

19 THE COURT: All right. It may work.

20 MR. BRENNER: So in this case, Judge,
21 we've got two defenses. The first one is a
22 defense at law. A tender as a legal doctrine
23 means that we extinguish the deed of trust. The
24 second is inequity, and that's the inequitable
25 balancing, the Shadow Wood, the Shadow Canyon

1 defense.

2 This is -- you know, forgetting the
3 CC&Rs issue the last time we had a case in front
4 of Your Honor, it's the same case. The only
5 difference is no check was issued. As we're going
6 to see, as a matter of law, that makes no
7 difference for the very practical reason that you
8 can't issue payment when somebody won't tell you
9 how much to pay. And we're going to see, when we
10 get to the slides, that the law treats that -- to
11 the extent the offer itself is not a tender, when
12 a party obstructs another's ability to complete
13 that final act of issuing payment, as a very
14 practical matter, we see that the law doesn't
15 treat that any differently than a payment.

16 We know that Miles Bauer offered to pay
17 the super-priority portion of the lien. It's the
18 very last sentence where they say, "My client
19 hereby offers to pay that sum upon presence of
20 adequate proof of the same."

21 We know NAS had no problem with the
22 request for an adequate proof that it was hundreds
23 of times, if not thousands, a ledger that was
24 provided, that Miles Bauer accepted the ledger,
25 and that that's the only thing that Miles Bauer

1 was looking for, and it offered to pay nine
2 months.

3 We know that it was stipulated that the
4 letter was sent and received. We know that
5 Mr. Jung confirmed it. And Mr. Yergensen
6 explained -- and in all of the trials that we've
7 had, this is the first time I've ever heard
8 Mr. Yergensen explain that the reason why NAS
9 didn't follow its own procedures was because it
10 got lazy. And that says something about what NAS
11 was doing with these tenders throughout this
12 process.

13 Here are the cases that Counsel, I
14 believe, was referring to, including the Cladonias
15 case, which says a tender is complete when the
16 money is offered to a creditor. It doesn't have
17 to be paid. Just like an insurance policy. You
18 can say, "Here's the hundred thousand dollar
19 insurance policy. All you've got to do is return
20 this release." That's a tender.

21 The fact that it is from the fifties,
22 after World War II, does not change the fact that
23 this is still good law, and it remains good law
24 today.

25 We've also cited to two other cases,

1 including the Guthrie and the Ebert case. This is
2 in a trial brief.

3 When a party able and willing to do so
4 offers to pay another a sum of money and is told
5 it will not be accepted, the offer is a tender
6 without the money being produced for the obvious
7 reasons that you don't have to perform a futile
8 act when somebody is not going to accept it or, in
9 this case, give information anyway.

10 There is no dispute in this case Miles
11 Bauer was ready, willing, and able to pay. It did
12 so hundreds of times. Ms. Woodbridge testified to
13 that. Mr. Jung testified to that. If it got the
14 ledger and could extrapolate the information, it
15 would issue the check. Even if it didn't get the
16 ledger, if there was a prior ledger from when NAS
17 was providing this information, the check would
18 still be issued.

19 And, of course, this case has the
20 interesting scenario where Silver State did
21 respond, which later we can discuss how that
22 evidences there really is no FDCPA concern, but we
23 saw exactly what Bank of America would have done.
24 And we saw that at this point in time, Bank of
25 America was actually willing to overpay the lien

1 in an effort to satisfy -- remember, the tender to
2 Silver State was four times what the super
3 priority was.

4 And, again, that's stipulated fact.

5 NAS confirmed its knowledge that Bank of
6 America would have paid. Again, they understood
7 what proof Miles Bauer sought. They knew Miles
8 Bauer would send a check. And they testified that
9 they would have rejected payment if it was
10 anything less than the full amount of the lien if
11 it came with the letter explaining it was for the
12 super priority.

13 Again, it's something I haven't heard in
14 a dozen cases, maybe more. We heard Mr. Haddad
15 himself say, well, you've got to send a letter
16 explaining what it's for when he got on the stand.
17 Otherwise, it's just a payment, and who knows what
18 it would go to.

19 The only valid justification for a
20 rejection, which the failure to respond amounts
21 to, is an invalid offer. And, of course, we know
22 that nine months was the super priority. That's
23 the exactly the language in the Miles Bauer
24 letter. It's exactly what it was offering.

25 Interesting fact in this case -- I won't

1 ask Your Honor to read all of the fine print, but
2 we saw the CC&R that said the payments must be
3 applied to the oldest balance. We saw the fact
4 that Mr. Nolan actually issued a \$250 payment. We
5 saw that there was a \$5.90 credit. While that
6 wouldn't have satisfied the entire 295, it means
7 that ultimately the super priority in this case,
8 because it's measured from the date of the notice
9 of delinquent assessment lien under the -- under
10 probably one of a dozen of Mr. Haddad's cases that
11 we're going to go over in these PowerPoints, it
12 begins at the recording of the notice of
13 delinquent assessment lien. So it's only those
14 old assessments.

15 So ultimately we're talking about a
16 \$39.10 super priority, and that's all the bank
17 owed. \$39.10. The bank is offering to pay nine
18 months. Probably going to pay costs in addition
19 to that, just as they did to Silver State, and NAS
20 is refusing to give this information over \$39.10
21 to let Bank of America satisfy the super priority.

22 The FDCPA is not a defense. I'm going
23 to go several reasons. We've done these trials, I
24 don't know, with NAS 15 or 20 of them. Yet to see
25 a court say, "Yes, FDCPA was a valid basis to

1 refuse to provide the information needed to
2 satisfy the super priority."

3 I might also add, although I'm sure this
4 Court is going to exercise its independent
5 discretion, four of the five judges have found
6 that the letter and NAS's refusal to respond at
7 trial has been a sufficient tender.

8 The FDCPA is inapplicable as a matter of
9 law for a few reasons. This is Miles Bauer
10 requesting the information, not the debtor.
11 There's no communication here with the debtor,
12 trying to coerce the debtor to make a payment.
13 That's one. And we've cited a mountain of law on
14 that.

15 And number two, foreclosing on a lien is
16 not debt collection. As a matter of law -- and I
17 think we've cited half a dozen, maybe less -- four
18 or five cases where varying circuits have all
19 reached that conclusion. It's completely
20 inapplicable.

21 We know that even if it was
22 inapplicable, the CC&Rs expressly entitled Bank of
23 America to that information in two different
24 places. First of all, if it's asked -- if notice
25 of the delinquency is requested, and it's more