BOB MILLER
Governor
ROSE McKINNEY-JAMES
Director

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
STATE MAIL COMPLEX
DISTRICT OFFICE
2501 E. SAHARA AVENUE
LAS VEGAS, NEVADA 89158
(702) 486-4033

JOAN G. BUCHANAN
Administrator

March 21, 1995

Allen A. Duke
9457 S. Las Vegas Blvd #243 Building #20
Las Vegas, NV 89123-3306

Re: Compliant/Joel Silverman/Magic Realty/Las Vegas Paradise Spa: 384 Unit Condominium Project

Dear Mr. Duke:

In follow up to our conversation today, again, I wanted to make clear that the Real Estate Division has no jurisdiction over the activities of a Home Owner Association. The Division does have jurisdiction over the activities of a real estate licensee. Nevada Revised Statutes 645.

Nevada Revised Statutes 116.4109 in the Common-Interest Ownership Act, it clearly states the requirement of a unit's owner to furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance the following documents: Declaration, ByLaws, Association Rules and Regulations, statement of monthly assessment and any unpaid assessment due from subject unit, current operating budget.

I will turn your complaint file over to Matt DiOrio, Compliance Supervisor for his review. Please direct your correspondence and documents directly to him. Your complaint will need to be readdressed as to issues that are jurisdictional to the Division; not receiving the Common-Interest documents prior to signing the sales agreement so you would have been aware of the Association and it's rules and regulations and monthly dues requirement.

I will look for you at the Saturday Sub-Committee Hearing of AB 152 at 9:30 am at the Sawyer Building in Carson City.

Yours truly,

Joan Buchanan
Administrator

STATE OF NEVADA
Department of Business and Industry
Real Estate Division
JOAN G. BUCHANAN
Administrator
2501 E. Sahara Avenue
Las Vegas, Nevada 89158
(702) 486-4033

DISPUTE INFORMATION & REFERRAL MEDIATION SERVICES

neighborhood justice center

... helping people arrive at a mutually acceptable solution

RE COUNTY SOCIAL SERVICE
NEIGHBORHOOD JUSTICE CENTER
1600 PINTO LANE
LAS VEGAS, NEVADA 89106

mission statement

Providing all citizens of Clark County with a free and comprehensive dispute resolution information and referral program. Offering an effective and efficient alternative to the traditional methods of conflict resolution by helping people arrive at a mutually acceptable solution through mediation services provided by professionally trained volunteers and staff.

funding for the n.j.c.

Comes from a filing fee in District and Justice Courts. However, this does not cover the cost of operating the program free of charge. Therefore, *donations are gratefully accepted, and they are tax-deductible.*

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SER00086

what does the neighborhood justice center (n.j.c.) do?

The N.J.C. helps residents of Clark County resolve conflicts at no cost through a comprehensive information and referral program and through mediation services.

The N.J.C. can assist in a variety of disputes. The following is a partial list of the types of disputes the N.J.C. can assist in:

- Neighborhood Disputes
- Consumer/Merchant Disputes
- Employer/Employee Disputes
- Family Disputes
- Landlord/Tenant Disputes
- Hospital-Doctor/Patient Disputes
- Student/Parent Disputes

how does the information and referral program work?

Trained staff who are familiar with the resources in the Southern Nevada community assist citizens by defining the dispute and, if appropriate, directing the citizens to the resources available. This may include a referral to the N.J.C. mediation program.

what is mediation?

Mediation is a process that assists disputing parties to resolve their differences and reach a mutually satisfactory agreement with the help of a trained neutral third party.

benefits of mediation

- COST EFFECTIVE
- FASTER THAN LITIGATION
- PROCESS IS PERSONALIZED
- ISSUES ARE DISCUSSED IN DEPTH
- THE PARTIES CONTROL THE OUTCOME RATHER THAN HAVING A DECISION MADE FOR THEM
- PRIVACY AND CONFIDENTIALITY ARE PROMOTED

type of disputes the n.j.c. won't mediate*

- PROBLEMS THAT CAN'T BE SETTLED THROUGH NEGOTIATION
- MATTERS INVOLVING VIOLENT ACTIVITY
- GANG ACTIVITIES
- MATTERS IN WHICH ONE OF THE PARTIES REFUSES TO PARTICIPATE WILLINGLY

*Information and Referral services are available.

who does the n.j.c. serve?

All citizens of Clark County regardless of income. There is no charge for the N.J.C. services.

IF YOU THINK THE N.J.C. CAN HELP OR YOU HAVE FURTHER QUESTIONS ABOUT THE N.J.C. SERVICES, PLEASE CALL OR COME INTO OUR OFFICES BETWEEN 8 A.M. AND 5 P.M.

CLARK COUNTY SOCIAL SERVICE
NEIGHBORHOOD JUSTICE CENTER
1600 PINTO LANE
LAS VEGAS, NEVADA 89106

(702) 455-3898

RURAL CLARK COUNTY
1-800-492-3177
(Ask for Social Service)

THE N.J.C. DOES NOT PROVIDE LEGAL ADVICE OR PROVIDE AN ATTORNEY

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SER00087

SPIDR

SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION

ETHICAL STANDARDS OF PROFESSIONAL RESPONSIBILITY

Adopted June 1986

International SPIDR Offices
815 15th Street, NW
Suite 530
Washington, DC 20005
202-783-7277
FAX 202-783-7281

03-17-92

Introduction

The Society for Professionals in Dispute Resolution (SPIDR) was established in 1973 to promote the peaceful resolution of disputes. Members of the Society believe that resolving disputes through negotiation, mediation, arbitration and other mutual interventions can be of great benefit to disputing parties and to society. In 1985, the SPIDR Board of Directors charged the SPIDR Ethics Committee with the task of developing ethical standards of professional responsibility. The Committee membership represented all the various sectors and disciplines within SPIDR. This document, adopted by the Board on June 2, 1986, is the result of that charge.

The purpose of this document is to promote among SPIDR Members and Associates ethical conduct and a high level of competency among SPIDR Members, including honesty, integrity, impartiality and the exercise of good judgment in their dispute resolution efforts. It is hoped that this document also will help to (1) define the profession of dispute resolution, (2) educate the public, and (3) inform users of dispute resolution services.

Applications of Standards

Adherence to these ethical standards by SPIDR Members and Associates is basic to professional responsibility. SPIDR Members and Associates commit themselves to be guided in their professional conduct by these standards. The SPIDR Board of Directors or its designee is available to advise Members and Associates about the interpretation of these standards. Other neutral professions and organizations are welcome to follow these standards.

Scope

It is recognized that SPIDR Members and Associates receive disputes in various modes within the disciplines of dispute resolution and have their own codes of professional conduct. These standards have been developed as general guidelines of practice for neutral disciplines represented in the SPIDR membership. Ethical considerations relevant to some, but not to all, of these disciplines are not covered by these standards.

SER00088

General Re[illegible] ...bilities

Neutrals have a duty to the parties, to the profession, and to themselves. They should be honest and unbiased, act in good faith, be diligent, and not seek to advance their own interests at the expense of their parties.

Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias toward individuals and institutions involved in the dispute, be reasonably available as requested by the parties, and be certain that the parties are informed of the process in which they are involved.

Responsibilities to the Parties

1. Impartiality. The neutral has an obligation to assure that all parties understand the nature of the process, the procedures, the particular role of the neutral, and the parties' relationship to the neutral.

2. Informed Consent. The neutral must maintain impartiality toward all parties throughout the process. Impartiality means freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.

3. Confidentiality. Maintaining confidentiality is critical to the dispute resolution process. Confidentiality encourages candor, a full exploration of the issues, and a neutral's impartiality. There may be some types of cases, however, in which confidentiality is not promoted. In such cases, the neutral must advise the parties, when appropriate in the dispute resolution process, that the confidentiality of the proceedings cannot necessarily be maintained. Except in such instances, the neutral must resist all attempts to cause him or her to reveal any information outside the process. A commitment by the neutral to hold information in confidence within the process also must be honored.

4. Conflict of Interest. The neutral must refrain from entering or continuing in any dispute if he or she believes or perceives that participation as a neutral would be a clear conflict of interest and any circumstance that may reasonably raise a question as to the neutral's impartiality.

The duty to disclose is a continuing obligation throughout the process.

Responsibilities to the Parties - continued

5. Promptness. The neutral shall exert every reasonable effort to expedite the process.

6. The Settlement and Its Consequences. The dispute resolution process belongs to the parties. The neutral has no vested interest in the terms of a settlement, but must be satisfied that agreements in which he or she has participated will not impugn the integrity of the process. The Neutral has a responsibility to see that the parties consider the terms of a settlement. If the neutral is concerned about the possible consequences of a proposed agreement, and the needs of the parties dictate, the neutral must inform the parties of that concern. In adhering to this standard, the neutral may find it advisable to encourage the parties, in rare cases or more parties for specialized advice, or to withdraw from the case. In no case, however, shall the neutral violate Section 3, Confidentiality, of these standards.

Unrepresented Interests

The neutral must consider circumstances where interests are not represented in the process. The neutral has an obligation, where in his or her judgment the needs of parties dictate, to assure that such interests have been considered by the principal parties.

Use of Multiple Procedures

The use of more than one dispute resolution procedure by the same neutral involves additional responsibilities. Where the use of more than one procedure is initially contemplated, the neutral must take care at the outset to advise the parties of the nature of the procedures and the consequences of revealing information during any one procedure which the neutral may later use for decision making or may share with another decision maker. Where the use of more than one procedure is contemplated after the initiation of the dispute resolution process, the neutral must explain the consequences and afford the parties an opportunity to select another neutral for the subsequent procedure(s). It is also incumbent upon the neutral to advise the parties of the transition from one dispute resolution process to another.

Background and Qualifications

A neutral should accept responsibility only in circumstances where the neutral has sufficient knowledge regarding the appropriate process and subject matter to be effective. The neutral has a responsibility to maintain and improve his or her professional skills.

Disclosure of Fees

It is the duty of the neutral to explain to the parties at the outset of the process the bases of compensation, fees and charges, if any.

Support of the Profession

The experienced neutral should participate in the development of new practitioners in the field and engage in efforts to educate the public about the value and use of neutral dispute resolution procedures. The neutral should provide pro bono services, where appropriate.

Responsibilities of Neutrals Working on the Same Case

In the event that more than one neutral is involved in the resolution of a dispute, each has an obligation to inform the others regarding his or her entry in the case. Neutrals working with the same parties should maintain an open and professional relationship with each other.

Advertising and Solicitation

A neutral must be aware that some forms of advertising and solicitation are inappropriate and in some conflict resolution disciplines, such as labor arbitration, are impermissible. All advertising must honestly represent the services to be rendered. No claims of specific results or promises which imply favor of one side over another for the purpose of obtaining business should be made. No commissions, rebates, or other similar forms of remuneration should be given or received by a neutral for the referral of clients.

For further information, please contact the International SPIDR Office

SPIDR
815 15th Street, NW Suite 530
Washington, DC 20005
202-783-7277

SER00089

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
May 24, 1995

The Committee on Judiciary was called to order at 8:00 a.m., on Wednesday, May 24, 1995, Chairman Anderson presiding in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. David E. Humke, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. Thomas Batten
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Ms. Dianne Steel
Ms. Jeannine Stroth

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Dennis Nellander, Research Analyst
Patty Hicks, Committee Secretary

OTHERS PRESENT:

Mr. Dennis Healy, Nevada Highway Patrol Association
Mr. Brent Kolvet, Esq.

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Ms. Buckley advised the areas were broken down into the major sections of the bill, and the proposed amendment was the result of interested parties working together and are in full agreement with the work document and amendments.

Mr. Dennis Healy and Gary Wolff, Nevada Highway Patrol Association, and Ms. Valerie S. Cooney, President, Nevada Trial Lawyers Association, affirmed they were in support of A.B. 292, as amended.

Mrs. Monaghan commented this particular bill was a difficult issue to understand and work on and appreciated everyone's ability to work together to make it easier.

ASSEMBLYMAN BUCKLEY MOVED TO AMEND AND DO PASS A.B. 292.

ASSEMBLYMAN BATTEN SECONDED THE MOTION.

THE MOTION CARRIED. (ASSEMBLYMEN GOLDWATER, HUMKE, PERKINS AND STEEL WERE NOT PRESENT FOR THE VOTE.)

ASSEMBLY BILL NO. 152 — Requires arbitration of certain claims relating to residential property.

Mr. Neilander informed Mr. Schneider and Mr. Sandoval held a subcommittee hearing in Las Vegas and briefly summarized the report of the subcommittee.

Mr. Schneider advised the big concern was trial de novo. He stated the Las Vegas people would prefer to go without trial de novo and advised it would allow the people instead of going to court to get right to arbitration to resolve differences. Mr. Schneider noted the real estate division has signed off on this amendment.

Mr. Sandoval commented it is a product of extensive negotiation, hard work and he was in complete support of the bill as amended.

Mrs. Monaghan stated Painted Desert is in her district and they are happy with the bill.

Mr. Schneider stated as soon as a fax is received from Crockett & Myers, Attorneys At Law, of Las Vegas, he will submit the amendment to the committee.

attached as (Exhibit F).

COMMITTEE INTRODUCTIONS:

ASSEMBLYMAN OHRENSCHALL MOVED FOR COMMITTEE INTRODUCTION OF BDR 11-630.

ASSEMBLYMAN SCHNEIDER SECONDED THE MOTION.

THE MOTION CARRIED. (ASSEMBLYMEN BATTEN, GOLDWATER, MANENDO AND HUMKE WERE NOT PRESENT FOR THE VOTE.)

ASSEMBLYMAN SCHNEIDER MOVED TO AMEND AND DO PASS A.B. 152 ALONG THE LINES OF THE WORK DOCUMENT PRESENTED WITH THE INCLUSION OF TRIAL DE NOVO.

ASSEMBLYMAN CARPENTER SECONDED THE MOTION.

Under discussion it confines its review to the records considered on appeal, Subsection 5 on p. 6, the appeal is only based on the record and does not take new witnesses and testimony. In a trial de novo you take new witnesses and testimony. Mr. Nellander read the proposed changes to the amendment into the record, attached in (Exhibit E).

THE MOTION CARRIED. (ASSEMBLYMEN BATTEN, GOLDWATER AND HUMKE WERE NOT PRESENT FOR THE VOTE.)

ASSEMBLY BILL NO. 502 — Makes various changes relating to discriminatory practices.

Mr. Nellander briefly summarized the report of the subcommittee, attached as (Exhibit G).

Ms. Buckley informed receipt of two more letters in support of A.B. 502 from MGM Grand and Southern Nevada Human Resource Association, attached as (Exhibit H).

Assembly Committee on Judiciary Work Session

May 23, 1995

I. Report of the Subcommittee to Consider Assembly Bill 292 - Chairwoman Buckley, Assemblymen Humke and Goldwater, and Assemblywoman Steel

This bill addresses the disposition of certain retirement benefits in divorce cases.

Attached is a conceptual amendment prepared by Valerie Cooney, Nevada Trial Lawyers, in consultation with the primary proponents, to reflect the intent of the subcommittee. The amendments propose the following major changes:

- Clarify that the bill only covers those retirement benefits that are vested at the time of divorce. Delete the remainder of subsection 1.
- In subsection 2, provide that where one party is not entitled to receive social security benefits, but the other is, the court may consider that element and provide an offset if necessary.
- Amend subsection 4, to address the time when a retirement benefit is payable to the non-participating spouse. If the benefit is available to the non-participating spouse at or before the date of eligibility to retire, then it must be paid at the time of divorce, upon eligibility to retire, or at a time agreed to by the parties. If the plan does not allow payment until the participating party actually retires, then payment need not be paid until actual retirement if the court orders an alternative means of protection like a surety bond or some other form of protection agreed upon by the parties.
- Amend subsection 5 to ensure that the participating parties' estate is not required to continue payment of benefits upon the death of the participating party.
- Provide that the bill is effective upon passage and approval.

EXHIBIT E

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II. Report of the Subcommittee to Consider Assembly Bill 152 - Chairman Schneider and Assemblyman Sandoval

This bill requires mediation or arbitration of claims related to homeowners association disputes.

Attached is a conceptual amendment that makes the following major changes:

- Excludes disputes involving title to real property;
- Clarifies that the bill would apply to actions in the lower courts;
- Authorizes mediation if both parties agree, arbitration if they do not agree or so request;
- Provides procedures for the selection of mediators or arbitrators;
- Authorizes the parties to agree to binding or non-binding arbitration and a trial de novo if in binding arbitration the party seeks to vacate the award because of corruption or fraud, or in non-binding arbitration because of an injustice in the award of the arbitrator;
- Fees of the arbitrator are paid by the parties pro-rata; and
- If a party appeals to a trial de novo and achieves a result less favorable than the initial award, then that party must pay the costs and attorneys fees of the opposing party.

III. Report of Assemblywoman Buckley Concerning Assembly Bill 502

This measure amends various provisions of NRS to bring Nevada in "substantial compliance" with the Fair Housing Act. The bill prohibits discrimination in housing and sets up a procedure for the adjudication of disputes. Attached is a copy of the proposed amendments to address issues raised during the initial hearing on the bill.

IV. Report of the Subcommittee to Consider Assembly Bill 95 - Chairman Sandoval and Assemblywoman Buckley

Assembly Bill 95

Requires records of DUI violations by juveniles to be placed on the offender's driving record for 7 years.

Amendment No. 342 - The information may not be released to an employer or insurance company unless the juvenile or parent or guardian agrees to the release. Law enforcement officials and courts are granted access.

Further discussion concerning the ability of a child to deny conviction of such offense on employment application.

Assembly Bill 91

Requires the evaluation and treatment of a person under 21 who has committed DUI to determine if he is an abuser of alcohol or drugs.

Amendment No. 86 - Changes the mandatory treatment provisions to discretionary. Allows the judge to order the child to perform community service lieu of paying the charges relating to the evaluation or treatment.

V. Assembly Bill 505

This measure requires the establishment of a boot camp for juvenile offenders.

CROCKETT & MYERS
ATTORNEYS AT LAW
700 South Third Street
Las Vegas, Nevada 89101
Telephone: (702) 382-6711
Telecopier: (702) 382-7595

TELECOPIER COVER LETTER

DATE: May 17, 1995 TIME: 3:55pm

TO: Mike Schneider
Nevada Legislature - Assembly

FAX NUMBER: 702-687-5962

FROM: Melissa C. Lavelle, Esq.

RE: Assembly Bill

COMMENTS: See attached.

WE ARE TRANSMITTING 7 PAGE(s) (Excluding the cover sheet). IF YOU DO NOT RECEIVE ALL OF THE PAGES, PLEASE CALL BACK AS SOON AS POSSIBLE.

TELECOPIER OPERATOR: Cathy

CONFIDENTIAL AND PRIVILEGED.

THIS INFORMATION CONTAINED IN THIS FACSIMILE MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE, AND RETURN THE ORIGINAL MESSAGE TO US AT THE ABOVE ADDRESS VIA THE U.S. POSTAL SERVICE. WE WILL REMIT ANY POSTAGE CHARGES INCURRED BY YOU. THANK YOU.

EXHIBIT J

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PROPOSED AMENDMENT TO:

ASSEMBLY BILL NO. 152

SUMMARY--Requires arbitration of certain claims relating to residential property.

FISCAL NOTE: Effect on Local Government No.

Effect on the State or on Industrial Insurance: Yes.

AN ACT relating to alternative dispute resolution; requiring the arbitration or mediation of certain claims relating to residential property; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 10, inclusive, of this act.

Sec. 2. As used in sections 2 to 10, inclusive, of this act, unless the context otherwise requires:

1. "Assessments" means all charges, including late charges, interest and costs of collection which an association may levy against owners of residential property pursuant to a declaration of covenants, conditions and restrictions, as well as fines, fees and other

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assembly bill 38

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charges which may be levied pursuant to NRS 116.3102(1),(k) and (l).

2. "Association" has the meaning ascribed to it in NRS 116.110315, whether or not the particular association is subject to that law.

3. "Civil action" includes an action for money or equitable relief but does not include an action in equity for injunctive relief where there exists an immediate threat of irreparable harm, or any action involving the title to residential property.

4. "Division" means the real estate division of the Department of Business and Industry.

5. "Geographical area" means an area within a radius of 150 miles of the residential property or association which is the subject of the arbitration or litigation.

6. "Qualified Mediator" and "Qualified Arbitrator" mean that the mediator or arbitrator shall be trained and experienced in mediation or arbitration and shall have specialized training or experience in the resolution of disputes involving associations and the interpretation and enforcement of declarations of covenants, conditions and restrictions affecting residential property, and an associations corporate articles of incorporation, bylaws and rules and regulations promulgated by an association.

4. "Residential property" includes, but is not limited to, real estate within a planned community subject to the provisions of chapter 116 of NRS. The term does not include commercial property if no portion thereof contains property which is used for residential purposes.

Sec. 3. 1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions, rules and regulations, or bylaws adopted by an association, applicable to residential property; or

(b) An increase, reduction or imposition of additional assessments upon residential property; or

(c) The collection of existing assessments

may be commenced in any small claims court, justice's court or district court unless

(i) the complaining party has exhausted all intra-association administrative procedures which are specified in the covenants, conditions or restrictions, or in the bylaws, or in the rules and regulations of the association; and

(ii) the action has been submitted to arbitration pursuant to the provisions of sections 2 to 10, inclusive, this act.

2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Sec. 4. 1. All persons having any dispute governed by Section 3, above, shall submit the dispute to alternative dispute resolution in the manner prescribed below:

(a) A person shall file a complaint with the Division, which must include:

(1) The complete names, addresses and telephone numbers of all parties

to the claim;

(ii) A specific statement of the nature of the claim;

(iii) A statement of whether the person wishes to have the claim submitted to a mediator and whether he agrees to binding arbitration; and

(iv) Such other information as the Division may require.

2. The petition must be accompanied by a fee to be determined by the Division.

3. Upon the filing of the petition, the petitioner shall serve a copy of the complaint in the manner prescribed in Rule 4 of the Nevada Rules of Civil Procedure for the service of a summons and complaint. The complaint so served must be accompanied by a statement explaining the procedures for mediation and arbitration set forth in this act.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the complaint was served shall, within thirty (30) days after the date of service, file a written answer with the Division and must include a fee to be determined by the Division.

Sec. 5. 1. The Division shall establish and maintain (a) a written explanation of the arbitration and mediation process required by this statute, and (b) a list of qualified mediators and arbitrators available in all major population centers in the State. To comply with this part, the Division may rely upon lists of qualified persons maintained and published by such organizations as the American Arbitration Association, Nevada Dispute Resolution Service, Nevada Arbitration Association, Community Associations Institute, or by any other qualified provider. The Division may require that any dispute resolution service provider in the State demonstrate to the Division that he or she is in fact qualified.

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conf/assembly.38

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SER00100

2. If all parties named in a complaint filed pursuant to Section 4 of this Act agree to mediation of the dispute, their agreement to mediate shall be reduced to writing and the parties shall select a qualified mediator available within the geographic area or such other location in the State, from a list of qualified mediators to be maintained by the Division. If the parties cannot agree upon a mediator, then the Division shall appoint a mediator available within the geographic area from such list maintained by the Division. Mediation shall be completed within ninety (90) days of the parties' agreement to mediate, unless the parties otherwise agree. Any agreement reached through mediation shall be reduced to writing by the mediator within thirty (30) days of the conclusion of the mediation, and a copy of the agreement shall be provided to all parties. The parties to mediation may enforce the agreement reached in mediation in the same manner as any other written agreement. The parties shall be responsible for all costs of the mediation.

3. If all parties to a dispute do not request mediation, and whether or not an answer to the complaint is filed within the period specified, the parties shall select a qualified arbitrator available within the geographic area to arbitrate the dispute. If the parties cannot agree upon a qualified arbitrator, then the Division shall select the qualified arbitrator from the geographic area and shall notify each party of the name of such arbitrator.

4. The arbitration shall be conducted consistently with the provisions of Sections 38.075 through 38.105, subsection 1 inclusive, and sections 38.115 through 38.135 inclusive, and section 38.165 of NRS Chapter 38, Uniform Arbitration Act, subject, however to the

appeal provisions and other requirements stated in this Act. The arbitrator may hear evidence and make a final determination based upon the evidence produced, notwithstanding the failure of a party to file an answer or to appear after proper notification of the hearing. The award of the arbitrator shall be rendered within the time agreed by the parties but not later than thirty (30) days after the conclusion of the arbitration. The decision must include findings of fact and, if appropriate, conclusions of law. The decision may include an award of attorney's fees to the prevailing party, in the discretion of the arbitrator. The arbitrator shall deliver the decision personally or by registered or certified mail to each party and to the Division.

5. Upon receipt of a final decision pursuant to subsection 4, a party may, within thirty (30) days, appeal the decision of the arbitrator to the district court in whose district the decision was made. In conducting an appeal pursuant to this section, the district court shall confine its review to the record submitted on appeal and shall not substitute its judgment for that of the arbitrator as to the weight of evidence on a question of fact.

6. The court may remand or affirm the final decision or set it aside in whole or in part if the substantial rights of either party have been prejudiced because the final decision of the arbitrator is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the arbitrator;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

7. If no appeal is made pursuant to this section within the prescribed period, the decision of the arbitrator becomes final. Upon application therefor by a party, the district court shall enter a judgment or decree in conformity with the decision of the arbitrator. The judgment or decree may be enforced as an other judgment or decree.

Sec. 10. 1. The Division shall administer the provisions of sections 2 to 10, inclusive, of this act and may adopt such regulations as are necessary to carry out those provisions.

2. Except as otherwise provided in subsection 3, all fees collected by the division pursuant to the provisions of sections 2 to 10, inclusive, of this act must be accounted for separately and may only be used by the division to administer the provisions of sections 2 to 10, inclusive, of this act.

Sec. 11. NRS 38.250 is hereby amended to read as follows:

38.250 1. [All] Except as otherwise provided in section 3 of this act, all civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $25,000 must be submitted to nonbinding arbitration in accordance with the provisions of NRS 38.253, 38.255 and 38.258.

2. A civil action for damages filed in justice's court may be submitted to arbitration if the parties agree, orally or in writing, to the submission.

Mr. Speaker:

Your Concurrent Committee on Transportation, to which was referred Assembly Bill No. 530, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

THOMAS BATTEN, *Chairman*

Mr. Speaker:

Your Concurrent Committee on Ways and Means, to which was referred Assembly Bill No. 530, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

MORSE ARBERRY, JR., *Chairman*

Mr. Speaker:

Your Committee on Ways and Means, to which was referred Assembly Bill No. 628, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

MORSE ARBERRY, JR., *Chairman*

Mr. Speaker:

Your Committee on Natural Resources, Agriculture and Mining, to which was referred Senate Bill No. 402, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

JOHN CARPENTER, *Chairman*

Mr. Speaker:

Your Committee on Natural Resources, Agriculture and Mining, to which was referred Assembly Bill No. 537, has had the same under consideration, and begs leave to report the same back with the recommendation: Amend, and do pass as amended.

JOHN CARPENTER, *Chairman*

MOTIONS, RESOLUTIONS AND NOTICES

Assemblyman Ernaut moved that Assembly Bills Nos. 152, 231, 258, 405, 433, 498, 530, 532, 537, 580, 628, 629; Senate Bills Nos. 265, 334, 357, 370, 402 be placed on the Second Reading File.

Motion carried.

Assemblyman Ernaut moved that Assembly Bill No. 317 be placed on the General File.

Motion carried.

Assemblyman Arberry moved that Assembly Bill No. 120 be taken from the Chief Clerk's desk and re-referred to the Committee on Ways and Means.

Motion carried.

SECOND READING AND AMENDMENT

Assembly Bill No. 152.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 659.

Amend section 1, page 1, line 2, by deleting "10," and inserting "8,".

Amend sec. 2, page 1, line 3, by deleting "10," and inserting "8,".

Amend sec. 2, page 1, by deleting lines 5 through 8 and inserting:

"1. "Assessments" means:

(a) Any charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions, including any late charges, interest and costs of collecting the charges; and

(b) Any fines, fees and other charges which may be imposed by an association pursuant to paragraphs (j), (k) and (l) of subsection 1 of NRS 116.3102.

2. "Association" has the meaning ascribed to it in NRS 116.110315.

3. "Civil action" includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.

4. "Division" means the real estate division of the department of business and industry.

5. "Residential property" includes, but is not limited to, real estate within".

Amend sec. 3, page 1, line 14, by deleting "property;" and inserting: "property or any bylaws, rules or regulations adopted by an association;",

Amend sec. 3, page 1, line 15, by deleting: "An increase or imposition of" and inserting: "The procedures used for increasing, decreasing or imposing",

Amend sec. 3, page 1, line 17, by deleting: "a district court" and inserting: "any court in this state",

Amend sec. 3, page 1, line 18, by deleting "10," and inserting "8,",

Amend sec. 3, page 1, by deleting line 19 and inserting: "act and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.",

Amend sec. 3, page 1, line 20, by deleting "district",

Amend the bill as a whole by deleting sections 4 through 11 and adding new sections designated sections 4 through 10, following sec. 3, to read as follows:

"Sec. 4. 1. Any civil action described in section 3 of this act must be submitted for mediation or arbitration by filing a written claim with the division. The claim must include:

(a) The complete names, addresses and telephone numbers of all parties to the claim;

(b) A specific statement of the nature of the claim;

(c) A statement of whether the person wishes to have the claim submitted to a mediator or to an arbitrator. If the person wishes to have the claim submitted to an arbitrator, whether he agrees to binding arbitration; and

(d) Such other information as the division may require.

2. The written claim must be accompanied by a reasonable fee as determined by the division.

3. Upon the filing of the written claim, the claimant shall serve a copy of the claim in the manner prescribed in Rule 4 of the Nevada Rules of Civil

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Procedure for the service of a summons and complaint. The claim so served must be accompanied by a statement explaining the procedures for mediation and arbitration set forth in sections 2 to 8, inclusive, of this act.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the written claim was served shall, within 30 days after the date of service, file a written answer with the division. The answer must be accompanied by a reasonable fee as determined by the division.

Sec. 5. 1. If all parties named in a written claim filed pursuant to section 4 of this act agree to have the claim submitted for mediation, the parties shall reduce the agreement to writing and shall select a mediator from the list of mediators maintained by the division pursuant to section 6 of this act. Any mediator selected must be available within the geographic area. If the parties fail to agree upon a mediator, the division shall appoint a mediator from the list of mediators maintained by the division. Any mediator appointed must be available within the geographic area. Unless otherwise provided by an agreement of the parties, mediation must be completed within 90 days after the parties agree to mediation. Any agreement obtained through mediation conducted pursuant to this section must, within 30 days after the conclusion of mediation, be reduced to writing by the mediator and a copy thereof provided to each party. The agreement may be enforced as any other written agreement. The parties are responsible for all costs of mediation conducted pursuant to this section.

2. If all the parties named in the claim do not agree to mediation, the parties shall select an arbitrator from the list of arbitrators maintained by the division pursuant to section 6 of this act. Any arbitrator selected must be available within the geographic area. If the parties fail to agree upon an arbitrator, the division shall appoint an arbitrator from the list maintained by the division. Any arbitrator appointed must be available within the geographic area. Upon appointing an arbitrator, the division shall provide the name of the arbitrator to each party.

3. Except as otherwise provided in this section and except where inconsistent with the provisions of sections 2 to 8, inclusive, of this act, the arbitration of a claim pursuant to this section must be conducted in accordance with the provisions of NRS 38.075 to 38.105, inclusive, 38.115 to 38.135, inclusive, 38.155 and 38.165. An award must be made within 90 days after the conclusion of arbitration, unless a shorter period is agreed upon by the parties to the arbitration.

4. If all the parties have agreed to nonbinding arbitration, any party to the arbitration may, within 30 days after a decision and award have been served upon the parties, commence a civil action in the proper court concerning the claim which was submitted for arbitration. Any complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been arbitrated pursuant to the provisions of sections 2 to 8, inclusive, of this act. If such an action is not commenced within that period, any party to the arbitration may, within 1 year after the service of the award, apply to the proper court for a confirmation of the award pursuant to NRS 38.135.

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SER0106

5. If all the parties agree in writing to binding arbitration, the arbitration must be conducted in accordance with the provisions of chapter 38 of NRS. An award procured pursuant to such arbitration may be vacated and a rehearing granted upon application of a party pursuant to the provisions of NRS 38.145.

6. If after the conclusion of arbitration a party:

(a) Applies to have an award vacated and a rehearing granted pursuant to NRS 38.145; or

(b) Commences a civil action based upon any claim which was the subject of arbitration,

the party shall, if he fails to obtain a more favorable award or judgment than that which was obtained in the initial arbitration, pay all costs and reasonable attorney's fees incurred by the opposing party after the application for a rehearing was made or after the complaint in the civil action was filed.

7. As used in this section, "geographic area" means an area within 150 miles from any residential property or association which is the subject of a written claim submitted pursuant to section 4 of this act.

Sec. 6. For the purposes of sections 2 to 8, inclusive, of this act, the division shall establish and maintain:

1. A list of mediators and arbitrators who are available for mediation and arbitration of claims. The list must include mediators and arbitrators who, as determined by the division, have received training and experience in mediation and arbitration and in the resolution of disputes concerning associations, including, without limitation, the interpretation, application and enforcement of covenants, conditions and restrictions pertaining to residential property and the articles of incorporation, bylaws, rules and regulations of an association. In establishing and maintaining the list, the division may use lists of qualified persons maintained by the American Arbitration Association, the Nevada Arbitration Association or any other organization which provides similar services. Before including a mediator or arbitrator on a list established and maintained pursuant to this section, the division may require the mediator or arbitrator to present proof satisfactory to the division that he has received the training and experience required for mediators and arbitrators pursuant to this section.

2. A document which contains a written explanation of the procedures for mediating and arbitrating claims pursuant to sections 2 to 8, inclusive, of this act.

Sec. 7. Any statute of limitations applicable to a claim described in section 3 of this act is tolled from the time the claim is submitted for mediation or arbitration pursuant to section 4 of this act until the conclusion of mediation or arbitration of the claim and the period for vacating the award has expired.

Sec. 8. 1. The division shall administer the provisions of sections 2 to 8, inclusive, of this act and may adopt such regulations as are necessary to carry out those provisions.

2. All fees collected by the division pursuant to the provisions of sections 2 to 8, inclusive, of this act must be accounted for separately and may only

be used by the division to administer the provisions of sections 2 to 8, inclusive, of this act.

Sec. 9. NRS 38.250 is hereby amended to read as follows:

38.250 *Except as otherwise provided in section 3 of this act:*

1. All civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $25,000 must be submitted to nonbinding arbitration in accordance with the provisions of NRS 38.253, 38.255 and 38.258.

2. A civil action for damages filed in justice's court may be submitted to arbitration if the parties agree, orally or in writing, to the submission.

Sec. 10. NRS 116.4110 is hereby amended to read as follows:

116.4110 1. Except as otherwise provided in [subsection 2,] *subsections 2 and 3,* a deposit made in connection with the purchase or reservation of a unit from a person required to deliver a public offering statement pursuant to subsection 3 of NRS 116.4102 must be placed in escrow and held either in this state or in the state where the unit is located in an account designated solely for that purpose by a licensed title insurance company, an independent bonded escrow company, or an institution whose accounts are insured by a governmental agency or instrumentality until:

(a) Delivered to the declarant at closing;

(b) Delivered to the declarant because of the purchaser's default under a contract to purchase the unit;

(c) Released to the declarant for an additional item, improvement, optional item or alteration, but the amount so released:

(1) Must not exceed the lesser of the amount due the declarant from the purchaser at the time of the release or the amount expended by the declarant for the purpose; and

(2) Must be credited upon the purchase price; or

(d) Refunded to the purchaser.

2. A deposit or advance payment made for an additional item, improvement, optional item or alteration may be deposited in escrow or delivered directly to the declarant, as the parties may contract.

3. In lieu of placing a deposit in escrow pursuant to subsection 1, the declarant may furnish a bond executed by him as principal and by a corporation qualified under the laws of this state as surety, payable to the State of Nevada, and conditioned upon the performance of the declarant's duties concerning the purchase or reservation of a unit. Each bond must be in a principal sum equal to the amount of the deposit. The bond must be held until:

(a) Delivered to the declarant at closing;

(b) Delivered to the declarant because of the purchaser's default under a contract to purchase the unit; or

(c) Released to the declarant for an additional item, improvement, optional item or alteration.".

Amend the title of the bill, first line, after "the arbitration" by inserting "or mediation".

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Amend the summary of the bill, first line, after "arbitration" by inserting "or mediation".

Assemblyman Schneider moved the adoption of the amendment.

Remarks by Assemblyman Schneider.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 231.

Bill read second time, ordered engrossed and to third reading.

Assembly Bill No. 258.

Bill read second time.

The following amendment was proposed by the Committee on Ways and Means:

Amendment No. 760.

Amend section 1, page 1, line 10, after "*numbers, and*" by inserting: "*except as otherwise provided in subsections 3 and 4,*".

Amend section 1, page 1, between lines 12 and 13, by inserting:

"*3. Except as otherwise provided in subsection 4, the department shall, upon the request of an applicant, substitute for the seal of the branch of the Armed Forces of the United States the emblem or other insigne of the specific military unit to which the applicant was assigned if:*

(a) The military unit is a recognized unit within the particular branch of the Armed Forces of the United States; and

(b) At least 250 applicants request the substitution of that emblem or insigne.

4. The director may use or imitate a seal, emblem or other insigne of a branch, or unit within that branch, of the Armed Forces of the United States only if that use or imitation complies with the provisions of 10 U.S.C. § 1057, as that section existed on October 1, 1995.".

Amend section 1, page 1, line 13, by deleting "*3.*" and inserting "*5.*".

Amend section 1, page 1, line 16, by deleting "*4.*" and inserting "*6.*".

Amend section 1, page 2, by deleting line 3 and inserting: "*7. The department shall deposit the fees collected pursuant to subsection 6*",

Amend section 1, page 2, line 12, by deleting "*6.*" and inserting "*8.*".

Amend section 1, page 2, line 20, by deleting "*7.*" and inserting "*9.*".

Assemblyman Arberry moved the adoption of the amendment.

Remarks by Assemblyman Arberry.

Amendment adopted.

Bill ordered reprinted, engrossed and to third reading.

Assembly Bill No. 405.

Bill read second time.

The following amendment was proposed by the Committee on Judiciary:

Amendment No. 530.

Amend sec. 3, page 1, lines 11 and 12 by deleting: "*to:*

1. Law" and inserting "*to law*".

Amend sec. 3, page 1, by deleting lines 15 through 18.

(REPRINTED WITH ADOPTED AMENDMENTS)
FIRST REPRINT A.B. 152

ASSEMBLY BILL NO. 152—ASSEMBLYMEN SCHNEIDER, CARPENTER, BUCKLEY, STEEL, SANDOVAL, BENNETT, MONAGHAN, OHRENSCHALL, SEGERBLOM, SPITLER, HUMKE, GIUNCHIGLIANI, STROTH, DE BRAGA, ERNAUT, ANDERSON, DINI, MANENDO, HETTRICK, GOLDWATER, HARRINGTON, FREEMAN, BATTEN, PERKINS AND BACHE

FEBRUARY 1, 1995

Referred to Committee on Judiciary

SUMMARY—Requires arbitration or mediation of certain claims relating to residential property. (BDR 3-1442)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: Yes.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to arbitration; requiring the arbitration or mediation of certain claims relating to residential property; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 8, inclusive, of this act.

Sec. 2. *As used in sections 2 to 8, inclusive, of this act, unless the context otherwise requires:*

1. "Assessments" means:

(a) Any charge which an association may impose against an owner of residential property pursuant to a declaration of covenants, conditions and restrictions, including any late charges, interest and costs of collecting the charges; and

(b) Any fines, fees and other charges which may be imposed by an association pursuant to paragraphs (j), (k) and (l) of subsection 1 of NRS 116.3102.

2. "Association" has the meaning ascribed to it in NRS 116.110315.

3. "Civil action" includes an action for money damages or equitable relief. The term does not include an action in equity for injunctive relief in which there is an immediate threat of irreparable harm, or an action relating to the title to residential property.

4. "Division" means the real estate division of the department of business and industry.

5. "Residential property" includes, but is not limited to, real estate within a planned community subject to the provisions of chapter 116 of NRS. The term does not include commercial property if no portion thereof contains property which is used for residential purposes.

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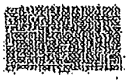

Sec. 3. 1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or

(b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property,

may be commenced in any court in this state unless the action has been submitted to arbitration pursuant to the provisions of sections 2 to 8, inclusive, of this act and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Sec. 4. 1. Any civil action described in section 3 of this act must be submitted for mediation or arbitration by filing a written claim with the division. The claim must include:

(a) The complete names, addresses and telephone numbers of all parties to the claim;

(b) A specific statement of the nature of the claim;

(c) A statement of whether the person wishes to have the claim submitted to a mediator or to an arbitrator. If the person wishes to have the claim submitted to an arbitrator, whether he agrees to binding arbitration; and

(d) Such other information as the division may require.

2. The written claim must be accompanied by a reasonable fee as determined by the division.

3. Upon the filing of the written claim, the claimant shall serve a copy of the claim in the manner prescribed in Rule 4 of the Nevada Rules of Civil Procedure for the service of a summons and complaint. The claim so served must be accompanied by a statement explaining the procedures for mediation and arbitration set forth in sections 2 to 8, inclusive, of this act.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the written claim was served shall, within 30 days after the date of service, file a written answer with the division. The answer must be accompanied by a reasonable fee as determined by the division.

Sec. 5. 1. If all parties named in a written claim filed pursuant to section 4 of this act agree to have the claim submitted for mediation, the parties shall reduce the agreement to writing and shall select a mediator from the list of mediators maintained by the division pursuant to section 6 of this act. Any mediator selected must be available within the geographic area. If the parties fail to agree upon a mediator, the division shall appoint a mediator from the list of mediators maintained by the division. Any mediator appointed must be available within the geographic area. Unless otherwise provided by an agreement of the parties, mediation must be completed within 90 days after the parties agree to mediation. Any agreement obtained through mediation conducted pursuant to this section must, within 30 days after the conclusion of mediation, be reduced to writing by the mediator and a copy thereof provided

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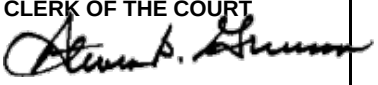

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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST Plaintiff, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS Defendants.	CASE NO.: A-14-704412-C DEPT NO.: XXIV **SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM**
U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; Counterclaimant, vs. 5316 CLOVER BLOSSOM CT TRUST, Counterdefendant.	

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Cross-claimant,

vs.

COUNTRY GARDEN OWNERS' ASSOCIATION,

Cross-defendant.

Plaintiff 5316 Clover Blossom Ct Trust, by and through its attorney, the Law Offices of Michael F. Bohn, Esq., Ltd., hereby submits this supplemental authority in support of its motion to dismiss as follows.

POINTS AND AUTHORITIES

The new case of Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91 (2017) decided on November 22, 2017, clarified a large numbers of issues regarding real property foreclosure sales in Nevada.

1. The commercial reasonableness standard from Article 9 of the UCC is not applicable to real property foreclosures.

2. The court re-affirmed what it said in Shadow Wood, that price alone, however gross, is not sufficient grounds to set aside a foreclosure sale, but there must be some element of fraud, oppression or unfairness as accounts for and brings about the inadequate price."

3. The 20% standard contained in the Restatement (Third) of Property: Mortgages §8.3 (1997) was outright rejected by the court.

4. The bank has the burden to show that the sale should be set aside in light of the purchaser's status as record title holder.

5. There is a presumption in favor of the record title holder.

6. There is the statutory presumption that the foreclosure sale complied with the provisions of NRS Chapter 116, citing to NRS 47.250(16) providing for a rebuttable presumption "[that] the law has been obeyed") and NRS 116.31166, providing for the conclusiveness of the deed containing the recitals of the required steps for a valid sale.

7. There must be "actual" evidence of fraud, unfairness or oppression.

8. Fines may be included in an assessment lien and foreclosed upon

9. The fact that the notice of lien stated the current amount due rather than the estimated amount as of the scheduled sale date does not invalidate the sale when there was no evidence in the record to show that the bank was prejudiced by the error.

10. Post foreclosure activities do not affect the validity of the sale.

11. The class of persons who signed the recorded notices is very broad.

DATED this 29th day of November, 2017

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: / s / Michael F. Bohn, Esq. /
Michael F. Bohn, Esq.
Adam R. Trippiedi, Esq.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 29th day of November, 2017, an electronic copy of the **REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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Las Vegas, NV 89134

/s/ /Marc Sameroff /
An Employee of the LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

EXHIBIT 1

EXHIBIT 1

133 Nev., Advance Opinion 91

IN THE SUPREME COURT OF THE STATE OF NEVADA

NATIONSTAR MORTGAGE, LLC,
Appellant,
vs.
SATICOY BAY LLC SERIES 2227 SHADOW CANYON,
Respondent.

No. 70382

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

Akerman LLP and Ariel E. Stern, Rex D. Garner, and Allison R. Schmidt, Las Vegas,
for Appellant.

Law Offices of Michael F. Bohn, Ltd., and Michael F. Bohn, Las Vegas,
for Respondent.

BEFORE HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408 (2014), this court held that under NRS Chapter 116, a homeowners' association (HOA) has a lien on a homeowner's home for unpaid monthly assessments, that the HOA's lien is split into superpriority and subpriority pieces, and that proper foreclosure of the

superpriority piece of the lien extinguishes a first deed of trust. In so doing, we noted but did not consider whether such a foreclosure sale could be set aside if it were "commercially unreasonable." *Id.* at 418 n.6. Subsequently in *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev., Adv. Op. 5, 366 P.3d 1105 (2016), we considered whether such a sale could be set aside based solely on inadequacy of price. Therein, we reiterated the rule from prior Nevada cases that inadequacy of price alone "is not enough to set aside a sale; there must also be a showing of fraud, unfairness, or oppression." *Id.* at 1112 (citing *Long v. Towne*, 98 Nev. 11, 639 P.2d 528 (1982)). Nonetheless, because *Shadow Wood* also cited the Restatement (Third) of Property: Mortgages § 8.3 (1997), which recognizes that a court is "[g]enerally" justified in setting aside a foreclosure sale when the sales price is less than 20 percent of the property's fair market value, 132 Nev., Adv. Op. 5, 366 P.3d at 1112-13 & n.3, appellant Nationstar Mortgage argues that an HOA foreclosure sale can be set aside based on commercial unreasonableness or based solely on low sales price. We therefore take this opportunity to provide further clarification on these issues.

As to the "commercial reasonableness" standard, which derives from Article 9 of the Uniform Commercial Code (U.C.C.), we hold that it has no applicability in the context of an HOA foreclosure involving the sale of real property. As to the Restatement's 20-percent standard, we clarify that *Shadow Wood* did not overturn this court's longstanding rule that "'inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale'" absent additional "'proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price,'" 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (quoting

Golden v. Tomiyasu, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)). That does not mean, however, that sales price is wholly irrelevant. In this respect, we adhere to the observation in *Golden* that where the inadequacy of the price is great, a court may grant relief based on slight evidence of fraud, unfairness, or oppression. 79 Nev. at 514-15, 387 P.2d at 994-95 (discussing *Oller v. Sonoma Cty. Land Title Co.*, 90 P.2d 194 (Cal. Ct. App. 1955)). Because Nationstar's identified irregularities do not establish that fraud, unfairness, or oppression affected the sale, we affirm the district court's summary judgment in favor of respondent Saticoy Bay.

FACTS AND PROCEDURAL HISTORY

The subject property is located in a neighborhood governed by an HOA. The previous homeowner had obtained a loan to purchase the property, which was secured by a deed of trust, and which was eventually assigned to Nationstar. When the previous homeowner became delinquent on her monthly assessments, the HOA's agent recorded a notice of delinquent assessment lien, a notice of default, and a notice of sale, and then proceeded to sell the property at a foreclosure sale to Saticoy Bay for $35,000. Thereafter, Saticoy Bay instituted the underlying quiet title action, naming Nationstar as a defendant and seeking a declaration that the sale extinguished Nationstar's deed of trust such that Saticoy Bay held unencumbered title to the property.

Saticoy Bay and Nationstar filed competing motions for summary judgment. As relevant to this appeal, Nationstar argued "the sales price of the property at the HOA auction was commercially unreasonable as a matter of law." In support of this argument, Nationstar provided an appraisal valuing the property at $335,000 as of the date of the HOA's foreclosure sale, and it cited to the Restatement (Third) of Property:

Mortgages § 8.3 (1997) for the proposition that a court is generally justified in setting aside a foreclosure sale when the sales price is less than 20 percent of the property's fair market value. In opposition, Saticoy Bay argued that commercial reasonableness is not a relevant inquiry in an HOA foreclosure sale of real property and that, instead, such a sale can only be set aside if it is affected by fraud, unfairness, or oppression. According to Saticoy Bay, because Nationstar had not produced any evidence showing fraud, unfairness, or oppression affected the sale, Saticoy Bay was entitled to summary judgment. Ultimately, the district court agreed with Saticoy Bay and granted summary judgment in its favor. This appeal followed.

DISCUSSION

We review de novo a district court's decision to grant summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id.* (quotation and alteration omitted). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* at 731, 121 P.3d at 1031.

We first consider whether U.C.C. Article 9's commercial reasonableness standard applies when considering an HOA's foreclosure sale of real property. Concluding that the commercial reasonableness standard is inapplicable, we next consider whether a low sales price, in and of itself, may warrant invalidating an HOA foreclosure sale. After reaffirming our longstanding rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a [foreclosure] sale,"

Golden, 79 Nev. at 514, 387 P.2d at 995, we next consider whether Nationstar produced evidence showing that the sale was affected by "fraud, unfairness, or oppression" that would justify setting aside the sale, *id.* Because we agree with the district court that Nationstar's proffered evidence does not show fraud, unfairness, or oppression affected the sale, we affirm the district court's summary judgment.[1]

U.C.C. Article 9's commercial reasonableness standard is inapplicable in the context of an HOA foreclosure sale of real property

Before considering Nationstar's argument regarding commercial reasonableness, some context is necessary. Article 9 of the U.C.C. is entitled "Secured Transactions." Generally speaking, and with various exceptions, Article 9 provides the framework by which a person may obtain money from a creditor in exchange for granting a security interest in personal property (i.e., collateral). *See* NRS 104.9109(1); U.C.C. § 9-109(a) (Am. Law Inst. & Unif. Law Comm'n (2009); *see generally* William H. Lawrence, William H. Henning & R. Wilson Freyermuth, Understanding Secured Transactions §§ 1.01-1.03 (4th ed. 2007) (providing an overview of Article 9's purpose and scope). Article 9 also provides the framework by which the creditor, upon the debtor's default, may repossess and dispose of the personal property to satisfy the outstanding debt. *See* NRS 104.9601-.9628; U.C.C. §§ 9-601 to 9-628. Because a wide array of personal property may be used as collateral, Article 9 does not provide detailed requirements

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[1]Nationstar also argues that NRS Chapter 116's foreclosure scheme violates its due process rights. That argument fails in light of *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev., Adv. Op. 5, 388 P.3d 970 (2017), wherein this court held that due process is not implicated when an HOA forecloses on its superpriority lien in compliance with NRS Chapter 116's statutory scheme because there is no state action.

by which a creditor must dispose of the collateral, but instead provides generally that the creditor's disposition of the collateral must be done in a "commercially reasonable" manner. *See* NRS 104.9610(1)-(2); U.C.C. § 9-610(a)-(b); *see also* NRS 104.9627(2) (defining a "commercially reasonable" disposition with reference to the "recognized market" and "in conformity with reasonable commercial practices" for the particular collateral at issue); U.C.C. § 9-627(b) (same); Lawrence, Henning & Freyermuth, *supra* § 18.02 (recognizing that Article 9's procedures governing disposition are "deliberately flexible" because "[t]he drafters hoped that Article 9 dispositions would produce higher prices than those typically obtained in real estate foreclosures").

This court has considered on several occasions whether an Article 9 disposition of collateral was commercially reasonable. In so doing, we have observed that "every aspect of the disposition, including the method, manner, time, place, and terms, must be commercially reasonable," *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) (quoting the former version of NRS 104.9610(1)), and that "[t]he conditions of a commercially reasonable sale should reflect a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor," *Dennison v. Allen Grp. Leasing Corp.*, 110 Nev. 181, 186, 871 P.2d 288, 291 (1994). We have also observed that because "a secured creditor is generally in the best position to influence the circumstances of sale, it is reasonable that the creditor has an enhanced responsibility to promote fairness." *Savage Constr., Inc. v. Challenge-Cook Bros., Inc.*, 102 Nev. 34, 37, 714 P.2d 573, 575 (1986). In other words, in the context of Article 9 sales, it is arguable that this court has at least implicitly recognized two things: (1) the secured creditor has an affirmative obligation to obtain the

highest sales price possible; and (2) if the sale is challenged, the secured creditor has the burden of establishing commercial reasonableness. *See Dennison*, 110 Nev. at 186, 871 P.2d at 291; *Savage Constr.*, 102 Nev. at 37, 714 P.2d at 575; *Levers*, 93 Nev. at 98, 560 P.2d at 920; *accord Chittenden Tr. Co. v. Maryanski*, 415 A.2d 206, 209 (Vt. 1980) ("[T]he majority rule appears to be that the secured party has the burden of pleading and proving that any given disposition of collateral was commercially reasonable . . . .").

Relying on our aforementioned case law, Nationstar contends that an HOA foreclosure sale of real property should be subject to Article 9's commercial reasonableness standard, such that the HOA (or the purchaser at the HOA sale) has the burden of establishing that the HOA took all steps possible to obtain the highest sales price it could. We disagree.[2] In contrast to Article 9's "deliberately flexible" requirements regarding the method, manner, time, place, and terms of a sale of personal property collateral, *see* Lawrence, Henning & Freyermuth, *supra* § 18.02, NRS Chapter 116 provides "elaborate" requirements that an HOA must follow in order to foreclose on the real property securing its lien, *see SFR Invs.*, 130 Nev., Adv. Op. 75, 334 P.3d at 416. For example, before an HOA can foreclose, it must mail, record, and post various notices at specific times

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[2]Our ensuing analysis does not directly address the basis for Nationstar's argument, which relies on a comparison of NRS 116.1113's definition of "good faith" and U.C.C. § 2-103(1)'s definition of "good faith." Nonetheless, we have considered Nationstar's argument. In summary, we find it implausible that the drafters of the Uniform Common Interest Ownership Act (and, in turn, Nevada's Legislature when it enacted NRS Chapter 116) intended to equate U.C.C. Article 9's commercial reasonableness standard pertaining to sales of personal property in a secured transaction with an HOA's sale of real property merely by cross-referencing the definition of "good faith" in U.C.C. Article 2.

and containing specific information. *See generally* NRS 116.31162-.31164 (2013).[3] In other words, because the relevant statutory scheme curtails an HOA's ability to dictate the method, manner, time, place, and terms of its foreclosure sale, an HOA has little autonomy in taking extra-statutory efforts to increase the winning bid at the sale. Thus, HOA foreclosure sales of real property are ill suited for evaluation under Article 9's commercial reasonableness standard.

The Uniform Common Interest Ownership Act (UCIOA), upon which NRS Chapter 116 is modeled, *see SFR Invs.*, 130 Nev., Adv. Op. 75, 334 P.3d at 411, supports our conclusion that HOA real property foreclosure sales are not to be evaluated under Article 9's commercial reasonableness standard. In particular, the UCIOA recognizes that there are technically three different types of common interest communities and that in one of those types, the unit owner's interest in his or her property is characterized as a *personal property* interest. *See* 1982 UCIOA § 3-116(j). Specifically, and although not necessary to examine the distinctions between them for purposes of this appeal, the three different types of common interest communities are: (1) a "condominium or planned community,"[4] (2) "a cooperative whose unit owners' interests in the units are *real estate*," and

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[3]Because the foreclosure sale in this case took place in January 2014, we refer to the 2013 version of NRS Chapter 116 throughout this opinion. We note, however, that the Legislature's 2015 amendments to NRS Chapter 116 further curtailed an HOA's autonomy regarding the method, manner, time, place, and terms of its foreclosure sale. *See* 2015 Nev. Stat., ch. 266, §§ 2-5, at 1336-42.

[4]The vast majority (perhaps all) of the HOA foreclosure sales that this court has had occasion to review appear to have involved this type of common interest community.

(3) "a cooperative whose unit owners' interests in the units are *personal property*." *Id.* (emphases added). Tellingly, the UCIOA prompts a state adopting its provisions to choose and insert the following methods of sale for each of the three common interest community types:

> (1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];
>
> (2) In a cooperative whose unit owners' interests in the units are real estate . . . , the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or
>
> (3) ***In a cooperative whose unit owners interests in the units are personal property*** . . . , the association's lien must be foreclosed in like manner as a security interest under [***insert reference to Article 9, Uniform Commercial Code***.]

1982 UCIOA § 3-116(j)(1)-(3) (emphases added).

Thus, the UCIOA's drafters drew a distinction between real property foreclosures under subsections 3-116(j)(1) and (2) and personal property foreclosures under subsection 3-116(j)(3) and expressly indicated that in the context of a personal property foreclosure, Article 9 should apply.[5] Had the drafters intended for Article 9's commercial reasonableness standard to apply to real property foreclosures in addition to personal

[5]We recognize that UCIOA § 3-116(j)(2) references "subsection k" and that subsection k contains language similar to Article 9's commercial reasonableness standard. *See* 1982 UCIOA § 3-116(k) ("Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable."). We do not believe that this language changes the propriety of our reasoning.

property foreclosures, it stands to reason that the drafters would have included such language in subsections (j)(1) and (2). *See* Norman Singer & Shambie Singer, *2A Sutherland Statutory Construction* § 47:23 (7th ed. 2016) ("[W]here a legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed the legislature acts intentionally and purposely in the disparate inclusion or exclusion . . . ." (quotation and alterations omitted)).[6]

Because we conclude that HOA real property foreclosure sales are not evaluated under Article 9's commercial reasonableness standard, Nationstar's argument that the HOA did not take extra-statutory efforts to garner the highest possible sales price has no bearing on our review of the district court's summary judgment. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant."). And because HOA real property foreclosures are not subject to Article 9's commercial reasonableness standard, it follows that they are governed by this court's longstanding framework for evaluating any other real property foreclosure sale: whether the sale was affected by some element of fraud, unfairness, or oppression.[7] *Shadow Wood*, 132 Nev., Adv. Op. 5, 366 P.3d

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[6]To be sure, Nevada's Legislature did not adopt § 3-116(j) when it adopted the UCIOA and instead "handcrafted a series of provisions to govern HOA lien foreclosures." *SFR Invs.*, 130 Nev., Adv. Op. 75, 334 P.3d at 411. Nonetheless, the Legislature's handcrafted provisions draw the same real property/personal property distinction and apply Article 9 only to personal property foreclosures. *See* NRS 116.3116(10).

[7]While we reject the applicability of Article 9's commercial reasonableness standard to HOA real property foreclosures, we contemporaneously clarify that evidence relevant to a commercial reasonableness inquiry may sometimes be relevant to a

at 1111-12 (reaffirming the applicability of this framework after examining case law from this court and other courts); *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) (applying same framework); *Turner v. Dewco Servs., Inc.*, 87 Nev. 14, 18, 479 P.2d 462, 465 (1971) (same); *Brunzell v. Woodbury*, 85 Nev. 29, 31-32, 449 P.2d 158, 159 (1969) (same); *Golden*, 79 Nev. at 514-15, 387 P.2d at 994-95 (same). Under this framework, and in contrast to an Article 9 sale, *see Chittenden Tr. Co.*, 415 A.2d at 209, Nationstar has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder, *see Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) ("[T]here is a presumption in favor of the record titleholder."), and the statutory presumptions that the HOA's foreclosure sale complied with NRS Chapter 116's provisions, NRS 47.250(16) (providing for a rebuttable presumption "[t]hat the law has been obeyed"); *cf.* NRS 116.31166(1)-(2) (providing for a conclusive presumption that certain steps in the foreclosure process have been followed);[8] *Shadow Wood*, 132 Nev., Adv. Op. 5, 366 P.3d at 1111 (observing that NRS 116.31166's language was taken from NRS 107.030(8), which governs power-of-sale foreclosures). However, before considering whether Nationstar introduced evidence that fraud, unfairness, or

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fraud/unfairness/oppression inquiry. Nothing in this opinion should be construed as suggesting otherwise, nor does this opinion require us to examine the extent to which the two inquiries overlap.

[8]In *Shadow Wood*, we noted the potential due process implications behind NRS 116.31166's conclusive (as opposed to rebuttable) presumption provision. 132 Nev., Adv. Op. 5, 366 P.3d at 1110. This appeal does not implicate the scope of NRS 116.31166's conclusive presumption provision, and we cite the statute only as additional legislative support for the proposition that the party challenging the foreclosure sale bears the burden of showing why the sale should be set aside.

oppression affected the sale, we must first consider Nationstar's argument that it was not required to do so in light of the $35,000 sales price for a property with a fair market value of $335,000.

A low sales price, in and of itself, does not warrant invalidating an HOA foreclosure sale

Nationstar's argument is based in part on its interpretation of our opinion in *Shadow Wood*, and as such, a brief summary of *Shadow Wood* is necessary. In *Shadow Wood*, a bank foreclosed on its deed of trust and then obtained the property via credit bid at the foreclosure sale for roughly $46,000. 132 Nev., Adv. Op. 5, 366 P.3d at 1107. Because the bank never paid off the unextinguished 9-month superpriority lien and failed to pay the continually accruing assessments after it obtained title, the HOA foreclosed on its lien. *Id.* at 1112. At that sale, the purchaser bought the property for roughly $11,000. *Id.* The bank filed suit to set aside the sale, and the district court granted the bank's requested relief. *Id.* at 1109.

On appeal, this court considered whether the bank had established equitable grounds to set aside the sale. *Id.* at 1112. This court started with the premise that "demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression." *Id.* (citing *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982)). We then stated that the bank "failed to establish that the foreclosure sale price was grossly inadequate as a matter of law," *id.*, observing that the $11,000 purchase price was 23 percent of the property's fair market value and therefore the sales price was "not obviously inadequate." *Id.* As support, we cited *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963), wherein this court upheld a sale with a purchase price that was 29 percent of fair market value. *Shadow Wood*, 132

Nev., Adv. Op. 5, 366 P.3d at 1112. We also cited the Restatement's suggestion that a sale for less than 20 percent of the property's fair market value may "'[g]enerally'" be invalidated by a court. *Id.* at 1112-13 & n.3 (quoting Restatement (Third) of Prop.: Mortgages § 8.3 (1997)). Our analysis then focused on whether the sale was affected by fraud, unfairness, or oppression. *Id.* at 1113-14.

Nationstar suggests that *Shadow Wood* adopted the Restatement's 20-percent standard by necessary implication and that any foreclosure sale for less than 20 percent of the property's fair market value should be invalidated as a matter of law. Alternatively, if *Shadow Wood* did not adopt the Restatement, Nationstar suggests that this court should do so now.[9] As explained below, we reject both suggestions.

The citation to the Restatement in *Shadow Wood* cannot reasonably be construed as an implicit adoption of a rule that requires invalidating any foreclosure sale with a purchase price less than 20 percent of a property's fair market value. In particular, adopting the Restatement would be inconsistent with this court's holding in *Golden* that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale" absent additional "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." 79 Nev. at 514, 387 P.2d at 995. If this court had adopted the Restatement, we would have overruled *Golden* rather than cite favorably to it.

[9]Although Nationstar's appellate briefs can be construed as making these suggestions, we recognize that during oral argument Nationstar backed away from endorsing such a hard-and-fast rule.

Nor do we believe that we should adopt a 20-percent standard and abandon *Golden*. Primarily, we note that the Restatement provides no explanation for why 20 percent (as opposed to 10 percent, 30 percent, etc.) should be the price threshold to invalidate a foreclosure sale as a matter of law. Rather, the Restatement arrived at its conclusion that courts are generally warranted in setting aside sales for less than 20 percent of fair market value by simply surveying cases throughout the country that invalidated sales based on price alone and concluding that 20 percent of fair market value was the rough dividing line between where courts upheld the sales and where courts invalidated the sales. *See* Restatement § 8.3 cmt. b. This is not a compelling justification for adopting the Restatement's standard.

Perhaps the best rationale the Restatement gives to support its 20-percent threshold is that if the price is so low as to be "grossly inadequate" or to "shock the conscience," then there *must* have been fraud, unfairness, or oppression affecting the sale. *Id.* cmt. b; *see In re Krohn*, 52 P.3d 774, 781 (Ariz. 2002) (adopting the Restatement and construing it in a similar manner). However, *Golden* considered and rejected this same rationale, concluding there is no reason to invalidate a "'legally made'" sale absent *actual* evidence of fraud, unfairness, or oppression. 79 Nev. at 514, 387 P.2d at 995 (quoting *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App. 1955), in adopting California's rule).[10] Because we remain convinced that *Golden*'s reasoning is sound, we decline to adopt the

[10]We note that other jurisdictions agree with the reasoning in *Golden* and *Oller*. *See, e.g.*, *Holt v. Citizens Cent. Bank*, 688 S.W.2d 414, 416 (Tenn. 1984); *Sellers v. Johnson*, 63 S.E.2d 904, 906 (Ga. 1951); *Powell v. St. Louis Cty.*, 559 S.W.2d 189, 196 (Mo. 1977).

Restatement's 20-percent standard or any other hard-and-fast dividing line based solely on price.

This is not to say that price is wholly irrelevant. To the contrary, *Golden* recognized that the price/fair-market-value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale:

> [I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.

79 Nev. at 515-16, 387 P.2d at 995 (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907)); *id.* ("'While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.'" (quoting *Schroeder v. Young*, 161 U.S. 334, 337-38 (1896))). Thus, we continue to endorse *Golden*'s approach to evaluating the validity of foreclosure sales: mere inadequacy of price is not in itself sufficient to set aside the foreclosure sale, but it should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness, or

oppression.[11] *See id.*[12] However, it necessarily follows that if the district court closely scrutinizes the circumstances of the sale and finds no evidence that the sale was affected by fraud, unfairness, or oppression, then the sale cannot be set aside, regardless of the inadequacy of price. *See id.* at 515-16, 387 P.2d at 995 (overruling the lower court's decision to set aside the sale upon concluding there was no evidence of fraud, unfairness, or oppression).

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[11]While not an exhaustive list, irregularities that may rise to the level of fraud, unfairness, or oppression include an HOA's failure to mail a deed of trust beneficiary the statutorily required notices, *see SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev., Adv. Op. 75, 334 P.3d 408, 418 (2014) (observing that NRS 116.31168 incorporates NRS 107.090, which requires that notices be sent to a deed of trust beneficiary); *id.* at 422 (Gibbons, C.J., dissenting) (same); *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1163-64 (9th Cir. 2016) (Wallace, J., dissenting) (same), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2017 WL 1300223; an HOA's representation that the foreclosure sale will not extinguish the first deed of trust, *see ZYZZX2 v. Dizon*, No. 2:13-cv-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016); collusion between the winning bidder and the entity selling the property, *see Las Vegas Dev. Grp., LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1058 (D. Nev. 2016); *Polish Nat'l Alliance v. White Eagle Hall Co.*, 470 N.Y.S.2d 642, 650-51 (N.Y. App. Div. 1983); a foreclosure trustee's refusal to accept a higher bid, *see Bank of Seoul & Trust Co. v. Marcione*, 244 Cal. Rptr. 1, 3-5 (Ct. App. 1988); or a foreclosure trustee's misrepresentation of the sale date, *see Kouros v. Sewell*, 169 S.E.2d 816, 818 (Ga. 1969).

[12]This court has endorsed a similar approach in evaluating Article 9 sales. *See Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983); *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98-99, 560 P.2d 917, 920 (1977); *see also* U.C.C. § 9-627 cmt. 2 (indicating that when an Article 9 sale yields a low price, courts should "scrutinize carefully" all aspects of the collateral's disposition). If Nationstar's reliance on Article 9 is meant solely to argue in favor of applying such an approach in the context of real property foreclosures, we have no issue with that argument, as it does not change existing law.

In sum, we decline to adopt the Restatement's suggestion that a foreclosure sale for less than 20 percent of fair market value necessarily invalidates the sale, meaning Nationstar was not entitled to have the foreclosure sale invalidated based solely on Saticoy Bay purchasing the property for roughly 11 percent of the property's fair market value ($35,000 purchase price for a property valued at $335,000). Consequently, we must next consider whether Nationstar's identified irregularities in the sales process show that the sale was affected by fraud, unfairness, or oppression.

Nationstar's identified irregularities do not show that the HOA foreclosure sale was affected by fraud, unfairness, or oppression

Nationstar points to three purported irregularities in the foreclosure process as evidence that the sale was affected by fraud, unfairness, or oppression: (1) the HOA's lien included fines in addition to monthly assessments even though NRS 116.31162(5) prohibits an HOA from foreclosing on a lien comprised of fines; (2) the notice of sale listed the unpaid lien amount as of the day the notice of sale was generated even though NRS 116.311635(3)(a) requires the notice of sale to list what the unpaid lien amount will be on the date of the to-be-held sale; and (3) the person who signed the notice of default was not the person who the HOA's president designated to sign the notice, which violated NRS 116.31162(2).[13] We consider each identified irregularity in turn.

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[13]Nationstar also argues that the foreclosure sale was conducted in violation of the statute of limitations. Although the argument is not properly raised on appeal because Nationstar did not raise it in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), the argument nevertheless fails in light of *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, which determined that "a party has instituted 'proceedings to enforce the lien'" when the

Foreclosure of a lien that includes fines does not invalidate the sale

Nationstar's first argument relies on NRS 116.31162(5), which provides that an HOA "may not foreclose a lien by sale based on a fine or penalty." Here, because it is undisputed that the HOA's lien was comprised of fines in addition to monthly assessments, Nationstar argues that the sale violated NRS 116.31162(5) and therefore is void.[14] We believe Nationstar's interpretation of the statute is untenable. In particular, NRS 116.3116(1) is the statute that authorizes an HOA's lien, and that statute provides that an HOA has a lien for fines *and* monthly assessments and that those fines and assessments automatically become part of the HOA's lien as soon as they become due. Thus, under Nationstar's construction of NRS 116.31162(5), an HOA could never foreclose on its lien if it had imposed a fine on the homeowner, regardless of whether the HOA's lien was also comprised of unpaid monthly assessments.

It does not appear that the Legislature intended this result, as NRS 116.31162(5) was enacted in 1997, six years after the Legislature enacted the UCIOA (i.e., NRS Chapter 116), which included NRS 116.3116(1). *See* 1997 Nev. Stat., ch. 631, § 17, at 3122; 1991 Nev. Stat., ch. 245, §§ 1-142, at 535-87. Based on the legislative history, the Legislature enacted NRS 116.31162(5) in conjunction with several other statutes in an apparent attempt to curb an HOA's ability to arbitrarily fine a homeowner and then foreclose on the homeowner's home. *See* Hearing on S.B. 314

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homeowner is provided a notice of delinquent assessment. 133 Nev., Adv. Op. 3, 388 P.3d 226, 231 (2017) (quoting NRS 116.3116(6)).

[14]In this respect, it is unclear whether Nationstar is relying on the foreclosed-upon fines as evidence of fraud, unfairness, or oppression or as an independent statutory basis for setting aside the sale. Regardless, we are not persuaded by the argument for the reasons given below.

Before the Senate Comm. on Commerce & Labor, 69th Leg. (Nev., May 1, 1997) (statement of Gail Burks, President of the Nevada Fair Housing Center, memorialized in exhibit L, explaining that HOAs tend to "abuse their authority" by "foreclos[ing] on a property for unpaid fines"); Hearing on S.B. 314 Before the Senate Comm. on Commerce & Labor, 69th Leg. (Nev., June 24, 1997) (discussing the purpose of what would become NRS 116.31162(5) without reference to its effect on NRS 116.3116(1)); 1997 Nev. Stat., ch. 631, §§ 1-27, at 3110-27 (enacting what would become NRS 116.31162(5) without altering NRS 116.3116(1)).

Because the Legislature did not discuss what impact NRS 116.31162(5) would have on NRS 116.3116(1), it is improbable that the Legislature intended for NRS 116.31162(5) to have the effect that Nationstar proposes. Rather, because the Legislature did not consider NRS 116.3116(1) when it enacted NRS 116.31162(5), it appears that the Legislature intended for NRS 116.31162(5) to prohibit an HOA from foreclosing on a lien that was comprised *solely* of fines. *See Barney v. Mount Rose Heating & Air Conditioning*, 124 Nev. 821, 826, 192 P.3d 730, 734 (2008) ("Statutes are to be read in the context of the act and the subject matter as a whole . . . ."); *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 228, 19 P.3d 245, 249 (2001) ("The intent of the Legislature may be discerned by reviewing the statute or the chapter as a whole."). Thus, the fact that the HOA in this case foreclosed on a lien that was comprised of fines in addition to monthly assessments does not violate NRS 116.31162(5) so as to invalidate the sale.

Even if the sale is not void, Nationstar suggests that unfairness exists because all the foreclosure sale proceeds were distributed to the HOA (including fine-related proceeds) instead of just the HOA's superpriority lien

amount.[15] However, Saticoy Bay points out that this post-sale impropriety would not warrant invalidating the sale because NRS 116.31166(2) absolves Saticoy Bay from any responsibility to see that the sale proceeds are properly distributed and that Nationstar's recourse, if any, is against the HOA or its agent that conducted the sale and distributed the proceeds. Indeed, NRS 116.31166(2) appears to support Saticoy Bay's argument, as the statute provides that "[t]he receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money." Because Nationstar has not addressed Saticoy Bay's reliance on NRS 116.31166(2), we need not definitively determine whether the statute has such an effect in all cases implicating a dispute regarding post-sale distribution of proceeds. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious). For purposes of this case, however, we are not persuaded that the apparently improper post-sale distribution of proceeds amounts to unfairness so as to justify invalidating an otherwise properly conducted sale.

The notice of sale's failure to list the unpaid lien amount on the date of the sale does not amount to fraud, unfairness, or oppression

Nationstar's next argument is based on NRS 116.311635(3)(a), which provides that the notice of sale "must include [t]he amount necessary to satisfy the lien as of the date of the proposed sale." Here, the notice of sale listed the unpaid lien amount as of the date the notice was generated,

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[15]As we explained in *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev., Adv. Op. 35, 373 P.3d 66, 73 (2016), the superpriority portion of the lien included only the amount equal to nine months of common expense assessments, not any fines, collection fees, and foreclosure costs.

not as of the date of the to-be-held sale. Accordingly, Nationstar contends that this irregularity amounts to fraud, unfairness, or oppression sufficient to warrant setting aside the sale when considered in conjunction with the sale price being roughly 11 percent of the property's value. Although the notice of sale technically violated the statute, we are not persuaded that this irregularity amounts to fraud, unfairness, or oppression. Significantly, there is no evidence in the record to suggest that Nationstar ever tried to tender payment in any amount to the HOA, much less that Nationstar was confused or otherwise prejudiced by the notice of sale. Thus, we conclude that this technical irregularity does not amount to fraud, unfairness, or oppression.

The person who signed the notice of default was authorized by the HOA to do so

Nationstar's last argument is based on NRS 116.31162(2), which provides that the notice of default "must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association." Here, Nationstar appears to be arguing that the HOA violated NRS 116.31162(2) because the notice of default was signed by Yvette Thomas (an employee of the HOA's agent, Red Rock Financial Services) and there is no evidence in the record showing that the HOA's declaration (i.e., its CC&Rs) or the HOA's president specifically designated Ms. Thomas as the person who could sign the notice of default. To the extent that this is Nationstar's argument, we disagree. Although the statute provides that the notice of default "must" be signed by the person designated to sign the notice, the statute provides three ways by which that person may be designated, one of which is "by the association." Thus, "the association" may make a collective decision whom to designate even if its CC&Rs or president made no such designation. Nor did the HOA

violate the statute by designating Red Rock Financial Services in general and not Ms. Thomas specifically, as NRS 116.073's definition of "person" supplements NRS 0.039's general definition of "person," which expressly includes "any . . . association." Accordingly, because the HOA did not violate NRS 116.31162(2), this alleged irregularity in the sales process necessarily does not amount to fraud, unfairness, or oppression.

In sum, because a low sales price alone does not warrant invalidating the foreclosure sale, and because Nationstar failed to introduce evidence that the sale was affected by fraud, unfairness, or oppression, the district court correctly determined that Saticoy Bay was entitled to summary judgment on its quiet title and declaratory relief claims. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. We therefore affirm.

_____, J.
Hardesty

We concur:

_____, J.
Parraguirre

_____, J.
Stiglich

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DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST; Plaintiff, v. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Defendants.	CASE NO: A-14-704412-C DEPT NO: XXIV **COUNTRY GARDEN OWNERS ASSOCIATION'S REPLY IN SUPPORT OF MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION** **HEARING DATE: December 12, 2017** **HEARING TIME: 9 AM**
U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Counterclaimant, v. 5316 CLOVER BLOSSOM CT TRUST; Counterdefendant.	

PENGILLY LAW FIRM

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS,

Cross-Claimant,

v.

COUNTRY GARDEN OWNERS ASSOCIATION;

Cross-Defendant.

COUNTRY GARDEN OWNERS ASSOCIATION'S REPLY IN SUPPORT OF MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION

COMES NOW, COUNTRY GARDEN OWNERS' ASSOCIATION ("HOA"), by and through its counsel of record, the Pengilly Law Firm, hereby submits COUNTRY GARDEN OWNERS' ASSOCIATION'S REPLY IN SUPPORT OF MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION ("Reply") in response to U.S. Bank N.A., as Trustee's Opposition to Country Garden Owners Association's Motion to Dismiss ("Opposition"). The HOA maintains that the Opposition filed by Cross-Claimant U.S. BANK, NATIONAL ASSOCIATION ("the Bank") does not support a denial of the HOA's Motion; therefore, the HOA respectfully requests this Court grant the Motion and dismiss the claims against the HOA.

The Bank's arguments regarding the accrual of damages and equitable tolling are unavailing because the Bank's potential damages accrued at the time of the foreclosure sale that is the subject of this litigation and not in the future as the Bank argues. If the Bank's arguments are to be taken at face value, its claims have not yet accrued and its claims should be dismissed for lack of standing. In addition an analysis of the relevant factors shows that the Bank is not entitled to equitable tolling. To the extent that the Bank argues its claim for wrongful foreclosure is brought under the CC&Rs, the Complaint contradicts this claim because it does not mention the CC&Rs at all.

A. The Bank's Claims Accrued at the Latest on the Day the Trustee's Deed Was Recorded

The Bank compares its claims to derivative claims such as indemnity and malpractice claims for which limitations periods "do not begin running until judgment is entered." (Opposition at p. 7.) However, its claims are not similar and the authority on which the Bank relies is distinguishable.

"Implied indemnification has been developed by the courts to address the unfairness which results when one party, who has committed no independent wrong, is held liable for the loss of a plaintiff caused by another party." *Rodriguez v. Primadonna Co., LLC*, 216 P.3d 793, 801 (Nev. 2009). "[T]he party seeking indemnity **must plead** and prove that: (1) it has discharged a legal obligation owed to a third party; (2) the party from whom it seeks liability also was liable to the third party; and (3) as between the claimant and the party from whom it seeks indemnity, the obligation ought to be discharged by the latter." *Id.*

In this case, the Bank has not stated that it is bringing a claim for indemnity in the Cross-Claim that it filed against the HOA, and the allegations in the Cross-Claim are not sufficient notice, even under the light burden of notice pleading as practiced in Nevada, to the HOA of the elements of an indemnity claim. (*See* Answer to 5316 Clover Blossom Trust's Amended Complaint, Counterclaims and Cross-claims, filed on , Counterclaim and Cross-Claim, filed October 10, 2017.) As discussed in the Motion, the Bank's claims against the HOA are for Unjust Enrichment, Tortious Interference with Contract, Breach of NRS 116.1113, and Wrongful Foreclosure.

Furthermore, even if the Bank were to plead such a claim that is not the nature of the allegations against the HOA. This Court's potential decision quieting title against the Bank does not create a liability on the Bank's part, to the Plaintiff. It simply determines a contested issue of title to property. Furthermore, even assuming the Bank did have a claim for indemnity against the HOA, it is required to bring that claim as a third-party claim under NRCP 14, which was not done.

Furthermore, the Bank's comparison of its claims to claims for legal malpractice in a litigation setting is inaccurate. While it is true that claims for malpractice in a litigation setting only do not accrue until the entry of a judgment, this is not true of claims for transaction malpractice or for any other type of claim. As stated in *Gonzales v. Stewart Title of N. Nevada*, 905 P.2d 176, 178–

79 (Nev. 1995), *overruled in part by Kopicko v. Young*, 971 P.2d 789 (Nev. 1998) discussing transactional malpractice as opposed to malpractice during litigation:

> [A] plaintiff necessarily "discovers the material facts which constitute the cause of action" for attorney malpractice **when he files or defends a lawsuit occasioned by that malpractice, and he "sustains damage" by assuming the expense, inconvenience and risk of having to maintain such litigation, even if he wins it.** Other statutory limitations are not tolled to wait for damages to accrue in an amount certain. The limitation period for medical malpractice is not tolled to await all the bills for remedial treatment, which could include a lifetime of special care. *See* NRS 41A.097. A homeowner who knows of a construction defect would be ill advised to wait until the house falls down to sue the builder. *See* Tahoe Village Homeowners v. Douglas Co., 106 Nev. 660, 799 P.2d 556 (1990). We see no reason to impose a special rule for attorney malpractice. Further, the rule set forth herein should not deter clients from allowing their attorney to "cure" an error. It merely means that the client must observe the limitation period in doing so.

(emphasis added). While the later case *Kopicko v. Young*, 971 P.2d 789 (Nev. 1998) makes clear that the rule above does not apply to claims for malpractice during litigation, which has a different rule, this rule, which distinguishes between malpractice in a transaction that may cause litigation, and malpractice that occurs during litigation, is still good law in Nevada.

In spite of its protestations, the Bank's knowledge of its damages accrued at the time that the sale occurred, or at least when the sale deed was recorded. On January 24, 2013, all of the relevant facts were in the Bank's possession. The Bank's attorney had already advised it that, according to the statute, "a portion of [the] HOA lien is arguably prior to BAC's first deed of trust, specifically the nine months of assessments for common expenses it incurred before the date of [the] notice of delinquent assessment." (*See* Answer to 5316 Clover Blossom Trust's Amended Complaint, Counterclaims and Cross-claims, filed October 10, 2017 ("Cross-Claim"), at Ex. G-3.) The Bank's attorney had also issued a check and had recorded a notation in its records indicating that this check had been rejected. And on January 24, 2013, the Bank had constructive notice that the HOA had foreclosed upon its lien based on the recorded Trustee's Deed Upon Sale. (*See* Answer to 5316 Clover Blossom Trust's Amended Complaint, Counterclaims and Cross-claims, filed October 10, 2017, at Ex. H at at Paragraph 21.)

While the Bank will argue that its claims are not indemnity or malpractice claims, that they are just **similar** to indemnity or malpractice claims and should be **treated similarly** for purposes of

the statute of limitations, there is simply no basis for treating them similarly or for calculating the running of the limitations periods as the Bank urges.

"Where the complaining party has access to all the fact surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." *Shadow Wood HOA v. N.Y. Cmty. Bancorp.*, 366 P.3d 1105, 1116 (Nev. 2016). In addition, the Nevada Supreme Court has already ruled on the issue of whether the interpretation that it handed down in the *SFR Case* created a cause of action for the Bank when it ruled on the issue of retroactivity. Recently, the Court ruled that *SFR* "did not create new law or overrule existing precedent; rather, that decision declared what NRS 116.3116 has required since the statute's inception." *K&P Homes v. Christiana Tr.*, 398 P.3d 292, 295 (Nev. 2017).

This holding overrules the Bank's theory and arguments that the claims it seeks to bring against the HOA did not accrue at the time of the recording of the foreclosure sale. The Bank is saying that it should be allowed extra time to bring its claims because it did not know that the law would be interpreted as it was; however, the bank cites to no authority that would allow such an extension of the statutes of limitations.

B. The Bank Has Not Shown a Basis for Equitable Tolling

Equitable tolling allows the suspension of the running of a statute of limitations when the claim would have been filed timely but for a procedural technicality. *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). Even when a procedural technicality is the basis for a claim's untimely filing, the doctrine should only be applied when "'the danger of prejudice to the defendant is absent' " and " 'the interests of justice so require.' " *Seino v. Employers Ins. Co. of Nevada*, 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005) (quoting *Azer v. Connell*, 306 F.3d 930, 936 (9th Cir.2002)); When applying the doctrine of equitable tolling, the Nevada Supreme Court has examined the following non-exclusive factors to determine whether it would be just or fair to toll the statute of limitations:

> the diligence of the claimant; the claimant's knowledge of the relevant facts; the claimant's reliance on authoritative statements by the administrative agency that misled the claimant about the nature of the claimant's rights; any deception or false assurances on the part of the employer against whom the claim is made; the prejudice to the employer that would actually result from delay during the time that the

> limitations period is tolled; and any other equitable considerations appropriate in the particular case.

Copeland v. Desert Inn Hotel, 673 P.2d 490, 492 (Nev. 1983).

In this case, the Bank claims that it is entitled to equitable tolling of the applicable statutes; however, pursuant to the *Copeland* factors equitable tolling does not apply.

1. The HOA is prejudiced by the delay in filing claims against it

First, equitable tolling may never be applied if it will prejudice the defendant. *Seino*, 121 Nev. at 152. In this case, the Bank did not even attempt to argue that the HOA will not be prejudiced by the Bank's delay in filing the claims against the HOA. In fact the HOA is prejudiced because the passage of time has made it difficult for the HOA to gather testimony to defend itself. Like many homeowners associations, the HOA is staffed by volunteer board members who are in office for a short period of time. Furthermore, many homeowners associations change community managers frequently. Without board members or community managers who were in office at the time of the collection action and sale that is the subject of this litigation, it is difficult for the HOA to defend itself. Had the Bank not delayed filing its claims these witnesses would be more likely to be available.

2. The Bank Cannot Show that it Relied on the CC&Rs

In addition to failing to show that the HOA will not be prejudiced by the application of equitable tolling, and even assuming that the CC&Rs contain misrepresentations, which the HOA does not concede, the Bank has not shown that it relied on the CC&Rs. In fact, the evidence before the Court indicates that the Bank did not rely on the CC&Rs at all. In Exhibit G-3 to the Bank's Cross-Claim, the Bank's attorney states "a portion of [the] HOA lien is arguably prior to BANA's first deed of trust, specifically the nine months of assessments for common expenses incurred before the date of [the] notice of delinquent assessment." The Bank's attorney then proceeds to take action based upon that statement, that is the Bank's attorney sent a check to the HOA Trustee, as a tender, presumably based on an intention to satisfy the portion of the HOA's lien that was "arguably prior to" the mortgage and protect the mortgage. Had the Bank relied on the CC&Rs, it would not have taken that action. If the Bank relied on anything, it appears that the Bank relied on the legal

conclusion that its tender, even if rejected, would protect its mortgage from extinguishment and obviate the need for the Bank to attend the HOA foreclosure sale and bid to protect the mortgage. Therefore, this factor weighs against the application of equitable tolling. *Copeland,* 673 P.2d at 492.

3. The Bank had knowledge of the relevant facts

Furthermore, as discussed in the previous section, the Bank knew all of the relevant facts that created a claim against the HOA. The only missing element was the decision in the SFR Case, which the Nevada Supreme Court has said was merely a declaration of what the statute had always said. Neither the SFR Case nor this Court's potential award is considered a "fact" that the Bank was unaware of back in January of 2013. Instead these two things are an application of the law; and the Bank has failed to show that the Bank's claims should be equitably tolled because the Bank lacked knowledge that it needed to make a claim against the HOA. *Copeland, 673* P.2d at 492.

4. The Bank was not diligent

The sale in this case occurred on January 16, 2013. In July of 2014, the Plaintiff filed a complaint against the Bank to quiet title in the property that is the subject of this litigation. In September of 2014, just when the Bank file its response, the *SFR Case* was handed down. Yet the Bank failed to file its claims against the HOA for three years. There are multiple cases, perhaps before this Court, if not, in other courts in Nevada, filed after this case, concerning the same constellation of events, centering on an HOA foreclosure sale, in which the bank has asserted claims against the HOA and the HOA Trustee at the outset of the case. If multiple other claimants have asserted the claims in a timely fashion, a bank that does not should not be able to cure its lack of planning by invoking equitable tolling. In this case the Bank waited over four years before bringing its claims against the HOA and the Bank has not shown any newly discovered facts or evidence to explain why the claims against the HOA were brought so late in the litigation.

Because the Bank was not diligent in bringing its claims against the HOA, this factor also weighs against the application of equitable tolling. *Copeland, 673* P.2d at 492.

As explained above, the *Copeland* factors do not show that it would be just to toll the statute of limitations in this instance. Furthermore, the Bank has not met its burden to show that the HOA

would not be prejudiced by the late filing of this case. The HOA respectfully requests that the Court decline to apply to equitable tolling in this instance.

C. **The Bank Has Misapplied the Doctrine of Equitable Tolling**

The Bank has also failed to address the discrepancy between this case and the cases in which equitable tolling applies which makes it doubtful that the doctrine would even apply. In all of the cases that the Bank cites the parties to the dispute are parties between which there is a previous relationship and an inherent imbalance of power, with the doctrine of equitable tolling being invoked by the weaker of the parties. The *Seino Case* involved an employer employee relations, as does the *Copeland Case*. The *City of N. Las Vegas Case* is about a dispute between police officers and the government that employs them. Finally, the *Masco Case* involves a dispute between a taxpayer and the taxing authority to whom he is appealing. In all of these cases there is a common thread in which the party who is invoking the doctrine of equitable tolling is in a much weaker position that the opposing party, who is an administrative body, or an employer or a labor board, and was, to some extent, dependent upon the opposing party's just treatment. Equitable tolling in those cases, was applied in order to remedy an unjust action by the stronger side. In this case, there is no imbalance of power, merely two parties interacting at arms length and attempting to protect their interest. Consequently, the Court should not apply the doctrine in this case.

D. **The Bank's Wrongful Foreclosure Claim Is Not Based on the CC&Rs**

The Bank cites an unpublished federal court opinion *Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Ass'n*, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017) for the proposition that the statute of limitations on wrongful foreclosure can be six years. However, the Bank fails to explain the final conclusion reached in that opinion. While Judge Jones does opine that a claim that was based on the CC&Rs would have a statute of six years, this portion of the opinion is *dicta* because Judge Jones, in *Nationstar*, concludes that the statute of limitations on the claim for wrongful foreclosure in his case is three years, because the complaint does not mention the CC&Rs and is clearly based on NRS Chapter 116. *Id.*

The claims in this case are similar to the ones in the *Nationstar* case. Nowhere in the Bank's Cross-claims against the HOA does the Bank make an allegation concerning the CC&Rs, while it

makes multiple references the NRS Chapter 116. The HOA anticipates that the Bank will argue that the Notices attached to the Bank's claims reference the CC&Rs; however, that is not enough to satisfy even the lenient standards of Nevada notice pleading requirements. The notices are not incorporated as part of the Cross-Claim, and no facts are alleged in the Bank's claims that would support a legal theory regarding wrongful foreclosure under the HOA's CC&Rs. Consequently, the Court should not apply a six-year statute of limitations to the Bank's wrongful foreclosure claim and should apply a three or four-year statute instead, allowing summary judgment to be entered for the HOA.

DATED this 7th day of December, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Based on the allegations on the face of the Complaint, the claims brought by U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS (the "Bank") in its Answer to 5316 Clover Blossom Trust's Amended Complaint, Counterclaims, and Cross-Claims, filed on October 10, 2017 (the "Complaint"), should be dismissed because they are barred by the statute of limitations or must be dismissed pursuant to NRS 38.310 for mediation with the Nevada Real Estate Division. On the face of the Complaint, the Complaint was filed four years and nine months after the date upon which the foreclosure deed

providing, constructive notice of the sale that is the subject of this litigation was recorded, and causing the statute of limitations on the bank's causes of action to begin running. (Complaint at ¶ 21 and Exhibit 7.) In addition, the Bank lacks standing to bring claims from violation of NRS Chapter 116 based upon NRS 116.4117, the provision that creates causes of for violation of the Chapter's provisions. Finally, to the extent that the Bank argues that its causes of action should have a six-year statute of limitations because they incorporate the applicable Covenants, Conditions, & Restrictions ("CC&Rs") this argument would also require dismissal because it would implicate NRS 38.310's requirement that all civil actions requiring the interpretation, application, or enforcement of any covenants, conditions, and restrictions applicable to residential property must be dismissed unless they have been submitted to a mediation prior to being filed with the court.

II. BACKGROUND

The subject of this litigation is a certain foreclosure sale of residential real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031, APN 124-31-220-092 (the "Property"). (Compl. at ¶6.) The foreclosure sale that is the subject of this litigation (the "HOA Sale") foreclosed a lien against the Property held by the HOA. (Compl. at ¶ 13 - 24.) The HOA Sale was held on January 16, 2013, and the Foreclosure Deed ("Foreclosure Deed") was recorded on November 8, 2012. (Compl. at ¶ 21 and Exhibit H.)

On or about July 25, 2014, the present owner of the Property, 5316 Blossom Ct. Trust (the "Buyer"), filed this action, seeking to quiet title in the property against the Bank. The Bank filed its Answer on September 25, 2014.

On or about September 28, 2017, the Bank and the Buyer filed a stipulation and order allowing the Bank to add claims against the HOA.

The Complaint asserts the following claims against the HOA: Third Cause of Action, Unjust Enrichment, Fourth Cause of Action, Quiet Title/ Declaratory Relief Pursuant to NRS 30.010; Third Cause of Action, Unjust Enrichment; Fourth Cause of Action, Tortious Interference with Contractual Relations; Fifth Cause of Action, Breach of the Duty of Good Faith; and Sixth Cause of Action, Wrongful Defective Foreclosure.

III. LEGAL STANDARD

A motion to dismiss for failure to state a claim is proper under NRCP 12 (b)(5) if it appears that the claimant can prove no set of fact which would entitle it to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).While the Court must accept factual allegations in the Complaint as true and may draw all inferences in the in the Bank's favor, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. at 224. "Dismissal [is] proper where the allegations are insufficient to establish the elements of the claim for relief." *Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, 183 P.3d. 133, 135 (2008).

Furthermore, when a complaint shows on its face that the cause of action is barred by the statute of limitations, the burden falls upon the plaintiff to demonstrate that the bar does not exist. *Bank of Nevada v. Friedman*, 82 Nev. 417, 422, 420 P. 2d 1, 4 (1966).

Finally, NRS 38.310(2) states that a "court shall dismiss any civil action which is commenced in violation of the provisions of [NRS 38.310(1)]" requiring that a claim that requires a court to interpret, apply or enforce CC&Rs that are applicable to residential property must be mediated prior to filing them in district court.

IV. LEGAL ARGUMENT

As outlined below, the face of the Complaint shows that many of the Bank's claims are barred by the applicable statute of limitations. Furthermore, the Bank lacks standing to pursue claims for violation of NRS Chapter 116. Finally, to the extent that the Bank argues it is entitled to a six-year statute of limitations because its claims are based on the CC&Rs, NRS 38.310 requires that these claims be dismissed.

A. All of the Bank's Claims Are Barred by the Applicable Statutes of Limitations

"In determining whether a statute of limitations has run against an action, the time must be computed from the day the cause of action accrued. A cause of action 'accrues' when a suit may be maintained thereon." *Clark v. Robison*, 944 P.2d 788, 789 (Nev. 1997). Pursuant to Nevada Revised Statute 111.320, a recorded document will "impart notice to all persons of the contents thereof . . . ."

In addition, "[i]f the facts giving rise to the cause of action are matters of public record then '[t]he public record gave notice sufficient to start the statute of limitations running.'" *Job's Peak Ranch Cmty. Ass'n,Inc. v. Douglas Cty.*, No. 55572, 2015 WL 5056232, at *3 (Nev. Aug. 25, 2015); *see also U.S. Bank Nat'l Ass'n v. Woodland Village*, 3:16-cv-00501-RCJ-WGC at DE #32, page 5, lines 21-23.

Nevada Revised Statute 11.190 describes the statutes of limitations that are applicable to various causes of action. Pursuant to this statute, a six-year limitations period applies to "[a]n action upon a contract, obligation or liability founded upon an instrument in writing." A four-year limitations period applies to a claim for unjust enrichment. A three-year limitations period applies to "[a]n action upon a liability created by statute, other than a penalty or forfeiture." A claim for tortious interference with contract is also "subject to the three-year statute of limitations set forth in NRS 11.190(3)(c)." *Stalk v. Mushkin*, 199 P.3d 838, 842 (Nev. 2009). Finally, pursuant to another catch-all statute that follows NRS 11.190, NRS 11.220, "[a]n action for relief, not hereinbefore provided for [within the Nevada Revised Statutes], must be commenced within 4 years after the cause of action shall have accrued."

In this case, on its face, the Complaint indicates that Plaintiff's claims for unjust enrichment, tortious interference with contractual relations, breach of the duty of good faith, and wrongful or defective foreclosure are all barred by the statute of limitations because their limitations period is either three or four years and the complaint was filed four years and nine months after the Foreclosure Deed was recorded and the Bank's causes of action accrued.

The Complaint states at Paragraph 21 that "[t]he HOA non-judicially foreclosed on its sub-priority lien secured by the Property on January 16, 2013, selling an encumbered interest in the Property to Plaintiff for $8,200.00. A true and correct copy of the Trustee's Deed Upon Sale is attached as Exhibit H." Examination of Exhibit H shows that it was recorded on January 24, 2013. Therefore, at the very latest, the Bank's claims regarding the foreclosure sale accrued January 24, 2017. Because the Complaint asserting claims against the HOA was not filed until October of 2017, any claim with a three-year or four-year limitations period is barred. In addition, it is the Bank's burden to show that its claims are not barred.

1. Unjust Enrichment

The third cause of action in the Complaint is for unjust enrichment. "The statute of limitation for an unjust enrichment claim is four years." *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev. 2011)(citing NRS 11.190(2)(c)). The Bank's claim for unjust enrichment accrued on January 24, 2013; however, the Bank did not file its claim until after the four-year limitations period, in October of 2017.

2. Tortious Interference with Contractual Relations

The fourth cause of action in the Complaint is for tortious interference with contractual relations. A claim for tortious interference with contract is also "subject to the three-year statute of limitations set forth in NRS 11.190(3)(c)." *Stalk v. Mushkin*, 199 P.3d 838, 842 (Nev. 2009). Because this claim accrued on January 24, 2013, but was not filed until October of 2017 it is barred by NRS 11.190(3)(c).

3. Breach of the Duty of Good Faith

The fifth cause of action in the Complaint is for breach of the duty of good faith that is found within NRS 116.1113. Because this is a claim regarding a violation of a statute it is governed by NRS 11.190(3)(a) which states that "[a]n action upon a liability created by state, other than a penalty or forfeiture" must be brought within 3 years. Because this claim was not brought until October 2017, more than four years after the recording of the foreclosure deed, this cause of action is barred.

4. *Wrongful/Defective Foreclosure*

The sixth cause of action in the Complaint is for "Wrongful / Defective Foreclosure." The Complaint's allegations center primarily on a discussion of an alleged tender by the Bank to the HOA's collection company.

This claim should have a three-year statute of limitations.

> A tortious wrongful foreclosure claim 'challenges the authority behind the foreclosure, not the foreclosure act itself.' Red Rock's authority to foreclose on the HOA lien on behalf of the HOA arose from Chapter 116, essentially rendering count three a claim for damages based on liability created by a statute. Therefore, count three is likewise time-barred under NRS 11.190(3)(a) because it was not brought within three years.

HSBC Bank USA v. Park Ave. Homeowners' Assn., 216CV460JCMNJK, 2016 WL 5842845, at *3 (D. Nev. Oct. 3, 2016) (Citing *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev. 2013) (en banc). Even assuming that a claim for wrongful foreclosure did not fall under NRS 11.190(3)(a), it would fall within the catch-all provision in NRS 11.220 and would have a four-year limitations period. Consequently, all of the bank's claims regarding violation of NRS Chapter 116 are time barred.

B. In Addition, the Bank Lacks Standing to Bring a Claim for Violation of NRS 116.1113

Nevada Revised Statute NRS 116.4117 creates a private right of action for violations of NRS 116, but specifically limits standing to bring such a claim to only specific classes of persons.

The relevant language of NRS 116.4117 provides as follows:

> 1. Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.
>
> 2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:
>
> (a) By the association against:
> (1) A declarant;
> (2) A community manager; or
> (3) A unit's owner.
>
> (b) By a unit's owner against:
> (1) The association;
> (2) A declarant; or
> (3) Another unit's owner of the association.
>
> (c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

Nevada Revised Statute 116.095 defines "unit's owner" as "a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common-interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common-interest community, **but does not include a person having an interest in a unit solely as security for an obligation."** (emphasis added). Based on this provision and on other provisions in

Chapter 116, for example NRS 116.2119, the legislature knew that secured lenders had potential interests in property that could be subject to NRS Chapter 116, but chose not to include them in the list of entities with standing to bring a claim for violations of Chapter 116. Consequently, Plaintiff's claims for violation of NRS 116.1113 should be dismissed for lack of standing.

C. If the Bank Argues that Its Claims Concern the CC&Rs, the Claims Should Be Dismissed Because Plaintiff Has Failed to Comply with NRS 38.310

Nevada Revised Statute 38.310 provides:

> 1. No civil action based upon a claim relating to:
>
> (a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or
>
> (b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property, may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.
>
> 2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Furthermore, Nevada Revised Statute 38.330 states that "[a]ny complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, but an agreement was not obtained."

The Complaint does not contain a sworn statement pursuant to NRS 38.330.

Although the Complaint does not contain allegations regarding the CC&Rs, it does contain a claim for wrongful foreclosure, to the extent that this claim requires the interpretation, enforcement or application of the CC&Rs, the claim should be dismissed so the Bank can comply with NRS 38.310.

V. CONCLUSION

Based on the foregoing, Country Garden Owners Association respectfully requests that the Court grant the instant Motion and dismiss the claims against the HOA in their entirety. The HOA

requests that the Court dismiss all of the Bank's causes of action based upon the expiration of the applicable statute of limitations. Furthermore, the HOA requests that the Court dismiss the Bank's cause of action for breach of NRS 116.1113 for lack of standing. Finally, to the extent the Bank argues that its claims have a six-year statute based on the applicable CC&Rs, the HOA requests that the claims be dismissed pursuant to NRS 38.310 because these causes of action require the interpretation, application or enforcement of the applicable CC&Rs and were brought without being submitted to mediation as is required.

DATED this 7th day of December, 2017.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that on the 7th day of December, 2017, a copy of **COUNTRY GARDEN OWNERS ASSOCIATION'S REPLY IN SUPPORT OF MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION**, was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court E-Filing System in compliance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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12/12/2017	**All Pending Motions** (9:00 AM) (Judicial Officer Crockett, Jim) **Minutes** 12/12/2017 9:00 AM - PLAINTIFF'S MOTION TO DISMISS COUNTERCLAIM...CROSS DEFENDANT COUNTRY GARDEN OWNER'S ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIM OF U.S. BANK NATIONAL ASSOCIATION Court noted the details of the case, read from the Supreme Court's remand, and inquired as to what additional discovery there may be if any. Ms. Lachman sent a written discovery request and took depositions, noting there are two months left but they are happy with the discovery that has been conducted. Court noted that instead of a motion for summary judgment, Plaintiff filed a motion to dismiss and advised it is subject to being treated as a motion for summary judgment. Court noted its findings upon its review and stated the pleadings strongly suggest that the bank forfeited its equitable claim. Further comments by the Court regarding what the bank could have done, the bank's actions, and thought on commercial unreasonableness. Court stated its findings and inclination. Mr. Lachman stated his argument on the mortgage protection clause and further argued. COURT FINDS, no reasonable minds would differ as to what the appropriate action would be. Further arguments by Counsel. COURT ORDERED, Plaintiff's Motion to Dismiss Counterclaim and Cross Defendant Country Garden Owner's Association's Motion to Dismiss, both to be treated as a motion for summary judgment and GRANTED. Court advised it needs findings of fact and conclusion of law that Court can agree with, Counsel to submit to opposing Counsel its proposed order for approval as to form and content only, and submit even without agreement to the Court within TEN days per EDCR 7.21.

FFCL

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DISTRICT COURT
CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST

Plaintiff,

vs.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS

Defendants.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1,

Counterclaimant,

vs.

5316 CLOVER BLOSSOM CT TRUST

Counterdefendant.

CASE NO.: A-14-704412-C
DEPT NO.: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Date of Hearing: December 12, 2017
Time of Hearing: 9:00 a.m.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1,

Cross-claimant,

vs.

5316 CLOVER BLOSSOM CT TRUST

Cross-defendant.

Plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss having come before the court on the 12th day of December, 2017, at 9:00 a.m., Adam R. Trippiedi, Esq. appearing on behalf of plaintiff; Scott Lachman, Esq. appearing on behalf of defendant U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., Successor by Merger to Lasalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-through Certificates Series 2006-OA1 ("US Bank"); and Elizabeth B. Lowell, Esq. appearing on behalf of cross-defendant Country Garden Owners' Association, and the court, having reviewed plaintiff's motion and defendant's opposition, and having heard the arguments of counsel, makes its findings of fact, conclusion of law and judgment as follows.

FINDINGS OF FACT

1. 5316 Clover Blossom Ct Trust is the owner of real property commonly known as 5316 Clover Blossom Court, North Las Vegas, Nevada (hereinafter referred to as "the Property").

2. The property is encumbered by a Declaration of Covenants, Conditions, and Restrictions for Country Garden (Arbor Gate) (hereinafter referred to as the "CC&Rs").

3. 5316 Clover Blossom Ct Trust acquired the Property from Country Garden Owners' Association (hereinafter the "HOA") at a foreclosure sale conducted on January 16, 2013.

4. The foreclosure sale arose from a delinquency in assessments due from the former owners to the HOA pursuant to NRS Chapter 116.

5. US Bank is the beneficiary of a deed of trust that was originally recorded as an encumbrance against the Property on June 30, 2004.

6. On June 20, 2011, an assignment of the deed of trust was recorded which assigned the beneficial interest in the deed of trust to US Bank.

7. At some point, the former owner of the property became delinquent in paying assessments and the HOA and its foreclosure agent, Alessi & Koenig, LLC (hereinafter "the foreclosure agent"), began foreclosure proceedings based on the delinquent assessments.

8. On January 30, 2012, and again on February 6, 2012, the foreclosure agent served a Notice of Delinquent Assessment Lien on the former owners of the property via regular and certified mail.

9. On February 22, 2012, the foreclosure agent recorded a Notice of Delinquent Assessment Lien against the property.

10. On April 20, 2012, the foreclosure agent recorded a Notice of Default and Election to Sell under homeowners association lien against the property.

11. On April 30, 2012, the foreclosure agent mailed copies of the notice of default to the former owner, to MERS, to US Bank, and to other interested parties.

12. On October 31, 2012, a Notice of Foreclosure Sale was recorded against the property.

13. On October 25, 2012, the foreclosure agent mailed copies of the notice of foreclosure sale to the former owner, US Bank, and other interested parties.

14. The foreclosure agent also served the notice of foreclosure sale on the former owners by posting a copy of the notice in a conspicuous place on the Property, and also posted copies of the notice in three public locations throughout Clark County.

15. The foreclosure agent also published the notice of sale in the Nevada Legal News.

16. As reflected by the conclusive recitals in the foreclosure deed, 5316 Clover Blossom Ct Trust entered the high bid of $8,200.00 at the public auction conducted on January 16, 2013, to purchase the Property.

17. The foreclosure agent issued a deed upon sale, which was recorded on January 24, 2013, and contains the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on January 16, 2013 at the place indicated on the Notice of Trustee's Sale.

18. US Bank alleges that on November 21, 2012, US Bank, by way of its agent, sent correspondence to the foreclosure agent requesting an accounting of the HOA arrears.

19. In response, the foreclosure agent sent a letter to US Bank's agent. The foreclosure agent's letter stated that the total amount due was $4,186.00.

20. On December 6, 2012, US Bank, by way of its agent, mailed a check in the amount of $1,494.50 to the foreclosure agent, along with an accompanying letter, in an effort to satisfy the HOA's super-priority lien.

21. There is no evidence to indicate the HOA or foreclosure agent accepted or otherwise responded to the $1,494.50 check.

22. After sending the letter and $1,494.50 check to the foreclosure agent, US Bank made no other efforts to pay off the lien or otherwise prevent the foreclosure sale from going forward.

23. Prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA lien representing 9 months of assessments for common expenses.

24. US Bank did not present evidence of any fraud, oppression or unfairness in regards to the foreclosure sale which would account for or bring about an unreasonably low purchase price.

25. 5316 Clover Blossom Ct Trust is a bona fide purchaser, and the US Bank has failed to present sufficient proof to disprove that the 5316 Clover Blossom Ct Trust was a bona fide purchaser.

26. Any findings of fact which should be considered to be a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. If, in a motion under NRCP 12(b)(5), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made

pertinent to such a motion by Rule 56. See NRCP 12(b).

2. This Court finds that, by virtue of the arguments presented in 5316 Clover Blossom Ct Trust's motion to dismiss, US Bank's opposition, and 5316 Clover Blossom Ct Trust's reply, matters outside the counterclaim were presented and, thus, 5316 Clover Blossom Ct Trust's motion to dismiss was converted into a motion for summary judgment and this court is treating it as such.

3. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate "no genuine issue as to any material fact [remains] and the moving party is entitled to judgment as a matter of law. See NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005).

4. To defeat a motion for summary judgment the non-moving party bears the burden to "do more than simply show there is some metaphysical doubt: as to the operative facts. Wood, 121 Nev. at 732 (citing Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1983)). Moreover, the non-moving party must come forward with specific facts showing a genuine issue exists for trial. Matsushita, 475 U.S. at 587; Wood P.3d at 1130. Further, in ruling upon a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the non-moving party. Torrealba v. Kesmetis, 124 Nev. 95, 178 P.3d 716 (2008).

5. When ruling on a motion for summary judgment, the court may take judicial notice of the public records attached to the motion. Harlow v. MTC Financial Inc. 865 F. Supp.2d 1095 (D. Nev. 2012). The recorded exhibits to US Bank's counterclaim are public records of which the Court may, and did take judicial notice. See NRS 47.150; Lemel v. Smith, 64 Nev. 545 (1947) (Judicial Notice takes the place of proof and is of equal force.") "Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic." NRS 52.165.

6. Summary judgment in favor of 5316 Clover Blossom Ct Trust is proper.

7. The HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of notice of delinquent assessment lien and notice of default and election to sell under homeowners association lien, and the recording, mailing, posting, and

publication of the notice of foreclosure sale.

8. The law presumes foreclosure notices are received upon proof of mailing, and does not require proof that the notices be received. Actual notice is not necessary as long as the statutory requirements are met. Mailing of the notices is all that the statute requires. Hankins v. Administrator of Veterans Affairs v. Administrator of Veterans Affairs 92 Nev. 578, 555 P.2d 483 (1976); Turner v. Dewco 87 Nev. 14, 479 P.2d 462 (1971).

9. There is a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2003); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210.

10. There is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A. Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

11. Nevada has a disputable presumption that "the law has been obeyed." See NRS 47.250(16). This creates a disputable presumption that the foreclosure sale was conducted in compliance with the law.

12. 5316 Clover Blossom Ct Trust, as the record title holder of the property, has a presumption of validity in its favor, and US Bank "has the burden to show that the sale should be set aside in light of" 5316 Clover Blossom Ct Trust's status as the record title holder. Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91 (2017).

13. The recitals in the foreclosure deed are sufficient and conclusive proof that the required notices were mailed by the HOA. See NRS 116.31166 and NRS 47.240(6) which also provide that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made

conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that US Bank bank was served with copies of the required notices for the foreclosure sale.

14. US Bank has not presented any evidence to show that equitable relief is warranted in this case or to disprove any of the recitals in the foreclosure deed.

15. US Bank has not presented any evidence to show any defect with the foreclosure sale or the recording and service of the notices prior to the foreclosure sale.

16. US Bank further argues that the low price when combined with fraud, unfairness, or oppression is sufficient to void said sale. However, US Bank failed to present any evidence of fraud, unfairness, or oppression in regards to the foreclosure sale.

17. US Bank argues there was fraud, oppression, or unfairness in the conduct of the sale because the foreclosure agent rejected US Bank's tender. However, the fraud, oppression, or unfairness must bring about or account for the low purchase price. See Shadow Wood, et al. Examples would be collusion between the auctioneer and the purchaser to keep the price artificially low or an effort to prevent public notice of the auction. US Bank never explains how rejection of a tender accounts for a low purchase price.

18. Nevada Rule of Civil Procedure 9(b) requires that "[i]n all averments of fraud..., the circumstances constituting fraud... shall be stated with particularity." US Bank, in alleging fraud in this matter, has not stated the basis for its fraud allegation with sufficient particularity or factual support.

19. There is no issue regarding whether the association foreclosed on the "super-priority" portion of its lien. The evidence and deed recitals show that both the notice of default and the notice of sale were properly mailed to US Bank. The language in both the notice of default and notice of sale shows that the HOA was foreclosing on a lien comprised of monthly assessments. As such, there is no genuine issue of material fact that the HOA possessed a super priority lien at the time of the foreclosure sale, and that the super priority lien was foreclosed upon. As stated in SFR, as to first deeds of trust, NRS 116.3116(2) splits an HOA lien into two pieces, a superpriority piece and a

subpriority piece. Unless the superpriority piece has been satisfied prior to the foreclosure sale, the HOA foreclosure sale on its assessment lien would necessarily include both the superpriority piece and a subpriority piece of the lien. US Bank failed to present any evidence that the superpriority portion of the lien was satisfied prior to the foreclosure sale.

20. In considering whether equity supports setting aside the sale in question, the Court is to consider any other factor bearing on the equities, including actions or inactions of both parties seeking to set aside the sale and the impact on a bona fide purchaser for value. Shadow Wood at 1114 (finding "courts must consider the entirety of the circumstances that bear upon the equities").

21. The attempted tender of assessments made by US Bank for $1,494.50, does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank had several different options to prevent the sale from going forward and failed to do so. Specifically, US Bank could have "pa[id] the entire amount and request[ed] a refund of the balance." SFR at 418. US Bank also could have sought "a temporary restraining order and preliminary injunction and fil[ed] a lis pendens on the property." Shadow Wood at 1114 n.7. US Bank failed to avail itself of any of these options and instead allowed the HOA to foreclose.

22. US Bank's tender letter contains conditions, including that the tender amount is "non-negotiable"; that endorsement of the check "will be strictly construed as an unconditional acceptance... of the facts" stated in the tender letter; and acceptance of the check is an acknowledgment that the lien has been "'paid in full.'" Because of these conditions, the tender was not valid and had no effect on the foreclosure sale of the HOA's lien. Smith v. School Dist. No. 64 Marion County, 89 Kan. 225, 131 P. 557, 558 (1913) ("A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due.")

23. US Bank's tender also contains conditions that were not consistent with Commission for Common Interest Communities and Condominium Hotels' (hereinafter "CCICCH") Advisory Opinion 2010-01 issued on December 8, 2010:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.
>
> ...
> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien.**

(emphasis added)

24. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

25. The fact that the foreclosure agent did not accept the tender does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank failed to take any steps to protect its interest aside from mailing the letter and check, which was in an amount less than the full amount of the HOA's lien. Accordingly, US Bank is not entitled to equitable relief. Shadow Wood at 1114 n.7.

26. Specifically, the Nevada Supreme Court decision of Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016) did not exist on December 6, 2012, when US Bank sent its tender, so the HOA and the foreclosure agent could not have relied upon that authority.

27. To the contrary, the December 8, 2010, CCICCH opinion existed on December 6, 2012, and the HOA and foreclosure agent could have relied upon that authority.

28. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

29. US Bank's further argues that the presence of a mortgage protection clause within the CC&Rs, which represents that the HOA lien "shall not affect the rights of the mortgagee under any first mortgage upon such Lot, Unit or Parcel," was evidence of fraud, oppression, and/or unfairness that rendered the foreclosure sale a subpriority sale. However, the mortgage protection language cited by US Bank was determined to be legally ineffective by the Nevada Supreme Court in SFR based on NRS 116.1104, which states that the provisions of NRS 116 "may not be varied by agreement, and rights conferred by it may not be waived." Based on SFR, this court finds the mortgage protection clause was invalid and thus was also not evidence of fraud, oppression, or unfairness.

30. Therefore, because US Bank's has failed to set forth material issues of fact demonstrating some fraud, unfairness, or oppression which led to the low purchase price, the Court finds that the price of the sale is not a legitimate basis to overturn the sale.

31. There is no issue of fact regarding whether the former owner was in default in payment of the assessments as well as whether the lien and foreclosure notices were properly served. The recitals in the foreclosure deed are conclusive as to these issues. Furthermore, 5316 Clover Blossom Ct Trust presented proof, which was not controverted, that the notices were mailed, published, and posted.

32. 5316 Clover Blossom Ct Trust is a bona fide purchaser ("BFP"). A subsequent purchaser is bona fide under common law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); see also Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive.").

33. The evidence shows 5316 Clover Blossom Ct Trust purchased said property for valuable consideration in the amount of $8,200.00 and had no actual, constructive, or inquiry notice of any dispute of title or defect in the sales process. Such evidence is clear from the fact US Bank did not pay

off the super-priority lien, attend the sale in question, record notice with the Clark County Recorder, or attempt to take any other action to put potential buyers on notice of any dispute. US Bank was in the position to take any number of simple steps to avoid a BFP issue and simply failed to take such action. After being fully apprised of the pending foreclosure sale and taking no action, US Bank looks now to enforce its rights. The Court notes that all that was required of US Bank to defeat BFP status was to put purchasers on notice of their claim to the property by either showing up to the sale to announce their claim of title, record a legal tender, file a lis pendens, or seek a temporary restraining order. US Bank's argument that 5316 Clover Blossom Ct Trust cannot be a BFP based on the mere fact that a Deed of Trust was recorded is not supported under the law.

34. In the absence of evidence to the contrary, US Bank had the burden of proving 5316 Clover Blossom Ct Trust was not a BFP because for 5316 Clover Blossom Ct Trust to prove it was a BFP would be akin to proving a negative, i.e., proving 5316 Clover Blossom Ct Trust was not aware of information which would defeat BFP status. See Shadow Wood at 1112 ("The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment."); First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 1442, 71 Cal. Rptr. 2d 295 (1998) ("That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of its reconveyed deed of trust was an element of First Fidelity's case.... Showing that Alliance was not an innocent purchaser for value was hence an element of First Fidelity's claim.")

35. Equitable relief is only available when no adequate remedy at law exists. One who seeks equitable relief cannot merely sit on its hands to its detriment. It would be a gross injustice for 5316 Clover Blossom Ct Trust, an innocent third party who paid valuable consideration, to have its equitable rights subordinate to US Bank, who did nothing to protect itself at the foreclosure sale. See generally Holmberg v. Armbrecht, 66 S. Ct. 582, 584 (1946)(quoting Russell v. Todd, 60 S. Ct. 527, 532 (1940)) (finding "[t]here must be conscience, good faith, and reasonable diligence, to call into action the [equitable] powers of the court."). Therefore, the Court finds 5316 Clover Blossom Ct Trust is a BFP, undisturbed by any issue raised in US Bank's opposition, as 5316 Clover Blossom Ct

Trust's equitable interest as an innocent purchaser cannot be outweighed by the inaction of US Bank.

36. US Bank is not entitled to equitable relief because it was on notice of the foreclosure sale and failed to take adequate steps to protect its interest in the property. The Nevada Supreme Court has stated, that "[w]here the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." Shadow Wood, 366 P.3d at 1116 (quoting Nussbaumer v. Sup. Ct. in & for Yuma Cty., 107 Ariz. 504, 489 P.2d 843, 846 (1971)). In Shadow Wood, the Nevada Supreme Court held that "[c]onsideration of harm to potentially innocent third parties is especially pertinent where [the lender] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." Shadow Wood, 366 P.3d at 1114 fn. 7.

37. The policies and equities favor the 5316 Clover Blossom Ct Trust. In balancing the equities, 5316 Clover Blossom Ct Trust's interest as the successor to a bona fide purchaser is not outweighed by the inaction of US Bank.

38. US Bank shall take nothing by way of its counterclaim.

39. Any conclusion of law which should be a finding of fact shall be considered as such.

ORDER and JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss, converted to a motion for summary judgment, is granted.

IT IS FURTHER ORDERED that judgment is entered on behalf of plaintiff 5316 Clover Blossom Ct Trust and against defendant US Bank.

IT IS FURTHER ORDERED that title to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, and legally described as:

PARCEL I

LOT NINETY TWO (92) OF THE PLAT OF ARBOR GATE AS SHOWN BY MAP THEREOF ON FILE IN BOOK 91 OF PLATS, PAGE 71, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II
A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AND ENJOYMENT IN AND TO THE ASSOCIATION PROPERTY AS SET FORTH IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR COUNTRY GARDEN (ARBOR GATE) A COMMON INTEREST COMMUNITY RECORDED FEBRUARY 25, 2000 IN BOOK 20000225 AS DOCUMENT NO. 00963, OF OFFICIAL RECORDS OF CLARK COUNTY, NEVADA, AS THE SAME MAY FROM TIME TO TIME BE AMENDED AND/OR SUPPLEMENTED, WHICH EASEMENT IS APPURTENANT TO PARCEL ONE.

APN 124-31-220-092

is hereby quieted in the name of 5316 Clover Blossom Ct Trust.

IT IS FURTHER ORDERED that as a result of the foreclosure sale conducted on January 16, 2013, as evidenced by the foreclosure deed recorded January 24, 2013, the interests of defendant US Bank, as well as its successors and assigns in the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, are extinguished.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, have no further right, title or claim to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, or anyone acting on their behalf. are forever enjoined from asserting any estate, right, title or interest in the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

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A704412

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns or anyone acting on their behalf, are forever barred from enforcing any rights against the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

DATED this 5 day of February, 2018.

DISTRICT COURT JUDGE
MS Case No. A704412

Respectfully submitted by:

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: _____
MICHAEL F. BOHN, ESQ.
ADAM R. TRIPPIEDI, ESQ.
376 East Warm Springs Road, Ste. 140
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Attorney for plaintiff

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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1

DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST, Plaintiff, v. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS; Defendants.	Case No.: A-14-704412-C Dept. No.: XXIV **NOTICE OF COMPLETION OF NRED MEDIATION**

Defendant U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1 and Country Garden Owners' Association completed NRED mediation on January 22, 2017.

…

The parties did not resolve this matter at the mediation. *See* **Exhibit A**, NRED Mediation Certificate.

DATED February 7, 2018.

AKERMAN LLP

/s/ Karen A. Whelan

DARREN T. BRENNER, ESQ.
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AKERMAN LLP
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TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Akerman LLP, and that on this 7th day of February, 2018 and pursuant to NRCP 5, I caused to be served a true and correct copy of the foregoing **NOTICE OF COMPLETION OF NRED MEDIATION,** in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof & served through the Notice Of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List.

Law Office of Michael F. Bohn	
Michael F Bohn Esq.	mbohn@bohnlawfirm.com
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/s/ Tracey Wayne
An employee of AKERMAN LLP

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EXHIBIT A

NRED Mediation Certificate

42753445;1

BRIAN SANDOVAL
Governor

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND
CONDOMINIUM HOTELS PROGRAM
CICOmbudsman@red.nv.gov http://www.red.nv.gov

C.J. MANTHE
Director

SHARATH CHANDRA
Administrator

CHARVEZ FOGER
Ombudsman

January 23, 2018

Claimant(s):

U.S. BANK, N.A.
C/O AKERMAN LLP
ATTN: REBEKKAH BODOFF
1635 VILLAGE CENTER CIRCLE, STE. 200
LAS VEGAS, NEVADA 89134

Respondent(s):

COUNTRY GARDEN OWNERS' ASSOCIATION
C/O PENGILLY LAW FIRM
ATTN: ELIZABETH LOWELL, ESQ.
1995 VILLAGE CENTER CIRCLE, STE. 190
LAS VEGAS, NEVADA 89134

Alternative Dispute Resolution (ADR) **Control #: 18-69 / MEDIATION UNSUCCESSFUL**

Dear Sir or Madam:

The Claimant and Respondent participated in mediation on January 22, 2017 through the Division's Alternative Dispute Resolution Program as described in NRS 38. Unfortunately, no agreement was reached. Thank you for your efforts to resolve the dispute between the parties. This matter is now closed.

Sincerely,

Elizabeth Meza
Administrative Assistant IV

NEFF
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Attorney for plaintiff

DISTRICT COURT

CLARK COUNTY NEVADA

5316 CLOVER BLOSSOM CT TRUST Plaintiff, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS Defendants.	CASE NO.: A-14-704412-C DEPT NO.: XXIV

NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW

TO: Parties above-named; and

TO: Their Attorney of Record

YOU, AND EACH OF YOU, WILL PLEASE TAKE NOTICE that an **FINDINGS OF FACT,**

/ / /

/ / /

/ / /

CONCLUSIONS OF LAW has been entered on the 7th day of February, 2018, in the above captioned matter, a copy of which is attached hereto.

Dated this 8th day of February, 2018.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: /s/ /*Michael F. Bohn, Esq.*/
MICHAEL F. BOHN, ESQ.
376 E. Warm Springs Rd., Ste. 140
Las Vegas, NV 89119
Attorney for plaintiff

CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of LAW OFFICES OF MICHAEL F. BOHN., ESQ., and on the 8th day of February, 2018, an electronic copy of the **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

Darren T. Brenner, Esq.
Rebekkah B. Bodoff, Esq.
AKERMAN LLP
1635 Village Center Circle, Suite 200
Las Vegas, Nevada 89134

/s/ /Marc Sameroff /
An Employee of the LAW OFFICES OF
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Attorney for plaintiff

DISTRICT COURT
CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST

Plaintiff,

vs.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS

Defendants.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1,

Counterclaimant,

vs.

5316 CLOVER BLOSSOM CT TRUST

Counterdefendant.

CASE NO.: A-14-704412-C
DEPT NO.: XXIV

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

Date of Hearing: December 12, 2017
Time of Hearing: 9:00 a.m.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1,

Cross-claimant,

vs.

5316 CLOVER BLOSSOM CT TRUST

Cross-defendant.

Plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss having come before the court on the 12th day of December, 2017, at 9:00 a.m., Adam R. Trippiedi, Esq. appearing on behalf of plaintiff; Scott Lachman, Esq. appearing on behalf of defendant U.S. Bank, National Association, Successor Trustee to Bank of America, N.A., Successor by Merger to Lasalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-through Certificates Series 2006-OA1 ("US Bank"); and Elizabeth B. Lowell, Esq. appearing on behalf of cross-defendant Country Garden Owners' Association, and the court, having reviewed plaintiff's motion and defendant's opposition, and having heard the arguments of counsel, makes its findings of fact, conclusion of law and judgment as follows.

FINDINGS OF FACT

1. 5316 Clover Blossom Ct Trust is the owner of real property commonly known as 5316 Clover Blossom Court, North Las Vegas, Nevada (hereinafter referred to as "the Property").

2. The property is encumbered by a Declaration of Covenants, Conditions, and Restrictions for Country Garden (Arbor Gate) (hereinafter referred to as the "CC&Rs").

3. 5316 Clover Blossom Ct Trust acquired the Property from Country Garden Owners' Association (hereinafter the "HOA") at a foreclosure sale conducted on January 16, 2013.

4. The foreclosure sale arose from a delinquency in assessments due from the former owners to the HOA pursuant to NRS Chapter 116.

5. US Bank is the beneficiary of a deed of trust that was originally recorded as an encumbrance against the Property on June 30, 2004.

6. On June 20, 2011, an assignment of the deed of trust was recorded which assigned the beneficial interest in the deed of trust to US Bank.

7. At some point, the former owner of the property became delinquent in paying assessments and the HOA and its foreclosure agent, Alessi & Koenig, LLC (hereinafter "the foreclosure agent"), began foreclosure proceedings based on the delinquent assessments.

8. On January 30, 2012, and again on February 6, 2012, the foreclosure agent served a Notice of Delinquent Assessment Lien on the former owners of the property via regular and certified mail.

9. On February 22, 2012, the foreclosure agent recorded a Notice of Delinquent Assessment Lien against the property.

10. On April 20, 2012, the foreclosure agent recorded a Notice of Default and Election to Sell under homeowners association lien against the property.

11. On April 30, 2012, the foreclosure agent mailed copies of the notice of default to the former owner, to MERS, to US Bank, and to other interested parties.

12. On October 31, 2012, a Notice of Foreclosure Sale was recorded against the property.

13. On October 25, 2012, the foreclosure agent mailed copies of the notice of foreclosure sale to the former owner, US Bank, and other interested parties.

14. The foreclosure agent also served the notice of foreclosure sale on the former owners by posting a copy of the notice in a conspicuous place on the Property, and also posted copies of the notice in three public locations throughout Clark County.

15. The foreclosure agent also published the notice of sale in the Nevada Legal News.

16. As reflected by the conclusive recitals in the foreclosure deed, 5316 Clover Blossom Ct Trust entered the high bid of $8,200.00 at the public auction conducted on January 16, 2013, to purchase the Property.

17. The foreclosure agent issued a deed upon sale, which was recorded on January 24, 2013, and contains the following recitals:

> This conveyance is made pursuant to the powers conferred upon Trustee by NRS 116 et seq., and that certain Notice of Delinquent Assessment Lien, described herein. Default occurred as set forth in a Notice of Default and Election to Sell which was recorded in the office of the recorder of said county. All requirements of law regarding the mailing of copies of notices and the posting and publication of the copies of the Notice of Sale have been complied with. Said property was sold by said Trustee at public auction on January 16, 2013 at the place indicated on the Notice of Trustee's Sale.

18. US Bank alleges that on November 21, 2012, US Bank, by way of its agent, sent correspondence to the foreclosure agent requesting an accounting of the HOA arrears.

19. In response, the foreclosure agent sent a letter to US Bank's agent. The foreclosure agent's letter stated that the total amount due was $4,186.00.

20. On December 6, 2012, US Bank, by way of its agent, mailed a check in the amount of $1,494.50 to the foreclosure agent, along with an accompanying letter, in an effort to satisfy the HOA's super-priority lien.

21. There is no evidence to indicate the HOA or foreclosure agent accepted or otherwise responded to the $1,494.50 check.

22. After sending the letter and $1,494.50 check to the foreclosure agent, US Bank made no other efforts to pay off the lien or otherwise prevent the foreclosure sale from going forward.

23. Prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA lien representing 9 months of assessments for common expenses.

24. US Bank did not present evidence of any fraud, oppression or unfairness in regards to the foreclosure sale which would account for or bring about an unreasonably low purchase price.

25. 5316 Clover Blossom Ct Trust is a bona fide purchaser, and the US Bank has failed to present sufficient proof to disprove that the 5316 Clover Blossom Ct Trust was a bona fide purchaser.

26. Any findings of fact which should be considered to be a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. If, in a motion under NRCP 12(b)(5), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made

pertinent to such a motion by Rule 56. See NRCP 12(b).

2. This Court finds that, by virtue of the arguments presented in 5316 Clover Blossom Ct Trust's motion to dismiss, US Bank's opposition, and 5316 Clover Blossom Ct Trust's reply, matters outside the counterclaim were presented and, thus, 5316 Clover Blossom Ct Trust's motion to dismiss was converted into a motion for summary judgment and this court is treating it as such.

3. Summary judgment is appropriate and "shall be rendered forthwith" when the pleadings and other evidence on file demonstrate "no genuine issue as to any material fact [remains] and the moving party is entitled to judgment as a matter of law. See NRCP 56(c); Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026 (2005).

4. To defeat a motion for summary judgment the non-moving party bears the burden to "do more than simply show there is some metaphysical doubt: as to the operative facts. Wood, 121 Nev. at 732 (citing Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574, 586 (1983)). Moreover, the non-moving party must come forward with specific facts showing a genuine issue exists for trial. Matsushita, 475 U.S. at 587; Wood P.3d at 1130. Further, in ruling upon a motion for summary judgment, the Court must view all evidence and inferences in the light most favorable to the non-moving party. Torrealba v. Kesmetis, 124 Nev. 95, 178 P.3d 716 (2008).

5. When ruling on a motion for summary judgment, the court may take judicial notice of the public records attached to the motion. Harlow v. MTC Financial Inc. 865 F. Supp.2d 1095 (D. Nev. 2012). The recorded exhibits to US Bank's counterclaim are public records of which the Court may, and did take judicial notice. See NRS 47.150; Lemel v. Smith, 64 Nev. 545 (1947) (Judicial Notice takes the place of proof and is of equal force.") "Documents accompanied by a certificate of acknowledgment of a notary public or officer authorized by law to take acknowledgments are presumed to be authentic." NRS 52.165.

6. Summary judgment in favor of 5316 Clover Blossom Ct Trust is proper.

7. The HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of notice of delinquent assessment lien and notice of default and election to sell under homeowners association lien, and the recording, mailing, posting, and

publication of the notice of foreclosure sale.

8. The law presumes foreclosure notices are received upon proof of mailing, and does not require proof that the notices be received. Actual notice is not necessary as long as the statutory requirements are met. Mailing of the notices is all that the statute requires. Hankins v. Administrator of Veterans Affairs v. Administrator of Veterans Affairs 92 Nev. 578, 555 P.2d 483 (1976); Turner v. Dewco 87 Nev. 14, 479 P.2d 462 (1971).

9. There is a public policy which favors a final and conclusive foreclosure sale as to the purchaser. See 6 Angels, Inc. v. Stuart-Wright Mortgage, Inc., 85 Cal. App. 4th 1279, 102 Cal. Rptr. 2d 711 (2011); McNeill Family Trust v. Centura Bank, 60 P.3d 1277 (Wyo. 2003); In re Suchy, 786 F.2d 900 (9th Cir. 1985); and Miller & Starr, California Real Property 3d §10:210.

10. There is a common law presumption that a foreclosure sale was conducted validly. Fontenot v. Wells Fargo Bank, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (2011); Moeller v. Lien 25 Cal. App. 4th 822, 30 Cal. Rptr. 2d 777 (1994); Burson v. Capps, 440 Md. 328, 102 A.3d 353 (2014); Timm v. Dewsnup 86 P.3d 699 (Utah 2003); Deposit Insurance Bridge Bank, N.A. Dallas v. McQueen, 804 S.W. 2d 264 (Tex. App. 1991); Myles v. Cox, 217 So.2d 31 (Miss. 1968); American Bank and Trust Co v. Price, 688 So.2d 536 (La. App. 1996); Meeker v. Eufaula Bank & Trust, 208 Ga. App. 702, 431 S.E. 2d 475 (Ga. App 1993).

11. Nevada has a disputable presumption that "the law has been obeyed." See NRS 47.250(16). This creates a disputable presumption that the foreclosure sale was conducted in compliance with the law.

12. 5316 Clover Blossom Ct Trust, as the record title holder of the property, has a presumption of validity in its favor, and US Bank "has the burden to show that the sale should be set aside in light of" 5316 Clover Blossom Ct Trust's status as the record title holder. Nationstar Mortgage v. Saticoy Bay, LLC Series 2227 Shadow Canyon, 133 Nev. Adv. Op. 91 (2017).

13. The recitals in the foreclosure deed are sufficient and conclusive proof that the required notices were mailed by the HOA. See NRS 116.31166 and NRS 47.240(6) which also provide that conclusive presumptions include "[a]ny other presumption which, by statute, is expressly made

conclusive." Because NRS 116.31166 contains such an expressly conclusive presumption, the recitals in the foreclosure deed are "conclusive proof" that US Bank bank was served with copies of the required notices for the foreclosure sale.

14. US Bank has not presented any evidence to show that equitable relief is warranted in this case or to disprove any of the recitals in the foreclosure deed.

15. US Bank has not presented any evidence to show any defect with the foreclosure sale or the recording and service of the notices prior to the foreclosure sale.

16. US Bank further argues that the low price when combined with fraud, unfairness, or oppression is sufficient to void said sale. However, US Bank failed to present any evidence of fraud, unfairness, or oppression in regards to the foreclosure sale.

17. US Bank argues there was fraud, oppression, or unfairness in the conduct of the sale because the foreclosure agent rejected US Bank's tender. However, the fraud, oppression, or unfairness must bring about or account for the low purchase price. See Shadow Wood, et al. Examples would be collusion between the auctioneer and the purchaser to keep the price artificially low or an effort to prevent public notice of the auction. US Bank never explains how rejection of a tender accounts for a low purchase price.

18. Nevada Rule of Civil Procedure 9(b) requires that "[i]n all averments of fraud..., the circumstances constituting fraud... shall be stated with particularity." US Bank, in alleging fraud in this matter, has not stated the basis for its fraud allegation with sufficient particularity or factual support.

19. There is no issue regarding whether the association foreclosed on the "super-priority" portion of its lien. The evidence and deed recitals show that both the notice of default and the notice of sale were properly mailed to US Bank. The language in both the notice of default and notice of sale shows that the HOA was foreclosing on a lien comprised of monthly assessments. As such, there is no genuine issue of material fact that the HOA possessed a super priority lien at the time of the foreclosure sale, and that the super priority lien was foreclosed upon. As stated in SFR, as to first deeds of trust, NRS 116.3116(2) splits an HOA lien into two pieces, a superpriority piece and a

subpriority piece. Unless the superpriority piece has been satisfied prior to the foreclosure sale, the HOA foreclosure sale on its assessment lien would necessarily include both the superpriority piece and a subpriority piece of the lien. US Bank failed to present any evidence that the superpriority portion of the lien was satisfied prior to the foreclosure sale.

20. In considering whether equity supports setting aside the sale in question, the Court is to consider any other factor bearing on the equities, including actions or inactions of both parties seeking to set aside the sale and the impact on a bona fide purchaser for value. Shadow Wood at 1114 (finding "courts must consider the entirety of the circumstances that bear upon the equities").

21. The attempted tender of assessments made by US Bank for $1,494.50, does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank had several different options to prevent the sale from going forward and failed to do so. Specifically, US Bank could have "pa[id] the entire amount and request[ed] a refund of the balance." SFR at 418. US Bank also could have sought "a temporary restraining order and preliminary injunction and fil[ed] a lis pendens on the property." Shadow Wood at 1114 n.7. US Bank failed to avail itself of any of these options and instead allowed the HOA to foreclose.

22. US Bank's tender letter contains conditions, including that the tender amount is "non-negotiable"; that endorsement of the check "will be strictly construed as an unconditional acceptance... of the facts" stated in the tender letter; and acceptance of the check is an acknowledgment that the lien has been "'paid in full.'" Because of these conditions, the tender was not valid and had no effect on the foreclosure sale of the HOA's lien. Smith v. School Dist. No. 64 Marion County, 89 Kan. 225, 131 P. 557, 558 (1913) ("A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due.")

23. US Bank's tender also contains conditions that were not consistent with Commission for Common Interest Communities and Condominium Hotels' (hereinafter "CCICCH") Advisory Opinion 2010-01 issued on December 8, 2010:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.
>
> ...
> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien.**

(emphasis added)

24. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

25. The fact that the foreclosure agent did not accept the tender does not affect 5316 Clover Blossom Ct Trust's title to the property because US Bank failed to take any steps to protect its interest aside from mailing the letter and check, which was in an amount less than the full amount of the HOA's lien. Accordingly, US Bank is not entitled to equitable relief. Shadow Wood at 1114 n.7.

26. Specifically, the Nevada Supreme Court decision of Horizons at Seven Hills v. Ikon Holdings, LLC, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016) did not exist on December 6, 2012, when US Bank sent its tender, so the HOA and the foreclosure agent could not have relied upon that authority.

27. To the contrary, the December 8, 2010, CCICCH opinion existed on December 6, 2012, and the HOA and foreclosure agent could have relied upon that authority.

28. Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) authorizes "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

29. US Bank's further argues that the presence of a mortgage protection clause within the CC&Rs, which represents that the HOA lien "shall not affect the rights of the mortgagee under any first mortgage upon such Lot, Unit or Parcel," was evidence of fraud, oppression, and/or unfairness that rendered the foreclosure sale a subpriority sale. However, the mortgage protection language cited by US Bank was determined to be legally ineffective by the Nevada Supreme Court in SFR based on NRS 116.1104, which states that the provisions of NRS 116 "may not be varied by agreement, and rights conferred by it may not be waived." Based on SFR, this court finds the mortgage protection clause was invalid and thus was also not evidence of fraud, oppression, or unfairness.

30. Therefore, because US Bank's has failed to set forth material issues of fact demonstrating some fraud, unfairness, or oppression which led to the low purchase price, the Court finds that the price of the sale is not a legitimate basis to overturn the sale.

31. There is no issue of fact regarding whether the former owner was in default in payment of the assessments as well as whether the lien and foreclosure notices were properly served. The recitals in the foreclosure deed are conclusive as to these issues. Furthermore, 5316 Clover Blossom Ct Trust presented proof, which was not controverted, that the notices were mailed, published, and posted.

32. 5316 Clover Blossom Ct Trust is a bona fide purchaser ("BFP"). A subsequent purchaser is bona fide under common law principles if it takes the property "for a valuable consideration and without notice of the prior equity, and without notice of facts which upon diligent inquiry would be indicated and from which notice would be imputed to him, if he failed to make such inquiry." Bailey v. Butner, 64 Nev. 1, 19, 176 P.2d 226, 234 (1947) (emphasis omitted); see also Moore v. De Bernardi, 47 Nev. 33, 54, 220 P. 544, 547 (1923) ("The decisions are uniform that the bona fide purchaser of a legal title is not affected by any latent equity founded either on a trust, [e]ncumbrance, or otherwise, of which he has no notice, actual or constructive.").

33. The evidence shows 5316 Clover Blossom Ct Trust purchased said property for valuable consideration in the amount of $8,200.00 and had no actual, constructive, or inquiry notice of any dispute of title or defect in the sales process. Such evidence is clear from the fact US Bank did not pay

off the super-priority lien, attend the sale in question, record notice with the Clark County Recorder, or attempt to take any other action to put potential buyers on notice of any dispute. US Bank was in the position to take any number of simple steps to avoid a BFP issue and simply failed to take such action. After being fully apprised of the pending foreclosure sale and taking no action, US Bank looks now to enforce its rights. The Court notes that all that was required of US Bank to defeat BFP status was to put purchasers on notice of their claim to the property by either showing up to the sale to announce their claim of title, record a legal tender, file a lis pendens, or seek a temporary restraining order. US Bank's argument that 5316 Clover Blossom Ct Trust cannot be a BFP based on the mere fact that a Deed of Trust was recorded is not supported under the law.

34. In the absence of evidence to the contrary, US Bank had the burden of proving 5316 Clover Blossom Ct Trust was not a BFP because for 5316 Clover Blossom Ct Trust to prove it was a BFP would be akin to proving a negative, i.e., proving 5316 Clover Blossom Ct Trust was not aware of information which would defeat BFP status. See Shadow Wood at 1112 ("The question remains whether NYCB demonstrated sufficient grounds to justify the district court in setting aside Shadow Wood's foreclosure sale on NYCB's motion for summary judgment."); First Fidelity Thrift & Loan Ass'n v. Alliance Bank, 60 Cal. App. 4th 1433, 1442, 71 Cal. Rptr. 2d 295 (1998) ("That Alliance had knowledge of First Fidelity's equitable claim for reinstatement of its reconveyed deed of trust was an element of First Fidelity's case.... Showing that Alliance was not an innocent purchaser for value was hence an element of First Fidelity's claim.")

35. Equitable relief is only available when no adequate remedy at law exists. One who seeks equitable relief cannot merely sit on its hands to its detriment. It would be a gross injustice for 5316 Clover Blossom Ct Trust, an innocent third party who paid valuable consideration, to have its equitable rights subordinate to US Bank, who did nothing to protect itself at the foreclosure sale. See generally Holmberg v. Armbrecht, 66 S. Ct. 582, 584 (1946)(quoting Russell v. Todd, 60 S. Ct. 527, 532 (1940)) (finding "[t]here must be conscience, good faith, and reasonable diligence, to call into action the [equitable] powers of the court."). Therefore, the Court finds 5316 Clover Blossom Ct Trust is a BFP, undisturbed by any issue raised in US Bank's opposition, as 5316 Clover Blossom Ct

Trust's equitable interest as an innocent purchaser cannot be outweighed by the inaction of US Bank.

36. US Bank is not entitled to equitable relief because it was on notice of the foreclosure sale and failed to take adequate steps to protect its interest in the property. The Nevada Supreme Court has stated, that "[w]here the complaining party has access to all the facts surrounding the questioned transaction and merely makes a mistake as to the legal consequences of his act, equity should normally not interfere, especially where the rights of third parties might be prejudiced thereby." Shadow Wood, 366 P.3d at 1116 (quoting Nussbaumer v. Sup. Ct. in & for Yuma Cty., 107 Ariz. 504, 489 P.2d 843, 846 (1971)). In Shadow Wood, the Nevada Supreme Court held that "[c]onsideration of harm to potentially innocent third parties is especially pertinent where [the lender] did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property." Shadow Wood, 366 P.3d at 1114 fn. 7.

37. The policies and equities favor the 5316 Clover Blossom Ct Trust. In balancing the equities, 5316 Clover Blossom Ct Trust's interest as the successor to a bona fide purchaser is not outweighed by the inaction of US Bank.

38. US Bank shall take nothing by way of its counterclaim.

39. Any conclusion of law which should be a finding of fact shall be considered as such.

ORDER and JUDGMENT

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiff 5316 Clover Blossom Ct Trust's motion to dismiss, converted to a motion for summary judgment, is granted.

IT IS FURTHER ORDERED that judgment is entered on behalf of plaintiff 5316 Clover Blossom Ct Trust and against defendant US Bank.

IT IS FURTHER ORDERED that title to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, and legally described as:

PARCEL I

LOT NINETY TWO (92) OF THE PLAT OF ARBOR GATE AS SHOWN BY MAP THEREOF ON FILE IN BOOK 91 OF PLATS, PAGE 71, IN THE OFFICE OF THE COUNTY RECORDER OF CLARK COUNTY, NEVADA.

PARCEL II
A NON-EXCLUSIVE EASEMENT FOR INGRESS AND EGRESS AND ENJOYMENT IN AND TO THE ASSOCIATION PROPERTY AS SET FORTH IN THE DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS FOR COUNTRY GARDEN (ARBOR GATE) A COMMON INTEREST COMMUNITY RECORDED FEBRUARY 25, 2000 IN BOOK 20000225 AS DOCUMENT NO. 00963, OF OFFICIAL RECORDS OF CLARK COUNTY, NEVADA, AS THE SAME MAY FROM TIME TO TIME BE AMENDED AND/OR SUPPLEMENTED, WHICH EASEMENT IS APPURTENANT TO PARCEL ONE.

APN 124-31-220-092

is hereby quieted in the name of 5316 Clover Blossom Ct Trust.

IT IS FURTHER ORDERED that as a result of the foreclosure sale conducted on January 16, 2013, as evidenced by the foreclosure deed recorded January 24, 2013, the interests of defendant US Bank, as well as its successors and assigns in the property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031, are extinguished.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, have no further right, title or claim to the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031.

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns, or anyone acting on their behalf. are forever enjoined from asserting any estate, right, title or interest in the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

///

///

///

A704412

IT IS FURTHER ORDERED that defendant US Bank, as well as its successors and assigns or anyone acting on their behalf, are forever barred from enforcing any rights against the real property commonly known as 5316 Clover Blossom Ct, North Las Vegas, Nevada 89031 as a result of the deed of trust recorded on June 30, 2004, as instrument number 20040630-0002408.

DATED this 5 day of February, 2018.

DISTRICT COURT JUDGE
MS Case No. A704412

Respectfully submitted by:

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

By: _____
MICHAEL F. BOHN, ESQ.
ADAM R. TRIPPIEDI, ESQ.
376 East Warm Springs Road, Ste. 140
Las Vegas, Nevada 89119
Attorney for plaintiff

IN THE SUPREME COURT OF THE STATE OF NEVADA

U.S. BANK, N.A.,

Appellant,

vs.

5316 CLOVER BLOSSOM CT. TRUST and COUNTRY GARDEN OWNERS ASSOCIATION,

Respondents.

Case No. 75861

APPEAL
from the Eighth Judicial District Court, Department XXIV
The Honorable Jim Crockett, District Judge
District Court Case No. A-14-704412-C

APPELLANT'S APPENDIX
VOLUME III

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CERTIFICATE OF SERVICE

I certify that I electronically filed on October 24, 2018, the foregoing **APPELLANT'S APPENDIX VOLUME III** with the Clerk of the Court for the Nevada Supreme Court by using the CM/ECF system. I further certify that all parties of record to this appeal either are registered with the CM/ECF or have consented to electronic service.

[ ] By placing a true copy enclosed in sealed envelope(s) addressed as follows:

[X] (By Electronic Service) Pursuant to CM/ECF System, registration as a CM/ECF user constitutes consent to electronic service through the Court's transmission facilities. The Court's CM/ECF systems sends an e-mail notification of the filing to the parties and counsel of record listed above who are registered with the Court's CM/ECF system.

[X] (Nevada) I declare that I am employed in the office of a member of the bar of this Court at whose discretion the service was made.

/s/ Patricia Larsen
An employee of AKERMAN LLP

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DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST; Plaintiff, v. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Defendants.	CASE NO: A-14-704412-C DEPT NO: XXIV **COUNTRY GARDEN OWNERS' ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION** **HEARING DATE:** **HEARING TIME:**
U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Counterclaimant, v. 5316 CLOVER BLOSSOM CT TRUST;	

Counter-Defendant.

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS,

Cross-Claimant,

v.

COUNTRY GARDEN OWNERS' ASSOCIATION;

Cross-Defendant.

COUNTRY GARDEN OWNERS' ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION

COMES NOW, COUNTRY GARDEN OWNERS' ASSOCIATION ("HOA"), by and through its counsel of record, the Pengilly Law Firm, hereby submits its COUNTRY GARDEN OWNERS' ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION ("Motion"). The Motion is based on the Nevada Rules of Civil Procedure, NRS 11.190, NRS 11.220, NRS 38.310, and *McKnight Family, LLP v. Adept Management Services, et al.*, the attached memorandum of points and authorities, the documents on file in this case and any attached exhibits, and any oral argument or evidence the Court may entertain.

DATED this 9th day of November, 2017.

PENGILLY LAW FIRM

James W. Pengilly, Esq.
Nevada Bar No. 6085
Elizabeth Lowell, Esq.
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1995 Village Center Cir., Suite 190
Las Vegas, NV 89134
Attorneys for Country Garden Owners Association

NOTICE OF MOTION

TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the undersigned will bring the forgoing COUNTRY GARDEN OWNERS' ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION on for hearing before the above-entitled Court, Department VII on the 12 day of December, 2017, at the hour of 9:00 am.

DATED this 9th day of November, 2017.

PENGILLY LAW FIRM

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Based on the allegations on the face of the Complaint, the claims brought by U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS (the "Bank") in its Answer to 5316 Clover Blossom Trust's Amended Complaint, Counterclaims, and Cross-Claims, filed on October 10, 2017 (the "Complaint"), should be dismissed because they are barred by the statute of limitations or must be dismissed pursuant to NRS 38.310 for mediation with the Nevada Real Estate Division. On the face of the Complaint, the Complaint was filed four years and nine months after the date upon which the foreclosure deed providing, constructive notice of the sale that is the subject of this litigation was recorded, and causing the statute of limitations on the bank's causes of action to begin running. (Complaint at ¶ 21 and Exhibit 7.) In addition, the Bank lacks standing to bring claims from violation of NRS Chapter 116 based upon NRS 116.4117, the provision that creates causes of for violation of the Chapter's provisions. Finally, to the extent that the Bank argues that its causes of action should have a six-year statute of limitations because they incorporate the applicable Covenants, Conditions, & Restrictions ("CC&Rs") this argument would also require dismissal because it would implicate NRS 38.310's requirement that all civil actions requiring the interpretation, application, or enforcement of any covenants, conditions, and restrictions applicable to residential property must be dismissed unless they have been submitted to a mediation prior to being filed with the court.

II. BACKGROUND

The subject of this litigation is a certain foreclosure sale of residential real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031, APN 124-31-220-092 (the "Property"). (Compl. at ¶6.) The foreclosure sale that is the subject of this litigation (the "HOA Sale") foreclosed a lien against the Property held by the HOA. (Compl. at ¶ 13 - 24.) The HOA Sale was held on January 16, 2013, and the Foreclosure Deed ("Foreclosure Deed") was recorded on November 8, 2012. (Compl. at ¶ 21 and Exhibit H.)

On or about July 25, 2014, the present owner of the Property, 5316 Blossom Ct. Trust (the "Buyer"), filed this action, seeking to quiet title in the property against the Bank. The Bank filed its Answer on September 25, 2014.

On or about September 28, 2017, the Bank and the Buyer filed a stipulation and order allowing the Bank to add claims against the HOA.

The Complaint asserts the following claims against the HOA: Third Cause of Action, Unjust Enrichment, Fourth Cause of Action, Quiet Title/ Declaratory Relief Pursuant to NRS 30.010; Third Cause of Action, Unjust Enrichment; Fourth Cause of Action, Tortious Interference with Contractual Relations; Fifth Cause of Action, Breach of the Duty of Good Faith; and Sixth Cause of Action, Wrongful Defective Foreclosure.

III. LEGAL STANDARD

A motion to dismiss for failure to state a claim is proper under NRCP 12 (b)(5) if it appears that the claimant can prove no set of fact which would entitle it to relief. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 181 P.3d 670 (2008).While the Court must accept factual allegations in the Complaint as true and may draw all inferences in the in the Bank's favor, "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. at 224. "Dismissal [is] proper where the allegations are insufficient to establish the elements of the claim for relief." *Stockmeier v. Nevada Dept. of Corrections Psychological Review Panel*, 183 P.3d. 133, 135 (2008).

Furthermore, when a complaint shows on its face that the cause of action is barred by the statute of limitations, the burden falls upon the plaintiff to demonstrate that the bar does not exist. *Bank of Nevada v. Friedman*, 82 Nev. 417, 422, 420 P. 2d 1, 4 (1966).

Finally, NRS 38.310(2) states that a "court shall dismiss any civil action which is commenced in violation of the provisions of [NRS 38.310(1)]" requiring that a claim that requires a court to interpret, apply or enforce CC&Rs that are applicable to residential property must be mediated prior to filing them in district court.

//

IV. LEGAL ARGUMENT

As outlined below, the face of the Complaint shows that many of the Bank's claims are barred by the applicable statute of limitations. Furthermore, the Bank lacks standing to pursue claims for violation of NRS Chapter 116. Finally, to the extent that the Bank argues it is entitled to a six-year statute of limitations because its claims are based on the CC&Rs, NRS 38.310 requires that these claims be dismissed.

A. All of the Bank's Claims Are Barred by the Applicable Statutes of Limitations

"In determining whether a statute of limitations has run against an action, the time must be computed from the day the cause of action accrued. A cause of action 'accrues' when a suit may be maintained thereon." *Clark v. Robison*, 944 P.2d 788, 789 (Nev. 1997). Pursuant to Nevada Revised Statute 111.320, a recorded document will "impart notice to all persons of the contents thereof . . . ." In addition, "[i]f the facts giving rise to the cause of action are matters of public record then '[t]he public record gave notice sufficient to start the statute of limitations running.'" *Job's Peak Ranch Cmty. Ass'n,Inc. v. Douglas Cty.*, No. 55572, 2015 WL 5056232, at *3 (Nev. Aug. 25, 2015); *see also U.S. Bank Nat'l Ass'n v. Woodland Village*, 3:16-cv-00501-RCJ-WGC at DE #32, page 5, lines 21-23.

Nevada Revised Statute 11.190 describes the statutes of limitations that are applicable to various causes of action. Pursuant to this statute, a six-year limitations period applies to "[a]n action upon a contract, obligation or liability founded upon an instrument in writing." A four-year limitations period applies to a claim for unjust enrichment. A three-year limitations period applies to "[a]n action upon a liability created by statute, other than a penalty or forfeiture." A claim for tortious interference with contract is also "subject to the three-year statute of limitations set forth in NRS 11.190(3)(c)." *Stalk v. Mushkin*, 199 P.3d 838, 842 (Nev. 2009). Finally, pursuant to another catch-all statute that follows NRS 11.190, NRS 11.220, "[a]n action for relief, not hereinbefore provided for [within the Nevada Revised Statutes], must be commenced within 4 years after the cause of action shall have accrued."

In this case, on its face, the Complaint indicates that Plaintiff's claims for unjust enrichment, tortious interference with contractual relations, breach of the duty of good faith, and wrongful or

defective foreclosure are all barred by the statute of limitations because their limitations period is either three or four years and the complaint was filed four years and nine months after the Foreclosure Deed was recorded and the Bank's causes of action accrued.

The Complaint states at Paragraph 21 that "[t]he HOA non-judicially foreclosed on its sub-priority lien secured by the Property on January 16, 2013, selling an encumbered interest in the Property to Plaintiff for $8,200.00. A true and correct copy of the Trustee's Deed Upon Sale is attached as Exhibit H." Examination of Exhibit H shows that it was recorded on January 24, 2013. Therefore, at the very latest, the Bank's claims regarding the foreclosure sale accrued January 24, 2017. Because the Complaint asserting claims against the HOA was not filed until October of 2017, any claim with a three-year or four-year limitations period is barred. In addition, it is the Bank's burden to show that its claims are not barred.

1. Unjust Enrichment

The third cause of action in the Complaint is for unjust enrichment. "The statute of limitation for an unjust enrichment claim is four years." *In re Amerco Derivative Litig.*, 252 P.3d 681, 703 (Nev. 2011)(citing NRS 11.190(2)(c)). The Bank's claim for unjust enrichment accrued on January 24, 2013; however, the Bank did not file its claim until after the four-year limitations period, in October of 2017.

2. Tortious Interference with Contractual Relations

The fourth cause of action in the Complaint is for tortious interference with contractual relations. A claim for tortious interference with contract is also "subject to the three-year statute of limitations set forth in NRS 11.190(3)(c)." *Stalk v. Mushkin*, 199 P.3d 838, 842 (Nev. 2009). Because this claim accrued on January 24, 2013, but was not filed until October of 2017 it is barred by NRS 11.190(3)(c).

3. Breach of the Duty of Good Faith

The fifth cause of action in the Complaint is for breach of the duty of good faith that is found within NRS 116.1113. Because this is a claim regarding a violation of a statute it is governed by NRS 11.190(3)(a) which states that "[a]n action upon a liability created by state, other than a penalty

or forfeiture" must be brought within 3 years. Because this claim was not brought until October 2017, more than four years after the recording of the foreclosure deed, this cause of action is barred.

4. *Wrongful/Defective Foreclosure*

The sixth cause of action in the Complaint is for "Wrongful / Defective Foreclosure." The Complaint's allegations center primarily on a discussion of an alleged tender by the Bank to the HOA's collection company.

This claim should have a three-year statute of limitations.

> A tortious wrongful foreclosure claim 'challenges the authority behind the foreclosure, not the foreclosure act itself.' Red Rock's authority to foreclose on the HOA lien on behalf of the HOA arose from Chapter 116, essentially rendering count three a claim for damages based on liability created by a statute. Therefore, count three is likewise time-barred under NRS 11.190(3)(a) because it was not brought within three years.

HSBC Bank USA v. Park Ave. Homeowners' Assn., 216CV460JCMNJK, 2016 WL 5842845, at *3 (D. Nev. Oct. 3, 2016) (Citing *McKnight Family, L.L.P. v. Adept Mgmt.*, 310 P.3d 555, 559 (Nev. 2013) (en banc). Even assuming that a claim for wrongful foreclosure did not fall under NRS 11.190(3)(a), it would fall within the catch-all provision in NRS 11.220 and would have a four-year limitations period. Consequently, all of the bank's claims regarding violation of NRS Chapter 116 are time barred.

B. In Addition, the Bank Lacks Standing to Bring a Claim for Violation of NRS 116.1113

Nevada Revised Statute NRS 116.4117 creates a private right of action for violations of NRS 116, but specifically limits standing to bring such a claim to only specific classes of persons.

The relevant language of NRS 116.4117 provides as follows:

> 1. Subject to the requirements set forth in subsection 2, if a declarant, community manager or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, any person or class of persons suffering actual damages from the failure to comply may bring a civil action for damages or other appropriate relief.
>
> 2. Subject to the requirements set forth in NRS 38.310 and except as otherwise provided in NRS 116.3111, a civil action for damages or other appropriate relief for a failure or refusal to comply with any provision of this chapter or the governing documents of an association may be brought:
>
> (a) By the association against:
> (1) A declarant;

(2) A community manager; or
(3) A unit's owner.

(b) By a unit's owner against:
(1) The association;
(2) A declarant; or
(3) Another unit's owner of the association.

(c) By a class of units' owners constituting at least 10 percent of the total number of voting members of the association against a community manager.

Nevada Revised Statute 116.095 defines "unit's owner" as "a declarant or other person who owns a unit, or a lessee of a unit in a leasehold common-interest community whose lease expires simultaneously with any lease the expiration or termination of which will remove the unit from the common-interest community, **but does not include a person having an interest in a unit solely as security for an obligation."** (emphasis added). Based on this provision and on other provisions in Chapter 116, for example NRS 116.2119, the legislature knew that secured lenders had potential interests in property that could be subject to NRS Chapter 116, but chose not to include them in the list of entities with standing to bring a claim for violations of Chapter 116. Consequently, Plaintiff's claims for violation of NRS 116.1113 should be dismissed for lack of standing.

C. If the Bank Argues that Its Claims Concern the CC&Rs, the Claims Should Be Dismissed Because Plaintiff Has Failed to Comply with NRS 38.310

Nevada Revised Statute 38.310 provides:

1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property or any bylaws, rules or regulations adopted by an association; or

(b) The procedures used for increasing, decreasing or imposing additional assessments upon residential property, may be commenced in any court in this State unless the action has been submitted to mediation or arbitration pursuant to the provisions of NRS 38.300 to 38.360, inclusive, and, if the civil action concerns real estate within a planned community subject to the provisions of chapter 116 of NRS or real estate within a condominium hotel subject to the provisions of chapter 116B of NRS, all administrative procedures specified in any covenants, conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association have been exhausted.

2. A court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Furthermore, Nevada Revised Statute 38.330 states that "[a]ny complaint filed in such an action must contain a sworn statement indicating that the issues addressed in the complaint have been mediated pursuant to the provisions of NRS 38.300 to 38.360, inclusive, but an agreement was not obtained."

The Complaint does not contain a sworn statement pursuant to NRS 38.330.

Although the Complaint does not contain allegations regarding the CC&Rs, it does contain a claim for wrongful foreclosure, to the extent that this claim requires the interpretation, enforcement or application of the CC&Rs, the claim should be dismissed so the Bank can comply with NRS 38.310.

V. CONCLUSION

Based on the foregoing, Country Garden Owners Association respectfully requests that the Court grant the instant Motion and dismiss the claims against the HOA in their entirety. The HOA requests that the Court dismiss all of the Bank's causes of action based upon the expiration of the applicable statute of limitations. Furthermore, the HOA requests that the Court dismiss the Bank's cause of action for breach of NRS 116.1113 for lack of standing. Finally, to the extent the Bank argues that its claims have a six-year statute based on the applicable CC&Rs, the HOA requests that the claims be dismissed pursuant to NRS 38.310 because these causes of action require the interpretation, application or enforcement of the applicable CC&Rs and were brought without being submitted to mediation as is required.

DATED this 9th day of November, 2017.

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Attorneys for Country Gardens Owners Association

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that on the 9th day of November, 2017, a copy of **COUNTRY GARDEN OWNERS' ASSOCIATION'S MOTION TO DISMISS THE CROSSCLAIMS OF U.S. BANK, NATIONAL ASSOCIATION**, was served upon those persons designated by the parties in the E-Service Master List for the above-referenced matter in the Eighth Judicial District Court E-Filing System in compliance with the mandatory electronic service requirements of Administrative Order 14-2 and the Nevada Electronic Filing and Conversion Rules.

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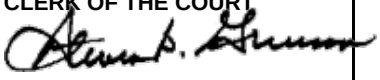

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DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST Plaintiff, vs. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS Defendants.	CASE NO.: A-14-704412-C DEPT NO.: XXIV **REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM**
U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; Counterclaimant, vs. 5316 CLOVER BLOSSOM CT TRUST, Counterdefendant.	

U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1;

Cross-claimant,

vs.

COUNTRY GARDEN OWNERS' ASSOCIATION,

Cross-defendant.

Plaintiff 5316 Clover Blossom Ct Trust, by and through its attorney, the Law Offices of Michael F. Bohn, Esq., Ltd., hereby submits this reply in support of its motion to dismiss defendant's counterclaim. This reply is based upon the points and authorities contained herein.

DATED this 21st day of November, 2017.

LAW OFFICES OF
MICHAEL F. BOHN, ESQ., LTD.

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Attorney for plaintiff

POINTS AND AUTHORITIES

1. The Nevada Supreme Court Order did not address all of the issues in defendant's counterclaim.

Defendant argues the Nevada Court of Appeals vacated this Court's order granting summary judgment "and remanded this case for further fact-finding regarding Bank of America's super-priority-plus tender, Plaintiff's bona fide purchaser status, and the commercial reasonableness of the HOA's foreclosure sale." However, that is not an accurate recitation of the Court of Appeals' order. The order states that on remand, "the district court should reconsider U.S. Bank's request for an NRCP 56(f)

continuance in light of Shadow Wood.

If this Court is unwilling to grant the motion to dismiss is in its entirety because of concerns over the development of factual issues, , plaintiff requests this Court grant the motion to dismiss in part. In particular, defendant's counterclaim should be dismissed as to the following claims:

1. The counterclaim alleges the HOA did not provide proper notice of the super-priority amount. See plaintiff's motion to dismiss, Section 5;

2. The counterclaim alleges that under Bourne Valley, NRS 116 is facially unconstitutional as a violation of defendant's due process rights. The Nevada Supreme Court disagrees with defendant. See plaintiff's motion to dismiss, Section 7.

3. The counterclaim alleges the HOA foreclosure was commercially unreasonable because the CC&Rs stated the foreclosure sale could not extinguish senior deeds of trust. The Nevada Supreme Court disagrees with this position. See plaintiff's motion to dismiss, Section 15.

These three claims are contained in the counterclaim. However, all three have been addressed by the Nevada Supreme Court in various decisions as discussed in plaintiff's motion to dismiss and are no longer viable claims in Nevada. Defendant does not address these three claims in its opposition and thus any reference to these claims in defendant's counterclaim should be dismissed.

2. The recitals in the foreclosure deed are conclusive against defendant.

At page 7 of its opposition, defendant states that in Shadow Wood, the Nevada Supreme Court "held the 'conclusive' recitals found in association foreclosure deeds do not bar mortgages or homeowners from challenging the validity of an association's foreclosure sale." In Shadow Wood, the Court instead stated that "such recitals are 'conclusive, *in the absence of grounds for equitable relief.*'" 366 P.3d at 1112. (quoting from Holland v. Pendleton Mortg. Co., 61 Cal. App. 2d 570, 143 P.2d 493, 496 (Cal. Ct. App.1943). The Court also cited Bechtel v. Wilson, 18 Cal. App. 2d 331, 63 P.2d 1170, 1172 (1936), as "distinguishing between a challenge to the sufficiency of pre-sale notice, which was precluded by the conclusive recitals in the deed, and an equity-based challenge based upon the alleged unfairness of the sale." 366 P.3d at 1112.

Defendant is overlooking the statement by the Nevada Supreme Court that the recitals in fact

conclusive when there are no grounds for equitable relief. Because defendant does not have any grounds for equitable relief, the foreclosure deed recitals are conclusive of the matters stated therein.

3. The HOA's superpriority lien was not extinguished when the HOA or its foreclosure agent rejected defendant's alleged tender.

At page 8 of its opposition, defendant argues its alleged tender "extinguished the HOA's super-priority lien." As discussed herein and in plaintiff's motion to dismiss, however, the HOA or its agent properly rejected the conditional tender and defendant did not keep the tender "good."

At page 8, defendant cites Fresk v. Kramer, 99 P.3d 282, 286-287 (Or. 2004), as authority that a tender is "an offer of payment that is coupled either with no conditions or only with conditions upon which the tendering party has a right to insist." The court in Fresk v. Kramer, however, only considered whether the defendant had made a "tender" that precluded an award of attorney's fees under ORS 20.080(1) when the defendant made a "prelitigation payment offer" that was conditioned upon "plaintiff releasing defendant from further liability for plaintiff's negligence claim." 99 P.3d at 283. The case did not involve a junior lien holder demanding that a senior lien holder agree that the amount offered need not include interest, late fees, charges for preparing statements and the "costs of collecting" approved by the CCICCH in Advisory Opinion 2010-01 and allowed by NAC 116.470.

Defendant Bank also claims that the unpublished order in Stone Hollow Avenue Trust v. Bank of America, N.A., 2016 WL 4543202 (Nev. Aug. 11, 2016), that was vacated by the Nevada Supreme Court on December 21, 2016, found that "a valid super-priority tender extinguishes an association's super-priority lien, and that whether the HOA-sale purchaser is a bona fide purchaser is a bona fide purchaser is irrelevant in super-priority tender cases." However, because that decision is unpublished and vacated, this Court has no basis upon which to follow the order therein.

Defendant does not address plaintiff's argument in the motion to dismiss that defendant has not alleged it kept the tender good, as required by the Restatement.

Defendant Bank allowed the HOA to foreclose its entire lien and sell the Property to plaintiff without revealing to plaintiff , or any of the other bidders, its unrecorded claim that the foreclosure agent had wrongfully rejected the conditional tender made by Miles Bauer. Defendant Bank's failure to make

its unrecorded claim known prior to the public auction prevents defendant Bank from now asserting that equitable claim against plaintiff.

At page 8 of its opposition, defendant cites Cladianos v. Friedhoff, 69 Nev. 41, 240 P.2d 208 (1952), but that case did not involve a junior lien holder offering to pay, or paying, any part of a senior lien. That case instead involved a contractor who sued to recover the full amount of his contract fee for supervising the construction of a 20-unit addition to a motel when the owner of the motel was forced to stop construction and failed to notify the contractor when construction resumed. The Nevada Supreme Court affirmed the judgment entered in favor of the contractor for the full contract amount owed. 240 P.2d at 210.

Defendant also cites Ebert v.Western States Refining Co., 75 Nev. 217, 337 P.2d 1075 (1959), but that case did not involve a junior lien holder offering to pay, or paying, any part of a senior lien. In Ebert, the respondent instead provided 60 days' notice of its intention to exercise its option to purchase the real property, and this court found that respondent's failure to pay the rent for the last two months of the option was excused because "it was apparent to the corporation that Ebert would not convey voluntarily and that the corporation was at all times ready, willing, and able to pay the $800 rent remaining due and unpaid and the $16,000 remaining to be paid on the purchase price." 337 P.2d at 1077.

In Dohrmann v. Tomlinson, 399 P.2d 255 (Id. 1965), the defendant agreed to sell 1269 acres of land to plaintiffs, and plaintiffs notified the defendant that they had deposited the final payment at a bank with instructions to remit the sum to defendant upon receipt of a deed to the property. Id. at 257. Two additional letters were mailed to defendant before plaintiffs filed their lawsuit for specific performance. Id. at 257-258. The court also found that the debt owed was only $5,350.90, that plaintiff's tender of $6,165.44 "exceeded the amount found to be due and no objection having been made either to the mode, form or substance of the offer, the offer, under the circumstances, constituted a proper tender." Id. at 258.

Unlike the plaintiffs in Dohrmann, defendant was not the person primarily responsible for the payment of the HOA assessments. Defendant's counterclaim also alleges that the foreclosure agent rejected the tender made by defendant.

4. Defendant's claim of tender is void as to plaintiff because it was not recorded.

At page 10 of its opposition, defendant states that "the recording statutes only protect bona fide purchasers." First, defendant's counterclaim does not allege sufficient facts that, even if assumed to be true, would support a finding that plaintiff was not a bona fide purchaser. Second, NRS 111.325 does not contain any language limiting its protection to bona fide purchasers.

As noted in plaintiff's motion to dismiss, NRS 116.1108 provides that "the law of real property . . . supplement[s] the provisions of this chapter, except to the extent inconsistent with this chapter." As set forth within plaintiff's motion to dismiss, the rules regarding payment and discharge when a payment is tendered by a person who is "not primarily responsible for performance" are stated in sections e, f, and g of the Restatement (Third) of Prop.: Mortgages, §6.4 (1997).

Even though Restatement (Third) of Prop.: Mortgages, §6.4 (f) (1997) requires that the mortgagee provide "an appropriate assignment in recordable form" or that the person performing "obtain judicial relief ordering the mortgage assigned," defendant claims that its "super-priority tender did not amount to an equitable subrogation."

At page 10 of its opposition, defendant states "Bank of America did not have to record the tender." However, NRS 116.1108 provides that "the law of real property . . . supplements the provisions of this chapter, except to the extent inconsistent with this chapter." Defendant has not identified any provision in NRS Chapter 116 that is inconsistent with the rules governing redemption by performance or tender contained in Section 6.4 of Restatement (Third) of Prop.: Mortgages (1997). Thus, defendant was required, in accordance with Section 6.4 to record notice of its attempted tender. Defendant's counterclaim does not allege defendant recorded any such notice.

Restatement (Third) of Prop.: Mortgages, §6.4(f) (1997) requires that the mortgagee provide the person performing with "an appropriate assignment of the mortgage in recordable form." Otherwise, the person performing must "obtain judicial relief ordering the mortgage assigned." Defendant's counterclaim does not allege that defendant satisfied this requirement.

On December 8, 2010, the Commission for Common Interest Communities and Condominium Hotels (hereinafter "CCICCH") issued Advisory Opinion 2010-01 that stated:

> An association may collect as a part of the super priority lien (a) interest permitted by NRS 116.3115, (b) late fees or charges authorized by the declaration, (c) charges for preparing any statements of unpaid assessments and (d) the "costs of collecting" authorized by NRS 116.310313.
>
> Id. at 1.
>
> In the conclusion to Advisory Opinion 2010-01, the CCICCH stated:
> Accordingly, both a plain reading of the applicable provisions of NRS 116.3116 and the policy determinations of commentators, the state of Connecticut and lenders themselves support the conclusion that **associations should be able to include specified costs of collecting as part of the association's super priority lien**. (emphasis added)
>
> Id. at 12.

Furthermore, effective as of May 5, 2011, the CCICCH adopted NAC 116.470 in order to set limits on the costs assessed in connection with a notice of delinquent assessment. NAC 116.470(4)(b) included "[r]easonable attorney's fees and actual costs, without any increase or markup, incurred by the association for any legal services which do not include an activity described in subsection 2."

The Nevada Supreme Court stated in State Dep't of Business & Industry, Financial Institutions Div'n v. Nevada Ass'n Services, Inc., 128 Nev. Adv. Op. 54, 294 P.3d 1223, 1227-1228 (2012): "We therefore determine that the plain language of the statute requires that the CCICCH and the Real Estate Division, and no other commission or division, interpret NRS Chapter 116."

The issue presented is not whether a lender tendered an amount which is later determined to be correct, but whether the foreclosure agent "wrongfully rejected" the offer based on the state of the law at the time the tender was made. Even in cases where a tender is offered by the person primarily responsible for payment, it is appropriate for a party to reject a conditional tender if the party in good faith believes that more is owed. Thus, in the instant matter, the HOA had a good faith basis to reject the tender because it was simply following the CCICCH opinion, which was uncontradicted at the time defendant allegedly tendered to the HOA on December 6, 2012.

In Hohn v. Morrison, 870 P.2d 513, 517-518 (Colo. App. 1993), the court stated:

> Although this is an issue of first impression in Colorado, other jurisdictions which have adopted the lien theory of real estate mortgages have also adopted the rule that an **unconditional tender of the amount due** by the debtor releases the lien of the mortgage **unless the creditor establishes a justifiable and good faith reason for the rejection of the tender**. Moore v. Norman, 43 Minn. 428, 45 N.W. 857 (1890); Renard v. Clink, 91 Mich. 1, 51 N.W. 692 (1892); Easton v. Littooy, 91 Wash. 648, 158 P.531 (1916) (tender

> of the full amount due operates to discharge the lien of the mortgage if the tender is refused without adequate excuse. (emphasis added)

In First Nat. Bank of Davis v. Britton, 94 P.2d 896, 898 (Okla. 1939), the Oklahoma Supreme Court stated:

> "To constitute a sufficient tender, it must be unconditional. *Where a larger sum than that tendered is in good faith claimed to be due*, the tender is ineffectual as such if its acceptance involves the admission that no more is due." (Emphasis ours.) A number of other authorities were cited in the Bly case establishing the general recognition of the rule. More recently this rule was reiterated with specific allusion to attorneys' fees in the annotation in 93 A.L.R. 73, where it is stated: "And refusal by the mortgagee to accept a tender upon the ground that it does not include attorneys' fees may prevent the tender from operating as a discharge of the mortgage lien when made in good faith, even though, as a matter of law, the mortgagee was not entitled to the fees."
>
> 94 P.2d at 898.

In Smith v. School Dist. No. 64 Marion County, 89 Kan. 225, 131 P. 557, 558 (1913), the Kansas Supreme Court stated:

> A conditional tender is not valid. Where it appears that a larger sum than that tendered is claimed to be due, the offer is not effectual as a tender if coupled with such conditions that acceptance of it as tendered involves an admission on the part of the person accepting it that no more is due. Moore v. Norman, 52 Minn. 83, 53 N.W. 809, 18 L.R.A. 359, 38 Am. St. Rep. 526, and not page 529; 38 Cyc. 152, and cases cited in note 152, 153.

In Hilmes v. Moon, 11 P.2d 253, 260 (Wash. 1932), the Washington Supreme Court stated:

> In order to discharge the lien of the mortgage, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary, and unaccompanied by any bona fide, though mistaken, claim of right.

At page 8 of its opposition, defendant stated that according to the decision in Horizons at Seven Hills v. Ikon Holdings, 132 Nev. Adv. Op. 35, 373 P.3d 66 (2016), issued on April 28, 2016, "an association's super-priority lien is limited to nine months of delinquent assessments." However, the Horizons decision did not exist on December 6, 2012, when defendant allegedly tendered. Thus, it was perfectly appropriate for the HOA to include attorney's fees and costs of collecting as part of the HOA's superpriority lien, and it was not "wrongful" for the HOA or its foreclosure agent to reject defendant's tender.

At page 11 of its opposition, defendant cites In re Fontainebleau Las Vegas Holdings, LLC, 128 Nev. Adv. Op. 53, 289 P.3d 1199 (2012), as authority that "[e]quitable subrogation cannot be applied

against statutorily-created HOA super-priority liens." That case, however, did not discuss general principles that apply to all statutory liens, but focused only on mechanic's liens and specific language found in NRS Chapter 108. In response to a certified question from the United States Bankruptcy Court, the Nevada Supreme Court answered the question of "whether the doctrine of equitable subrogation can apply to allow a subsequent lender to claim the senior priority status of an original loan that the subsequent lender satisfied when contractors and suppliers hold intervening mechanics' liens." 289 P.3d at 1209. The court held "that the plain and unambiguous language of NRS 108.225 precludes application of the doctrine of equitable subrogation, as it unequivocally places mechanic's lien claimants in an unassailable priority position." 289 P.3d at 1212.

The Fontainebleau case did not discuss in any way the effect of an unrecorded conditional offer of payment made to a senior lien claimant by a subordinate lien holder, so the case does not support defendant's argument that the unrecorded conditional offer made by Miles Bauer affected the HOA's super priority lien in any way.

Restatement (Third) of Prop.: Mortgages, § 6.4 (f) (1997) provides that the mortgagee provide "an appropriate assignment of the mortgage in recordable form." In the present case, because the foreclosure agent rejected the conditional tender, defendant was obligated to "obtain judicial relief ordering the mortgage assigned." Defendant has not alleged in its counterclaim that it took the actions required by the law of real property incorporated by NRS 116.1108.

Defendant also cites to Houston v. Bank of America, 19 Nev. 485 (2003) for the proposition that "equitable subrogation is an equitable remedy designed to protect a creditor's lien priority." However, no such language appears in the Houston decision. Additionally, Houston is factually distinct from the instant matter because Houston did not involve a homeowners' association foreclosure.

5. Defendant has not sufficiently plead commercial reasonableness to survive the motion to dismiss stage.

On page 16 of its opposition, defendant argues the sale was commercially unreasonable because, in addition to the low price, there was fraud, oppression, or unfairness" due to the HOA's rejection of the tender. However, the fraud, oppression, or unfairness must bring about or account for the low purchase

price. See Shadow Wood, et al. Examples would be collusion between the auctioneer and the purchaser to keep the price artificially low or an effort to prevent public notice of the auction. Defendant never explains how rejection of a tender accounts for a low purchase price.

6. Defendant has not alleged sufficient facts to support a conclusion that plaintiff is not a bona fide purchaser.

In Shadow Wood Homeowners Association, Inc. v. New York Community Bancorp, Inc., 132 Nev. Adv. Op. 5, 366 P.3d 1105, 1115, n. 7 (2016), the court stated:

> Consideration of harm to potentially innocent third parties is especially pertinent here where NYCB did not use the legal remedies available to it to prevent the property from being sold to a third party, such as by seeking a temporary restraining order and preliminary injunction and filing a lis pendens on the property. *See* NRS 14.010; NRS 40.060. *Cf.* Barkley's Appeal. Bentley's Estate, 2 Monag. 274, 277 (Pa.1888) ("In the case before us, we can see no way of giving the petitioner the equitable relief she asks without doing great injustice to other innocent parties who would not have been in a position to be injured by such a decree as she asks if she had applied for relief at an earlier day.").

Defendant has not alleged that it took any such legal action before the public auction held on January 11, 2013.

Defendant cites Berge v. Fredericks, 95 Nev. 183, 591 P.2d 246 (1979), where the Court stated that the respondent's relationship with the seller and respondent's knowledge that "appellant was in sole and exclusive possession of the property in question" gave rise to the duty of inquiry. 591 P.2d at 249. Defendant's counterclaim does not include any allegations that would have imposed a duty of inquiry on plaintiff to discover defendant's unrecorded claim that the foreclosure agent wrongfully rejected the conditional tender by Miles Bauer.

Defendant also cites Allison Steel Manufacturing Co. v. Bentonite, Inc., 86 Nev. 494, 499, 471 P.2d 666, 699 (1970), where the Nevada Supreme Court found that a duty of inquiry arose because "[a]t the time appellant's judgment lien attached on May 26, 1964, the two IRS liens were already of record giving it constructive notice." This court also stated that "[h]ad appellant purchased the Henderson land at the Sheriff's sale after instead of before the IRS tax liens were released, a different result would prevail." 86 Nev. at 500, 471 P.2d at 670.

In the present case, the only documents recorded as of the date of the HOA foreclosure sale showed that the deed of trust was subordinate to the HOA lien being foreclosed. Nothing appeared in

the public record to alert the HOA or any bidders that defendant claimed that the foreclosure agent had wrongfully rejected the conditional tender made by Miles Bauer. In addition, in defendant's counterclaim does not allege that defendant took the actions required to keep the rejected tender "good" or that defendant sought judicial relief ordering the superpriority lien to be assigned as required by Restatement (Third) of Prop.: Mortgages, § 6.4 (f) and (g) (1997).

CONCLUSION

By reason of the foregoing, plaintiff respectfully requests that the court enter an order dismissing defendant's counterclaim.

DATED this 21st day of November, 2017

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5, NEFCR 9 and EDCR 8.05, I hereby certify that I am an employee of Law Offices of Michael F. Bohn., Esq., and on the 21st day of October, 2017, an electronic copy of the **REPLY IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM** was served on opposing counsel via the Court's electronic service system to the following counsel of record:

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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates, Series 2006-OA1

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

5316 CLOVER BLOSSOM CT TRUST; Plaintiff, v. U.S. BANK, NATIONAL ASSOCIATION, SUCCESSOR TRUSTEE TO BANK OF AMERICA, N.A., SUCCESSOR BY MERGER TO LASALLE BANK, N.A., AS TRUSTEE TO THE HOLDERS OF THE ZUNI MORTGAGE LOAN TRUST 2006-OA1, MORTGAGE LOAN PASS-THROUGH CERTIFICATES SERIES 2006-OA1; and CLEAR RECON CORPS, Defendants.	Case No.: A-14-704412-C Dept. No.: XXIV **U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO COUNTRY GARDEN OWNERS ASSOCIATION'S MOTION TO DISMISS**

U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates, Series 2006-OA1 (**U.S. Bank**), by and through its attorneys at the law firm AKERMAN LLP, hereby files its Opposition to the Motion to Dismiss filed by Country Garden Owners Association (**HOA**). This Opposition is based upon the Memorandum of Points and

Authorities attached hereto, all exhibits attached hereto, and such oral argument as may be entertained by the Court at the time and place of the hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The HOA's motion to dismiss should be denied. U.S. Bank's cross-claims against the HOA seek monetary damages in the alternative to its quiet title and declaratory relief counterclaims against Plaintiff. Like any other damages claims, U.S. Bank's claims against the HOA do not accrue until U.S. Bank actually incurs damages. Those damages were far too speculative and remote for its claims to accrue on the date of the HOA's foreclosure sale – the date the HOA contends the claims accrued. U.S. Bank will not suffer any compensable damages unless this Court holds that U.S. Bank's Deed of Trust was extinguished by the HOA's foreclosure sale (despite the fact its loan servicer tendered an amount much greater than the statutory super-priority amount to the HOA's agent before that sale) as a result of equitable balancing between U.S. Bank and Plaintiff or Plaintiff's status as a bona fide purchaser. If this Court decides against U.S. Bank on its quiet title and declaratory relief claims against Plaintiff, it should be allowed to pursue its damages claims against the HOA – the party that chose to foreclose on its super-priority lien rather than accept U.S. Bank's super-priority-plus payment.

II. STATEMENT OF RELEVANT FACTS

A. The Johnsons borrow $147,456.00 to purchase a home.

On June 24, 2004, Dennis Johnson and Geraldine Johnson (collectively, **Borrowers**) executed a promissory note (**Note**) in the amount of $147,456.00 to finance the purchase of real property located at 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (**Property**). The Note was secured by a senior deed of trust encumbering the Property executed in favor of Countrywide Home Loans, Inc. (**Deed of Trust**). U.S. Bank, N.A. as Trustee's Answer to 5316 Clover Blossom CT Trust's Amended Complaint, Counterclaims, and Cross-claims (hereinafter "U.S. Bank's Am. Pldg."), **Ex. A**. This Deed of Trust was assigned to U.S. Bank via an Assignment of Deed of Trust, which was recorded on June 20, 2011. U.S Bank's Am. Pldg., **Ex. B**.

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B. The HOA Trustee rejects Bank of America's super-priority-plus payment and forecloses.

The Property is governed by the HOA's Declaration of Covenants, Conditions, and Restrictions (**CC&Rs**), which require the Property's owner to pay certain assessments to the HOA. U.S. Bank's Opposition to Plaintiff's Motion to Dismiss (hereinafter "U.S. Bank's Opp'n"), **Ex. A**. Borrowers defaulted on their obligations to the HOA. As a result, Alessi & Koenig, LLC (**HOA Trustee**), acting on behalf of the HOA, recorded two Notices of Delinquent Assessment Liens on February 22, 2012, at 9:17 AM, both ostensibly encumbering the Property. One Notice stated the Borrowers owed $1,095.50 to the HOA and that the Lien was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. The other Notice, which also stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs, stated the Borrowers owed $1,150.50 to the HOA. U.S. Bank's Am. Pldg., **Ex. D**.

On April 20, 2012, the HOA Trustee recorded a Notice of Default and Election to Sell Under Homeowners Association Lien, particularly the Lien attached to U.S. Bank's Amended Pleading as Exhibit C (the **Lien**), which stated the total amount due to the HOA was $3,396.00. U.S. Bank's Am. Pldg., **Ex. E**. The HOA Trustee then recorded a Notice of Trustee's Sale on October 31, 2012, which stated the total amount due to the HOA was $4,039.00, and set the sale for November 28, 2012. U.S. Bank's Am. Pldg., **Ex. F**.

In response to the Notice of Sale, Bank of America, N.A. (**Bank of America**), who serviced the loan secured by the Deed of Trust at the time, retained Miles, Bauer, Bergstrom & Winters LLP (**Miles Bauer**) to determine the super-priority amount of the HOA's lien and pay that amount to protect the Deed of Trust. U.S Bank's Am. Pldg., **Ex. G**, at ¶ 4. On November 21, 2012, Miles Bauer sent a letter to the HOA Trustee requesting information regarding the super-priority amount and "offer[ing] to pay that sum upon adequate proof of the same by the HOA." U.S Bank's Am. Pldg., **Ex. G-1**. The HOA Trustee refused to provide the super-priority amount, instead demanding that Bank of America pay off the HOA's entire lien even though the majority of the lien was junior to the Deed of Trust. U.S Bank's Am. Pldg., **Ex. G-2**. However, the payoff ledger the HOA Trustee provided showed the

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HOA's monthly assessments were $55.00 each, meaning the statutory super-priority amount of the HOA's lien was $495.00. *Id.*

Bank of America nonetheless sent the HOA Trustee a check in the amount of $1,494.50 – which included $999.50 in "reasonable collection costs" in addition to the $495.00 statutory super-priority amount. U.S Bank's Am. Pldg., **Ex. G-3**. The letter enclosing the check made clear that the payment was meant to extinguish only the super-priority portion of the HOA's lien, stating specifically that the check was to "satisfy [Bank of America]'s obligations as a holder of the first deed of trust against the property." *Id.* The HOA Trustee unjustifiably rejected this super-priority-plus payment. *Id.*, at ¶ 9.

Instead of accepting this payment, the HOA Trustee foreclosed on the HOA's lien on January 26, 2013, selling an interest in the Property to Plaintiff for $8,200.00. U.S Bank's Am. Pldg., **Ex. H**. The Lien foreclosed stated that it was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. *See* U.S. Bank's Opp'n, **Ex. A**, at § 9.1.

C. <u>Procedural History</u>

Plaintiff filed its Complaint on July 25, 2014, seeking to quiet title to the Property. Plaintiff moved for summary judgment on May 18, 2015, arguing that the recitals contained in the HOA's Trustee's Deed Upon Sale were sufficient standing alone to show that it obtained title to the Property free and clear at the HOA's foreclosure sale. In its opposition, U.S. Bank argued that Bank of America's super-priority-plus payment extinguished the HOA's super-priority lien before the sale, meaning Plaintiff took title subject to the Deed of Trust, and that Plaintiff was not a bona fide purchaser. On September 10, 2015, this Court granted Plaintiff's motion for summary judgment and quieted title in Plaintiff's favor.

U.S. Bank appealed, and the Nevada Court of Appeals vacated the judgment in Plaintiff's favor and remanded the case to this Court. *See U.S. Bank, N.A., as Trustee v. 5316 Clover Blossom CT Trust*, Case No. 68915 (Nev. Ct. App. June 30, 2017). The Court of Appeals explained that the recitals in the Trustee's Deed Upon Sale were not conclusive, and that this Court should resolve the legal and

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factual issues surrounding the super-priority-plus tender, commercial reasonableness of the HOA's foreclosure sale, and Plaintiff's bona fide purchaser status before determining the effect of the HOA's foreclosure sale. *See id.*, at 2.

After remand, U.S. Bank submitted its claims against the HOA to the Department of Business and Industry – Real Estate Division (**NRED**) on September 5, 2017. **Exhibit A**. On September 28, 2017, U.S. Bank and Plaintiff stipulated to adding the HOA as a party. On October 10, 2017, U.S. Bank filed its amended pleading, which included claims against the HOA for unjust enrichment, tortious interference with contractual relations, breach of the duty of good faith, and wrongful foreclosure.

III. LEGAL STANDARDS

In a motion to dismiss under NEV. R. CIV. P. 12(b)(5), "[t]he standard of review is rigorous as [the court] 'must construe the pleading liberally and draw every fair intendment in favor of the [non-moving party].'" *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 844, 858 P.2d 1258, 1260 (1993) (quoting *Squires v. Sierra Nev. Educational Found.*, 107 Nev. 902, 903, 823 P.2d 256, 257 (1991)). Further, "[a]ll factual allegations of the complaint must be accepted as true." *Breliant*, 109 Nev. at 844. Claims against a party "will not be dismissed for failure to state a claim 'unless it appears beyond a doubt that the [claimant] could prove no set of facts which, if accepted by the trier of fact, would entitle him [or her] to relief.'" *Id.* (quoting *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 112 (1985)). Finally, "[t]he test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." *Id.*

IV. ARGUMENT

This Court should deny the HOA's motion to dismiss for two reasons. **First**, the HOA's motion should be denied because U.S. Bank's claims were all filed within the applicable statutes of limitation. **Second**, NRS 38.310 does not apply to U.S. Bank's claims against the HOA, and even if it did, U.S. Bank satisfied that statute by submitting its claims against the HOA to NRED mediation before filing them here.

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A. U.S. Bank's cross-claims against the HOA are timely.

This Court should deny the HOA's motion because all of U.S. Bank's claims are timely, as those claims do not accrue unless this Court holds that U.S. Bank's Deed of Trust was extinguished by the HOA's tortious foreclosure sale. Even if the statutes of limitations on those claims began running when the HOA's Foreclosure Deed was recorded, the claims are still timely because the statutes were equitably tolled by the HOA's inequitable misrepresentations regarding the effect of its foreclosure sale. Finally, even if the statute of limitations on the wrongful foreclosure claim ran untolled from the date the Foreclosure Deed was recorded, that claim is still timely because it was filed within six years of that date.

1. U.S. Bank's claims do not accrue unless this Court holds the Deed of Trust was extinguished by the HOA's tortious foreclosure sale.

Statutes of limitations begin to run on "the day the cause of action accrues." *Clark v. Robison*, 113 Nev. 949, 951, 944 P.2d 788, 789 (1997). "A cause of action accrues when a suit may be maintained thereon." *Id.* A tort cause of action does not accrue until damages occur, as "compensable damages" are an "essential element of a negligent tort." *Szekeres by Szekeres v. Robinson*, 102 Nev. 93, 95, 715 P.2d 1076, 1077 (1986); *see also City of Pomona v. SQM North America Corp.*, 750 F.3d 1036, 1051 (9th Cir. 2014) (explaining that limitations period begins running when the last element of a cause of action occurs, and "[w]hen the last element to occur is damage, the limitations period starts upon the occurrence of appreciable and actual harm").

Here, the HOA contends that U.S. Bank's claims are time-barred because they were filed more than four years after the HOA's Foreclosure Deed was recorded – the date on which the HOA contends the claims accrued. HOA's MTD, at 7. But U.S. Bank did not suffer damages on that date. U.S. Bank will not suffer any compensable damages unless this Court holds that U.S. Bank's Deed of Trust was extinguished by the HOA's foreclosure sale – even though its loan servicer tendered an amount much greater than the statutory super-priority amount before that sale – as a result of equitable balancing between U.S. Bank and Plaintiff or Plaintiff's status as a bona fide purchaser. Because U.S. Bank's claims against the HOA are derivative of its quiet title and declaratory relief claims against Plaintiff,

the statutes of limitations on its claims against the HOA do not run until its underlying claims against Plaintiff are resolved.

This statute-of-limitations analysis is a familiar part of Nevada jurisprudence, as the statute of limitations for other derivative claims – like indemnity and attorney malpractice – do not begin running until the judgment is entered that triggers the indemnity right or causes the malpractice claim to accrue. *See Saylor v. Arcotta*, 126 Nev. 92, 96, 225 P.3d 1276, 1279 (2010). The statute of limitations for an indemnity claim "does not begin to run until the indemnitee suffers actual loss by paying a settlement or underlying judgment." *Id.* Likewise, the statute of limitations for an attorney-malpractice claim does not begin running when the attorney's negligent act occurs. *Brady Vorwerck v. New Albertson's, Inc.*, 130 Nev. Adv. Op. 68, 333 P.3d 229, 230 (2014). Instead, it begins running when the "underlying legal action has been resolved" because that is when "damage has been sustained" – the final element of the malpractice claim. *Id.* This is so because "[w]here there has been no final adjudication of the client's case in which the malpractice allegedly occurred, the element of injury or damage remains speculative and remote, thereby making premature the cause of action for professional negligence." *Id.*, at 234. Allowing malpractice damages "to become certain before judicial resources are invested in entertaining the malpractice action" furthers judicial economy. *Id.*, at 235.

This same analysis applies to the statutes of limitations for U.S. Bank's claims against the HOA here. As in indemnity and attorney-malpractice claims, it was entirely uncertain whether U.S. Bank suffered any damage on the date of the HOA's sale, as its loan servicer submitted payment for an amount much greater than the statutory super-priority amount to the HOA Trustee before the foreclosure sale. *See* U.S. Bank's Am. Pldg., **Exs. G-1**, **G-2**, & **G-3**. U.S. Bank contends that this super-priority-plus tender extinguished the HOA's super-priority lien before the sale, meaning Plaintiff took title subject to U.S. Bank's Deed of Trust. *See* U.S. Bank's Opp'n, at 8-14. However, Plaintiff contends that even if Bank of America's tender extinguished the super-priority lien before the sale, it still took title free and clear because it is a bona fide purchaser. *See generally*, Pltf's MTD. If Plaintiff prevails on this theory,[1] that will be the moment U.S. Bank incurs damage from the HOA's

[1] As U.S. Bank explained at length in its opposition to Plaintiff's motion to dismiss, its position is that Plaintiff's bona fide purchaser status is irrelevant in light of Bank of America's effective super-priority-plus tender, and even if it were relevant, Plaintiff is clearly not a bona fide purchaser. U.S. Bank's Opp'n, at 17-21. U.S. Bank asserted its claims for damages

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wrongful rejection of Bank of America's super-priority-plus tender – the final element of its claims against the HOA.

This is closely analogous to the statute-of-limitations analysis for attorney-malpractice claims wherin the damage is not incurred and is not even certain when the malpractice occurs. Instead, the damage is incurred when the court enters a judgment against the client caused by the lawyer's negligent act. For example, if a lawyer inexcusably fails to timely file a motion *in limine* to exclude a key piece of unfavorable evidence that would likely be granted, that inaction would likely satisfy the negligence element of a malpractice claim. But if the lawyer nevertheless prevails for his client at trial, there is no malpractice claim because the negligent act never actually damaged the client. "[N]o one has a claim against another without having incurred damages." *See Boulder City v. Miles*, 85 Nev. 46, 49, 449 P.2d 1003, 1005 (1969). That is why the statute of limitations on an attorney-malpractice claim does not begin to run until the judgment is entered against the client. At the point of the attorney's negligent conduct, the damages are too "speculative and remote." *See Semenza v. Nevada Med. Liab. Ins. Co.*, 104 Nev. 666, 668, 765 P.2d 184, 186 (1988).

Here, U.S. Bank's damages were too "speculative and remote" to trigger the statutes of limitations on its claims against the HOA when the HOA conducted its foreclosure sale, as the effect of that sale was not and is still not known. Accordingly, U.S. Bank's claims against the HOA are timely. The HOA's motion to dismiss those claims should be denied.

2. Even if the statutes of limitations began to run when the Foreclosure Deed was recorded, they should be equitably tolled in light of the HOA's misrepresentations.

Even if they began running when the HOA's Foreclosure Deed was recorded, the statute of limitations on U.S. Bank's claims should be equitably tolled in light of the HOA's misrepresentations regarding the effect of its foreclosure sale. "Where the danger of prejudice to the defendant is absent, and the interests of justice so require, equitable tolling of the limitations period may be appropriate."

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against the HOA in the alternative in case this Court decides differently, which is common practice and expressly allowed under the Nevada Rules of Civil Procedure. *See* NEV. R. CIV. P. 8(a) (explaining that "[r]elief in the alternative or of several different types may be demanded" in a pleading); *E.H. Boly & Son, Inc. v. Schneider*, 525 F.2d 20, 23 n.3 (9th Cir. 1975) (explaining that "although a plaintiff may not recover on both theories, a plaintiff may claim remedies as alternatives, leaving the ultimate election for the court"); *see also Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) ("Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.").

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Seino v. Employers Ins. Co. of Nevada, Mut. Co., 121 Nev. 146, 152, 111 P.3d 1107, 1112 (2005). Equitable tolling "focuses on whether there was excusable delay by the claimant." *City of N. Las Vegas v. State Local Gov't Employee-Mgmt. Relations Bd.*, 127 Nev. 631, 640, 261 P.3d 1071, 1077 (2011). To determine whether equitable tolling applies, a court "look[s] at several nonexclusive factors," including whether the defendant made statements or "false assurances" that misled the claimant, and "any other equitable considerations appropriate in the particular case." *See, e.g., Copeland v. Desert Inn Hotel*, 99 Nev. 823, 827, 673 P.2d 490, 493 (1983); *State Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 739, 265 P.3d 666, 672 (2011); *Seino*, 121 Nev. at 152.

Here, the HOA's "false assurances" that its foreclosure would have no effect on the Deed of Trust justifies equitable tolling. The HOA's Notice of Delinquent Assessment Lien stated that the lien the HOA eventually foreclosed was instituted "[i]n accordance with Nevada Revised Statutes and the Association's" CC&Rs. U.S Bank's Am. Pldg., **Ex. C**. Those CC&Rs stated that no "enforcement of any lien provision [in the CC&Rs] shall defeat or render invalid" a senior deed of trust. *See* U.S. Bank's Opp'n, **Ex. A**, at § 9.1. These publicly-recorded documents informed U.S. Bank, Plaintiff, and everyone else that the HOA's foreclosure sale would have no effect on U.S. Bank's Deed of Trust.

Even though the HOA informed it that the Deed of Trust was in no danger, prior to the HOA's foreclosure sale, U.S. Bank's loan servicer sent the HOA's agent a check for $1,494.50 which was comprised of $999.50 in "reasonable collection costs" and the $495.00 statutory super-priority amount. U.S Bank's Am. Pldg., **Exs. G-2** & **G-3**; *see Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. Adv. Op. 35, 373 P.3d 66, 73 (2016) ("the superpriority lien … is limited to an amount equal to the common expense assessments due during the nine months before foreclosure"). The HOA's agent unjustifiably rejected this super-priority-plus payment and proceeded to foreclose on the HOA's lien, which Plaintiff contends extinguished the Deed of Trust despite the HOA's pre-foreclosure representations in publicly-recorded documents that such a result would not occur. *See* U.S. Bank's Am. Pldg., **Ex. C**; U.S. Bank's Opp'n, **Ex. A**, at § 9.1. Now, the HOA attempts to use its misrepresentations and ignorance of the laws under which it conducted its foreclosure to preclude U.S. Bank from recovering damages caused by that ignorance.

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There would be nothing equitable about holding that U.S. Bank is barred from recovering against the HOA if the Deed of Trust is held to be extinguished when (1) the HOA specifically informed the entire world that its foreclosure would not affect the Deed of Trust, (2) its agent rejected payment of an amount much greater than the super-priority amount before the foreclosure sale took place, and (3) it nonetheless proceeded to foreclose. In light of the HOA's "false assurances" regarding the effect of its foreclosure, U.S. Bank had no reason to sue the HOA until Plaintiff sued U.S. Bank claiming that its Deed of Trust was extinguished by that foreclosure.

As discussed above, U.S. Bank's claims are timely because its damages were too "speculative and remote" at the time of the HOA's foreclosure to trigger the statutes of limitations on those claims. However, even if this Court agrees with the HOA that those statutes began running on the day the HOA's Foreclosure Deed was recorded, those statutes should be equitably tolled by the HOA's inequitable misrepresentations and U.S. Bank's "excusable delay" in bringing those claims based on those misrepresentations. Under either scenario, U.S. Bank's claims are timely, and the HOA's motion should be denied.

3. Even if the statutes of limitations began to run when the Foreclosure Deed was recorded and were not equitably tolled, the wrongful foreclosure claim is still timely.

Even if the statutes of limitations ran un-tolled from January 24, 2013, U.S. Bank's wrongful foreclosure claim is still timely because it is subject to a six-year statute of limitations. In its motion, the HOA contends that the wrongful foreclosure claim is a claim for liability created by statute that is subject to a three-year limitations period. *See* HOA's MTD, at 8. The HOA is mistaken.

The Nevada Supreme Court has explained that "deciding a wrongful foreclosure claim against a homeowners' association involves interpreting covenants, conditions, or restrictions applicable to residential property." *McKnight Family, LLP v. Adept Mgmt.*, 129 Nev. Adv. Op. 64, 310 P.3d 555, 559 (2013). Because the HOA's CC&Rs are a recorded "instrument in writing," U.S. Bank's wrongful foreclosure claim is subject to NRS 11.190(1)(b)'s six-year statute of limitations because it is a claim that arises from a "contract, obligation, or liability founded upon an instrument in writing." *See* NRS 11.190(1)(b); *see also Nationstar Mortgage, LLC v. Falls at Hidden Canyon Homeowners Ass'n*, 2017 WL 2587926, at *3 (D. Nev. June 14, 2017) (holding that a mortgagee's wrongful foreclosure claim

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against an association arising from that association's foreclosure sale is subject to NRS 11.190(1)(b)'s six-year statute of limitations to the extent it implicates the association's CC&Rs).

Accordingly, even if the statute of limitations on U.S. Bank's wrongful foreclosure claim began running on January 24, 2013 and was not equitably tolled, U.S. Bank has until January 24, 2019 to assert that claim. For that reason, at minimum, the HOA's motion should be denied as to U.S. Bank's wrongful foreclosure claim.

B. <u>NRS 38.310 does not apply to U.S. Bank's claims, and even if it did, U.S. Bank satisfied that statute by submitting its claims to NRED mediation.</u>

The HOA argues that U.S. Bank's claims against it must be dismissed because NRS 38.310 requires that those claims first be mediated by NRED. HOA's MTD, at 10. The HOA is incorrect, as NRS 38.310 does not apply to mortgagees. Even if it did, U.S. Bank satisfied that statute by submitting its claims against the HOA to NRED mediation before filing them in this case.

1. NRS 38.310 does not apply to U.S. Bank's claims.

NRS 38.310(a) states that it applies to "civil action[s]," but that subsection itself does not describe to whom it is applicable. NRS 38.310(b), however, makes clear that NRS 38.310 is only applicable to civil actions brought by homeowners. NRS 38.310(b) provides that if the "civil action" applies to property in a planned community subject to NRS 116, then the parties to that action must first exhaust "all administrative procedures specified in any conditions or restrictions applicable to the property or in any bylaws, rules and regulations of an association[.]"

Under the HOA's unsustainable reading of NRS 38.310, U.S. Bank would not only be required to mediate its claims, but also to comply with and exhaust the CC&Rs' administrative procedures, like appearing before the HOA's board for a hearing, before filing suit. U.S. Bank is not a unit owner in the planned community. U.S. Bank is not even a party to the CC&Rs. It is an absurdly broad reading of NRS 38.310 to make U.S. Bank comply with CC&Rs to which it is not even a party.

No part of a statute should be rendered meaningless and its language "should not be read to produce absurd or unreasonable results." *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). Reading NRS 38.310's subsections together, it is clear that NRS 38.310's mediation provision applies to homeowners in the planned community, the persons the

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CC&Rs are designed to govern, and not to third parties who are strangers to the community, like U.S. Bank. In sum, NRS 38.310 simply does not apply to U.S. Bank.

If NRS 38.310's plain language is not enough, there is also ample legislative history demonstrating the Nevada Legislature never intended to compel senior deed of trust beneficiaries like U.S. Bank into NRED mediation. At the initial hearing on Assembly Bill 152, which later became NRS 38.310, *et seq.*, the prime sponsor of the Assembly Bill described its purpose:

> Mr. Schneider, the prime sponsor of A.B. 152, stated it is a form of dispute resolution which developed as a result of his working closely with property management associations. Over the past year he has been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own constitutions which are referred to as covenants, conditions and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, **there are personality problems and management problems between the board and the residents.** As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days rather than the years it takes to a lawsuit to proceed through District Court.

Exhibit B, at p. 12 (emphasis added). Assemblyman Schneider then testified before the Senate Committee on Judiciary on June 16, 1995, and explained the purpose of the bill as follows:

> This bill proposes for any **problems between the residents of the community or the residents and the board . . . the parties go to arbitration or mediation, rather than court.** He opined this first step will result in most of the dispute[s] being resolved before they make it to court. Especially since **most of the disagreements end up as personality conflicts, rather than conflicts over substantive issues** . . .

Id., at p. 89 (emphasis added). This legislative history shows the mandatory mediation provision was designed to steer **homeowner** disputes, like disputes over stucco colors or how high a particular hedge can grow, into mediation. The framers of Assembly Bill 152 only wanted to focus these "personality driven" disputes into a non-judicial forum to ease the strain on Nevada's court system. NRS 38.310's legislative history confirms what the statute's plain language makes clear – claims like U.S. Bank's are not subject to NRS 38.310's mediation mandate.

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2. If NRS 38.310 applies, U.S. Bank constructively exhausted its requirements by submitting its claims against the HOA to NRED mediation.

Even if NRS 38.310 does apply to mortgagees, the administrative remedies it purportedly requires were constructively exhausted here because NRED failed to mediate U.S. Bank's claims against the HOA within the statutory 60-day deadline. A party constructively exhaust its administrative remedies "when certain statutory requirements are not met by the agency." *Reno Newspapers, Inc. v. U.S. Parole Comm'n*, 2011 WL 222144, at *2 (D.Nev. Jan. 24, 2011) (citing *Taylor v. Appleton*, 30 F.3d 1365, 1368 (11th Cir. 1994) ("A party is deemed to have constructively exhausted all administrative remedies 'if the agency fails to comply with the applicable time limit provisions….'"); *see also Farm Bureau Town & Country Ins. Co. of Missouri v. Angoff*, 909 S. W. 2d 348 (Mo. 1995) ("Another exception to the exhaustion of administrative remedies doctrine arises where the applicable administrative procedure must be commenced by the agency and the agency has failed to commence any proceeding."). Under NRS 38.330(1), NRED "mediation must be completed within 60 days after the filing of the written claim."

A mortgagee constructively exhausts the administrative remedies that NRS 38.310 may require if the mortgagee's claims are submitted to NRED and NRED fails to complete mediation within sixty days, as required by NRS 38.330(1). *Bank of America, N.A. v. Hartridge Homeowners Association*, 2016 WL 3563502, at *2 (D.Nev. June 19, 2016). In *Hartridge*, just as here, a mortgagee submitted to NRED claims against a homeowners association based on the association's putative foreclosure of a super-priority lien that had previously been extinguished by Bank of America's super-priority tender. *Id.*, at *2. And like here, NRED failed to mediate the mortgagee's claims within the sixty-day deadline imposed by NRS 38.330(1). *Id.* The association moved to dismiss the mortgagee's claims, arguing the mortgagee was "barred from initiating th[e] lawsuit because it had not participated in mediation per the statutory requirement" found in NRS 38.310. *Id.* The *Hartridge* Court denied the association's motion, holding that the mortgagee's claims were proper because the mortgagee "properly submitted the claim[s] to mediation per [NRS] 38.310(1)" before asserting them in the district court. *Id.*

The operative facts in *Hartridge* are identical to the facts material to the HOA's motion in this case. Here, U.S. Bank submitted its claims against the HOA to NRED mediation on September 5, 2017, well before it filed the claims in this Court. *See* **Ex. A**. Just as it failed to do in *Hartridge*, here

NRED failed to mediate these claims within the sixty-day deadline imposed by NRS 38.330(1). NRED thus "failed to comply with the applicable time limit provisions" for mediating U.S. Bank's claims, meaning U.S. Bank constructively exhausted the administrative remedies purportedly required by NRS 38.310. *See Taylor*, 30 F.3d at 1368.[2]

NRED's failure to comply with its statutory duties should not bar U.S. Bank from litigating its claims against the HOA in this suit. U.S. Bank's claims against the HOA arise from the same transaction or occurrence as Plaintiff's quiet title action – the HOA's purported foreclosure of its super-priority lien after that lien was extinguished by Bank of America's super-priority-plus tender. Judicial economy is furthered by allowing U.S. Bank to litigate its claims against the HOA in this action, rather than forcing a separate action after NRED mediates the claims it was required to mediate long ago. And U.S. Bank's constructive exhaustion of any administrative remedies required by NRS 38.310 ensures these claims are justiciable and can be resolved in this action. The HOA's motion to dismiss based on U.S. Bank's purported failure to follow NRS 38.310 should be denied.

V. CONCLUSION

For the foregoing reasons, the HOA's Motion to Dismiss should be denied.

DATED this 27th day of November, 2017

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/s/ Karen Whelan

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Attorneys for U.S. Bank, N.A., solely as Successor Trustee to Bank of America, N.A., successor by merger to LaSalle Bank, N.A., as Trustee to the Holders of the Zuni Mortgage Loan Trust 2006-OA1, Mortgage Loan Pass-Through Certificates Series 2006-OA1

[2] Notably, any failure to exhaust the administrative remedies prescribed by NRS 38.310 would not deprive this Court of subject matter jurisdiction. *See Allstate Ins. Co. v. Thorpe*, 170 P.3d 989, 993 (Nev. 2007). Rather, any such failure would render the matter nonjusticiable as unripe. *Id.* ("While in the past we have held that the failure to exhaust administrative remedies deprives the district court of subject-matter jurisdiction, more recently … we noted that failure to exhaust all available administrative remedies before proceeding in district court renders the matter unripe for district court review."). Even if U.S. Bank's claims were not ripe when the claims were filed, they became ripe on November 4, 2017, when NRED's sixty-day deadline expired, which was five days before the HOA filed the instant motion.

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of AKERMAN LLP, and that on this 18th day of November, 2017, I caused to be served a true and correct copy of the foregoing **U.S. BANK, N.A., AS TRUSTEE'S OPPOSITION TO COUNTRY GARDEN OWNERS ASSOCIATION'S MOTION TO DISMISS**, in the following manner:

(ELECTRONIC SERVICE) Pursuant to Administrative Order 14-2, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by the Court's facilities to those parties listed on the Court's Master Service List as follows:

PENGILLY LAW FIRM
Elizabeth B Lowell elowell@pengillylawfirm.com

WRIGHT FINLAY & ZAK, LLP
Brandon Lopipero blopipero@wrightlegal.net
Dana J. Nitz dnitz@wrightlegal.net

LAW OFFICES OF MICHAEL F. BOHN, ESQ., LTD.
Eserve Contact office@bohnlawfirm.com
Michael F Bohn Esq. mbohn@bohnlawfirm.com

/s/ Carla Llarena
An employee of AKERMAN LLP

AKERMAN LLP
1160 TOWN CENTER DRIVE, SUITE 330
LAS VEGAS, NEVADA 89144
TEL.: (702) 634-5000 – FAX: (702) 380-8572

EXHIBIT A

BRIAN SANDOVAL
Governor

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND
CONDOMINIUM HOTELS PROGRAM
CICOmbudsman@red.nv.gov www.red.nv.gov

C.J. MANTHE
Director

SHARATH CHANDRA
Administrator

CHARVEZ FOGER
Ombudsman

September 05, 2017

U.S. BANK, N.A.
C/O AKERMAN LLP
ATTN: REBEKKAH BODOFF
1160 TOWN CENTER DRIVE STE 330
LAS VEGAS, NV 89144

Alternative Dispute Resolution (ADR) Control #: **18-69**

Claimant(s): **U.S. BANK, N.A.**

Respondent(s): **COUNTRY GARDEN OWNERS' ASSOCIATION**

Dear U.S. BANK, N.A.:

Your claim was received by the Nevada Real Estate Division (Division) and must be served upon respondent(s) immediately upon receipt of this packet. Enclosed is:

- Your filing receipt;
- Instructions on how, and who, can serve the claim against all listed respondents;
- Affidavit of Service form *(copies are required to be submitted to the Division);*
- 1 packet, in its entirety, that is required to be served against all listed respondents:
  (If there are multiple listed respondents you will be responsible to make copies of these documents for each party),
  - Alternative Dispute Resolution Overview (Form # 523)
  - ADR Response Form (Form # 521)
  - A Processed copy of your ADR Form (Form #520)*
    - *This form is REQUIRED to be served.*

Please be advised, if the Affidavit of Service for each Respondent is not submitted to the Division, the claim will not process timely, which may result in delays in the claim moving forward. The completed form can be submitted via fax, email, mail or hand delivery.

It is strongly recommended that the overview of the ADR Program is read in its entirety. With the exception of this cover letter, filing receipt and Affidavit of Service form, **ALL** of the above documentation is required to be served to the respondent(s). Response is required within thirty (30) days of being served, so please contact our office if you do not hear back from the Respondent after 30 days from the date of service. Please contact the Division if you have any questions.

Sincerely,

Rhonda Galvin
ADMINISTRATIVE ASSISTANT III
Enclosures

Nevada Department of Business and Industry
Real Estate Division

Payment Receipt

Transaction Date : 09/01/2017 **Cashier :** RHONDA GALVIN
Receipt # : 448675
Receipt Identification : AKERMAN LLP

Money Tendered

Type	Amount	Reference	Payer Name	Payment Comment
Check	$50.00	26001006	AKERMAN LLP	CLAIM # 18-69 / U.S. BANK, N.A. AS TRUSTEE
Total :	$50.00			

Distribution

License	Use	Amount	Fee Desc	Business Name	Paid From	Paid To	BY
ADR.0000001	**MSC**	50.00	ADR CLAIM FEES - CLAIMANT FILING	ADR CLAIM FEES			RHONDA GALVIN

Close

BRIAN SANDOVAL
Governor

BRUCE H. BRESLOW
Director

SHARATH CHANDRA
Administrator

CHAVEZ FOGER
Ombudsman

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
CICOmbudsman@red.nv.gov www.red.nv.gov

SERVING THE CLAIM

This notice and the enclosed "Payment Receipt" are for your records.

The items listed below are to be served upon the Respondent(s) within 45 days from the date the claim has been processed into the Division's database pursuant to NAC 38.350 (1):

The following items are required to be served pursuant to NRS 38.320:

- An Affidavit of Service form - must be completed by the person who physically served the respondent, notarized, and **provided to the Division.**
- ADR Overview (#523)
- A Response form (#521)
- A Subsidy Application (#668)
- A copy of the claim you submitted to the Division

If there are multiple respondents: Each respondent must be separately served with a complete set of documents described above and a separate *Affidavit of Service* must be filed for each individual respondent.

Who may serve required documents? The sheriff of the county where the respondent resides or any citizen of the United States over eighteen (18) years of age other than the claimant or the respondent may provide service. A process server can also be used.

Pursuant to NAC 38.350(2)(a) – The Affidavit of Service MUST be submitted to the Division within 10 days of being served.

How service must be made:

- **Service on a Nevada Corporation:** Service shall be made upon the president or other corporate head, secretary, cashier, managing agent or resident agent. However, if this is not possible, then upon the Secretary of State in the manner described in Rule 4 of the Nevada Rules of Civil Procedure.

- **Service on a Non-Nevada Corporation:** Service shall be made upon the agent designated for service of process, in Nevada, or its managing agent, business agent, cashier, or secretary within this State. However, if this is not possible, then upon the Secretary of State in the manner described in Rule 4 of the Nevada Rules of Civil Procedure.

- **In all other cases (except service upon a person of unsound mind, or upon a city, town or county):** Service shall be made upon the respondent personally, or by leaving copies at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

- **If all of the above are not possible because of the absence from the state or inability to locate the respondent: An *Affidavit of Due Diligence* can be provided to the Division. If the Division determines adequate efforts were made to serve the respondent(s), the Division will provide a letter to the claimants acknowledging their unsuccessful efforts to participate in the ADR program.**

* ***"Service by Publication" is not a valid form of service for the ADR Program.***

AFFIDAVIT OF SERVICE

STATE OF NEVADA)
) SS:
COUNTY OF _____)

(Name of person completing service) _____, being first duly sworn, deposes and says: That at all times herein affiant was over 18 years of age, not a party to or interested in the proceeding in which this affidavit is made. That affiant received:

- ☐ Alternative Dispute Resolution Program Overview (6 pages # 523),
- ☐ Respondent Answer Form (2 pages #521),
- ☐ Mediation Subsidy Application (2 pages #668), and
- ☐ Copy of Claim #_____,
  Required – Located on the enclosed Claim Form (#520)

on the _____ day of _____, 20___, and served the same on the _____ day of _____, 20___, by delivering a copy to:

Provide the name and address claim was served to (*if applicable, a physical description, if no name was obtained*):

_____

_____

_____

_____

_____

_____
Signature of Person Completing Service

SUBSCRIBED and SWORN to before me,
a Notary Public on this _____day of
_____, 20 _____

_____
Notary Public Signature

SEAL

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY - REAL ESTATE DIVISION
OFFICE OF THE OMBUDSMAN FOR COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
3300 W. Sahara Ave., Suite 325, Las Vegas, Nevada 89102
(702) 486-4480 * Toll free: (877) 829-9907 * Fax: (702) 486-4520
E-mail: CICOmbudsman@red.nv.gov http://www.red.nv.gov

ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCESS OVERVIEW
Please read the entire overview before submitting Claim Form (#520) or Respondent Form (#521).

The ADR process is required under Nevada Revised Statutes (NRS) 38.300 to 38.360, before parties may file a civil action in court. The ADR process is available to all unit owners even if they have no intention of filing civil action in court. The regulations for NRS 38 are found in the Nevada Administrative Code (NAC) 38. Parties with a dispute involving the governing documents of their common-interest community must either participate in the Division's referee program or mediation prior to going to court. Aside from a $50 filing fee, the referee program is a free service offered by the Division to the extent funding is available. Parties to a referee proceeding must agree to participate.

If the referee program is not agreed to by both parties, the dispute will be mediated. If the dispute is not resolved by mediation, parties that initially participated in mediation may agree to have the issue arbitrated or they may proceed to civil court. Arbitration may be binding or non-binding. If the referee program is utilized, the referee will issue a decision. The referee's decision is enforceable if the decision is confirmed by a court.

Please be advised, pursuant to Nevada Administrative Code (NAC) 116.630, by filing an ADR claim, the Division will not move forward with investigating an intervention affidavit filed based on the same or similar issues.

MATTERS SUBJECT TO ADR

NRS 38.310 provides that the following matters must go through the ADR process:

- The interpretation, application or enforcement of any covenants, conditions or restrictions (CC&R's) or any other governing documents applicable to residential property; or
- The procedure used for increasing, decreasing or imposing additional assessments upon residential property.

Claims for injunctive relief where there is an immediate threat of irreparable harm and actions relating to the title of residential property are not required to participate in the ADR process and can proceed directly to court. ADR does not apply to civil disputes between owners, or between owners and their association that do not involve the governing documents or the process used to set the amount of the periodic assessments paid by unit's owners. For example, if an owner cuts down a neighbor's tree, the dispute does not involve the governing documents or assessment issues and is, therefore, not subject to ADR.

If a civil action is filed between a homeowner and an association concerning governing documents or an assessment dispute before the ADR process has been completed, the court may dismiss that case without taking any action. Any applicable statute of limitations that has not expired before filing an ADR claim is suspended until the conclusion of the ADR process.

compromise to the dispute. The mediator will not share that information with the opposing party. Any documents provided to the mediator are confidential and need not be provided to the Division. Supporting documentation should not be provided with the *Claim Form* (#520) or the *Respondent Form* (#521).

- If the parties agree to a resolution of the claim, a document detailing the resolution will be drafted by the mediator and signed by both parties before leaving the office. The settlement agreement is binding on the parties and can be enforced in court.

- If the parties do not agree to a resolution of the claim, either party may file a claim in the appropriate court stating that they have complied with the requirements of NRS 38.300, et seq. If the parties so desire, they may participate in arbitration or the referee program through the Division after an unsuccessful mediation.

MEDIATION SUBSIDY (NAC 116.520): Mediators may charge up to $167.00 per hour, up to $500.00 per claim. The Mediation may be subsidized up to $250.00 per party, not to exceed $500 per mediation. The parties must submit a *Subsidy Application for Mediation* (#668) at the time of filing a *Claim Form* (#520) or a *Response Form* (#521) with the Division. Unit owners may receive a subsidy once during each fiscal year of the State for each unit owned. An association may receive one subsidy each fiscal year against the same unit owner for each unit owned by that unit owner. Associations must be in good standing with the Secretary of State and the Office of the Ombudsman. The claimant requesting subsidy must file the claim for mediation within 1 year of discovery of the alleged violation. The State's fiscal year is from July 1 through June 30. If you have questions about your eligibility, please contact the ADR Facilitator.

- **Arbitration** – After participating in mediation or the referee program, the parties may elect to have the claim arbitrated. Arbitrator fees are limited to $300 per hour; however, there is no time limit or maximum allowable billing for arbitration. Both parties must agree to arbitrate. Arbitration may be binding or non-binding.

FEES DUE TO THE MEDIATOR / ARBITRATOR

- Mediators may charge up to $167 per hour, not to exceed $500 for three-hour mediation. The parties to the mediation may agree to extend the mediation at a cost of $200 for each hour. Mediators may require a deposit from both parties before proceedings begin. Each side pays half of the total amount. Mediators will refund, within 30 days, any amount that exceeds the allowable rate. Any outstanding amount due to the mediator must be paid within 10 days from the date of the mediation.

- Arbitrators may not bill more than $300 per hour; however, there is no maximum number of allowable hours. Arbitrators may require a deposit from both parties.

SUBMITTING A CLAIM FOR MEDIATION OR REFEREE PROGRAM

- **Fill out Claim Form (#520) completely.** This form is located on our website at **www.red.nv.gov**. The person making the claim is the "Claimant." If there is more than one Claimant, the additional Claimants must be listed on the *Additional Claimant Form* (#520A). The person or entity with whom you have a dispute is the "Respondent." If there are additional Respondents, list them on the *Additional*

If there are multiple respondents, each respondent must be separately served with the set of documents described above and a separate *Affidavit of Service* must be filed for each individual respondent.

Who may serve required documents? The sheriff of the county where the respondent resides or any citizen of the United States over eighteen (18) years of age other than the claimant or the respondent may provide service. A process server can also be used.

How service must be made:

- **Service on a Nevada Corporation:** Service shall be made upon the president or other corporate head, secretary, cashier, managing agent or resident agent. However, if this is not possible, then upon the Secretary of State in the manner described in Rule 4 of the Nevada Rules of Civil Procedure.

- **Service on a Non-Nevada Corporation:** Service shall be made upon the agent designated for service of process, in Nevada, or its managing agent, business agent, cashier, or secretary within this State. However, if this is not possible, then upon the Secretary of State in the manner described in Rule 4 of the Nevada Rules of Civil Procedure.

- **In all other cases (except service upon a person of unsound mind, or upon a city, town or county):** Service shall be made upon the respondent personally, or by leaving copies at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

- **If all of the above are not possible because of the absence from the state or inability to locate the respondent: An *Affidavit of Due Diligence* can be provided to the Division. If the Division determines adequate efforts were made to serve the respondent(s), the Division will provide a letter to the claimants acknowledging their unsuccessful efforts to participate in the ADR program.**

COMPLETION OF THE PROCESS

The Division will issue written notification certifying that the claim has been submitted to a referee, mediator, or arbitrator within 30 days after receiving a copy of:

(a) A statement from the mediator that the mediation was unsuccessful;
(b) The decision from the referee or;
(c) The decision from the arbitrator.

ENFORCEMENT OF MEDIATION AGREEMENT, REFEREE DECISION OR ARBITRATION AWARD

- **Referee Decision:** After receiving the decision of the Referee, the parties have 60 days to commence a civil action with the appropriate court. If neither party commences a civil action, the referee's decision can be confirmed by a court at the request of any party within 1 year of the decision. Confirmation of the decision makes it an order of the court and a judgment binding on the parties. A decision of the referee is non-binding on the parties until it is confirmed by a court.

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY - REAL ESTATE DIVISION
OFFICE OF THE OMBUDSMAN FOR COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
3300 W. Sahara Ave., Suite 325, Las Vegas, Nevada 89102
(702) 486-4480 * Toll free: (877) 829-9907 * Fax: (702) 486-4520
E-mail: CICOmbudsman@red.nv.gov http://www.red.nv.gov

ALTERNATIVE DISPUTE RESOLUTION (ADR)
RESPONDENT FORM

Please review the ADR Overview, Form #523, prior to completing this form.

NOTE: *Referee and arbitration decisions are public records and will be published on the Division's website. Parties that participated in a referee hearing or arbitration resulting in a decision can request, in writing, to the Division to have their identifying information (name, address, phone number) redacted from the decision that is published.*

Date: _____ _____
Signature of Respondent (or attorney)

Claim #: _____
Located on the bottom of the Claim Form

Respondent: _____
If individual, provide full name. If an Association, provide COMPLETE Association name as it appears on Secretary of State's website. (http://nvsos.gov/sosentitysearch/)

*** Please list only one party; attach Additional Claimant Form (#520B) if there is more than one Respondent**

If Respondent is represented by an attorney: _____
Please provide the name of the Law Firm and the name of the attorney

Contact Address: _____
Street City State Zip Code

Contact Phone: _____ **Fax:** _____ **E-Mail:** _____

PLEASE SELECT YOUR METHOD OF RESOLUTION:

☐ **MEDIATION**

☐ **REFEREE PROGRAM ***

*** Please Note - If Claimant has elected to participate in the Referee Program, you must also agree; otherwise the claim will be submitted to Mediation.**

_____ **I have read and agree to the policies stated in the ADR Overview (Form #523).**
(Initial)

_____ I mailed a copy of this Respondent Form and any supporting documents to the Claimant at the address on the Claim Form.

- ***Date packet was mailed:*** _____

_____ I **agree** to use the mediator/referee identified by the Claimant on page 3 of the Claim Form

- ***Mediator/ Referee listed on Claim form :*** _____

_____ I **disagree** with the mediator/referee identified by the Claimant on page 3, therefore I agree to have the Division assign the mediator/referee **at random**.

For office use only:

Receipt number: _____ Claim number: _____ Date received: _____

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS PROGRAM

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ALTERNATIVE DISPUTE RESOLUTION (ADR) SUBSIDY APPLICATION FOR MEDIATION

IMPORTANT: Subsidization of any Mediator fees is limited to actual Mediator fees only and may not exceed $250.00 per side not to exceed $500 per Mediation, **to the extent that funds are available.** Specific costs not subsidized include, but are not limited to, the $50 filing fee required to accompany any claim or response and any attorney fees incurred by the parties.

Date form is completed: _____ **Claim #:** _____
(Claimant: this number will be provided upon filing the claim with the Division)

This form is being completed on behalf of: ..... ☐ Claimant ☐ Respondent

Is the above indicated party: ..... ☐ Unit Owner ☐ Homeowners Association

Subsidy is based on to the unit address the claim is filed in reference to

For subsidy to be approved, for either party, the primary unit address involved in this claim is required:

Unit Owners Name: _____

Unit Address: _____
Street City State Zip Code

**If the Respondent is completing this form, please list the primary unit address involved in this claim*

Mailing address for the party applying for Subsidy:

Name: _____

If party is represented by an attorney: _____
Please provide the name of the Law Firm and the name of the attorney

Contact Address: _____
Street City State Zip Code

Contact Phone: _____ **Fax:** _____ **E-Mail:** _____

Claimant's acknowledgments:

_____ (Initial) Initial here confirming your claim was filed within one year of discovery. *

* *In order for subsidy to be approved, the claim form must be filed within 1 year from the date of discovery of the issues(s) listed on claim form.*

Claimant's & Respondent's acknowledgments:

_____ (Initial) If subsidy is denied, I acknowledge I will be responsible for the cost of the Mediation.

_____ (Initial) I acknowledge that the Subsidy Application will **ONLY** be accepted, and reviewed, prior to the claim being assigned to a Mediator/Referee.

☐ Yes ☐ No Have you received a subsidy during the State's current fiscal year? (The State's fiscal year is July 1 – June 30)

If yes, indicate: Claim #:_____Claimant Name: _____ Unit Address: _____

Association's acknowledgments:

☐ Yes ☐ No Is the association is "Good Standing" with both the Office of the Ombudsman and Secretary of the State?

_____ (Initial) If the Association is "Not in Good Standing" with either the Secretary of State and/or the Ombudsman Office, I acknowledge subsidy will be denied.

FOR OFFICIAL USE ONLY - MEDIATOR

Date claim assigned to mediator: _____ **Date form received by the Division** _____

Date of Mediation _____ **Date form completed and submitted to Ombudsman's office** _____

BRIAN SANDOVAL
Governor

BRUCE H. BRESLOW
Director

SHARATH CHANDRA
Administrator

CHARVEZ FOGER
Ombudsman

STATE OF NEVADA
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
COMMON-INTEREST COMMUNITIES AND CONDOMINIUM HOTELS
CICOmbudsman@red.nv.gov www.red.nv.gov

NOTIFICATION TO RESPONDENT

To whom it may concern:

Due to internal processes, the date a claim is input into our database is the actual filing date. This process is being used due to an increased amount of claims filed with this program.

Please use the "ENT'D" or "ENTERED" date stamp, located below the "RECEIVED" date stamp, to begin the 45 day the claim is to be served upon the respondent pursuant to Nevada Administrative Code (NAC) 38.350.1. Should you have any questions or concerns, please feel free to contact the Division and request to speak to the ADR Facilitator.

STATE OF NEVADA
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(702) 486-4480 * Toll free: (877) 829-9907 * Fax: (702) 486-4520
E-mail: CICOmbudsman@red.nv.gov http://www.red.nv.gov

ALTERNATIVE DISPUTE RESOLUTION (ADR) CLAIM FORM

Please review the ADR Overview, Form #523, prior to completing this form.

NOTE: Referee and arbitration decisions are public records and will be published on the Division's website. Parties that participated in a referee hearing or arbitration resulting in a decision can request, in writing, to the Division to have their identifying information (name, address, phone number) redacted from the decision that is published.

Date: 8/21/17 _____ Signature of Claimant (or attorney)

Claimant*: U.S. Bank, N.A., as Trustee
*If individual, provide full name. If an Association, provide COMPLETE Association name as it appears on Secretary of State's website. (http://nvsos.gov/sosentitysearch/)

***Please list only one party; attach Additional Claimant Form (#520A) if there is more than one Claimant.**

If Claimant is represented by an attorney: Rebekkah Bodoff, Akerman LLP
Please provide the name of the Law Firm and the name of the attorney

Contact Address: 1160 Town Center Drive, Suite 330, Las Vegas, Nevada 89144
Street City State Zip Code

Contact Phone: (702) 634-5000 **Fax:** (702) 380-8572 **E-Mail:** rebekkah.bodoff@akerman.com

Respondent*: Country Gardens Owners Association
*If individual, provide full name. If an Association, provide COMPLETE Association name as it appears on Secretary of State's website. (http://nvsos.gov/sosentitysearch/)

*** Please list only one party; attach Additional Claimant Form (#520B) if there is more than one Respondent**

Contact Address: C/O Jerry Marks, MP Association Management, 6029 South Fort Apache #130, Las Vegas, Nevada 89148
Street City State Zip Code

Contact Phone: _____ **Fax:** _____ **E-Mail:** _____

PLEASE SELECT YOUR METHOD OF RESOLUTION:

[✓] **MEDIATION**

[ ] **REFEREE PROGRAM***

*** Claims involving multiple parties may be excluded from the Referee Program.**

****If Referee Program is selected, Respondent must agree, otherwise this will be treated as a Mediation claim.**

(Initial) **I have read and agree to the policies stated in the ADR Overview (Form #523).**

(Initial if applicable) If the **Referee Program** is selected by both parties, the cost of the Referee will be fully subsidized by the Division as long as funds are available.

For office use only:
Receipt number: 4486751 Claim number: 18 - 69 Date received: RECEIVED AUG 31 2017

ENTERED SEP 01 2017

PROVIDE A BRIEF STATEMENT PERTAINING TO THE NATURE OF THE DISPUTE

- If this claim is being filed based on a referral from the Intervention process, please file your complaint as a new complaint. Do not refer to your original complaint, and all documents will need to be resubmitted.

- "SEE ATTACHMENT" IS NOT ACCEPTABLE. Your explanation must start on this page. You may attach additional pages, if more space is needed.

This dispute arises from an HOA super-priority lien foreclosure. In a related proceeding pending in the Clark County District Court, U.S. Bank is involved in litigation regarding whether the HOA's purported super-priority foreclosure extinguished its Deed of Trust. To the extent the Deed of Trust is held to be extinguished, U.S. Bank seeks monetary damages from the HOA based on its unjustified rejection of Bank of America's pre-foreclosure tender of an amount much greater than the super-priority amount of its lien.

The property at issue is 5316 Clover Blossom Court, North Las Vegas, Nevada 89031 (APN 124-31-220-092).

IDENTIFY THE SECTION OF GOVERNING DOCUMENTS PERTAINING TO DISPUTE:

The following provisions of Country Garden Owners Association's Covenants, Conditions, and Restrictions pertaining to this dispute include, but are not limited to, the following: (1) Section 1.16 Eligible Security Holder; (2) Section 1.22 Mortgage; (3) Section 1.23 Mortgagee; (4) Section 1.34 Security Interest; (5) Section 4.1 Creation of Lien; (6) Section 4.9 Effect of Non-Payment; (7) Section 4.10 Notice to LienHolders; (8) Section 4.11 Lien/Security Interest; (9) Section 4.12 Super Priority; (10) Section 4.13 Subordination of Lien; (11) Section 4.14 Estoppel Certificate; (12) Section 8.16 Security Interest Liens; (13) Section 9.1 Rights of Eligible Security Interest; and (14) Section 9.2 Notice of Eligible Security Interest.
With respect to the provisions outlined above governing "assessments," U.S. Bank maintains its position that the super-priority amount of the HOA's lien can be determined solely by reference to NRS 116.3116.

In order for the claim to be considered filed, the following must be submitted, if applicable.
Please indicate by initial that the following steps have been completed:

(Initial)

Forms:
One (1) Original Claim Form, # 520
Two (2) copies of the Claim Form and supporting documents
- *Supporting documents may be provided directly to the mediator or referee once assigned and need not be provided with this Claim Form. Should you chose to submit your documents; you must supply one (1) original set of two (2) copies.*

(Initial)

Filing Fee of $50.00 payable to "NRED" in the form of (*This fee is nonrefundable*):
- Money (exact change; Please do not mail cash)
- Money Order
- Check

(Initial)

I acknowledge that the Subsidy Application will ONLY be accepted, and reviewed, prior to the claim being assigned to a Mediator/Referee.

(Initial if applicable)

ADR Subsidy Application for Mediation (Form #668):
Subsidy is awarded based on:
* ***For a Unit Owner:***
  - *Once during each fiscal year of the State for each unit owned*
* ***For an Association***
  - *Once during each fiscal year of the State against the same unit owner for each unit owned*
  - *In "Good Standing" with Secretary of State & Office of the Ombudsman Office*

Should you be awarded subsidy, the Division will notify you via your opening letter.

(Initial if applicable)

I acknowledge that the Claimant will NOT be applying for Subsidy for this claim.

The following is a listing of the mediators and referees for the Alternative Dispute Resolution program. Before making your selection, resumes of the mediators and referees and their location availability can be viewed on the Division's website at http://red.nv.gov/Content/CIC/ADR/Panel/

- If the parties do not agree on the selection of mediator or referee, the Division will assign a mediator/referee at random.
- ***Please indicate the Mediator/Referee by initialing next to the party selected.***

SOUTHERN NEVADA

MEDIATOR LISTING

_____ Angela Dows, Esq.
_____ Barbara Fenster
_____ Cortney Young
_____ Christopher R. McCullough, Esq.
_____ Dee Newell, JD
_____ Donald E. Lowrey, J.D. LL.M.
_____ Hank Melton
_____ Ileana Drobkin
_____ Ira David, Esq.
__X__ Janet Trost, Esq
_____ Michael G. Chapman, Esq.
_____ Paul H. Lamboley, Esq.

REFEREE LISTING

_____ Angela Dows, Esq.
_____ Christopher R. McCullough, Esq.
_____ Donald E. Lowrey, J.D. LL.M.
_____ Ira David, Esq.
_____ Janet Trost, Esq
_____ Kurt Bonds, Esq.
_____ Paul H. Lamboley, Esq.

NORTHERN NEVADA

MEDIATOR LISTING

_____ Angela Dows, Esq.
_____ Cortney Young
_____ Michael G. Chapman, Esq.
_____ ~~Michael Matuska, Esq~~ 16 !
_____ Paul H. Lamboley, Esq.

REFEREE LISTING

_____ Angela Dows, Esq.
_____ Kurt Bonds, Esq.
_____ Michael Matuska, Esq.
_____ Paul H. Lamboley, Esq.

Once the claim has been received and processed by the Division, an opening packet will be mailed out to the address provided on page 1 of this form. This packet will include instructions on the next step in this process.

Submit the required forms and documents to:

Nevada Real Estate Division
ADR Facilitator
2501 E Sahara Ave., Ste. 205
Las Vegas, NV 89104-4137

EXHIBIT B

0w84t DETAIL LISTING FROM FIRST TO LAST STEP TODAY'S DATE: Aug. 25, 1995
TIME :11:28 am
LEG. DAY IS: 116
PAGE : 1 OF 1

N E L I S

1995

AB 152 By Schneider COMMON-INTEREST OWNER

Requires arbitration or mediation of certain claims relating to residential property. (BDR 3-1442)

Fiscal Note: Effect on Local Government: No. Effect on the State or on Industrial Insurance: Yes.

02/01	13	Read first time. Referred to Committee on Judiciary. To printer.
02/02	14	From printer. To committee.
02/02	14	Dates discussed in committee: 2/14, 3/1, 5/24 (A&DP)
06/08	93	From committee: Amend, and do pass as amended.
06/08	93	(Amendment number 659.)
06/08	93	Placed on Second Reading File.
06/08	93	Read second time. Amended. To printer.
06/09	94	From printer. To engrossment.
06/09	94	Engrossed. First reprint.
06/09	94	Placed on General File.
06/09	94	Read third time.
06/09	94	Taken from General File. Placed on Chief Clerk's desk.
06/10	95	Taken from Chief Clerk's desk. Re-referred to Committee on Ways and Means. To committee.
06/10	95	Dates discussed in committee: 6/12 (DP).
06/12	96	From committee: Do pass, as amended.
06/13	97	Read third time. Passed, as amended. Title approved, as amended. (42 Yeas, 0 Nays, 0 Absent, 0 Excused, 0 Not Voting.) To Senate.
06/14	98	In Senate.
06/14	98	Read first time. Referred to Committee on Judiciary. To committee.
06/14	98	Dates discussed in committee: 6/16 (A&DP)
06/23	106	From committee: Amend, and do pass as amended.
06/23	106	(Amendment number 1197.)
06/24	107	Read second time. Amended. To printer.
06/25	108	From printer. To re-engrossment.
06/25	108	Re-engrossed. Second reprint. Placed on General File.
06/25	108	Read third time. Passed, as amended. Title approved, as amended. (20 Yeas, 0 Nays, 0 Absent, 1 Excused, 0 Not Voting.) To Assembly.
06/25	108	In Assembly.
06/27	110	Senate amendment concurred in. To enrollment.
06/28	111	Enrolled and delivered to Governor.
06/30	113	Approved by the Governor.
07/01	114	Chapter 448. Sections 1 to 8, inclusive, of this act effective January 1, 1996. Section 9 of this act effective 12:01 a.m. January 1, 1996. (Effective date revised by S.B. 390.)

(* = instrument from prior session)

SER00034

A.B. 152 (Chapter 448)

Assembly Bill 152 requires that any civil action based on a claim relating to the bylaws, rules, or procedures for changing assessments in a common-interest community must be submitted to mediation or arbitration before the action is filed with a court. The procedure for submitting a claim to arbitration or mediation is established by this measure.

If the parties do not agree to mediation, the claim must be submitted to an arbitrator, and the parties may choose binding or nonbinding arbitration conducted pursuant to the procedures in existing law. Following the conclusion of the arbitration, if a party files the action in court and fails to obtain a more favorable judgment, the party must pay all costs and reasonable attorney's fees incurred by the opposing party after the action was filed.

The measure requires the Real Estate Division of the Department of Business and Industry to maintain a list of qualified mediators and arbitrators and provide to the parties, upon request, the fees charged by these individuals.

Finally, A.B. 152 authorizes a declarant to furnish a bond in lieu of placing certain deposits made in connection with the purchase or reservation of a unit under the Uniform Common-Interest Ownership Act.

This measure is effective on January 1, 1996.

ASSEMBLY BILL No. 152—ASSEMBLYMEN SCHNEIDER, CARPENTER, BUCKLEY, STEEL, SANDOVAL, BENNETT, MONAGHAN, OHRENSCHALL, SEGERBLOM, SPITLER, HUMKE, GIUNCHIGLIANI, STROTH, DE BRAGA, ERNAUT, ANDERSON, DINI, MANENDO, HETTRICK, GOLDWATER, HARRINGTON, FREEMAN, BATTEN, PERKINS AND BACHE

FEBRUARY 1, 1995

Referred to Committee on Judiciary

SUMMARY—Requires arbitration of certain claims relating to residential property. (BDR 3-1442)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State or on Industrial Insurance: Yes.

EXPLANATION—Matter in italics is new; matter in brackets [ ] is material to be omitted.

AN ACT relating to arbitration; requiring the arbitration of certain claims relating to residential property; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 10, inclusive, of this act.

Sec. 2. As used in sections 2 to 10, inclusive, of this act, unless the context otherwise requires:

1. "Civil action" does not include an action in equity for injunctive relief.

2. "Division" means the real estate division of the department of business and industry.

3. "Residential property" includes, but is not limited to, real estate within a planned community subject to the provisions of chapter 116 of NRS. The term does not include commercial property if no portion thereof contains property which is used for residential purposes.

Sec. 3. 1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property; or

(b) An increase or imposition of additional assessments upon residential property,

may be commenced in a district court unless the action has been submitted to arbitration pursuant to the provisions of sections 2 to 10, inclusive, of this act.

2. A district court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Sec. 4. 1. A person may submit a claim described in section 3 of this act for arbitration by filing a petition with the division. The petition must be executed by the person submitting the petition and must include:

(a) The complete names, addresses and telephone numbers of all parties to the claim;

(b) A specific statement of the nature of the claim;

(c) A statement of whether the person wishes to have the claim submitted to a mediator and whether he agrees to binding arbitration; and

(d) Such other information as the division may require.

2. The petition must be accompanied by a fee of $300.

3. Upon the filing of the petition, the petitioner shall serve a copy of the petition in the manner prescribed in Rule 4 of the Nevada Rules of Civil Procedure for the service of a summons and complaint. The copy so served must include:

(a) A statement explaining the procedures for arbitration set forth in sections 2 to 10, inclusive, of this act; and

(b) A document which allows the person upon whom the copy is served to indicate whether mediation is requested and whether he agrees to binding arbitration.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the petition was served may, within 30 days after the date of service, file a written answer with the division. The answer must include a completed document specified in paragraph (b) of subsection 3, and must include a fee of $300.

Sec. 5. 1. If all parties named in a petition filed pursuant to section 4 of this act request mediation, the division shall appoint a mediator. The mediator must be appointed from a panel of mediators maintained by a neighborhood justice center or a similar panel of mediators used to provide mediators for a district court, if such a center or panel is available. Upon appointment, the mediator shall set a time and place for mediation of the claim. If as a result of the mediation the parties reach an agreement, the mediator shall file a written memorandum thereof, executed by all parties, with the division.

2. If all parties do not request mediation, or if an answer to the petition is not filed within the period specified, the division shall select the names of five arbitrators from a list maintained for that purpose by the division and notify each party of the names selected. To facilitate the selection of an arbitrator by each party, the division shall include in the notice a brief statement of the background and qualifications of each arbitrator selected. Upon receipt of the list of selected arbitrators, each party may strike the names of not more than two persons on the list. The list must be returned to the division within the period specified by the division. Upon receipt of each list from the parties, the division shall select an arbitrator from the remaining names.

3. The division shall establish and maintain a panel of arbitrators which consists of the following persons:

(a) One or more persons with experience in the management of an association.

(b) One or more attorneys licensed to practice law in this state with experience in the laws applicable to an association.

(c) One or more certified public accountants with experience in the management or financing of an association.

(d) One or more persons who are developers or representatives of developers and who have experience in the operation or development of an association.

(e) One or more persons who are or were members of an association or the governing body of an association.

4. As used in this section, "association" has the meaning ascribed to it in NRS 116.110315.

Sec. 6. 1. Upon selecting an arbitrator pursuant to section 5 of this act, the division shall forward the petition and answer to the arbitrator. The arbitrator shall, within 20 days after the receipt of the petition and answer, schedule a prearbitration conference and notify each party of the date and time thereof.

2. At the conference, the arbitrator shall:

(a) Establish procedures to be followed by the parties during the course of arbitration, including, but not limited to, rules relating to the admission of evidence, discovery, dates for the completion of inspections, investigations and hearings and periods during which any alleged defect may be cured; and

(b) Discuss mediation as an alternative to arbitration.

Sec. 7. 1. If, after participating in a prearbitration conference conducted pursuant to section 6 of this act, the parties request mediation, the arbitrator shall refer the matter to the division for the appointment of a mediator pursuant to subsection 1 of section 5 of this act.

2. If the parties do not request mediation or if mediation is unsuccessful, the arbitrator shall, after conducting the prearbitration conference, set a time and place for a hearing and cause notification to the parties to be served personally or by registered or certified mail. The notice must be served not less than 5 days before the hearing. The arbitrator may adjourn the hearing from time to time as necessary and may, upon request of a party and for good cause shown, postpone or continue the hearing to a time determined by the arbitrator. The arbitrator may hear evidence and make a final determination based upon the evidence produced notwithstanding the failure of a party to appear after proper notification of the hearing. A district court may on application of a party direct the arbitrator to proceed promptly with the hearing and determination of the matter.

3. The parties are entitled to be heard, to present evidence material to the matter and to cross-examine witnesses appearing at the hearing.

4. Either party may, upon payment of the appropriate fees, request the presence of a court reporter to record the hearing.

Sec. 8. 1. An arbitrator may:

(a) Issue subpenas for the attendance of witnesses and for the production of books, records, documents and other evidence; and

(b) Administer oaths.

A subpena issued pursuant to this section must be served and, upon application to the court by a party or the arbitrator, enforced in the manner provided by law for the service and enforcement of subpenas in a civil action.

SER00038

2. On application of a party and for use as evidence, the arbitrator may authorize a deposition to be taken, in the manner and upon the terms designated by the arbitrator, of a witness who cannot be subpenaed or is unable to attend the hearing.

3. All provisions of law compelling a person under subpena to testify are applicable.

4. Fees and mileage for attendance as a witness must be the same as for a witness in civil actions in the district court.

Sec. 9. 1. The arbitrator shall, within 10 days after conducting the hearing, prepare a final written decision. The decision must include findings of fact and, if appropriate, conclusions of law. The decision must be provided by certified mail to each party and to the division.

2. Upon receipt of a final decision pursuant to subsection 1, a party may, within 30 days, appeal the decision to the district court in whose district the decision was made.

3. In conducting an appeal pursuant to this section, the district court shall confine its review to the record submitted on appeal and shall not substitute its judgment for that of the arbitrator as to the weight of evidence on a question of fact.

4. The court may remand or affirm the final decision or set it aside in whole or in part if the substantial rights of either party have been prejudiced because the final decision of the arbitrator is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the arbitrator;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

5. If no appeal is made pursuant to this section within the prescribed period, the decision of the arbitrator becomes final. Upon application therefor by a party, the district court shall enter a judgment or decree in conformity with the decision of the arbitrator. The judgment or decree may be enforced as any other judgment or decree.

Sec. 10. 1. The division shall administer the provisions of sections 2 to 10, inclusive, of this act and may adopt such regulations as are necessary to carry out those provisions.

2. Except as otherwise provided in subsection 3, all fees collected by the division pursuant to the provisions of sections 2 to 10, inclusive, of this act must be accounted for separately and may only be used by the division to administer the provisions of sections 2 to 10, inclusive, of this act.

3. The division shall:

(a) Upon the conclusion of arbitration and the filing of a decision by an arbitrator appointed pursuant to the provisions of sections 2 to 10, inclusive, of this act, pay to the arbitrator the sum of $500.

(b) Pay to any neighborhood justice center or panel of mediators which is used by the division to appoint a mediator pursuant to section 5 of this act the sum of $3.

Sec. 11. NRS 38.250 is hereby amended to read as follows:

38.250 1. [All] *Except as otherwise provided in section 3 of this act, all* civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $25,000 must be submitted to nonbinding arbitration in accordance with the provisions of NRS 38.253, 38.255 and 38.258.

2. A civil action for damages filed in justice's court may be submitted to arbitration if the parties agree, orally or in writing, to the submission.

[illegible] 10 1995

BDR [illegible]
A.B. [illegible]
S.B.

EXECUTIVE AGENCY
FISCAL NOTE

Date Prepared 2/8/95

STATE AGENCY'S ESTIMATES

Agency Submitting Real Estate

Items of Revenue or Expense or both	Fiscal Year 1994-95	Fiscal Year 1995-96	Fiscal Year 1996-97	Continuing (Y/N)
Revenue		$210,000	$2[illegible]0,000	
$ Administrative - [illegible]		<150,230>	<150,230>	Y
$ Personnel & Costs		<[illegible].01>	<40,591.81>	Y
$ Travel		<600.00>	<600.00>	Y
$ Space (200)		<1,311.68>	<1,311.[illegible]>	Y
$ Operating		<1,000.00>	<1,000.00>	Y
$ Office Set-Up		<11,803.35>	-----	N
Total [illegible]		$ 4,173.86	$14,064.61	

Explanation (Use Additional Sheets of Attachments, if required)
Personnel & Costs: Grade 35, Step 1, Program Officer IV
Travel: Town mileage and 3 north/south trips
Space: 200 square feet at .63 per, Las Vegas State owned
Operating: Telephone line, long distance, paper supplies, postage, etc.
Office Set-Up: See attached listing
Revenue: Fee offset would be either $100 or $600 or [illegible] of $600 per arbitration referral. Volume of transactions unknown. 470 non-profit associations registered with Secretary of State.

Signature [signature] [illegible] Buchanan
Title Administrator

Date 2-10-95

DEPARTMENT OF ADMINISTRATION'S COMMENTS

Estimates appear to be reasonable.

Signature [signature]
Title [illegible]

Date

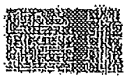
FISCAL EFFECT ON LOCAL GOVERNMENT
(LCB - Fiscal Division Use Only)

Signature
Title Deputy Fiscal Analyst

FN-1 (Revised 11/30/94)

SER00041

A.B. 152
Page 2



Fees Revenue:	$600 x 350*	$210,000
General Fund offset:	$100 x 300 referrals:	$30,000
	$595 x 50 referrals:	29,750
	Total:	59,750
Expenses:	Arbitrator $500 x 300 referrals:	$150,000
	Neighborhood Jus. $8 x 50	250
	Total:	$150,250

SER00042

A.B. 152
PAGE 3

STATE OF NEVADA
CAPITOL COMPLEX
DEPARTMENT OF BUSINESS AND INDUSTRY
REAL ESTATE DIVISION
[illegible]
CARSON CITY, NEVADA [illegible]
[illegible]

BOB MILLER
Governor

[illegible]
Director

JOAN G. BUCHANAN
Administrator

MEMORANDUM

DATE: February 6, 1995

TO: Joan Buchanan, Administrator
Patrick Cameron, Accountant

FROM: Bob Keller, Information Systems Specialist

SUBJECT: AB 152 EQUIPMENT FISCAL NOTE

I) Computer equipment:
1) IBM VALUE POINT MODEL 1[illegible]
A) 8M D/M [illegible] 1[illegible] MB [illegible]MHZ [illegible] PROCESSOR
OVER DRIVE READY [illegible] ADAPTER WINDOWS 3.1[illegible]
1,819.00

2) IBM COLOR DISPLAY XGA, VESA 1024X768	615.00	
3) IBM 5.25 DISKETTE DRIVE [illegible] 1970	75.00	
4) MODEM 14.4/14.4KPS DATA/FAX	109.00	
5) IBM 3270 EMULATION BOARD	417.00	
	3,030.00	
AC @ .05	151.50	
		3,[illegible].50

II) Software

1) WORDPERFECT FOR WINDOWS 6.1	398.00	
2) PC ANYWHERE V2.0 FOR WINDOWS	110.95	
3) MS OFFICE PRO WITH ACCESS FOR WINDOWS	494.50	
4) NORTON ANTI VIRUS	102.00	
5) IBM 3270 EMULATION SOFTWARE	[illegible]	
	1,144.75	
AC @ .05	57.24	
		1,201.99

[illegible]

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MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
February 14, 1995

The Committee on Judiciary was called to order at 1:06 p.m., on Tuesday, February 14, 1995, Chairman Sandoval presiding in Room 4401 of the Grant Sawyer State Building, Nevada Legislature, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. Thomas Batten
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Mrs. Dianne Steel
Ms. Jeannine Stroth

COMMITTEE MEMBERS ABSENT:

Mr. David E. Humke, Chairman (excused)

GUEST LEGISLATORS PRESENT:

Assemblyman Douglas Bache

STAFF MEMBERS PRESENT:

Dennis Nellander, Research Analyst
Patty Hicks, Committee Secretary
Barbara Moss, Committee Secretary

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SER00044

OTHERS PRESENT:

Judy Jacoboni, Victim Advocate, Mothers Against Drunk Driving
Laurel Stadler, Legislative Liasion, Mothers Against Drunk Driving
Mark Smith, Las Vegas Chamber of Commerce
Vicki Brennan, private citizen
James Mastrino, private citizen
Judi Root, private citizen
Jean Georges, private citizen and mediator
Michael Mack, private citizen
Allen Duke, private citizen
Jim Banner, private citizen and former legislator
Andy Malins, Vice-President, Community Association Institute
John Leach, President, Community Association Institute
Elaissa Lavelle, Legislative Action Chair, Community Association Institute
John Delmazzo, private citizen
Kate Davis, private citizen
Ken Way, private citizen

ASSEMBLY CONCURRENT RESOLUTION 2 - Urges peace officers to identify and arrest, and courts to impose prompt, meaningful and consistent sanctions upon juveniles who violate laws related to alcohol and drugs.

Judy Jacoboni, Lyon County Chapter President, Mothers Against Drunk Driving (MADD) spoke in support of Assembly Concurrent Resolution (A.C.R.) 2. Ms. Jacoboni stated A.C.R. 2 goes hand in hand with the other bills currently before the legislature this session regarding the laws affecting juveniles drinking. MADD feels currently law enforcement officers will not expend the time and energy to pursue arrests for juvenile consumption since they know virtually nothing will be done to that juvenile. A.C.R. 2 urges police officers to pursue arrests of juvenile alcohol offenders. A.C.R. 2 urges follow-through from the police officer's arrest, to the prosecutors, through the judge's conviction. She believes passage of A.C.R. 2 will send a message to law enforcement and courts that crimes involving minors

possessing, purchasing, or consuming alcohol or drugs will not be tolerated. Ms. Jacoboni's prepared testimony is attached hereto as (Exhibit C).

Laurel Stadler, Legislative Liaison, Mothers Against Drunk Driving, echoed Ms. Jacoboni's comments and added that someone needs to take a leadership role in the issue surrounding juvenile alcohol offenders. The legislators have been called upon to become that leadership role. Both Ms. Jacoboni and Ms. Stadler referred the committee to previous testimony made before the committee in recent weeks regarding the treatment programs, mandatory license revocation, and possession arrests. Ms. Stadler feels addressing youth alcohol offenders early on will hopefully eliminate the problem of alcohol in the lives of those youth as they become adults.

The committee adjourned for a break at 1:16 p.m. and reconvened at 1:55 p.m.

ASSEMBLY BILL 152 - Requires arbitration of certain claims relating to residential property.

Chairman Sandoval acknowledged the large number of persons wishing to testify and informed everyone that the meeting would adjourn at 3:15 p.m. He hoped to accommodate as many people as possible within the time frame available to them. He asked all those wishing to testify to form a line and limit their testimony to three minutes each.

Mr. Schneider, the prime sponsor of A.B. 152, stated it is a form of dispute resolution which developed as a result of his working closely with property management associations. Over the past year he has been privy to problems arising in the associations developed for the homeowners, by the homeowners. The associations have developed their own "constitutions" which are referred to as covenants, conditions, and restrictions (CC&R's). Although these associations have flourished and existed with encouragement, there are personality problems and management problems between the board and the residents. As a result, many lawsuits are being filed which could be resolved in some sort of dispute resolution such as arbitration. Dispute resolution may bring about results in 30 to 45 days rather than the years it takes a lawsuit to proceed through District Court.

Mr. Schneider stated there are some amendments already prepared on A.B. 152 which are contained in the folders of each committee member. Mr. Schneider also stated that 80% of the people in Clark County now live under some form of association and all the new housing projects in Clark County will be under an

association.

Mr. Anderson asked if these "associations" wished to no longer be an association, how would they dissolve the association? Mr. Schneider stated property, street management, or whatever else was affected, would probably fall back to the city or county. Mr. Anderson clarified that should an association wish to dissolve their association, the landscaping and street maintenance that is currently taken care of by the association would then fall to the city or county which would result in an overall tax burden. Mr. Schneider agreed.

Chairman Sandoval acknowledged the presence of Kathy Letterman, Sue Miller, Deanna Royder, Hans Hansen, and Joy Bolice, employees from the Las Vegas Chamber of Commerce. He also acknowledged the presence of John Gibbons, State of Nevada Real Estate Division, and Larry Struve, Nevada Department of Business and Industry, in Carson City. Chairman Sandoval again stressed the importance of the witnesses wishing to testify to keep their testimony brief and if there was a group of individuals perhaps they could identify one spokesperson to speak on their behalf.

Mark Smith, a private citizen living at 3163 Predara Avenue, Las Vegas, candidly stated he was unable to interpret much of the language in A.B. 152; however, he supports the bill in that he has had much personal experience in associations stemming back some ten years ago. In fact, he was once sued by a "dictatorial" board. The lawsuit was erroneous and in fact, that lawsuit precipitated him running as President for the Association and he was in that position for several years. These lawsuits would cost the association a lot of money. He feels that there should be a mechanism in place to avoid the lawsuits and keep the issues out of court allowing settlement on a more reasonable basis and therefore supports passage of A.B. 152.

Vicki Jean Brennan stated her understanding of the by-laws states there is an annual meeting every year however in her unit homeowners cannot go to those board meetings unless specifically invited. She further stated there was a parking problem in the covered parking areas. If someone is in your covered parking area, you are not allowed to call to have them towed away. Lastly, Ms. Brennan expressed her dismay that her complex did not have a children's playground. Chairman Sandoval asked if Ms. Brennan was testifying in support of A.B. 152 and Ms. Brennan stated she was in support of the bill.

James Mastrino testified he lives in west Las Vegas, across from Spanish Trails. Mr. Mastrino explained his experience of being attacked on the common ground of his complex near the swimming pool. He went on to state the board of his association is doing nothing about it and he feels he has no equal rights and the CC&R's are not being fulfilled.

Judi Root, private citizen and resident at Quail Estates, Las Vegas, stated she presently has a lawsuit against her board, not against the association but against the board because of the acts they carried out. She feels she has had her first amendment rights taken away because the board does not allow freedom of speech at the board meetings. Ms. Root also addressed the fact that whenever there is a problem everyone tells you to "read your CC&R's". She understands such things as maintaining your property in a good manner comes under the CC&R's, by-laws, and/or rules and regulations. However, the problem is the rules are written by the developer who does not even live on the premises. Yet, the only way to change the rules or bylaws is to rewrite them and a 75% passage is required. Ms. Root expressed her dismay in the association, board members, and the residents, because they are all acting like kindergartners rather than adults. The management company and their secretary are paid by the residents yet they will not act in any fashion without first checking with the board. She feels the passage of this bill is extremely important. Ms. Root thanked Mark Sawyer and Channel 13 for announcing today's meeting.

Jean Georges, a private citizen residing at 701 Rancho Circle, Las Vegas, testified that he was a member of the Community Association Institute Legislative Action Committee; however, today he was testifying as a homeowner and as a private mediator. He feels the passage of A.B. 162 is extremely important because it represents choices and options for both homeowners and boards for a faster, less expensive, time consuming, traumatic resolution. He hears horror stories every day as a private mediator. In most cases, none of the participants wish to take the case to court. He felt the bill provides a two-fold purpose. First, it provides an alternative for boards and homeowners to resolve their dispute; and secondly, by directing the disputes to mediation or arbitration, the communities become aware that these dispute resolutions are available.

Mr. Georges also expressed his concern with the way mediators would be paid and felt the method of payment should be consistent with how arbitrators are paid. He also feels that if arbitration is binding it should remain so and all the outs for appealing to the courts should not apply.

Mr. Schneider asked if Mr. Georges would enlighten the committee on what happens when there is a lawsuit pending before an association.

Mr. Georges stated, of course, any litigation is stressful. Further, the entire area is turned into a battleground involving the children as well as the adults. It eliminates any sense of peace and quiet that property owners have. A dispute over the building of a fence erupts into secondary disputes and both sides become angry. Mr. Schneider also commented that during litigation in an association, virtually all property sales come to a halt. You cannot sell your property because no title company will insure property with title insurance with a full blown lawsuit underway. It also affects the property value.

Michael Mack, 4800 Merlin Parkway, Las Vegas, a private citizen, testified he was in favor of A.B. 152; however, although he feels the bill will do a lot of good, it does not go quite far enough. He further stated that most of the condominium associations in Las Vegas are operating under CC&R's from 20 years ago and the law being applied in Nevada is federal law since the state law lacks details. Mr. Mack stated he owns three condominiums in three different states: Nevada, Hawaii, and Utah. He believes Hawaii's state law is very clear and effective as relates to associations in that Hawaii's legislature meets every year to redefine association laws. Mr. Mack provided a copy of one-fifth of the laws that the State of Hawaii has adopted, most particularly involving condominium management which is attached hereto as (Exhibit D)." Mr. Mack would like to see Nevada pattern their laws regarding condominium associations to that of the State of Hawaii. Mr. Mack went on to provide the committee with examples of how effective Hawaii laws were in relation to specific problems such as liens, funding of the reserve account, and obtaining copies of minutes. He also stated the State of Florida, since they have so many condominiums, has some good laws on the books that perhaps Nevada could pattern their laws from.

Allen Duke, Paradise Spa, brand new condominium resident in Las Vegas, testified that when he moved into his condominium he learned the bylaws had been amended six times since 1986. Although he realized he had to pay $75 per month for association fees he was not aware of a 10% increase in those fees and yet another 10% increase and a $17 assessment. He stated these assessments go back to 1986 and he should not have to pay for them since he did not reside in the condominium at that time. Mr. Duke is a disabled veteran of World War II and this is his first real estate purchase.

*** File in Research Library

Ms. Ohrenschall addressed Mr. Mack's previous testimony and asked him why Spanish Oaks had no reserve funding. Mr. Mack stated it was because of very poor management and the managers absconded with many funds.

Chairman Sandoval closed the testimony on A.B. 152 and opened testimony on a companion bill, Assembly Bill 74, sponsored by Assemblyman Bache.

ASSEMBLY BILL 74 - Revises provisions governing use of units in common-interest community.

Douglas Bache, District 11 Assemblyman, Las Vegas stated A.B. 74 had been previously heard in Carson City and then introduced Jim Banner.

Jim Banner, private citizen residing at 2533 Lotis Hill Drive, Las Vegas, and former legislator, spoke in favor of A.B. 74 and further stated he believes the CC&R's in Las Vegas are scattered all over the town with different descriptions for each--nobody knows what is going on and who to talk to when a problem arises. Mr. Banner stated he had read the CC&R's and had them reviewed by other people with more knowledge of CC&R's than himself, and at that point he was happy with the contents of the CC&R's. Mr. Banner further stated that soon after moving into his new residence a tenant filed suit against him and in his opinion this suit was filed to personally annoy and harass him. Mr. Banner stated that due to this annoyance and harassment he was hospitalized with heart problems, and the association's ruling was made as if nothing had happened, but Mr. Banner stated again that he was hospitalized with heart problems due to the annoyance and harassment made by this suit. Mr. Banner still feels changes need to occur in the laws because if someone wants to file a lawsuit they can do so but the moving party is the name of the association rather than the individual so you don't really know who is suing you.

Mr. Banner stated he would like to see some amendments in A.B. 74 which would include no retroactivity or no ex post facto, whatever language is preferred by the LCB. Mr. Banner further stated he would like to be invited to be on any subcommittees relating to A.B. 74 or Mr. Schneider's bill, A.B. 152 as long as there were no conflicts between the two bills. Chairman Sandoval stated there would be subcommittees formed in relation to A.B. 74 and A.B. 152 and thanked Mr. Banner for his testimony.

Andy Malline, Vice President of the Southern Nevada Chapter of Community

Association Institute of Southern Nevada, spoke in opposition to A.B. 74 stressing that it would be disastrous to gridlock the process of amending bylaws. Ms. Buckley stated her understanding of A.B. 74 affects youth, occupancy, and alienation only. The testimony the committee heard on Mr. Banner's case had to do with him using a saw mill in his garage after he had moved in. Mr. Maline, referring to Mr. Banner's situation, stated he believes occasional use of your garage to build a bookcase would be okay but if it is constant, you have to consider the neighbors, the noise level, and whether it is for gain, employment or business. Mr. Maline thinks the democratic process should prevail and he does not see how A.B. 74 would work at all.

Mr. Anderson asked if Mr. Maline had reviewed the laws from Hawaii that were presented to this committee. Mr. Maline stated he had read those laws and has worked for the past year on the committee that designed A.B. 152. He felt the committee needed to look at NRS 116 which has adopted and applied the Uniform Common Interest Ownership Act. This act develops uniformity across the states and the associations can apply the uniform act or choose not to. He discussed the quorum requirements of the uniform act and the proposed legislation.

John Leach, Attorney at Law and President of the Community Association Institute of Southern Nevada, stated he was going to testify in favor of A.B. 152 but after listening to Mr. Maline's concerns he changed his mind and stated he was very much opposed to this legislation. Mr. Leach's concerns were that of section 1, "subject to provisions of the declaration" and the requirement for somewhere 100% of the vote for CC&R's. Mr. Leach also stated that subsection 3 discusses bylaws. He informed the committee that a bylaw is a document that discusses procedures within the association, not restrictions on youths, occupancy, or alienation. These items would be governed by the declaration not the bylaws. The bylaws make up the annual meetings, special meetings, elections, definitions, etc. He reminded the committee that the developers make these documents before any homeowners are residing there and within time the homeowners need to amend them so they have the ability to adapt and adjust within those prepared documents. By imposing a 100% agreement by the homeowners you create enormous difficulties. He stated that 75% agreement is currently too high and unrealistic. Mr. Anderson stated the common interest statutes in this state have only been on the books since 1991 and were amended in 1992 and wondered if Mr. Leach provided testimony at that time. Mr. Leach stated that a law partner of his, Michael Buckley, participated in those discussions but he personally was not involved at that time. Mr. Anderson asked if he was familiar with the Hawaii

legislation discussed earlier. Mr. Leach stated he was familiar with some portions of it because they do try to keep informed of what other jurisdictions are doing to learn from their experiences. Mr. Anderson asked Mr. Leach if he felt there were major problems in existence regarding the current system for addressing common interest ownership problems. Mr. Leach stated that under the current laws, NRS Chapter 116, he did not consider there to be major problems. He does not feel that, like Mr. Mack, we need to change everything to the way Hawaii has their laws set up. Mr. Anderson asked how the legislature could change the apparent "dictatorial power" that currently exists in the associations. Mr. Leach did not feel there was a way, through the legislature, to change one person's power or control. He stated there are over 600 homeowner associations in the valley and many are run by honorable upstanding people but there is no way to legislate the dictatorial individual. In addition, there are procedures within each associations' declarations to remove board members. There is a mechanism in place for this if necessary. Perhaps the homeowners are not exercising their rights under the CC&R's to accomplish this.

Mr. Perkins stated he understood that having an unanimous vote is restrictive if not prohibitive in the amendment process but he was troubled with someone coming before the committee to oppose a bill and not offering them an alternative. He asked Mr. Leach what alternative he may have to protect the rights of the individual who buys a home based on existing CC&R's, spends money to create a workshop in his garage because it is allowed, and then is later threatened by homeowners that he will no longer be able to keep his workshop. Mr. Leach discussed the grandfathering-in clause that is usually used in enacting amendments and in fact he counsels his clients that they cannot pass one rule and then later on take it back. Before you could change the way someone uses their garage the way he was originally allowed to use it, the association's members have to adopt and amend the CC&R's by 75% to 90%. This is very difficult to do. He conveyed to the committee that amendments, because of the high percentage of quorum required, do not pass regularly.

Eleissa Lavelle, Attorney at Law, Crockett & Myers, Las Vegas, stated she has been an attorney for 18 years and currently the majority of her law practice is representation of homeowners associations, individual homeowners, and developers. She is also chairman of the Legislative Action Committee of Community Associations Institute and has been working closely with A.B. 152. She is a strong supporter of A.B. 152 "with some changes". They recognize the concerns of various members of the community and are addressing those concerns

specifically in two areas to make amendments to A.B. 152. One area is primarily the great length of time it takes these cases to go through litigation and that usually litigation exacerbates the problem rather than fixing it. The other area of concern is that the bill does not cover certain properties that do not necessarily fit with the associations. She believes arbitration would create a forum composed of people that homeowners and associations could trust--their peers. She stated they are working within the community to address the concerns everyone has and focus on the proper division each concern may address for instance, consumer problems or real estate problems, and they want to find the best place for the process because she feels it is an important process.

Ms. Lavelle stated there are two separate distinctions between the Hawaii law versus what is currently proposed in Nevada: 1) arbitration is by choice in Hawaii rather than mandatory; 2) the difference here is the confusion as to whether there is a trial including the introduction of findings of fact and conclusions of law. Ms. Lavelle concluded that she would like to be invited to subcommittees on these bills when so formed.

John J. Delmazza, Las Vegas resident, stated he supported the passage of A.B.152 and further informed the committee that he sat on the board of directors for his association for approximately three years. However, on October 23, 1994, the developer/declarant president fired four board members. Currently, within his association there is an injunction in place, bankruptcy proceedings, and temporary restraining orders. The interim board immediately amended the CC&R's which has increased power. He feels they are in violation of NRS 116 and also his rights have been violated. He further discussed the developer going bankrupt and therefore has not performed the terms and conditions promised to the homeowners relating to common areas and improvements within the complex. As homeowners, they cannot get 75% of the homeowners to amend the newly amended CC&R's. He stated the current association is practically a dictatorship now.

Mr. Manendo commented on his unpleasant experience dealing with a homeowner association relating to a problem of one of his constituents.

Mr. Delmazza concluded that some of the CC&R's and rules and regulations are good, but there are some that are bad and these are not protecting the homeowners but rather are providing more power to the board.

Kathleen Mary Davis, a Las Vegas resident, testified that about a year ago she was

violently assaulted and threatened with severe bodily injury by an officer on the board of directors of her homeowners association which resulted in a lawsuit in District Court. She stated she was in favor of the bill but felt more protection for those who have invested in homes in Las Vegas needed to be added. She has been threatened, fined, and attempts have been made to foreclose upon the condominium she has owned for four years because she has a washer and dryer in her condominium. The money for such lawsuits is coming out of the insurance company for the director's liability clause. Her association has no reserve fund and there are other serious issues going on in her association. Ms. Davis further expressed that the laws currently in effect do not happen in reality concerning associations. She resides at Casa Vegas condominiums and would hope to be included in the subcommittees designed to address these bills.

Chairman Sandoval stated there will be subcommittees forming and Assemblyman Schneider would be chairing those subcommittees.

Ken Way, 2120 Los Altos, Las Vegas, stated he opposed "the bill" because it does not address the problems they are having. He feels the committee should go away from today's hearing knowing there are a lot of troubles outstanding with the governing bodies in these associations. He reiterated past testimony of how difficult it is already to obtain a large majority to make any changes in the bylaws. He shared his personal experiences of owning a condominium in Las Vegas for the past four years and how the funds from the "treasury" were absconded. The city of Las Vegas did not take the property back into the city at all. Mr. Way relayed several other problems that exist in his homeowner's association. Additionally, some of the problems were as a result of having CPA's and attorneys on the board so he did not feel these professions would be useful on any "committee."

Mr. Way feels this legislation is intended to address certain problems and force into arbitration some resolution of issues in dispute but people here are talking about myriads of problems that are not going to be resolved by this bill alone. As long as the legislators are going to deal with the problem of homeowners associations, he would really like them to make a serious attempt to address the kinds of problems that everyone has been voicing here today at large. If it is not binding arbitration, then you are forced to go back into the legal system anyway. His view is simply that the bill does not go far enough.

Mr. Schneider commented that the law does not have to do only with associations. This law pertains to all property that has covenants over it so it pertains to single

family residences where there are covenants but you are not in an association. So, this is a very broad bill that is going to require a lot of work.

Chairman Sandoval stated once the subcommittee has been formed anyone interested should stay in touch with Mr. Schneider.

There being no further business before the committee the meeting was adjourned at 3:25 p.m.

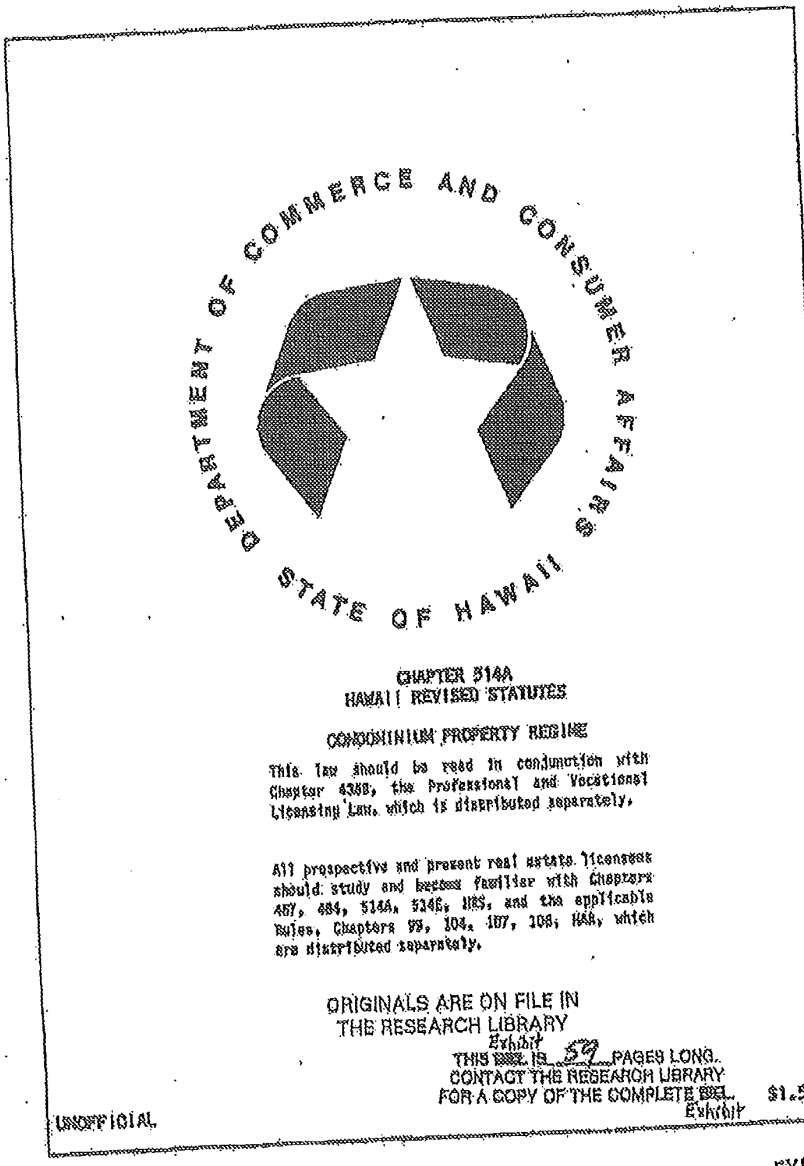
RESPECTFULLY SUBMITTED:

Jo Davis,
Committee Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chairman

Assemblyman David E. Humke, Chairman



CHAPTER 514A
HAWAII REVISED STATUTES

CONDOMINIUM PROPERTY REGIME

This law should be read in conjunction with Chapter 436B, the Professional and Vocational Licensing Law, which is distributed separately.

All prospective and present real estate licensees should study and become familiar with Chapters 467, 484, 514A, 514E, HRS, and the applicable Rules, Chapters 99, 104, 107, 108, HAR, which are distributed separately.

ORIGINALS ARE ON FILE IN
THE RESEARCH LIBRARY
Exhibit
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EXHIBIT D

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CHAPTER 514A
CONDOMINIUM PROPERTY REGIMES

Part I. General Provisions and Definitions

Part II. Creation, Alteration, and Termination of Condominiums

Part III. Registration and Administration

PART I. GENERAL PROVISIONS AND DEFINITIONS

§514A-1 Title. This chapter shall be known as the Condominium Property Act.

§514A-2 Chapter not exclusive. This chapter is in addition and supplemental to all other provisions of the Revised Statutes; provided that this chapter shall not change the substantive law relating to land court property, and provided further that if this chapter conflicts with chapters 501 and 502, chapters 501 and 502 shall prevail.

§514A-3 Definitions. Unless it is plainly evident from the context that a different meaning is intended, as used herein:

"Apartment" means a part of the property intended for any type of use or uses, and with an exit to a public street or highway or to a common element or elements leading to a public street or highway, and may include such appurtenances as garage and other parking space, storage room, balcony, terrace, and patio.

"Apartment owner" means the person owning, or the persons owning jointly or in common, an apartment and the common interest appertaining thereto; provided that to such extent and for such purposes, including the exercise of voting rights, as shall be provided by lease registered under chapter 501 or recorded under chapter 502, a lessee of an apartment shall be deemed to be the owner thereof;

"Association of apartment owners" means all of the apartment owners acting as a group in accordance with the bylaws and declaration.

"Commission" means the real estate commission of the state department of commerce and consumer affairs.

"Common elements", unless otherwise provided in the declaration, means and includes:

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Sixty-eighth Session
March 1, 1995

The Committee on Judiciary was called to order at 8:00 a.m., on Wednesday, March 1, 1995, Chairman Anderson presiding in Room 332 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Bernie Anderson, Chairman
Mr. David E. Humke, Chairman
Ms. Barbara E. Buckley, Vice Chairman
Mr. Brian Sandoval, Vice Chairman
Mr. John C. Carpenter
Mr. David Goldwater
Mr. Mark Manendo
Mrs. Jan Monaghan
Ms. Genie Ohrenschall
Mr. Richard Perkins
Mr. Michael A. (Mike) Schneider
Ms. Dianne Steel
Ms. Jeannine Stroth

COMMITTEE MEMBERS EXCUSED:

Mr. Thomas Batten

STAFF MEMBERS PRESENT:

Dennis Nellander, Research Analyst

OTHERS PRESENT:

Mary Lardini, President/Nevada Apartment Association
David Frazza, Executive Director/Nevada Apartment Association
Eleanor Couch, former rental property owner, Las Vegas, NV
Shelly Price, District Manager/GLEN Co.

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Niel Dexter, Vice President/TYDE Development Co.
Nancy Paolini, Executive Director/Project Restart
Lt. Phil Galeoto/Reno Police Department
Doug Dickson/city of Las Vegas
Stephanie Tyler/city of Sparks
Jon Gilbert/League of Women Voters
Holly Gregory, Vice President/West States Property Management
Debra Ramon, Property Manager/MacGregor Inn
Jon Sasser/Nevada Legal Services
Ernest Nielsen/Washoe Legal Services
Bobbie Gang/Nevada Women's Lobby

Chairman Anderson asked for Committee introduction on B.D.R. 43-452

B.D.R. 43-452 - Authorizes residential confinement as a punishment for certain convictions of driving while license is suspended, revoked or restricted.

ASSEMBLYMAN HUMKE MOVED FOR COMMITTEE INTRODUCTION OF BILL DRAFT REQUEST 43-452.

ASSEMBLYMAN SANDOVAL SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY BY THOSE PRESENT. ASSEMBLYMAN BATTEN WAS ABSENT AT THE TIME OF THE VOTE).

Prior to roll call Chairman Anderson referenced a subcommittee established while in Las Vegas pertaining to A.B. 182, Mr. Schneider's bill which required arbitration of certain claims relating to residential property. He added Mr. Sandoval's name, making it a subcommittee of two.

ASSEMBLY BILL 134 - Revises provisions governing short-term tenancies.

Vice Chairman Buckley informed the committee she was an attorney with Nevada Legal Services and had represented tenants on eviction matters but presently was on an unpaid leave of absence. She testified she had no pecuniary interest in A.B. 134 and no attorney-client relationship with tenants at the present time and therefore had no conflict of interest. However, having lobbied against A.B. 687, a

MINUTES OF THE
ASSEMBLY COMMITTEE ON JUDICIARY
SUBCOMMITTEE A.B. 162

Sixty-eighth Session
March 25, 1995

The Subcommittee on A.B. 162 was called to order at 9:45 a.m., on Saturday, March 25, 1995, Chairman Schneider presiding in Room 4401 of the Grant Sawyer State Office Building, 555 E. Washington Street, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mr. Michael A. (Mike) Schneider, Chairman
Mr. Brian Sandoval

GUEST LEGISLATORS PRESENT:

Mrs. Jan Monaghan, in Las Vegas
Mr. Bernie Anderson, in Carson City
Mr. David E. Humke, in Carson City
Mr. David Goldwater, in Carson City

STAFF MEMBERS PRESENT:

Brian L. Davis, Administrative Services Officer
Lyndi Payne, Administrative Assistant
Dennis Nellander, Research Analyst, in Carson City

OTHERS PRESENT:

Mr. Charles Umnuss, 8504 Glen Mount Drive, Sun City Homeowners Assoc.
Mr. Samuel Ollins, 2496 Paradise Village Way, Paradise Valley H.O.A.
Mr. Richard Morgan, 913 Rockview Dr., #102
Ms. Jean G. Georges, 701 Rancho Circ, Las Vegas, NV
Mr. Mike Malone, 3660 Thom Blvd, Las Vegas, NV
Mr. Steve Urbanatti, 2101A Willowbury Dr., Las Vegas, NV Real Estate Div.
Mr. Jim Crockett, 700 S. 3rd St., Las Vegas, NV, NTLA
Mr. Norm Siegel, 3986 Salisbury Place, Las Vegas, NV
Mrs. Elaine Siega, 3986 Salisbury Place, Las Vegas, NV

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OTHERS PRESENT: (Continued)

Mr. George Van Berriger, 3971 BoxBoro Circle, Las Vegas, NV
Ms. Jeri Paszternak, 7054 Beercot Ave. #99, Las Vegas, NV
Ms. Judi Root, 2851 S. Valley View #1096, Las Vegas, NV
Ms. Marjorie J. Dow, 1919 Quintaro St., Las Vegas, NV
Mr. John Leach, 8254 Hidden Crossing, CAI of Southern NV
Ms. Edith M. Jones, 1312 Pinto Rock Lane #101, Las Vegas, NV
Mr. Michael Mack, 1805 Calle De Espana, Las Vegas, NV
Mr. Brant Warner, 8844 Scaradale Dr., Las Vegas, NV
Mr. Kenneth E. Turbin, M.S., Intelligent Communications, 8070 W. Russell Rd. #1044, Las Vegas, NV
Ms. Ellia F. Dube, 4622 Grand Dr. Two, Monterey Grand Manor HOA
Mr. John Paul Ortstadt, 4659 Monterey Cir.#1, Monterey Grand Manor HOA
Ms. Patricia A. Warner, 8844 Scaradale Dr., Canyon Gate HOA
Ms. Kate Davis, 1405 Vegas Valley Dr., Casa Vegas Condo, Las Vegas, NV
Mr. J. E. Becud, 1405 Vegas Valley, Casa Vegas Condo, Las Vegas, NV
Mr. A. A. Duke, 9457 S. Las Vegas Blvd, Las Vegas, NV
Ms. Ruth Pearson Urban, 1600 Pinto Lane, Las Vegas, NV
Ms. Joan Buchanalo, 2501 E. Sahara, Las Vegas, NV
Ms. Andy Maline, 6213 W. Mineral Dr., CAI, Las Vegas, NV
Mr. Rodger Graef, 312 Wild Plum Ln., CAI, Las Vegas, NV
Ms. Eleissa Lavelle, 700 South Third St., CAI, Las Vegas, NV
Ms. Pat Nacilla, 823 Spyglass, Greens HOA, Las Vegas, NV

PRESENT IN CARSON CITY:

Ms. Mary Marsh Linde, Deputy Attorney General, Nev. Division of Real Estate, Carson City, NV
Ms. Judith R. Smith, condo broker, Carson City, NV

Testimony was heard and proposed amendments to A.B. 152 were presented.

Transcription of minutes were not required. The tape of the meeting is on file with the Legislative Counsel Bureau Research Division.

RESPECTFULLY SUBMITTED:

Patty Hicks,
Committee Secretary

APPROVED BY:

Assemblyman Michael A. (Mike) Schneider, Chairman

If Mediation is chosen as the first proces, each party will pay a fee of $300, for a total of $600.

$400 will go to the mediator
$200 will go to the division

If Arbitration is first chosen, each party will be required to pay a fee of $400, for a total of $800.

$500 will go to the arbitrator
$300 will go to the division

At this point, the division has $100 to $200 more than than originally planned to help pay for arbitration as a second step.

If arbitration follows mediation as that second step, each party will pay an additional $200 to cover $500 paid to the arbitrator. ($400 plus $100 from fees already paid to the division) This is just $100 per party more than had arbitration been chosen as a first step. **

The above would require explanation of mediation and arbitration prior to filing of the petition and payment of fees.

The fee schedule provides incentive to try mediation, as does the complexity of the arbitration process.

** It has been suggested that if arbitration is used as a second step, that claims may be increased at this point.

PROPOSED AMENDMENT TO:

ASSEMBLY BILL NO. 152

SUMMARY--Requires arbitration of certain claims relating to residential property.

FISCAL NOTE: Effect on Local Government: No.

Effect on the State or on Industrial Insurance: Yes.

AN ACT relating to arbitration; requiring the arbitration of certain claims relating to residential property; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 38 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 to 10, inclusive, of this act.

Sec. 2. As used in sections 2 to 10, inclusive, of this act, unless the context otherwise requires:

1. "Association" has the meaning ascribed to it in NRS 116.110315.

2. "Civil action" does not include an action in equity for injunctive relief.

3. "Division" means the real estate division of the department of business and industry.

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4. "Residential property" includes, but is not limited to, real estate within a planned community subject to the provisions of chapter 116 of NRS. The term does not include commercial property if no portion thereof contains property which is used for residential purposes.

Sec. 3. 1. No civil action based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property; or

(b) An increase or imposition of additional assessments upon residential property may be commenced in a district court unless the action has been submitted to arbitration pursuant to the provisions of sections 2 to 10, inclusive, this act.

2. A district court shall dismiss any civil action which is commenced in violation of the provisions of subsection 1.

Sec. 4. 1. A person may submit a claim described in section 3 of this act for arbitration by filing a petition with the division. The petition must be executed by the person submitting the petition and must include:

(a) The complete names, addresses and telephone numbers of all parties to the claim;

(b) A specific statement of the nature of the claim;

(c) A statement of whether the person wishes to have the claim submitted to a mediator and whether he agrees to binding arbitration; and

(d) Such other information as the division may require.

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2. The petition must be accompanied by a fee to be determined by the division of not less than $300.

3. Upon the filing of the petition, the petitioner shall serve a copy of the petition in the manner prescribed in Rule 4 of the Nevada Rules of Civil Procedure for the service of a summons and complaint. The copy so served must [include] be accompanied by:

(a) A statement explaining the procedures for mediation and arbitration set forth in sections 2 to 10, inclusive, of this act; and

(b) A document which allows the person upon whom the copy is served to indicate whether mediation is requested and whether he agrees to binding arbitration.

4. Upon being served pursuant to subsection 3, the person upon whom a copy of the petition was served may, within 30 days after the date of service, file a written answer with the division. The answer must include a completed document specified in paragraph (b) of subsection 3, and must include a fee to be determined by the division of not less than $300.

Sec. 5. 1. If all parties named in a petition filed pursuant to section 4 of this act request mediation, the division shall appoint a mediator[,], chosen by and acceptable to all parties, or in the alternative. [T]the mediator [must] may be appointed from a panel of mediators used to provide mediators for a district court, if such a panel is available. Upon appointment, the mediator shall set a time and place for mediation of the claim. If as a result of the mediation the parties reach an agreement, the mediator shall file a written memorandum with the division [thereof], executed by all parties. [, with the division.]

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cm/lec/tea/arts381

2. If all parties do not request mediation, [or if] and whether or not an answer to the petition is [not] filed within the period specified, the division shall select the names of five arbitrators from a list maintained for that purpose by the division and notify each party which has made an appearance by having filed a complaint or an answer within the period specified and having paid the required fee, of the names selected. To facilitate the selection of an arbitrator [by each party], the division shall include in the notice a brief statement of the background and qualifications of each arbitrator selected. Upon receipt of the list of selected arbitrators, [each] any party which has made an appearance may strike the names of not more than two persons on the list. The list must be returned to the division within the period specified by the division. Upon receipt of each list from the parties, the division shall select an arbitrator from the remaining names.

3. The division shall establish and maintain a panel of arbitrators which consists of the following persons:

(a) One or more persons with experience in the management of an association.

(b) One or more attorneys licensed to practice law in this state with experience in the laws applicable to an association.

(c) One or more certified public accountants with experience in the management or financing of an association.

(d) One or more persons who are developers or representatives of developers and who have experience in the operation or development of an association.

(e) One or more persons who are or were members of an association or the

governing body of an association.

[As used in this subsection, "association" has the meaning ascribed to it NRS 116.110315.]

Sec. 6.

1. Upon selecting an arbitrator pursuant to section 5 of this act, the division shall forward the petition and answer to the arbitrator. The arbitrator shall, within 20 days after the receipt of the petition and answer, schedule a prearbitration conference and notify each party of the date and time thereof.

2. At the conference, the arbitrator shall:

(a) Establish procedures to be followed by the parties during the course of arbitration, including, but not limited to, [rules relating to the admission of evidence,] discovery, dates of the completion of inspections, investigations and hearings and periods during which any alleged defect may be cured; and

(b) Discuss mediation as an alternative to arbitration.

Sec. 7. 1. If, after participating in a prearbitration conference conducted pursuant to section 6 of this act, the parties request mediation, the arbitrator shall refer the matter to the division for the appointment of a mediator pursuant to subsection 1 of section 5 of this act.

2. If the parties do not request mediation or if mediation is unsuccessful, the arbitrator shall, after conducting the prearbitration conference, set a time and place for the hearing and cause notification to the parties to be served personally or by registered or certified mail. The notice must be served not less than 5 days before the hearing.

Appearance at the hearing waives such notice. The arbitrator may adjourn the hearing from time to time as necessary and may, upon request of a party and for good cause shown, postpone or continue the hearing to a time determined by the arbitrator. The arbitrator may hear evidence and make a final determination based upon the evidence produced, notwithstanding the failure of a party to appear after proper notification of the hearing. A district court may on application of a party direct the arbitrator to proceed promptly with the hearing and determination of the matter.

3. The parties are entitled to be heard, to present evidence material to the controversy [matter] and to cross-examine witnesses appearing at the hearing.

4. Either party may, upon payment of the appropriate fees, request the presence of a court reporter to record the hearing.

Sec. 8. 1. An arbitrator may:

(a) Issue subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence; and

(b) Administer oaths.

A subpoena issued pursuant to this section must be served and, upon application to the court by a party or the arbitrator, enforced in the manner provided by law for the service and enforcement of subpoenas in a civil action.

2. On application of a party and for use as evidence, the arbitrator may authorize a deposition to be taken, in the manner and upon the terms designated by the arbitrator, of a witness who cannot be subpoenaed or is unable to attend the hearing.

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3. All provisions of law compelling a person under subpoena to testify are applicable.

4. Fees and mileage for attendance as a witness must be the same as for a witness in civil actions in the district court.

Sec. 9. 1. The arbitrator shall, within 10 days after conducting the hearing, prepare a final written decision. The decision must include findings of fact and, if appropriate, conclusions of law. The decision must be provided by certified mail to each party and to the division.

2. Upon receipt of a final decision pursuant to subsection 1, a party may, within 30 days, appeal the decision to the district court in whose district the decision was made.

3. In conducting an appeal pursuant to this section, the district court shall confine its review to the record submitted on appeal and shall not substitute its judgment for that of the arbitrator as to the weight of evidence on a question of fact.

4. The court may remand or affirm the final decisions or set it aside in whole or in part if the substantial rights of either party have been prejudiced because the final decision of the arbitrator is:

(a) In violation of constitutional or statutory provisions;

(b) In excess of the statutory authority of the arbitrator;

(c) Made upon unlawful procedure;

(d) Affected by other error of law;

(e) Clearly erroneous in view of the reliable, probative and substantial evidence

on the whole record; or

(f) Arbitrary or capricious or characterized by abuse of discretion.

5. If no appeal is made pursuant to this section within the prescribed period, the decision of the arbitrator becomes final. Upon application therefor by a party, the district court shall enter a judgment or decree in conformity with the decision of the arbitrator. The judgment or decree may be enforced as an other judgment or decree.

Sec. 10. 1. The division shall administer the provisions of sections 2 to 10, inclusive, of this act and may adopt such regulations as are necessary to carry out those provisions.

2. Except as otherwise provided in subsection 3, all fees collected by the division pursuant to the provisions of sections 2 to 10, inclusive, of this act must be accounted for separately and may only be used by the division to administer the provisions of sections 2 to 10, inclusive, of this act.

3. The division shall:

(a) Upon the conclusion of arbitration and the filing of a decision by an arbitrator appointed pursuant to the provisions of section 2 to 10, inclusive, of this act, pay to the arbitrator the sum of $500.

(b) In the event that the controversy is resolved during or after the pre arbitration conference specified in Section 6, by written stipulation executed by the parties, or withdrawal of the complaint, pay to the arbitrator the sum of $250.

(c) Pay to any panel of mediators which is used by the division to appoint a mediator pursuant to section 5 of this act the sum of $500 if as a result of the mediation the

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parties reach an agreement which is executed by all parties, as described in Section 5 of this act.

(d) Pay to any panel of mediators which is used by the division to appoint a mediator pursuant to section 5 of this act the sum of $250 if no agreement is reached by the parties as a result of the mediation.

Sec. 11. NRS 38.250 is hereby amended to read as follows:

38.250 1. [All] Except as otherwise provided in section 3 of this act, all civil actions filed in district court for damages, if the cause of action arises in the State of Nevada and the amount in issue does not exceed $25,000 must be submitted to nonbinding arbitration in accordance with the provisions of NRS 38.253, 38.255 and 38.258.

2. A civil action for damages filed in justice's court may be submitted to arbitration if the parties agree, orally or in writing, to the submission.

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February 10, 1995

TO: Joan G. Buchanan, Administrator, Real Estate Division
Department of Business and Industry; Authors and Proponents
of A.B. 152; Interested Persons

FROM: Mary Marsh Linde, Deputy Attorney General for the
Real Estate Division

RE: Analysis of A.B. 152 by Real Estate Division.
HEARING DATE: FEBRUARY 14, 1995, 9:30 A.M. - LAS VEGAS

Review by the Real Estate Division ("RED") of A.B. 152 ("Bill"), as worded on February 1, 1995, raises a number of serious concerns regarding the following issues:

(1) the lack of jurisdiction to effect complete relief on most CC&R disputes by diversion to initial mediation and/or arbitration for alternative dispute resolution (ADR) arranged through the RED,

(2) the advisability of delegating to the Division the resolution of disputes concerning matters not within the Division's licensing authority,

(3) the constitutionality of delegating judicial functions to the executive branch, and

(4) the fiscal impact on the RED involved in staffing the administration of the ADR program called for in the Bill and the likely level of fee revenues to be generated, given the limited types of cases for which jurisdiction is provided.

EXECUTIVE SUMMARY OF COMMENTS OF REAL ESTATE DIVISION:

1. JURISDICTIONAL CONSTRAINTS WILL LIMIT THE TYPES OF CASES DIVERTED INTO ADR TO CLAIMS FOR MONEY IN EXCESS OF $7,500, LEAVING MOST ACTIONS FOR INTERPRETATION, APPLICATION AND ENFORCEMENT OF CC&Rs IN DISTRICT COURT.

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2. HAVING NO STATUTORY AUTHORITY FOR LICENSING OR OTHERWISE REGULATING DRAFTING OR ENFORCEMENT OF CC&Rs, THE DIVISION IS ILL-SUITED TO ADMINISTER QUASI-JUDICIAL ADR.

3. CONSTITUTIONALLY-MANDATED SEPARATION OF POWERS BETWEEN THE JUDICIARY AND THE EXECUTIVE BRANCH MAY BE VIOLATED BY THE BILL'S ESTABLISHMENT OF A FORUM IN THE RED TO ADJUDICATE PURELY PRIVATE CLAIMS FOR MONEY, ABSENT A PUBLIC INTEREST.

4. COSTS TO THE DIVISION AND TO THE LITIGANTS ARE LIKELY INCREASED WITHOUT AN OFFSETTING INCREASE IN EFFICIENT RESOLUTION.

CONCLUSION: APPROPRIATE PROVISIONS OF NRS CHAPTER 116 AND EXISTING CC&Rs MAY BE AMENDED TO ENCOURAGE OR REQUIRE ADR BEFORE RESORT TO THE COURTS.

ISSUE NO. 1: JURISDICTIONAL CONSTRAINTS THWART THE BILL'S PURPOSE.

Key provisions of the Bill provide in pertinent part as follows:

"1. No civil action [defined as excluding an action in equity for injunctive relief] based upon a claim relating to:

(a) The interpretation, application or enforcement of any covenants, conditions or restrictions applicable to residential property; or

(b) An increase or imposition of additional assessments upon residential property,

may be commenced in a district court unless the action has been submitted to arbitration pursuant to the provisions of sections 2 to 10, inclusive, of this act." (Emphasis ours.)

Nevada has many hundreds of residential "common interest communities" as defined in and governed by NRS Chapter 116, including cooperatives, condominiums and Planned Unit Developments ("PUDs").

These forms of residential development and ownership typically include common areas owned by a homeowners' association and all use and ownership is common interest communities is governed by rules and procedures set forth in the Declaration of Covenants, Conditions and Restrictions ("CC&Rs"). CC&Rs can be enforced by the homeowners' association or by individual owners, or often by the developer of the community.

CC&Rs can cover virtually every aspect of ownership of a lot in a common interest subdivision -- ranging from land use, use of common areas, use by invitees, pet control, architectural and landscaping control and maintenance, voting and self-government, acquiring and disposing of common area, road maintenance and exterior residential maintenance, to the imposition and collection of assessments to support these functions, and more.

Perhaps because common interest communities are popular and numerous and because the owner's interest in the affairs of the community is keen, civil litigation concerning issues governed by the CC&Rs is not only common, but is increasing. Resolution of CC&R disputes often requires highly specialized knowledge.

It is understandable, therefore, that proponents of A.B. 152 have sought to create a separate forum for resolution of these disputes, and a specialized forum is indeed needed. However, for the reasons we will explain below, the RHD is not the appropriate venue. By amendment of existing CC&Rs, many communities could provide for referral of their CC&R disputes to arbitration by a local panel of experts in this area, with appropriate resort to justices' and district courts.

A. The Bill Forces Piecemeal Referral to ADR of Disputes Arising under Section 3(1)(a) Interpretation, Application or Enforcement of CC&Rs.

As currently worded, the Bill would require that legal disputes involving an amount in controversy exceeding $7,500 (district court jurisdictional minimum) and concerning the interpretation, application and enforcement of CC&Rs -- except by injunctive relief such as a mandatory or prohibitory order -- be first submitted to mediation or arbitration (ADR) arranged by the RHD, before resort to the district court. (Bill, Section 2(1) and Section 3 (1)(a) and (b).

Currently, district court jurisdiction permits resolution of CC&R disputes by interpreting and enforcing their mandatory and prohibitory provisions, either at law, by declaratory relief or in equity, or by means of a combination of these remedies.

For example, in an action at law for collection of delinquent assessments, the amount in controversy may be less than the district court minimum of $7,500, but may include a claim for judicial foreclosure of the assessment lien which can only be ordered by a district court exercising its equitable powers.

As another example, an injunction may be sought to prevent or halt construction of improvements without architectural review or to compel compliance with maintenance or landscaping standards, together with an award of monetary damages for past violations. Or equitable relief may be awarded to an association which seeks to compel a developer to convey title to common area, again invoking district court jurisdiction.

Additionally, disputes often concern a disagreement as to the interpretation of a CC&R provision, in which case a declaratory judgment may be sought; upon the district court's conclusion of law as to its meaning, an ancillary judgment either for a money judgment or an order enjoining compliance with the declaratory judgment, may be sought under NRS 30.100.

Alternatively, an action for damages asserting a particular interpretation of the CC&Rs may be brought at law, and the court will issue its interpretation and award any damages appropriate, if any, under the court's interpretation. Other examples are too numerous to elaborate here.

Because CC&R actions frequently present a combination of legal and declaratory or equitable/injunctive issues, the Bill's express exclusion of actions for injunctive relief and its probable exclusion of equitable and declaratory relief actions, will tend to carve up many actions and create confusion as to the applicability of its mandatory ADR provisions: the legal portions will be diverted to ADR, while the equitable and injunctive, and probably also declaratory, remedies must remain in district court.

Given the jurisdictional limitation in NRS 30.030 that declaratory relief actions be commenced in courts of record, and that the forum to be provided through RED is not of record, it is doubtful that the Bill properly delegates jurisdiction to the RED's ADR to perform much of the Bill's intended functions and one of the most frequently requested determinations: "the interpretation and application of CC&Rs. (Bill, Section 3.1(b).)

Moreover, as the interpretation of contracts including CC&Rs is a judicial function (Crumpler v. Bigham, 99 Nev. 142, 1983), the delegation of this judicial function to the RED, an executive branch, may violate the mandate of separation of powers contained in the Nevada Constitution, Article 3, Section 1. This query is discussed as ISSUE NO. 3, below.

Importantly, there is no bridge provision in the Bill to permit the prevailing party who obtains a final ADR determination that a given CC&R was violated, to proceed to court to obtain the equitable or injunctive relief needed to fully enforce the arbitrator's award.

This built-in jurisdictional schism impedes complete disposition of a given matter and may complicate rather than simplify resolution of many CC&R disputes. Further, many association versus developer disputes involve questions of title to real property and can involve hundreds of thousands of dollars. To include this scale of matter within the Bill's scope would needlessly embroil the RED in a matter destined for district court.

B. Assessment Disputes Frequently Involve Complex Issues of Budgeting for Reserves and Appropriate Accounting, or Involve the Right of Owners to Vote to Approve Assessment Increases or "Additional Assessments". Neither Type of Issues Appropriate for Referral to ADR through the RED under Section 3.1(b).

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It is to be remembered here that the Bill limits initial resort to district courts, leaving untouched the numerous and relatively small actions at law, within the jurisdiction of justice's courts up to $7,500, to collect assessments and other monetary fines under existing assessments or fines procedures. Justices' court jurisdiction, however, does not include equitable, injunctive or declaratory relief: Nevada Constitution, Art. 6, Sections 6 and 8, NRS 4.370, NRS 30.030 and NRS 33.010 repose exclusive jurisdiction of these remedies in the district courts.

We have already expressed our view that the mediator or arbitrator is limited by this Bill to the remedy of an award of money. Thus, jurisdictional limitations prevent issuance of declaratory interpretation of the propriety of any increase in assessment or imposition of any "additional assessment," nor can be set aside an approved assessment, nor order rebates of improperly collected amounts, nor can be order foreclosure of the assessment lien.

At the outset of any consideration of assessment issues, it must be noted that the whole matter of increasing existing assessments and imposing "additional assessments" is governed by the Declaration which usually requires that increases over a given percentage and "additional" assessments must first be approved by a vote of the membership.

Moreover, common interest communities created after January 1, 1992 must levy assessments sufficient to cover all common expenses including a reserve. NRS 116.3115. Earlier developments may amend their Declarations to include this rule. NRS 116.1206. Older condominium developments created under NRS Chapter 117 and PUDs created under 278A were also authorized, although not expressly required, to levy assessments sufficient to create replacement reserves. These provisions tend to insulate assessment levies from attack.

While it is unclear what an "additional assessment" might be, the CC&Rs must identify the types of authorized assessments which are a lien on the owner's unit. Most Declarations limit the imposition of "additional assessments" to those approved by a duly adopted amendment to the Declaration.

With these facts in mind, then, only those increases or new assessments first approved by the majority, or irregularities in the approval process itself, would likely come under attack in ADR proceedings taken under the Bill. The ADR powers may permit determination of compliance with CC&Rs, but may not correct irregularities, nor stop the approval or collection of an increased or new assessment.

Remaining candidates for ADR under the aegis of the BID, then, are collection actions for delinquent assessments and fines exceeding $7,500 -- most associations are diligent to collect delinquencies before they reach this sum in aggregate -- and counter claims in avoidance of collection, which allege that the assessment is illegal under the CC&Rs or is excessive.

The substantive issue in most disputes concerning increases in assessments is whether the association has properly budgeted for expenditures and/or has properly incurred scheduled expenses. This answer necessarily entails a sophisticated understanding of the reserve analysis employed to determine the useful life of community facilities and the sum needed to fund its replacement as well as its routine maintenance. This budgeting process is particularly complex in associations with extensive common areas and services and may require expert accounting and property management testimony.

In summary, it is doubtful that ADR through the RED is empowered to perform the functions assigned under Section 3(1)(b), to resolve many claims involving increases in existing assessments or imposition of "additional assessments" or equipped with necessary expertise to pass judgment on a given assessment.

ISSUE NO. 2: The Advisability of Delegating to the RED the Resolution of Disputes in Matters not within the Division's Licensing Authority.

Apart from approving time share budgets, the RED has no licensing or enforcement authority over the management of owners' associations or the manner in which they levy and collect assessments and fines, nor over their interpretation and enforcement of CC&Rs. As noted, assessment claims, other than mere collection, raise complex proof issues.

Therefore, to efficiently become involved in selecting the panels of experts to be chosen by the parties to arbitration, the RED would have to become something of an expert in this complex and specialized field. At a minimum, the Bill would require the RED to hire a seasoned manager of a complex PUD who has experience in all aspects of CC&R enforcement and budgeting, reserve analysis, assessment collection, architectural review compliance, etc., etc., in order to be able to screen claims for selection of an appropriate panel. Salary impacts would likely $40,000, plus support staff and overhead.

Then the RED would be required to maintain a panel of arbitrators representing the various disciplines involved in the management of community associations: managers, attorneys, CPAs, developers and members. Whether the RED is supposed to identify and stay in contact with such a variety of persons within every community where a PUD dispute may arise is unclear. The location for ADR proceedings is also unclear: is an owner with a dispute in Elko required to travel to Carson City for ADR?

While five panelists are to be identified and described in narratives prepared by the RED, the RED is required to select one of the names not otherwise stricken as arbitrator for a particular dispute, if arbitration is chosen. This selection may imply a duty on the RED's part to find the arbitrator with the experience most suited to the nature of the dispute, which in turn requires expertise not resident in the RED.

If mediation is first chosen by the parties to the dispute, the RED is required to appoint a mediator, who is not required to have any experience with associations, as required for arbitrators. If mediation is unsuccessful, then the matter is referred to arbitration, as above. This involves the RED in two referrals for a given issue. (There is no provision for collecting two fees for two referrals.)

The benefit to the parties of involving the RED in referral to a neighborhood mediator, who is presumably has no particular training, is not evident.

Once in arbitration, the RED is not empowered to direct any procedural or substantive issues. The decision of the arbitrator becomes final if not appealed to the district court within 30 days of the final decision which is merely served on the RED, which has no enforcement powers. The decision is reviewable by the district court to determine whether substantial evidence supported the arbitrator's determination or whether the arbitrator erred as a matter of law.

Navigating in perhaps unfamiliar waters, there is the risk that those panelists who are not attorneys with special knowledge of community association law would be underqualified to render a decision which would pass district court muster for errors of law. This flaw may build in a high probability of resort to the District Courts, which this Bill is aimed to obviate.

Again, the limited reach of permissible referral to ADR and the lack of resident experience in the RED combine to portend little net gain to beleaguered owners and their associations while posing a significant added burden and expense to the RED.

ISSUE NO. 3: Constitutionality; Separation of Powers Issue.

This Bill would establish through RED the administration of ADR for the determination of purely private civil claims, chiefly for money; other forms of relief may exceed the jurisdiction of this ADR forum. For RED, an executive branch, to administer this ADR for adjudication of private money claims may invade the provinces of the Judiciary.

Article 3, Section 1 of the Nevada Constitution divides the government of the State into three separate departments - the Legislative, the Executive and the Judiciary - and forbids one from performing functions belonging to the other unless expressly permitted.

Unlike dispute resolution bodies in other state agencies where enforcement of a statute or regulation is effected or protection of the public interest is advanced, the RED here would address purely private interests in enforcing purely private, commercial claims. This raises the issue that this legislative delegation of judicial functions to the executive branch may not survive constitutional scrutiny. See, State ex rel. Artick v. Hampton, 13 Nev. 459 (1878).

<u>ISSUE NO. 4:</u> <u>The Fiscal Impact on the RED Involved in Staffing and Administration of the ADR Program Called for in the Bill and the Likely Level of Fee Revenues to be Generated, Given the Limited Types of Cases for which Jurisdiction Is Provided, Causes Serious Concern to the Division.</u>

We have already mentioned the potential cost approaching $40,000 for an experienced person to oversee the administration of the Bill's ADR program and the collection and disbursement of revenues. Of the $600 collected by the RED fees from the parties ($300 per side), the RED must act as purser and pay $500 over to the arbitrator or pay $5 to the neighborhood mediator.

There is no indication of the volume of cases which would properly pass the jurisdictional screening to come into ADR through the RED, to foretell whether the $100 net to the RED on an arbitration, or $595 net to the RED on a mediation, would offset fixed costs.
Moreover, the cost effectiveness for a homeowner or association to pay $300 for a $5 mediation referral may inhibit use of RED's forum for mediation.

The net effect of the proposed amendment to NRS 38.250 appears to be to divert into mandatory, non-binding arbitration all described CC&R claims exceeding $7,500, regardless of the amount in controversy and potentially inclusive of claims exceeding the $25,000 "cap" of NRS 38.250. It is questionable whether the drafters of this Bill intended to "lift the cap" off of statutorily-compelled ADR in CC&R cases, by this amendment to Section 38.250.

<u>CONCLUSION</u>

While there is indeed a clear need for ADR for the small and persistent squabbles which plague large and small associations alike, the Division is probably not the appropriate venue.
A possible avenue to the same result, however, may lie in amendment of NRS Chapter 116 to provide arbitration, whether binding or not, before resort to the courts, and to include an incentive to initially pursue ADR. For example, NRS 116.1114 provides for enforcement of the CC&Rs declared under this Chapter by judicial proceeding; this section could be amended to condition resort to the courts upon proof filed with the initial complaint that the parties had first submitted their dispute to a panel of association members or to an agreed panel of experts.

A corresponding amendment to Section 116.4117 could condition award of the prevailing party's entitlement to attorney's fees upon proof that the party had engaged in good faith in pre-filing ADR.

Additionally, Section 116.2105 could be amended to include among the mandatory provisions for CC&Rs, a provision that every association of, say, 15 or more units, shall maintain a panel of three or more of its members to act as mediators for CC&R disputes, or shall refer CC&R

disputes to an agreed panel, to whom first resort is contractually or statutorily required. Also, as with most contracts, CC&Rs could compel arbitration - binding or non-binding - of all disputes arising under enumerated provisions, possibly with some limitation on a developer's right to compel arbitration of his performance of his obligations.

Along the same vein, Section 116.3102 could be amended to add as a power of owners' associations, the power to empanel dispute resolution boards and to periodically hold ADR sessions for matters arising under the CC&Rs, again required of members either contractually under the CC&Rs or statutorily by amendment of Chapter 116.

Similarly, Section 116.3106 could be amended to add the requirement that the association's Bylaws provide a means of ADR for CC&R disputes, to ensure that the association provide the forum of first resort in all disputes arising under the CC&Rs.

Organizations such as the Community Associations Institute are available in larger cities to gather the experts necessary to offer its members an alternative forum to resolve matters which do not belong in litigation. Such resources should be encouraged to respond to the clear need for expeditious, cost-effective resolution of this unique brand of claim.

Thank you for your attention to this interesting, if perplexing, matter.

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